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In *AFL-CIO v. Kahn*,[1] the District of Columbia Court of Appeals upheld the President's authority, under the Federal Property and Administrative Services Act of 1949 (Procurement Act),[2] to deny federal contracts to companies that violate otherwise voluntary wage and price standards. Despite language apparently to the contrary in the Council on Wage and Price Stability Act (COWPSA),[3] the court held that the President could legitimately use the procurement process to further anti-inflation goals. The court also rejected the contention that the President's program interfered with the right to free collective bargaining protected by the National Labor Relations Act (NLRA).[4]

This Note argues that the court in *Kahn* reached the correct result, but that much of its reasoning is flawed. Part I describes the facts of the case and discusses the court's opinion. Part II examines the issue, unaddressed by the court, of the proper standard of review of the President's action, and concludes that the court was far too deferential to the President's interpretation of the relevant legislation. Parts III and IV analyze the court's interpretation of the Procurement Act and the other statutes discussed, respectively, and conclude that the only satisfactory ground for upholding the program was an implied ratification by Congress in extending COWPSA. Aside from this ratification, the court's holding improperly concedes to the President majestic powers to regulate the general economy under the guise of formulating procurement policy.

I
FACTS AND OPINION

On November 1, 1978, President Carter issued Executive Order 12,092[5] as part of a general voluntary program aimed at fighting infla-

1. 618 F.2d 784 (D.C. Cir.) (Wright, J.) (en banc) (6-3), *cert. denied*, 443 U.S. 915 (1979).
2. 40 U.S.C. §§ 471-514 (1976).
3. 12 U.S.C. § 1904 (1976).
4. 29 U.S.C. §§ 151-169 (1976).
5. 3 C.F.R. § 249 (1979) [hereinafter cited as Exec. Order]. The order relied on the President's constitutional and statutory authority, including §§ 2(c) and 3(a) of COWPSA, 12 U.S.C. § 1904 note (1976), and § 205(a) of the Procurement Act, 40 U.S.C. § 486(a) (1976). It also cited § 6 of the Office of Federal Procurement Policy Act, 41 U.S.C. § 405 (1976), as authority for

tion.[6] A key focus of this program was on the federal procurement and contracting process.[7] Regulations issued pursuant to the order required that all government contracts and first-tier sub-contracts valued at more than five million dollars and signed after February 15, 1979 include a clause certifying that the contractor or sub-contractor was in compliance with the detailed wage and price standards issued by the Council on Wage and Price Stability (Council).[8]

Plaintiff labor unions challenged the procurement compliance aspect of the program on four grounds: (1) that it violated the NLRA by interfering with the unions' right to free collective bargaining; (2) that it constituted a system of mandatory controls prohibited by COWPSA; (3) that it exceeded the President's authority under the Procurement Act; and (4) that it exceeded the President's constitutional authority.[9] Without reaching the collective bargaining issue, the district court agreed, granted the unions' motion for summary judgment, and enjoined the procurement compliance program.[10] The court of appeals expedited the appeal and stayed the injunction pending its resolution.[11]

The court of appeals reversed.[12] The majority opinion, authored by Chief Judge Wright, identified the central issue as being whether the President had acted within the scope of his delegated authority under the Procurement Act.[13] Relying on the bare statutory language, the

granting the Office of Procurement Policy (OFPP) overall implementation authority for the procurement compliance aspect of the program.

6. The order asked firms to limit annual wage increases to no more than 7% and average price increases to 0.5% below the firms' annual rate in 1976-77. Exec. Order § 1-102. It also ordered the Council to further define those standards, monitor compliance by private firms, and publish the names of noncomplying companies. Exec. Order § 1-101. The Council announced its initial wage and price standards on December 4, 1978. 43 Fed. Reg. 60,772 (1978) (to be codified at 6 C.F.R. § 705).

7. The procurement compliance program was expected to reach 65% to 70% of all 1979 procurement dollars. 618 F.2d at 786. This represents only a part of the program's impact, since *all* of the contractors' prices and wages, even where they have no connection to government contracting, must conform to the guidelines. The potential scope of the program is even wider. The OFPP regulations warn that the $5 million threshold may be lowered at a later date. *See* F.P.R. § 1-1.340(d)(1) in 9 GOV'T CONT. REP. (CCH) ¶ 90,167.

8. 44 Fed. Reg. 1229-31 (1979). If the Council determines that a firm is not in compliance with the standards, the relevant agency head may terminate the contract. *Id.* at 1230. In the event of willful noncompliance, the Council may place the noncomplying firm on a debarment list, making it ineligible for any future government contracts in excess of $5 million. *Id.* at 1231.

An agency head may waive a contract termination or a finding of future ineligibility if (1) "the product or service is essential to National security or public safety," and there are no feasible alternative sources of supply; (2) government action would "threaten the contractor's or subcontractor's ability to survive;" or (3) the contractor agrees to comply with the wage and price standards and to make an "equitable" reduction in the contract price. *Id.* at 1230-31.

9. AFL-CIO v. Kahn, 472 F. Supp. at 90 (D.D.C. 1979).

10. *Id.* at 102.

11. 618 F.2d at 787.

12. *Id.* at 809.

13. *Id.* at 787. The court also rejected the district court's conclusion that *Kahn* presented a

court read the Procurement Act as giving the President direct and broad-ranging authority to achieve a sophisticated management system capable of pursuing the "not narrow" goals of "economy and efficiency" in the procurement system.[14] The court examined the legislative history only to reject an argument that some of the history, combined with a section of the Act itself, indicated a congressional intention to preclude any use of the procurement system to affect wage and price levels.[15]

The court found support for its broad reading of the President's procurement authority in the history of the Executive's interpretation of the Act. Most notably, the court found that a succession of Presidents had relied on the Act's authority to impose antidiscrimination and affirmative action requirements on government contractors, citing three circuit court opinions that had upheld several such orders as being pursuant to the Procurement Act.[16] In addition, the court determined that its interpretation of the scope of the President's power did not violate the delegation doctrine because the goals of economy and efficiency provided sufficient standards, particularly as delineated by the administrative standards embodied in the Executive Order, by which to judge whether the President's actions were within the legislative delegation.[17]

The court next considered whether a sufficiently close nexus existed between the statutory goal of economy and the wage-price conditions established by Executive Order 12,092. The court determined that such a nexus was established by government savings through lower short-term prices in negotiated contracts and through the program's long-term effect of reducing inflation.[18]

The court then examined whether the procurement program had instituted "mandatory economic controls" and was therefore barred by COWPSA. The court concluded that the program was not mandatory, since no one has a right to a government contract[19] and since no judicial enforcement was involved in the program, as was characteristic of

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separation of powers issue similar to that decided in Youngstown Steel & Tube Co. v. Sawyer, 343 U.S. 579 (1952). The court held that *Kahn* did not involve a constitutional challenge to executive authority because the government relied solely on statutory authority in its appeal, making no claim of any "inherent" Presidential power. 618 F.2d at 787.

14. *Id.* at 787-89.

15. *Id.* at 789 n.24.

16. Contractors Ass'n v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971); Farkas v. Texas Instrument, Inc., 375 F.2d 629 (5th Cir.), *cert. denied*, 389 U.S. 977 (1967); Farmer v. Philadelphia Elec. Co., 329 F.2d 3 (3d Cir. 1964).

17. 618 F.2d at 793 n.51.

18. *Id.* at 793.

19. *Id.* at 794 (citing Perkins v. Lukens Steel Co., 310 U.S. 113 (1940)).

historic wage-price regulation.[20] The court also emphasized that Congress had renewed COWPSA while fully aware of the procurement compliance program.[21] On these bases, the court concluded that the President had acted within the authority delegated to him.

Finally, the court summarily concluded that the order did not subvert the free collective bargaining policy embodied in the NLRA because the program represented only an external economic factor in the environment of labor negotiations.[22]

II
STANDARD OF REVIEW

The *Kahn* court never addressed the question of the proper standard of review. It appeared to treat the legality of the procurement compliance program as an issue of law over which it was to exercise its independent judgment. However, analysis of the decision indicates that the court was extremely deferential to the President's interpretation of section 205.[23]

The Administrative Procedure Act (APA) excepts from judicial review all agency[24] action "committed to agency discretion by law."[25] The APA also provides that a "court shall decide *all* relevant questions of law, interpret constitutional and statutory provisions, and determine

20. 618 F.2d at 794-95.

21. *Id.* at 795-96.

22. *Id.* at 796.

