A TOOL TO ENFORCE SOCIAL AND ECONOMIC POLICY IN THE UNITED STATES OF AMERICA : GOVERNMENT CONTRACTS

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The author of this note believes that there is presently a strong need for an effective and comprehensive anti-inflation program in Turkey. This note is to introduce an example experienced in the U.S.

The principal purpose of government procurements is to acquire quality goods and services in a timely manner at the lowest reasonable cost[1]. Despite the primary function of government procurements, government contracts are used to satisfy other national purposes, such as promoting small businesses, controlling labor surplus[2], and to counter inflation.

This note deals with President Carter's program to counter inflation. Part I describes and discusses Executive Order 12, 092[3], an attempt to promote national policy through government procurement power. Part II examines and argues *AFL - CIO v. Kahn*[4] the case in which the Court of Appeals for the District of Columbia Circuit upheld the Pre-

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1) *See* 41 U.S.C. § 401 (1982) (listing various goals government procurements are intended to satisfy).

2) *See e.g.*, The Small Business Act of 1953, 15 U.S.C. §§ 631 - 647 (1982) (assisting small business concerns in government procurements Exec. Order No. 12,073, 43 Fed. Reg. 36,873 (1978) (emphasizing procurment set-asides in labour surplus areas).

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

4) 472 F. Supp. 88 (D.D.C.), *rev'd en banc*, 618 F. 2d 784 (D.C.Cir), *cert. denied*, 443 U.S. 915 (1979). The named defendant, Alfred E. Kahn, was Chairman of COWPS.

sident's authority to use the government procurement process to achieve the social and economic objectives of countering inflation. Part II also analyze the court's interpretation of the related statutes, and conclude that the court in *Kahn* reached the correct result, but the reasoning is flawed.

PART I

EXECUTIVE ORDER 12,092 : USING FEDERAL PROCUREMENT TO FIGHT INFLATION

In 1971, President Nixon attempted to control inflation by imposing the first mandatory peacetime wage and price controls in the U.S.'s history[5]. Three years later, Congress allowed the statute under which the President had acted[6] to lapse and substituted the Council on Wage and Price Stability Act (COWPSA)[7]. COWPSA created a body (COWPS) to seek voluntary cooperation from the private sector in the fight against inflation[8] an dspecifically provided that it did not authorize «mandatory» economic controls[9]. In 1978 President Carter announced a voiuntary national program to restrain wage and price increases. On November 1, 1978, he issued an executive order entitled «Prohibition Against Inflationary Procurement Practices»[10], requiring the Council to promulgate «voluntary» wage and price guidelines but ordering that the federal procurement system be used to encourage compliance[11]. Executive

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5) A. WEBER, IN PURSUIT OF PRICE STABILITY I (1973). *See generally* Note, *Phase V: The Cost of Living Council Reconsidered*, 62 Geo. L.J. 1663, 1666 - 67 (1974).

6) Economic Stabilization Act of 1970, Pub. L. No. 91-379, §§ 201 - 206, 84 Stat. 799, *as amended by* Economic Stabilization Act Amendments of 1971, Pub. L. No. 92 - 210, 85 Stat. 743 (expired 1974).

7) Pub. L. No. 93 - 387, 88 Stat. 750 (1974), *reprinted at* 12 U.S.C. § 1904 note (1976).

8) COWPSA, Pub. L. No. 93 - 387, 3 (a), 88 Stat. 750 (1974), *reprinted at* 12 U.S.C. § 1904 note (1976).

9) COWPSA, Pub. L. No. 93 - 387, 3 (b), 88 Stat. 750 (1974), *reprinted at* 12 U.S.C. § 1904 note (1976).

10) Executive Order No. 12,902, 3 C.F.R. 249 (1978).

11) Section 1 - 102, 3 C.F.R. at 249, provides in part : Noninflationary wage and price behavior shall be measured by the following standarts :
a) Non-inflationary wage and price behavior is the decerelation by companies of their current rate of avarage price increase by at least 0.5 per-

Order 12,092 directed COWPS to issue more specific guidelines and procurement standarts[12]. The order charged the Office of Federal Procurement Policy (OFPP) with responsibility to implement these standarts[13]. On Jaunary 4, 1979, the OFPP issued a policy letter denying federal contract awards exceeding five million dollars to companies which COWS finds do not comply with applicable wage and price standarts[14]. If, after the award of a contract, the successful bidder wilfully fails to observe the anti-inflation guidelines, the government may terminate the contract and debar the bidder from future public contracts exceeding five million dollars[15]. The five million dollar threshold coyers about sixty-five to seventy percent of all government procurement dollars[16].