23. *See* text accompanying notes 43-146 *infra*. Courts customarily give great weight to an interpretation of a statute made by the agency charged with its administration. C. SANDS, 2A J. SUTHERLAND, STATUTORY CONSTRUCTION §§ 49.03-.04 (4th ed. 1973) [hereinafter cited as SUTHERLAND]; K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 29.02-1 (Supp. 1980) [hereinafter cited as DAVIS I]. They will, however, substitute judgment on questions of statutory interpretation. Addison v. Holly Hill Fruit Prods., Inc., 322 U.S. 607 (1944). The general rule is that the scope of review for all questions of law is a de novo judgment of "rightness;" for questions of fact, the standard is one of "reasonableness" or substantial evidence. B. SCHWARTZ, ADMINISTRATIVE LAW §§ 208, 211 (1976). The policy of deference to an agency's interpretation blurs the distinction between these two standards, and may help to explain the Supreme Court's movement away from making sharp distinctions between law and fact as a ground for choosing between standards of review. DAVIS I, *supra*, at § 30.00.

Despite the difficulties in distinguishing between "questions of fact" and "questions of law," Jaffe, *Judicial Review: Questions of Law*, 69 HARV. L. REV. 239, 239-46 (1955), *see generally* C. CHURCHMAN, THEORY OF EXPERIMENTAL INFERENCE (1948), a question of law is clearly presented where the only dispute relates to the meaning of a statutory term. NLRB v. Marcus Trucking Co., 286 F.2d 583, 590 (2d Cir. 1961). *Kahn* thus presented predominantly a question of law. (As with all law/fact distinctions, even "clear" assertions must be qualified. For example, whether the procurement compliance program will directly reduce procurement costs could be treated as a question of fact under the "arbitrary or capricious" standard. *See* notes 55-60 and accompanying text *infra*. *See also* note 31 *infra*.).

24. The President is an agency for the purposes of judicial review under the APA. DAVIS I, *supra* note 23, at § 1.01-1 (construing 5 U.S.C. § 701(b)(1) (1976)).

25. 5 U.S.C. § 701(a)(2) (1976).

the meaning or applicability of the terms of an agency action."[26] Thus, a court must make a two-step analysis. First, it must decide as a "question of law" whether the agency's action or legal interpretation is within its discretion under the statute. Then, if the action is within agency discretion, it must inquire whether the action is rational.[27] If so, the agency action is lawful.

The central question in *Kahn* should have been whether the procurement compliance program, as an interpretation of section 205, was within the President's discretion. Professor Jaffe suggests "clear statutory purpose" as the primary criterion in such a situation.[28] If the action is within the clear purpose of the statute, it lies within agency discretion; otherwise not. Under this criterion, agency law interpreting "discretion should normally be permitted to function short of the point where the court is *convinced* that the purpose of the statute is contradicted."[29]

Since logic suggests that some lower priced bidders will be shut out

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26. *Id.* § 706 (emphasis added).

27. *Id.* § 706(2)(A) (not arbitrary, capricious, or an abuse of discretion). The "arbitrary or capricious" standard of review is used "when the rules consist primarily of an exercise of a legislative judgment not dependent on a factual foundation." DAVIS I, *supra* note 23, at § 29.01-3. The substantial evidence standard applies only to cases "reviewed on the record of an agency hearing provided by statute." 5 U.S.C. § 706(2)(E) (1976).

28. Jaffe, *supra* note 23, at 261.

29. L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 573 (1965) (emphasis in the original).

On May 8, 1980 the Senate Judiciary Committee reported out S.262, the "Regulatory Flexibility and Reform Act of 1980." S.262 proposes substantial modifications in the judicial standards of review of agency rulemaking as mandated in the APA. Under the proposed 5 U.S.C. § 706, the question of whether an agency's legal interpretation was within its discretion would be eliminated. A court could neither accord any presumption of validity to an agency rule nor could it uphold agency action by relying upon an implied statutory authorization. To uphold an agency rule, a court would have to find that statutory authority was granted expressly or by clear implication. The express delegation or clear implication standard would arguably also eliminate any reliance such as *Kahn's* on indirect relationships between a controversial program and the objectives of a statute. *See* notes 50-73 and accompanying text *infra.*

The proposed 5 U.S.C. § 706 reads as follows:

> To the extent necessary to decision and when presented, the reviewing court shall, *without according any presumption of validity to an agency rule,* decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The preceding sentence does not, *in any civil or criminal action in which an agency rule is set up as a defense, affect any applicable rule of law which accords a presumption of validity to such an agency rule or which provides that reliance on such an agency rule shall be a defense.* The reviewing court shall—
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> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

of contract competition on noncompliance grounds, the program might contradict the legislative purpose.[30] The procurement compliance program should therefore be presumed to fall outside the President's discretion under section 205.[31]

Jaffe suggests five secondary factors to test this presumption.[32] Two are relevant to the issue presented in *Kahn*: "the degree to which the framing of a rule appears to depend upon expertise, . . . [and] the role of the court as the guardian of the integrity of the legal system."[33]

A. Expertise

Expertise is a function of both the characteristics of the administrator and the subject-matter of his decision. In *Kahn*, the administra-

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(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in *the case of factual determinations (including inferences or projections) in proceedings subject to section 553 of this title or to section 554* of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. In making determinations under clause (2)(c) of this section, the reviewing court shall require that the agency's statutory jurisdiction or authority has been granted expressly or, in light of the statute and other relevant legal materials, by clear implication. *The standards of review of an agency rule set forth in this section shall also apply whenever an agency rule is challenged in any civil or criminal action not included within the scope of section 703 of this title.*

S.262, 96th Cong., 2d Sess. § 216 (1980) (italics represent new material).

30. *See* notes 55-69 and accompanying text *infra*.

This conclusion is supported by a major study that investigated the effect of using the procurement process to achieve unrelated social and economic objectives. It determined that such programs almost invariably add costs to the procurement process due to the heavy burden of additional administrative procedure. 1 REP. OF THE COMM. ON GOV'T PROCUREMENT 111-24 (1972).

31. Even if the President's interpretation of section 205 was within his discretion and thus subject to only the "reasonableness" test, 5 U.S.C. § 706(2)(A) (1976), as a question of law the court should have asked whether he had " 'consider[ed] the relevant factors,' " DAVIS I, *supra* note 23, at § 29.01-5 (quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 410 U.S. 402, 416 (1971)), behind the conclusion that the wage and price standards would reduce procurement costs. Whether the savings arising from the program outweigh the added expense of passing over lower-priced noncomplying contractors is a critical factual issue. *See* notes 155-59 and accompanying text *infra*. The court, however, did not explore any statistical findings based on an analysis of the impact of the program on the procurement system; it simply deferred to the reasonableness of the President's judgment. This is contrary to *Overton Park*: when the reasonableness test is used, "inquiry into the facts is to be searching and careful." 410 U.S. at 416. If the President had failed to develop a comprehensive set of factual predictions of the effect of the program on procurement costs, the court should have remanded to the Council with instructions to complete the record. *See* Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608 (2d Cir. 1965).

32. Jaffe, *supra* note 23, at 264.

33. *Id.* The other factors are "the clarity with which a rule can be made to emerge and be given a stable form and content, . . . the importance of the rule in the statutory and administrative scheme, . . . [and] the possible psychological advantage of judicial as compared with administrative pronouncement, . . . *Id.*

tor was President Carter, and the subject-matter was the procurement process.

The President's expertise derives from his constitutional status as chief executive and his political status as the only elected official with a national constituency. The President is also subject to numerous institutional checks on his actions.[34] Thus, there is little possibility that he will quasi-legislate in a politically unacceptable manner, and, if he does, Congress can override his decisions.[35] Courts should therefore give deference to the President as administrator.

Moreover, the President acted in an area in which he is often deemed to have "inherent power" in the absence of inconsistent legislation[36]—"housekeeping" affairs within the executive branch.

However, the adoption of the comprehensive scheme of legislation embodied in the Procurement Act has negated the historical antecedents that engendered the doctrine of an inherent presidential proprietorship power. The doctrine arose in the early nineteenth century when statutory regulation and delegation in the housekeeping area was fragmentary. At that time, the doctrine was a practical necessity for federal government operation.[37] But since the passage of the Procurement Act, the scope of inherent presidential power need be no greater than that accorded to the President under the clear statutory purpose test.[38]

Nor does it make sense to accord the President any inherent procurement power. The federal government is no longer comparable to other proprietors. Federal government contracting has become an eco-

34. J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 276 (1980) [hereinafter cited as CHOPER] (external political checks generated by party organizations, labor and business groups, the press, and the electorate).

35. *Id.* at 281-305.

36. 42 Op. Att'y Gen. 21 (1961) (citing United States v. Tingey, 30 U.S. (5 Pet.) 115, 127 (1831)). Several federal district courts have upheld the antidiscrimination and affirmative action executive orders, discussed in the text accompanying notes 87-105 *infra*, on the ground that the President has "inherent power" to decide with whom the government will deal and on what terms. Savannah Printing Specialties Local 604 v. Union Camp. Corp., 350 F. Supp. 632, 635 (S.D. Ga. 1972); Southern Ill. Builders Ass'n v. Ogilvie, 327 F. Supp. 1154, 1160-61 (S.D. Ill. 1971), *aff'd*, 471 F.2d 680 (7th Cir. 1972) (validity of the executive order not discussed by the court of appeals); Joyce v. McCrane, 320 F. Supp. 1284, 1290 (D.N.J. 1970). However, the reliance placed by these courts on Perkins v. Lukens Steel Co., 310 U.S. 113 (1940), was misplaced. *Lukens Steel* addressed the issue of *federal* power, not executive power. Contractors Ass'n v. Secretary of Labor, 442 F.2d at 166. The Supreme Court has expressly left the question of inherent presidential procurement power open. Chrysler Corp. v. Brown, 441 U.S. 281, 304-06 (1979).

37. *See* United States v. Tingey, 30 U.S. (5 Pet.) at 126-27.

38. The *Kahn* majority itself expressed doubt about the existence of any inherent presidential procurement authority. 618 F.2d at 791 n.40. Both United States v. Tingey, 30 U.S. (5 Pet). 115 (1831), and Perkins v. Lukens Steel Co., 310 U.S. 113 (1940), assumed that the government may act in business transactions like any business association. But only *Tingey* spoke of an independent presidential power to contract. *Lukens Steel* referred to contracting power expressly delegated by Congress. 310 U.S. at 116.

nomic leviathan, affecting individual fortunes through the business it creates[39] and the public in general through large-scale macroeconomic, social, and environmental impacts.[40] Concentration of this power through a doctrine of inherent presidential power would present a grave threat to economic freedom and due process. It is better to require that Congress and the President cooperate before government action hostile to an individual's eligibility for government contracts can be initiated.[41] Presidential action in the procurement area must therefore be pursuant to delegated authority in order to be legitimate, and the President's interpretation of the Procurement Act should receive no deference solely because the subject-matter of his decision is executive "housekeeping."

B. Integrity of the Legal System

The second factor affecting the scope of discretion accorded to an agency interpretation under Jaffe's analysis is the significance of that interpretation to the integrity and coherence of the legal system. Essentially, the President's interpretation of the Procurement Act confers upon him sweeping powers to intervene in the general economy and to impose social programs under the guise of formulating procurement policy. This creates such disharmony within the overall statutory framework that it affronts separation of powers principles.[42] This factor should weigh heavily against the President's interpretation of the Procurement Act being within his discretion.

Thus, application of the clear statutory purpose criterion to the procurement program results in a presumption against the program being within agency discretion. Final determination of the issue depends on a balancing of the special deference accorded the President against the difficulties in his interpretation of the relevant statutes. This Note argues that the *Kahn* court did not resolve this balance correctly because it failed to appreciate fully the difficulties caused by the President's interpretation of the possible statutory authority for the compliance program.

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39. *See generally* Reich, *The New Property*, 73 YALE L.J. 733 (1964).

40. This argument parallels that for relaxation of the right/privilege distinction in government contracting. *See* note 118 *infra*, and sources cited therein.

41. *Cf.* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1137-46 (1978) (suggesting a structural due process model of constitutional analysis that would permit government choices by processes designed to protect human freedom).

42. *See* text accompanying notes 106-46 *infra*.

III
THE PROCUREMENT ACT

The central issue in *Kahn* was the scope of the President's delegated power under section 205(a) of the Procurement Act,[43] which authorizes the President to "prescribe such policies and directives, not inconsistent with the provisions of this Act, as he shall deem necessary to effectuate [its] provisions."[44] The court gave short shrift to indications that Congress expressly intended that the President and the General Services Administration *not* have the power to require federal contractors to restrain their prices and wages as a condition of being eligible for federal contracts.[45]

To determine the implied scope of the President's power under section 205(a), the court relied on the language of the Act's goal and delegation provisions. It ignored the problem/solution character of the Act as revealed in its legislative history. The resulting interpretation is inconsistent with the principles underlying the delegation doctrine, as it defines the scope of delegated power so broadly as to make it virtually boundless.

A. Manifested Determinations of Congressional Policy and Principle

If a legislature does not explicitly address an issue within its jurisdiction, the courts should defer to the legislature's manifestations of relevant policy and principle.[46] In *Kahn*, the question was whether the Executive's power to order the procurement compliance program can be fairly inferred from the policies and principles embodied in the Procurement Act.

The Act's declaration of policy sets forth the goal of providing for "an economical and efficient system for . . . procurement and supply."[47] The *Kahn* court found that "economy and efficiency are not narrow terms," since various sections of the Act use these terms in conjunction with other factors such as "price, quality, suitability, and availability of goods or services."[48] Since section 205(a) gives the Presi-

43. Since the government relied solely on statutory authority on appeal, the court correctly rejected the notion that *Kahn* presented a constitutional issue of separation of powers. 618 F.2d at 787.

44. 40 U.S.C. § 486(a) (1976).

45. 618 F.2d at 789 n.24.

46. R. KEETON, VENTURING TO DO JUSTICE 94 (1969) [hereinafter cited as KEETON].

47. 40 U.S.C. § 471 (1976).

48. 618 F.2d at 788-89. The court referred to sections 201(a) and 303(b) of the Act. Section 201(a) directs the Administrator of General Services to chart policy and procure supplies in a manner "advantageous to Government in terms of economy, efficiency, or service and with due regard to the program activities of the agencies concerned." 40 U.S.C. § 481(a) (1976). Section 303(b) directs contracting officers to award contracts to bidders whose terms "will be most advantageous to the Government, price and other factors considered." 41 U.S.C. § 253(b) (1976).

dent ultimate authority over the General Services Administration, which is primarily responsible for the Act's administration, the court found that Congress had given the President wide-ranging authority "to achieve a flexible management system capable of making sophisticated judgments in pursuit of [the 'not narrow' goals of] economy and efficiency."[49]

1. The "Reasonably Related to Objectives" Test

To determine whether this broad delegation included the authority to promulgate the procurement compliance program, the *Kahn* court asked whether the program's requirements were reasonably related to the objectives of the Act.[50] The court found both direct and indirect relationships sufficient to uphold the program.

The court admitted that for bid contracts the compliance program might result in an award to a higher bidder because a lower one was disqualified for noncompliance.[51] Yet the court concluded that for negotiated contracts, which represent a substantial percentage of government contracts, the program requirements would enhance the government's bargaining position and "have the direct and immediate effect of holding down the Government's procurement costs."[52] The court also reasoned that widespread compliance with the guidelines would indirectly result in slowing inflation and would therefore lower government costs in the future.[53] Based on this analysis, the court held that a "sufficiently close nexus" existed between the program and the broadly construed purposes of "economy and efficiency," and that the President's action was therefore within his authority.[54]

This analysis is flawed. With regard to the direct relationship between the program and the goals of economy and efficiency, it exaggerated the practical impact of the guidelines on negotiated contracts.

Executive Order 12,092 allows a low bidder to be denied a contract solely on the basis of noncompliance. The court argued that the President may have reasonably concluded that any higher costs resulting from such contracts would be more than offset by the advantages gained in negotiated contracts and in bid contracts for which the bids are lower due to the wage-price guidelines.[55] The procurement program, however, will not produce significant savings in negotiated con-

49. 618 F.2d at 789.

50. *See* Mourning v. Family Publications Serv., Inc., 411 U.S. 356, 371 (1973).

51. 618 F.2d at 793.

52. *Id.* at 792.

53. *Id.* at 792-93.

54. *Id.* at 792.