Executive Order 12,092 requested members of the private sector to hold annual price increases at least one-half percentage point below their recent avarage annual increases and to hold annual wage increases below seven percent[17]. While the Order provided that all federal contracts should go to contractors who were in compliance and dealt only with compliant subcontractors and suppliers[18], the Administrator for Federal Procurement Policy was given the power to create exceptions by rule or by order[19]. It was estimated that under the regulations issued by the Administrator, the program would affect the distrubution of abovementioned sixty-five to seventy percent, that is roughly S 50 billion each year[20].

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centage points from their historical rate of annual price increase during 1976 - 1977 except where profits have not increased.

b) For pay, noninflationary pay behavior is the holding of pay increases to not more than 7 percent annually above their recent historical levels.

12) Section 1 - 101, 3 C.F.R. at 249. The price and pay standarts issued by COWPS in response to the order are found at 6 C.F.R. § 705.1 app. (1979). *See also id.* §§ 706.01 -. 76 (procedural rules).

13) Section 1 - 104, 3 C.F.R. at 249 - 50.

14) 44 Fed. Reg. 1229 (1979). The policy applies to first - tier subcontractors as well as to primary contractors.

15) *Id.* at 1230. As an alternative to contract termination, the government may require the contractor to accept an equitable reduction in contract prices to compensate for any violation. Id.

16) 618 F. 2d at 786.

17) *supra* note 11.

18) Section 1 - 103, 3 C.F.R. at 249.

19) *supra* note 13.

20) 618 F. 2d at 788. Exemptions were provided if (1) the good or service was essential to national security or public safety and no feasible alternative source was available; (2) failure to obtain the contract would threaten

Two specific congressional grants of authority underpinned the anti-inflation program: Section 205 (a) of the Federal Property and Administritive Services Act of 1949 (FPASA)[21], and sections 2 (c) and 3 (a) of the COWPSA[22]. In the FPASA, Congress sought to establish an «economical and efficient system» for procuring government goods and services[23]. The Act granted to the President the power to «prescribe such policies and directives, not inconsistent with the provisions of this Act, as he shall seem necessary to effectuate the provisions of said Act[24]. Through COWPSA, Congress authorized the President to establish COWPS[25], whose task it is to encourage non-inflationary behavior in government and industry[26].

PART II

AFL - CIO v. KAHN

On March 31, 1979, the AFL-CIO and nine of its affiliated international labor unions, challenged Executive Order 12,092 in the U.S. District Court for the District of Columbia on four grounds: (1) that it violated the National Labor Relations Act (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 Presirent's authority under the FPASA; and (4) that it exceeded the President's constitutional authority. Without reaching the collective bargaining issue, the district court agreed, granted the unions' motion for summary judgement, and enjoined the procurement compliance program[28]. That injuunction was stayed pending the outcome of the expedited appeal to the U.S. Court of Appeals for the District of

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compliance and make an equitable reduction in price. 44 Fed. Reg. at 1230.

21) 40 U.S.C. § 486 (a) (1976).

22) Pub. L. No. 93 - 387, §§ 2 (c), 3 (a), 88 Stat. 750, *reprinted as amended* in 12 U.S.C. § 1904 note (1976 and Supp. III 1979) (expired 1980).

23) 40 U.S.C. § 471 (1976).

24) Id. § 486 (a).

25) Pub. L. No. 93 - 387, 2 (a), 88 Stat. 750, *reprinted as ammended in* 12 U.S C. § 1904 note (1976).

26) Id. § 3 (a), reprinted as ammended at 12 U.S.C. 1904 note (1976 and Supp. III 1979).

27) 29 U.S.C. §§ 151 - 169 (1976).

28) 472 F. Supp. at 102.

Columbia. The court of appeals, sitting *en banc*[29] reversed the order of the district court and vacated its injunction[30].

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 FPASA[31]. Relying on the bare statutory language, the court read the FPASA 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[32]. 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[33].

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 persuant to the FPASA[34]. 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 afficiency provided sufficient standarts, particularly as delineated by the administri-

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29) In the United States, the Circuit Courts of Appeal usually sit in panels of judges but important cases may expand the bench to a large number, when they are said to be sitting *en banc*.

30) Chief Judge Wright was joined by Judges Bazelson, McGowan, Tamm, Leventhal, and Robinson. Judges Bazelson and Tamm also filed brief concurring opinions. Judge MacKinnon filed a dissent, as did Judge Robb, who was joined by judge Wilkey.

31) 618 F. 2d at 787. The court also rejected the district court's conclusion that *Kahn* presented a seperation 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 challange 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.

32) *Id.* at 787 - 89.

33) *Id.* at 789[24].