55. *Id.* at 793. The program arguably provides a forum for negotiation with contract bidders as well. *See* text accompanying note 123 *infra*.

tracts. Most procurement contracts are negotiated, since the Defense Department, which dominates federal procurement, negotiates the majority of its contracts.[56] The procurement program will not apply to many of these contracts, because its regulations exempt goods or services essential to national defense where there are no feasible alternative sources of supply or where the contractor's survival would be threatened.[57] These are precisely the circumstances that lead to the use of negotiations rather than a bidding process and explain why virtually all military contracts are negotiated.[58] Thus, the guidelines will be irrelevant in the majority of negotiating situations. Even when there is more than one available supplier of goods and services, the program will tend to screen noncomplying contractors from any participation in the negotiating process, and may therefore result in higher direct costs.[59] Thus, any direct positive relationship between the procurement program and the Act's goals is doubtful, except for those contracts, bid or negotiated, in which the lowest priced contractor under the guidelines has a lower cost than the lowest priced contractor in the absence of guidelines would have had. Thus, in the absence of statistical findings on the overall cost effect of the program, the court should not have been so quick to accept the President's conclusions.[60]

With regard to the indirect relationship between the compliance program and the goals of economy and efficiency, the court reasoned that if the program were successful in stemming inflation, future procurement costs would be substantially reduced.[61] However, this interpretation of the "reasonably related to objectives" test sets no definable boundaries for presidential action, since it would permit the President

56. 618 F.2d 792 n.44.

57. *See* note 8 *supra.*

58. 618 F.2d at 792.

59. *Id.* at 804 (MacKinnon, J., dissenting). Judge MacKinnon noted the resulting inequity to contractors. *See id.* at 805 (contractors may be penalized for having lower prices and lower profit margins, because they would not be able to raise prices enough to survive if costs go up).

60. *See* notes 30-31 *supra.*

61. 618 F.2d at 793. One commentator has criticized *Kahn* on the ground that the court's assumption of a causal relationship between decreased inflation and procurement savings is "highly speculative," Note, *Using Federal Procurement to Fight Inflation:* AFL-CIO v. Kahn, 93 HARV. L. REV. 793, 802 (1980), because a decrease in inflation might reduce tax revenues, which in turn might affect the amount of money available for procurement. *Id.* at 802 n.70. This criticism, though accurate, is unfair. The court seems to define "economy" and "efficiency" as *cost-reduction.* 618 F.2d at 792. A reduction in procurement costs through long-run decreases in price inflation is hardly speculative. The Harvard Note, on the other hand, assumes that "economy" is to be defined as a maximization of the ratio of government revenues to procurement costs for some fixed basket of goods and services. An examination of the problem/solution context of the Procurement Act reveals that the court's definition of "economy" is the correct one. *See* note 71 *infra.* Moreover, it is inconceivable that in the face of a long-term national anti-inflation policy, Congress would intend to define "economy" in a way that could justify an executive attempt to increase the inflation rate. *See* note 128 *infra.*

to initiate any social or economic program not otherwise precluded by Congress as long as some consequential reduction in procurement costs could be conceived.[62] For example, it would take little ingenuity to use section 205(a) to impose general economic controls. The President would only be required to extend the program to all government contracts of whatever size. Moreover, the President could, in effect, impose a secondary boycott on noncomplying firms by requiring that all government contractors not do business with such firms.[63] Unilateral presidential imposition of general economic controls by this route would amount to presidential lawmaking in violation of constitutional principles of separation of powers as enunciated in *Youngstown Sheet & Tube Co. v. Sawyer*.[64]

The majority asserted that "[o]ur decision today does not write a blank check for the President,"[65] and two short concurring opinions stressed the closeness of the nexus and the narrowness of the holding.[66] Yet the court suggested no formula and drew no lines.[67] It claimed that its approach would "raise serious questions about the validity" of a hypothetical executive order suspending NLRB violators from government contracting, but declined to state how.[68] To the contrary, an *indirect* relationship between such an order and the goals of economy and efficiency in procurement would exist. A suspension penalty would promote industrial peace, reduce losses due to strikes, and reduce future procurement costs.[69] Admittedly, however, it would be difficult to find a *direct* relationship between such a hypothetical executive order and savings to the government. To be fair, perhaps the court's asser-

62. *See* 618 F.2d at 813 (MacKinnon, J., dissenting); *id.* at 818 (Robb, J., dissenting).

63. 618 F.2d at 808 (MacKinnon, J., dissenting).

64. 343 U.S. 579 (1952). *Youngstown* teaches that in the sphere of domestic affairs, executive authority is subordinate to legislative power. Kauper, *The Steel Seizure Case: Congress, the President, and the Supreme Court*, 51 MICH. L. REV. 141, 175-76 (1952).

65. 618 F.2d at 793.

66. *Id.* at 796-97, (Bazelon, J., concurring) (Tamm, J., concurring).

67. One suggested limit is that "[s]ection 205(a) should be interpreted to require that procurement decisions be made on the basis of only those factors a businessman without market power would take into account." Note, *supra* note 61, at 802-03. Such an interpretation would eliminate the boundlessness of the President's procurement power as presented in *Kahn* and would prevent the President from unilaterally using the federal government's unrivaled buying power to restructure the market. However, it seems excessively narrow. This Note argues that the President may, in the exercise of his discretion, properly reinforce congressional policies enunciated in nonprocurement statutes through use of the procurement process, *see* text accompanying notes 101-14 *infra*. But he may also unilaterally impose programs that are only indirectly related to procurement objectives if they do not conflict with congressional policy, including the policy of not increasing procurement costs. *See* notes 47-48 and accompanying text *infra*. However, since pursuit of indirectly related social and economic objectives is bound to increase procurement costs as a practical matter, *see* note 30 *supra*, the President may only use the procurement process to reinforce other congressional policies.

68. 618 F.2d at 793 n.50.

69. *Id.* at 807 (MacKinnon, J., dissenting).

tion that its analysis would "raise serious doubts about the validity" of such an executive order indicated that the court's analysis was limited to the facts of *Kahn*. The court's analytical method, however, would have been improved if it had suggested factors that might indicate an overreaching of the President's discretion.

Application of the "reasonably related to objectives" test involves a causal theory about the relationship between the challenged regulations and the objectives of the relevant statute. As in tort law, the concept of cause has both factual and legal elements. The cause-in-fact element looks to the empirical connection between the program and the objectives of the Act. Demonstrating this connection may involve economic modeling and statistical analysis. The legal or proximate cause element is not properly "causal" at all, but involves a policy judgment as to whether the relationship is sufficiently close, or the effect sufficiently substantial in view of the principle of separation of powers, for the program to be considered the cause. The direct/indirect distinction is often employed in this context. When there are few or no factors intervening between the cause and the effect, the relationship is said to be direct. When the causal sequence is lengthy or attenuated, the relationship is indirect. The importance of this distinction lies in maintaining the supremacy of Congress in domestic policymaking. If the causal sequence is lengthy or attenuated, the procurement program may affect policy areas that Congress had not addressed or even thought of in its consideration of the Procurement Act. Under this analysis, whether the President has exceeded his delegated power depends upon the significance and number of the policy areas affected by the program, and the extent to which these effects are consistent with the will of Congress as evidenced by other statutes.

The *Kahn* court relied on the notion that by successfully stemming inflation, Executive Order 12,092 may ultimately reduce the federal government's cost of doing business.[70] Reliance on this indirect relationship, however, depends upon the operation of macroeconomic factors extrinsic to the concerns of the Act.[71] The use of some of these

70. *Id.* at 792-93.

71. An examination of the Procurement Act reveals it to be a precisely laid out set of policies and procedures for structuring the General Services Administration (GSA). The Act addresses such issues as transfers of property between different agencies, warehousing practices, accounting procedures, sales of surplus property, recordkeeping, lease management, building operation, procurement, and motor vehicle pool operation. There is no mention anywhere in the Act of macroeconomic factors. *See* 40 U.S.C. §§ 471-544 (1976). The legislative history also indicates that Congress considered the Act to be a well-defined solution to the serious federal supply problems of the times. Until the Act created the GSA, the government had no central management system, and Congress sought a remedy for the resulting waste and inefficiency. The solution was to set up an independent executive agency as a housekeeping organization that would provide a centralized system for purchasing, disposal of surplus, and record management. The overall

macroeconomic factors is adverse to clearly and precisely defined congressional policy.[72] Therefore, the court should not have relied on the indirect relationship between the program's possible effectiveness in slowing inflation and the possibility of lower government procurement costs in the future.[73]

2. *The Delegation Doctrine*

The delegation doctrine defines and limits the scope of delegated power by requiring that statutes present adequate standards by which a court can ascertain whether the legislature's intent has been obeyed by the body charged with the statute's administration.[74] Under the traditional doctrine, any statute failing to present such standards is invalid.

The Supreme Court has invalidated only two statutes on improper delegation grounds.[75] Since 1936, the doctrine has been virtually unused. Vague and uninstructive "standards" have passed judicial muster, including some requiring only that the executive agencies involved regulate in the public interest.[76] However, the doctrine is not dead[77] and its basic purpose—to protect against unnecessary and uncontrolled administrative power—remains sound.[78] A modern version of the delegation doctrine permits administrative standards to guide agency discretion in the absence of legislative standards.[79] Furthermore, the courts have invoked the doctrine in the absence of a clear statement of broad congressional intent in order to construe a statutory delegation narrowly if executive action might infringe an individual's constitu-

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purposes of "economy and efficiency" must be interpreted within this problem/solution context. *See* 95 CONG. REC. 7441-43 (1949) (remarks of Rep. Holifield). Seen in this context, the accomplishment of macroeconomic policy objectives through wage-price procurement guidelines was not within the provisions of the Act. *See* 618 F.2d at 799-800. (MacKinnon, J., dissenting).

72. For example, with respect to policy regarding wage-price controls and free collective bargaining, see text accompanying notes 115-46 *infra*.

73. The court relied on previous executive orders and judicial precedent for its approval of the indirect relationship. For a critique of that authority, see text accompanying notes 87-105 *infra*.

74. United States v. Robel, 389 U.S. 258, 272-73 (1967) (Brennan, J., concurring); Yakus v. United States, 321 U.S. 414, 425 (1944).

75. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935). *See also* Carter v. Carter Coal Co., 298 U.S. 238 (1936) (congressional delegation to private citizens invalidated).

76. *See generally* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE, §§ 3.5-3.7 (2d ed. 1978) [hereinafter cited as DAVIS II].

77. Wright, Book Review, (K. DAVIS, BEYOND DISCRETIONARY JUSTICE) 81 YALE L.J. 575, 582-84 (1972). For the argument that the doctrine should be discarded, see CHOPER, *supra* note 34, at 374-75.

78. DAVIS I, *supra* note 23, at § 3.15 (Supp. 1980).

79. Amalgamated Meat Cutters & Butcher Workmen v. Connally, 337 F. Supp. 737, 758-59 (D.D.C. 1971); *see* DAVIS II, *supra* note 76, at § 3.15; Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1698-1700 (1975).

tional rights.[80] Similarly, in *National Cable Television Ass'n v. United States*,[81] the Supreme Court construed a statute narrowly to avoid excessive delegation because the power delegated (taxation) has traditionally been exercised by Congress alone.[82] Thus, in certain contexts, the delegation doctrine remains an important consideration in statutory interpretation.

Relying on the modern theory that standards set out by the executive are adequate and often necessary substitutes for legislatively prescribed standards, the *Kahn* court held that its interpretation of the scope of the delegated power under section 205(a) did not violate the constitutional prohibition against excessive delegation.[83] The court argued that the standards established in Executive Order 12,092 compare favorably with those found sufficient in *Amalgamated Meat Cutters & Butcher Workmen v. Connally*[84] to uphold the constitutionality of the Economic Stabilization Act of 1970 (ESA).

Given the history of Congress' zealous guardianship of wage and price regulation,[85] however, the procurement program is more analogous to the tax delegation considered in *National Cable Television* than to the explicit wage and price delegation in *Amalgamated Meat Cutters*. Therefore, in accordance with this doctrine, the court should have interpreted narrowly the scope of the President's power to impose the procurement compliance program.[86]

B. Section 205(a) and Previous Executive Orders

In support of its holding, the majority relied on the executive's historical interpretation of section 205(a). The court discussed a host of executive orders[87] and administrative regulations allegedly based on section 205(a), the most prominent of which were a series of antidis-

80. *See* Green v. McElroy, 360 U.S. 474 (1959) (right to follow chosen profession); Kent v. Dulles, 357 U.S. 116 (1958) (right to travel); Hannegan v. Esquire, Inc., 327 U.S. 146 (1946) (freedom to receive and disseminate literature).

81. 415 U.S. 336 (1974).

82. *Id.* at 342.

83. 618 F.2d at 793 n.51.

84. 337 F. Supp. at 744-63 (three-judge court) (regulations pursuant to a statute clearly authorizing wage and price controls).

85. *See* note 128 *infra*.

86. Note, *supra* note 61, at 798-99.

87. *See, e.g.*, Exec. Order No. 11,141, 3 C.F.R. § 179 (1964-65 Compilation), *reprinted in* 5 U.S.C. § 3301 app., at 401 (1976) (anti-age discrimination order citing only "the authority vested in [the President] by the Constitution and statutes of the United States"); Exec. Order No. 11,598, 3 C.F.R. § 565 (1971-75 Compilation) (1971) (requirement that contractors list "suitable employment openings with the appropriate office of the State employment service system" in order to encourage employment of veterans, citing only the authority of the President of the United States), *superseded by* Exec. Order No. 11,701, 3A C.F.R. § 161 (1973 Compilation), *reprinted in* 38 U.S.C. § 2012 app., at 298 (1979). *See also* notes 89-90 *infra*.

crimination and affirmative action requirements for government contractors. Since an agency interpretation of a statute, if it operates over a period of time without legislative reversal, is generally given great deference by the courts, the court argued that the legislature had impliedly ratified the executive's interpretation by its failure to amend the statute to preclude the executive's action.[88]

Only two[89] of the cited orders had explicitly relied on the Procurement Act, however. To fill the gap created by this lack of direct authority, the court presumed that several early antidiscrimination orders, which had cited no specific statutory authority, were based on the President's war powers,[90] but that "for the period from 1953 to 1964 only the [Procurement Act] could have provided statutory support for the Executive action,"[91] presumably because no other statute was even a conceivable basis of support.

The strongest evidence of a historical pattern of executive use of the Procurement Act lies in a series of judicial decisions that "candidly acknowledged the validity of the use by the President or Congress of the procurement process to achieve social and economic objectives."[92] These decisions all dealt with the three-decade-old presidential practice of imposing antidiscrimination and affirmative action requirements on government contractors, and have uniformly acknowledged that the President has the power to do so under section 205(a).[93]

In the earliest cases, the validity of President Kennedy's Executive Order 10,925, directing affirmative action by contractors in minority hiring, was not challenged. In deciding that the order granted no private right of action, however, the courts determined that the order was

88. Red Lion Broadcasting Co. v. FCC, 395 U.S. 361, 381 (1969); SUTHERLAND, *supra* note 23, at §§ 49.03-.04 (an executive construction is a definite and reliable source of statutory meaning).

89. 41 C.F.R. § 1-6.8 (1978) (order issued by Administrator of GSA requiring that procurement of materials and supplies for nse outside the United States be restricted to goods produced in this country); Exec. Order No. 11,755, 3 C.F.R. § 837 (1971-75 Compilation) (1973) (President continued exclusion of certain state prisoners from employment in federal contract work).

90. 618 F.2d at 790 n.32 (citing executive orders issued by Presidents Roosevelt and Truman).

91. *Id.* at 790-91.

92. United States v. New Orleans Pub. Serv., Inc., 553 F.2d 459, 466-67 (5th Cir. 1977), *vacated on other grounds*, 436 U.S. 942 (1978). It is now "well established that the procurement process, once exclusively concerned with price and quality of goods and services, has been increasingly utilized to achieve social and economic objectives only indirectly related to conventional considerations." Rosetti Contracting Co. v. Brennan, 508 F.2d 1039, 1045 n.18 (7th Cir. 1975). *See also* Northeast Constr. Co. v. Romney, 485 F.2d 752, 760 (D.C. Cir. 1973); Southern Ill. Builders Ass'n v. Ogilvie, 327 F. Supp. 1154 (S.D. Ill. 1971), *aff'd*, 471 F.2d 680 (7th Cir. 1972); and cases cited notes 94 & 96 *infra*.

93. In Chrysler Corp. v. Brown, 441 U.S. 281 (1979), the Supreme Court expressly left open the question of whether Exec. Order 11,246 was authorized by § 205(a) of the Procurement Act. *Id.* at 304 n.34.

a proper exercise of presidential authority under section 205(a).[94] These determinations were dicta, made without analysis of any nexus between the Procurement Act and the order.[95]

The most important precedent is *Contractors Association v. Secretary of Labor*,[96] the first case to directly address the validity of the antidiscrimination/affirmative action orders. In that case, the Third Circuit Court of Appeals upheld President Johnson's Executive Order 11,246, which had reaffirmed the affirmative action requirement. The court offered several alternative grounds for its decision, including the President's "implied constitutional authority" and implied congressional ratification.[97] The *Kahn* majority, however, questioned the validity of these alternative rationales,[98] and focused on the Third Circuit's view that the order was authorized under the Procurement Act because "[i]t is in the interest of the United States in all procurement to see that its suppliers are not over the long run increasing its costs and delaying its programs by excluding from the labor pool available minority workmen."[99]

The *Kahn* court's reliance on *Contractors Association* was misplaced. *Contractors Association* dealt with federally-assisted state construction, and is therefore distinguishable from the procurement program in *Kahn*.[100] Moreover, *Contractors Association* did not hold that section 205(a) *alone* permits the President unilaterally to impose upon the procurement process social and economic programs with only indirectly related procurement objectives, since its holding depends on several other grounds.[101] And finally, Executive Order 11,246 was supported by congressional declarations of policy; Order 12,092 does not share such support.[102] Since the courts have recognized that the President cannot use the procurement power to circumvent the express or

94. Farkas v. Texas Instrument, Inc., 375 F.2d 629, 632 n.1 (5th Cir.), *cert. denied*, 389 U.S. 977 (1967); Farmer v. Philadelphia Elec. Co., 329 F.2d 3, 8 (3d Cir. 1964).