34) 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).

tive standarts embodied in the Executive Order, by which to judge whether the President's actions were within the legislative delegation[35].

To determine whether this broad delegation included the authority to promulgate the procurement compliance program, the *Kahn* court applied the «reasonably related to objectives» test[36]. 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[37]. Yet the court concluded that for negotiated contracts, which represents 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.»[38]. The court also reasoned that widespread compliance with the guidelines would indirectly result in slowing inflation and therefore lower government costs in the future[39]. 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[40].

The court then examined whether the procurement program had instituted «mandatory economic controls» and was therefore barred by COWPSA. In other words, 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, corpdrate dividents, or any similar transfers.»[41]. Two distinct issuues 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 statues.

The court held that the procurement compliance program was not a mandatory control[42]. In order to reach this result, the court relied

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35) 618 F. 2d at 793[51].
36) *See* Mourning v. Family Publications Serv., Inc., 411 U.S. 356, 371 (1973).
37) 618 F. 2d at 793.
38) *Id.* at 792.
39) *Id.* at 792 - 93.
40) *Id.* at 792.
41) 12 U.S.C. § 1904 (1976).
42) 618 F. 2d at 794.

on analogous case law upholuing conditional federal grants to states and local governments[43], and on the principle that no one has a right to a government contract[44]. 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[45]. Moreover, the court held that in the context of COWPSA, mardatory 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 adress rents, interest rates, or dividents[46].

Section 3 (b) of COWPSA states that «(n)othing in *this* Act ... authorizes ... mandatory economic controls.»[47]. 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 Councils power to prescribe voluntary wage and price stardarts; for the procurement program itself, the President's authority came from the FPASA alone[48].

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 persuant to the order gave the Council the power to both prescribe standarts and to monitor compliance[49], powers that are quasi-legislative and quiasi-judicial in nature This transforms COWPS into a de facto operating agency, a role specifically contrary to Congress' intentions in passing COWPSA[50].

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

44) *Id.* (citing Perkins v. Lukens Steel C., 310 U.S. 113, 127 (1940). The right/privilige distinction made in *Lukens Steel* is now in doubt, although not fuully abolished. *See* K. DAVIS, 2 ADMINISTRITIVE LAW TREATISE §§ 11.3 -. 4 (2d ed. 1979). Nevertheless, the Administrative Procedure Act (APA) nullified *Lukens Steel*'s narrow holding that dissapointed bidders on direct government contractsc have no standing to challange 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). Tha APA may reflect a congressional decision to abrogate the right/privilige distinction in the procurement area.

45) 618 F. 2d at 794.

46) *Id.* at 794 - 95.

47) 618 F. 2d at 795 (Emphasis added by court) (quoting 12 U.S.C. § 1904 note (1976)).

48) 618 F. 2d at 795.

49) *See* note 11 *supra.*

50) 120 CONG. REC. 28883 (1974) (statement of Senator Tower) (COWPS was

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 standarts, and procedural safeguards[51]. Viewed in this historical context, section 3 (b) 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 policy[52]. 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 adress that issue.

Just before the *Kahn* lawsuit, Congress approved a one year extension of COWPSA, tripling its budget, and increasing its staff sixfold[53]. Congress wass fully aware of the procurement compliance program and the Council's role in its implementation[54]. The court held that by this action Congress impliedly ratified the program[55].

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intended as «a forum with oversight authority and *not an operating agency.*») (emphasis added).

51) *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 eleborate standarts 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 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 consistentcy with its predecessors.

52) R. KEETON, VENTURING TO DO JUSTICE 94 (1969).

53) COWPSA Amendment of 1979, Pub. L. No. 96 - 10, 93 Stat. 23 (1979).

54) The 1979 extension acknowledged that the COWPS would «determine compliance with promulgated standarts.» H.R. REP. NO. 96 - 93, 96th Cong. 1st Sess. 5, *reprinted in* (1979) U.S. CODE CONG. AD. NEWS 123. 123. Alfred Kahn, testified that some of the additional funding for the COWPS would support its implementation of the compiance program. *See* Hearings, *supra* note 51, at 291 - 94.

55) 618 F. 2d at 795 - 96.

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 judgement on the legality of requiring government contractors to comply with wage and price guidelines, but in fact larrgely deferred to the President's discretion. The resulting interpretation of the FPASA gave to the President broad powers to regulate the national economy under the guise of formulating procurement policy, and as 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 FPASA should be limited to reinforcing other congressional acts. 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 FPASA itself. But since, as a practical matter, any pursuit of nonprocurement goals will invariably increase costs, 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 E tention 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 relience on implied ratification the court whould have exercised judicial restraint without legitimating a majestic interpretation of presidential procurement power.