95. Chrysler Corp. v. Brown, 441 U.S. at 304 n.34.

96. 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971). The plaintiffs in *Contractors Ass'n*, had challenged the validity of the "Philadelphia Plan," a set of regulations issued by the Secretary of Labor for certain federally-assisted state construction projects in a five-county area surrounding Philadelphia, that required bidders to submit an affirmative action program for the use of minority workers in certain crafts. *See* Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. CHI. L. REV. 723 (1972).

97. 442 F.2d at 171.

98. 618 F.2d at 791 n.40.

99. *Id.* at 792 (quoting Contractors Ass'n v. Secretary of Labor, 442 F.2d at 170).

100. This distinction was made by the *Contractors Ass'n* court itself. 442 F.2d at 167.

101. *See* text accompanying note 97 *supra*. United States v. New Orleans Pub. Serv., Inc., 553 F.2d 459 (5th Cir. 1977), *vacated and remanded on other grounds*, 436 U.S. 942 (1978), emphasized that Exec. Order 11,246 was authorized not only by the Procurement Act but also by Title VII of the Civil Rights Act of 1964 and the Equal Employment Opportunity Act of 1972. *Id.* at 465-68.

102. *Contractors Ass'n* held that Exec. Order 11,246 was consistent with Titles VI and VII of the Civil Rights Act of 1964, 442 F.2d at 171-74. Exec. Order 12,092 is, however, at odds with

implied will of Congress,[103] President Carter's procurement program is more difficult to justify.

Therefore, the cases affirming the President's power under the Procurement Act to impose equal employment opportunity and affirmative action requirements on federal contractors do not stand for the proposition that he has general authority to impose any social and economic objectives, however indirectly related to procurement policy, upon the procurement system. Under those cases the validity of a presidentially imposed procurement program indirectly related to economy and efficiency depends on whether it has been expressly or impliedly ratified by Congress,[104] or is at least consistent with other congressional enactments.[105] For *Kahn*, this conclusion requires an inquiry into congressional intent with regard to wage and price controls and the complementary policy of free collective bargaining.

IV
OTHER STATUTES

Congress did not specifically address the extent to which the Procurement Act might authorize programs in which social and economic objectives predominate over procurement objectives. The line of judicial decisions considering the equal employment orders, however, is consistent with the view that the scope of the President's power should be defined with reference to manifested determinations of congressional policy and principle outside the Procurement Act itself.[106] Other

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Congress' labor relations and anti-inflation policies. *See* notes 106-29 and 142-46 and accompanying text *infra*.

In addition, commentators have persuasively criticized *Contractors Ass'n* as being wrongly decided. For example, Comment, *supra* note 96, at 732-39, argued that Congress had preempted the fair employment area by enacting the Civil Rights Act of 1964 requiring nondiscrimination while expressly rejecting affirmative action. In other words, Exec. Order 11,246 is inconsistent with the Civil Rights Act. Morgan, *Achieving National Goals Through Federal Contracts: Giving Form to an Unconstrained Administrative Process*, 1974 WIS. L. REV. 301, 311-12 identified three errors in that decision: (1) The President's purpose in issuing Exec. Order 11,246 was solely to achieve employment equality rather than to increase the available labor force or cut procurement costs; (2) Congress' only intention in delegating procurement powers to the President was to minimize internal bureaucratic red tape; and (3) the order is bound to increase procurement costs because contractors must increase their prices to cover the added expenses of undertaking minority underutilization studies, setting goals and timetables, and seeing that they are implemented. *See also* Note, *Doing Good the Wrong Way: The Case for Delimiting Presidential Power Under Executive Order No. 11,246*, 33 VAND. L. REV. 921, 931 (1980).

103. For example, in United States v. East Texas Motor Freight Sys., Inc., 564 F.2d 179 (5th Cir. 1977), the Fifth Circuit held that a congressional policy favoring protection of bona fide seniority plans would override Exec. Order 11,246's requirement of affirmative action by government contractors.

104. 618 F.2d at 795-96.

105. United States v. East Texas Motor Freight Sys., Inc., 564 F.2d at 185.

106. KEETON, *supra* note 46, at 94.

statutes may therefore expressly or impliedly limit the President's options, since in them Congress may have addressed the problems that the executive order or regulations address. A court may then compare the presidential actions with congressional statements of policy, to determine whether they are consistent.[107]

A. The Subject-Matter Test

In *Chrysler Corp. v. Brown*,[108] the Supreme Court suggested a subject-matter test for determining whether an executive action allegedly based on a statutory delegation of power is actually authorized by the cited statute. In that case, Chrysler sought to enjoin public disclosure of information it had supplied to the Defense Logistics Agency concerning its affirmative action programs for women and minorities. In defense of its disclosure regulations, the government relied on the Procurement Act, Titles VI and VII of the Civil Rights Act of 1964, and the Equal Employment Opportunity Enforcement Act of 1972 as statutory authority for their imposition.[109] The Court held, however, that since Congress was not concerned with the disclosure of confidential business information at the time it enacted the statutes, it was "simply not possible to find in these statutes a delegation of the disclosure authority asserted by the Government."[110] To hold otherwise, the Court said, "would do violence to established principles of separation of powers."[111] The Court added that while a statutory delegation of authority need not be specific, Congress must have contemplated the regulations issued when it passed the delegating statute if those regulations are to be valid.[112]

Chrysler therefore requires that regulations issued under the authority of the Procurement Act must not trespass unreasonably into major policy areas unaddressed in the Act.[113] This approach reflects

107. SUTHERLAND, *supra* note 23, at §§ 56.01-.02.

108. 441 U.S. 281 (1979).

109. *Id.* at 304-05. The government also relied on Exec. Order 11,246, 3 C.F.R. § 339 (1964-65 Compilation), which gave the Secretary of Labor the responsibility of ensuring that corporations that benefit from federal contracts provide equal employment opportunities regardless of race or sex. The Court, however, refused to inquire whether the Executive Order authorized the disclosure regulations, holding that the statutes were the pertinent object of inquiry. *Id.* at 306.

110. *Id.* at 306.

111. *Id.* at 308.

112. *Id.*

113. This requirement is particularly evident in the Court's discussion of the remoteness of the disclosure regulations from the purposes of Exec. Order 11,246. The Court would not inquire into whether Exec. Order 11,246 authorized the disclosure regulations. *See* note 109 *supra*. Nevertheless, its discussion exemplifies the approach that courts should take in defining the scope of delegated powers generally. The order's purpose was to end discrimination in employment by the federal government and its contractors. The disclosure regulations, which allow disclosure of affirmative action reports submitted by government contractors, were reasonably related to this pur-

the high value the Court places on the principle that Congress, and not the Executive, is the nation's lawmaker and chief domestic policymaker.[114] It also suggests that the *Kahn* court should have considered whether the wage-price compliance program, although arguably furthering the Procurement Act's goals of economy and efficiency, touched upon major policies and problem areas not addressed by Congress in its enactment. This Note argues that the program was directed at such policies and programs, and directly conflicts with two express congressional policies: the promotion of free collective bargaining embodied in the NLRA and the disapproval of wage and price regulation expressed in COWPSA. Therefore, under the subject-matter test, the compliance program was beyond the President's delegated authority under section 205.

B. COWPSA

1. Mandatory Controls

A major issue in *Kahn* was whether the compliance program was forbidden by section 3(b) of COWPSA, which declares that "[n]othing 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."[115] Two distinct issues arise here: (1) the meaning of "mandatory" and (2) whether Congress' refusal to authorize "mandatory" controls under COWPSA meant that such an authorization should not be inferred from other statutes.

a. The Meaning of Mandatory

The court held that the procurement compliance program was not

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pose since disclosure would assist others in seeking to eliminate discrimination. For the Court, the overriding point appeared to be that the executive order was not concerned with the "public's access to information in Government files or the importance of protecting trade secrets or confidential business statistics." 441 U.S. at 307. The implication is that the President gave no consideration to the fact that important interests are in conflict: the public's access to information in government files and equal employment opportunities on the one hand, and personal privacy and business confidentiality on the other. *Id.* Therefore, the Director of the OFCCP exceeded his delegated authority under Exec. Order 11,246.

The *Chrysler* Court's reasoning regarding the nexus between the OFCCP disclosure regulations and Exec. Order 11,246 was intended as a paradigm of its reasoning on the nexus between the disclosure regulations and the arguable *statutory* authority, including the Procurement Act. The rationale is the same: the scope of delegated power does not include the resolution of major policy issues not considered by the delegator.

114. 441 U.S. at 308. It may also reflect growing public and judicial distrust of the regulatory process. S. BREYER & R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 32-35 (1979).

115. 12 U.S.C. § 1904 (1976).

a mandatory control.[116] In order to reach this result, the court relied on analogous case law upholding conditional federal grants to state and local governments,[117] and on the principle that no one has a right to a government contract.[118] Since no party is forced to comply, and no right is denied due to noncompliance, the court concluded that the program imposed no mandatory controls.[119] Moreover, the court held that in the context of COWPSA, mandatory refers to legally enforceable wage and price controls such as those imposed during World War II and the Korean War and by the Economic Stabilization Act of 1970. By contrast, the procurement program did not provide for civil or criminal penalties for noncompliance, authorize injunctions, or address rents, interest rates, or dividends.[120]

This treatment of the meaning of mandatory is superficial. Examination of COWPSA's legislative history reveals that Congress drew the line between voluntary standards and mandatory controls at the point "where the discipline of an agency or a council of the Federal Government begins to replace the discipline of the marketplace."[121] By this measure, the compliance program was a mandatory control, since it directed the Council to exclude noncomplying companies from federal contracting.[122] The threat of such an economic sanction can be as persuasive as legal penalties, and probably did have an effect on wages and prices.[123] Because of this threat, the dictates of the Council re-

116. 618 F.2d at 794.

117. *Id.* (citing Steward Mach. Co. v. Davis, 301 U.S. 548 (1937)).

118. *Id.* (citing Perkins v. Lukens Steel Co., 310 U.S. 113, 127 (1940)). The right/privilege distinction made in *Lukens Steel* is now in doubt, although not fully abolished. *See* K. DAVIS, 2 ADMINISTRATIVE LAW TREATISE §§ 11.3-.4 (2d ed. 1979). Nevertheless, the Administrative Procedure Act (APA) nullified *Lukens Steel*'s narrow holding that disappointed bidders on direct government contracts have no standing to challenge a government official's interpretation of congressionally mandated contract terms. 5 U.S.C. § 702 (1976); Scanwell Lab's, Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970). The APA may reflect a congressional decision to abrogate the right/privilege distinction in the procurement area.

119. 618 F.2d at 794.

120. *Id.* at 794-95.

121. 120 CONG. REC. 28883 (1974) (statement of Senator Tower, President Ford's floor leader for the bill). The line between voluntary standards and mandatory controls was clearly brought out in the 1974 debates regarding amendments to Senate Bill 3919, which would have given the President the power to delay wage and price increases for up to 90 days, *id.* at 28884-85, or for up to 60 days, *id.* at 28908-09. Both were rejected. Senator Tower described them as "backdoor controls, because the power to delay is, in itself, by definition, a power to control." *Id.* at 28910.

122. No company has been denied a contract or had a contract terminated for noncompliance with the Council's standards. Telephone conversation with Charles Samuels, attorney, Council of Wage and Price Stability, May 19, 1980. Generally, where the Council had determined that a company has exceeded the standards, the matter is resolved through informal bargaining. *Id.*

123. COUNCIL ON WAGE AND PRICE STABILITY, INTERIM REPORT ON THE EFFECTIVENESS OF THE PAY AND PRICE STANDARDS (May 6, 1980) (regression analysis showing that the voluntary standards reduced wage inflation by 1.8 to 2.0% and price inflation by 1.1 to 1.5%; there was no separate analysis of the procurement program's effect of these inflation rates). As a practical ex-

placed those of the marketplace to a significant extent. The program was therefore within the congressional definition of mandatory controls.

b. COWPSA's Effect on the Procurement Act

Section 3(b) of COWPSA states that "[n]othing in *this* Act . . . authorizes . . . mandatory economic controls."[124] While this language would appear to contradict the President's interpretation of his procurement power, the court held it to be irrelevant. The President, the court argued, relied on COWPSA only to establish the Council's power to prescribe voluntary wage and price standards; for the procurement program itself, the President's authority came from the Procurement Act alone.[125]

There are several problems with this reasoning. First, Executive Order 12,092 depends on COWPSA for more than mere standard-setting authority. The OFPP regulations issued pursuant to the order gave the Council the power to both prescribe standards and to monitor compliance,[126] powers that are quasi-legislative and quasi-judicial in nature. This transforms the Council into a de facto operating agency, a role specifically contrary to Congress' intentions in passing COWPSA.[127]

Furthermore, the court ignored indications that Congress intended to more narrowly define the limits of section 205(a) than the President assumed. Historically, Congress has always guarded the power to regulate wages and prices, delegating it only through positive legislation, circumscribed by explicit durational limits, substantive standards, and procedural safeguards.[128] Viewed in this historical context, section 3(b)

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ample, though the nation's six major tire manufacturers exceeded the wage standards, the companies made separate agreements with the Council such that the Council withdrew its preliminary determination of noncompliance in exchange for the companies' agreement not to pass on excess wage increases to consumers through higher prices. In effect, the companies agreed to hold their price increases to a figure below that which they would have been allowed under the price standard. Council on Wage and Price Stability, Press Release (Jan. 22, 1980).

124. 618 F.2d at 795 (emphasis added by court) (quoting 12 U.S.C. § 1904 note (1976)).

125. 618 F.2d at 795.

126. *See* note 6 *supra.*

127. 120 CONG. REC. 28883 (1974) (statement of Senator Tower) (the Council was intended as "a forum with oversight authority and *not an operating agency.*") (emphasis added).

128. *See, e.g.*, Pub. L. No. 421, 56 Stat. 23 (1942) (declaring that one of the Act's purposes was to make certain "that defense appropriations are not dissipated by excessive prices"); Pub. L. No. 729, 56 Stat. 765 (1942) (delegated additional power to regulate wages and agricultural prices); Pub. L. No. 774, 64 Stat. 798 (1950) (Korean War controls of limited duration); Pub. L. No. 91-379, § 101, 84 Stat. 796 (1970) (granting the President broad authority to control wages and prices). Although lacking the elaborate standards of earlier legislation, the 1970 grant was limited in duration to six months. Congress extended the Act four times for short periods. In 1971, the

indicates a congressional intention to preclude market intervention for the purpose of regulating wages and prices.

Kahn therefore appears to violate the principle of judicial deference to manifested determinations of relevant congressional poliey.[129] Where Congress has specifically considered and rejected a delegation of the authority to pursue an important public policy in one act, the courts should not read such a delegation into another act that did not address that issue.

2. *Implied Ratification*

Just before the *Kahn* lawsuit, Congress approved a one year extension of COWPSA, tripling its budget, and increasing its staff sixfold.[130] Congress knew of the procurement compliance program and the Council's role in its implementation.[131] The court held that by this action Congress impliedly ratified the program.[132]

Courts sometimes treat a legislature's failure to act after an executive interpretation of a statute as evidence of a legislative intent to adopt that interpretation.[133] Such a legislative intent requires awareness of the executive interpretation, however, and should not be generally presumed,[134] since the volume and complexity of a legislature's business prevents, in many cases, the reality of such a presumption. But when a legislature knows of an important executive interpretation and does not modify the statute in question, a ratification may be much more forcefully inferred.[135] Thus, the 1979 Extension might provide

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Act was amended to provide for agency review and the promulgation of agency regulation, Pub. L. No. 92-210, 85 Stat. 743 (1971), therefore bringing it into consistency with its predecessors.

The Economic Stabilization Act expired on April 30, 1974, after numerous bills failed in Committee, and after the Senate rejected an amendment to an unrelated bill that would have extended the control authority. In response to a request by President Ford, Congress passed COWPSA in August 1974, making absolutely clear both in the language of section 3(b) and in the statements of the bill's sponsors that it did not intend to reverse its previous decision to allow the President's mandatory control authority to expire. *See* Library of Congress, Congressional Research Service, *Constitutionality of the Wage and Price Program Established By Executive Order 12,092, reprinted in Adequacy of the Administration's Anti-Inflation Program (Part I)*: Hearings before a Sub-Comm. of the House Comm. on Government Operations, 96th Cong., 1st Sess. 493, (1979). *See also* 618 F.2d at 808-09 (MacKinnon, J., dissenting).

129. KEETON, *supra* note 46, at 94.

130. Council on Wage and Price Stability Act Amendment of 1979, Pub. L. No. 96-10, 93 Stat. 23 (1979).

131. The 1979 extension acknowledged that the Council would "determine compliance with promulgated standards." H.R. REP. No. 96-93, 96th Cong., 1st Sess. 5, *reprinted in* [1979] U.S. CODE CONG. & AD. NEWS 123, 123. Alfred Kahn, Chairman of the Council on Wage and Price Stability, testified that some of the additional funding for the Council would support its implementation of the compliance program. *See* Hearings, *supra* note 128, at 291-94.

132. 618 F.2d at 795-96.

133. SUTHERLAND, *supra* note 23, at § 49.10.

134. *Id.*

135. *Id.* An appropriation measure is generally an unreliable vehicle for implying congres-

strong support for the *Kahn* court's validation of the contract compliance program.

There are several assertions in the legislative history of the 1979 Extension, however, that Congress did not intend "to resolve . . . the issue of whether the Executive . . . [had] exceeded the authority granted by Congress,"[136] and that Congress would rely upon the courts to resolve any controversy over that issue.[137] This creates a conflict between Congress' actions and its words. On the one hand, Congress expressed a desire that the courts resolve the procurement issue without reference to the extension of COWPSA. On the other, it gave a strong indication of a desire for the program's continuation through its generous extension of the program's implementing body.

Congress' willingness to defer to the courts' assessment of the program's legality did not compel it to accept and support the procurement program to the extent that it did.[138] By its words, Congress attempted to duck a politically sensitive issue by in effect delegating it away. This strategy directly contradicts the purpose of both the delegation doctrine and separation of powers, which are intended to protect the democratic character of the government and to preserve liberty[139] by precluding the use of arbitrary power.[140] The judiciary must not allow the executive to become both the lawmaker and the executioner of the laws;[141] to

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sional approval of substantive administrative action, 618 F.2d at 791 n.40 (citing TVA v. Hill, 437 U.S. 153, 190-92 (1978)), because the connection between the appropriation and the administrative action is often very attenuated and it is difficult to demonstrate prior knowledge of the specific disputed action. SUTHERLAND, *supra* note 23, at § 49.10. However, the 1979 Extension of COWPSA was *not* an appropriation measure, and prior knowledge of the specific disputed action can be demonstrated in this case. *See* note 131 *supra*. Therefore, this principle should not undercut the *Kahn* court's reliance on the extension. *Contra*, Note, *supra* note 61, at 801.

136. H.R. Rep. No. 96-93, *supra* note 131, at 3. *See also* 125 CONG. REC. H2322 (daily ed. April 25, 1979) (remarks of Rep. Moorehead).

137. For example, Senator Proxmire, a sponsor of the 1979 Extension, assured Senator Heinz that if the courts found the wage-price compliance program to be illegal, Congress could reduce the agency's personnel. 125 CONG. REC. S3745 (daily ed. April 2, 1979).

138. 618 F.2d at 809 (MacKinnon, J., dissenting).

139. *See* Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 535, 545 (1947).

140. Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

141. Congressional reliance on judicial resolution of controversies between Congress and the Executive arguably weakens Congress' institutional position. For example, Professor Choper has speculated that "the large number of lawsuits—some filed by members of Congress themselves—diverted the legislative branch from coming to grips with the constitutionality of the war in Indochina . . . ." CHOPER, *supra* note 34, at 307. In recognition of this problem, Chief Judge Wright has argued that courts should use the traditional delegation doctrine to force Congress to reassert its "rightful role as the author of meaningful organic charters for administrative agencies." Wright, *supra* note 77, at 584. By forcing Congress to reclaim its institutional prerogatives, the courts would restrain unnecessary administrative discretion. *Id.* at 581. By analogy, a court should not respect Congress' verbal claim not to be resolving the question of a disputed agency action while effectively ratifying it. It should force Congress to take institutional responsibility for its own actions.

avoid this, the *Kahn* court correctly reached the paradoxical result of upholding the compliance program on ratification grounds. Congress' actions, not its words, should be the basis for judicial interpretation. These actions demonstrated support for the compliance program. The 1979 Extension is therefore a legitimate justification for the court's result.

C. *National Labor Relations Act*

Plaintiffs strongly contended that Executive Order 12,092 violated the policy of free collective bargaining embodied in the National Labor Relations Act (NLRA).[142] The court of appeals summarily rejected this contention, holding without analysis that the order's provisions represent only an "external factor" in the bargaining process, and therefore "[do] not subvert the integrity of that process."[143]

The NLRA established a system of free collective bargaining under which labor and management determine the terms of labor contracts without government coercion. The government's only role in this process is to provide a procedural framework within which the parties can operate. Congressional supporters of the NLRA specifically rejected any grant to the government of the power to fix wages or to impose compulsory arbitration, on the ground that it would abridge freedom of contract.[144]

The regulations issued pursuant to Executive Order 12,092 significantly infringe upon this policy of free collective bargaining. The compliance program has placed significant restraints on the bargaining process, since many employers have refused to make pay offers outside the guidelines[145] or to sign or put into effect noncomplying agree-

142. 29 U.S.C. §§ 151-169 (1976).

143. 618 F.2d at 796. The court cited Contractors Ass'n v. Secretary of Labor, 442 F.2d at 174-75. However, this reliance was inapposite. *Contractors Ass'n* held that the Philadelphia Plan promulgated under Executive Order 11,246 did not violate the NLRA, even though it interfered with exclusive union referral systems provided for in collective bargaining agreements. The court reasoned that hiring hall arrangements are not required by the NLRA but are only permitted.

But the wage-price procurement compliance program is distinguished from the Philadelphia Plan in that the procurement program arguably contravenes a *mandatory* policy, as opposed to a *permissive* provision, of the NLRA. *See* note 144 and accompanying text *infra*.

144. 93 CONG. REC. 3835-36 (1947) (remarks of Senator Taft, a sponsor of the bill). Specific congressional rejection of government power to impose wage settlement terms upon labor-management disputes distinguishes the compliance program from other federal contract terms that inevitably restrict collective bargaining, such as general specifications, security clearance requirements, affirmative action requirements, etc. When Congress has decided to impose wage terms upon government contractors it has done so expressly. *E.g.*, Service Contract Act of 1965, § 2, 41 U.S.C. § 351 (1976) (minimum wage and working condition requirements for government service contractors).

145. AFL-CIO v. Kahn, 472 F. Supp. at 101-02.

ments.[146] This effect is more than an "external factor." Rather, it is a direct influence on the bargaining process, in effect limiting the options open to labor contractors. As such, it limits the ability of the parties to bargain, and is inconsistent with the policy of the NLRA.

CONCLUSION

Kahn's weakness stems from a failure to address the question of the scope of judicial review of the President's interpretation of his delegated procurement power. The court purported to exercise independent judgment on the legality of requiring government contractors to comply with wage and price guidelines, but in fact largely deferred to the President's discretion. The resulting interpretation of the Procurement Act gave to the President broad powers to regulate the national economy under the guise of formulating procurement policy, and is in conflict with Congress' policies of tightly controlling the power to regulate wages and prices and of ensuring that labor contracts are produced through free collective bargaining without government interference. The President's discretion under the Procurement Act should be limited to reinforcing other congressional acts.[147] He may only impose indirectly related social and economic objectives with respect to which Congress is silent if they do not result in increased procurement costs. To increase procurement costs would offend the Procurement Act itself.[148] But since, as a practical matter, any pursuit of nonprocurement goals will invariably increase costs,[149] the President is effectively limited to reinforcing congressional policy. Thus, he may not use his procurement power to unilaterally impose social and economic programs.

To uphold the program, the *Kahn* court should have relied solely on Congress' implied ratification in its 1979 Extension of COWPSA. Congress attempted to avoid a politically controversial issue by in effect delegating its resolution to the judiciary, and the court was correct in ignoring this aspect of its action. Through sole reliance on implied ratification the court would have exercised judicial restraint without legitimating a majestic interpretation of presidential procurement power.

*J. Frederick Clarke**

146. *Id.* at 92.
147. *See* notes 101-14 *supra.*
148. *See* notes 47-48 *supra.*
149. *See* note 30 *supra.*

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