

NOTE

PRESIDENTIAL POWER OVER FEDERAL CONTRACTS UNDER THE FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT: THE CLOSE NEXUS TEST OF *AFL-CIO V. KAHN*

The United States government spends approximately \$110 billion on goods and services each year.¹ Since the depression of the 1930s, the government has with increasing frequency attempted to use the economic leverage provided by its purchasing power to achieve social and economic objectives.² Most attempts to implement national policy goals through the procurement process have been expressly directed by statute.³ On a few occasions, however, the sole source of the procurement policy has been an Executive order.⁴ As Professor Arthur Miller points out, the Executive order method is available to the President when Congress will not act.⁵ This makes the process attractively flexible, yet subject to serious questions about the power of the President vis-a-vis Congress.

In the past, Presidents have used this process only sparingly. In *AFL-CIO v. Kahn*,⁶ however, the United States Court of Appeals for the District of Columbia may have opened the door to a substantial increase in executive use of procurement power. In *Kahn* the court held that the President is authorized by the Federal Property and Ad-

1. Affidavit of James D. Currie, Acting Head, Office of Federal Procurement Policy 2 (May 10, 1979), addendum to Defendant's Cross-Motion for Summary Judgment, *AFL-CIO v. Kahn*, No. 79-802 (D.D.C. May 31, 1979), *rev'd*, No. 79-1564 (D.C. Cir. June 22, 1979), *cert. denied*, 99 S. Ct. 3107 (1979).

2. 1 REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT 112-13 (1972).

3. *See id.* 114-15. Among the more important national policy procurement statutes are the Davis-Bacon Act, 40 U.S.C. §§ 276a to 276a-5 (1976) (authorizing the establishment of minimum wages for mechanics and laborers employed by firms contracting with the government); the Buy American Act, 41 U.S.C. §§ 10a-10d (1976) (requiring government purchasers to give preference to domestic suppliers unless the domestic price is clearly unreasonable); and the Walsh-Healy Public Contracts Act, 41 U.S.C. §§ 35-45 (1976) (authorizing regulation of wages, hours, and working conditions of employees working on federal contracts).

4. *See* notes 25-40 *infra* and accompanying text.

5. Miller, *Government Contracts and Social Control: A Preliminary Inquiry*, 41 VA. L. REV. 27, 53 (1955).

6. No. 79-1564 (D.C. Cir. June 22, 1979), *cert. denied*, 99 S. Ct. 3107 (1979).

ministrative Services Act of 1949⁷ to implement national policy through the federal procurement process, provided there is a "close nexus" between the program and procurement "economy and efficiency." The court's interpretation of the Federal Property and Administrative Services Act raises important questions about the scope of the power the Act grants to the President. This Note will examine the use of the Federal Property and Administrative Services Act as a source of presidential power and the limitations of that power imposed by the court's close nexus test. It will also suggest factors that should be considered in evaluating presidential actions based on the Act or similar statutes.

I. THE FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT OF 1949

A. *History and Purposes of the Act.*

The Federal Property and Administrative Services Act of 1949⁸ was part of the government's response to procurement and property management problems it experienced during World War II. The first element of this response was the 1947 passage of the Armed Services Procurement Act,⁹ which regulated military procurement. Nonmilitary procurement remained under the direction of an 1861 statute.¹⁰ Legislative action to correct the perceived inadequacies of this arrangement was spurred by the 1949 report of the Commission on Organization of the Executive Branch of the Government,¹¹ popularly known as the Hoover Commission. The report concluded that the nonmilitary supply, records management, and public buildings functions of the federal government were poorly managed and in need of central direction. The Commission recommended that a General Services Agency be created with the responsibility for overseeing government purchases and property management.¹²

In 1948 and 1949, Congress considered a number of bills that addressed the problems raised in the Commission report.¹³ Those efforts

7. 40 U.S.C. §§ 471-514 (1976).

8. *Id.*

9. Pub. L. No. 413, 62 Stat. 21 (1947) (codified at 10 U.S.C. §§ 2201-2771 (1976)).

10. Act of Mar. 2, 1861, ch. 84, § 10, 12 Stat. 214 (current version at 41 U.S.C. § 5 (1976)).

11. COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, THE ORGANIZATION AND MANAGEMENT OF FEDERAL SUPPLY ACTIVITIES, H.R. DOC. NO. 73, 81st Cong., 1st Sess. (1949).

12. *Id.*

13. *See, e.g.*, S. 2020, 81st Cong., 1st Sess. (1949); S. 991, 81st Cong., 1st Sess. (1949); S. 990, 81st Cong., 1st Sess. (1949); H.R. 4754, 81st Cong., 1st Sess. (1949); H.R. 2781, 81st Cong., 1st Sess. (1949); S. 2754, 80th Cong., 2d Sess. (1948).

culminated in the passage of the Federal Procurement and Administrative Services Act of 1949.¹⁴ Representative Holifield, the floor manager of the legislation in the House, outlined the Act's purposes:

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

The major purpose of this bill is to provide for a uniform system of property management and supply for the entire Federal Government. Accordingly H.R. 4754 creates a new General Services Administration, which will include the property-management functions now scattered among several Federal agencies and carry with it certain other related service activities.

. . . .

At the present time the administration of this vast Federal supply business is largely uncoordinated, to some extent duplicative, and definitely in need of better methods and procedures. Corrective steps, which are indeed long overdue, are now critically required.¹⁵

The central feature of the Act was a provision directing the General Services Administration to oversee procurement for the executive agencies.¹⁶ This created "a uniform yet flexible system—Government-wide—for procurement, warehousing, property identification, supply, traffic management, and management of public utility services"¹⁷

The Congress, fearing it would be impractical to place such a large agency under the President's personal direction, established an independent agency.¹⁸ Nevertheless, the Act did provide for presidential appointment of the General Service Administration's director¹⁹ and presidential control over the agency's policies. This control over policy was explicitly set forth in section 205(a) of the Act: "The President may prescribe such policies and directives, not inconsistent with the provisions of this Act, as he shall deem necessary to effectuate the provisions of said Act, which policies and directives shall govern the Administrator and executive agencies in carrying out their respective functions hereunder."²⁰ Clearly, section 205(a) grants the President the authority to set policy; however, it also attempts to restrain the scope of that authority with admonitions that such policy may not be inconsistent with the provisions of the Act and must be considered necessary to effectuate the Act's provisions. Subsequent uses and judicial interpre-

14. Pub. L. No. 81-152, 63 Stat. 377 (codified as amended at 40 U.S.C. §§ 471-514 (1976)).

15. 95 CONG. REC. 7441 (1949) (remarks of Rep. Holifield).

16. 40 U.S.C. § 481 (1976).

17. 95 CONG. REC. 7442 (1949) (remarks of Rep. Holifield).

18. *Id.* 7441.

19. 40 U.S.C. § 751(b) (1976).

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

tation of this authority illustrate the effectiveness of these limitations.

B. *Uses of the Federal Property and Administrative Services Act Procurement Policymaking Authority.*

1. *Past Uses of Presidential Procurement Policymaking Authority.*

The Federal Property and Administrative Services Act has occasionally been cited as authority for procurement directives. In 1967 the General Services Administrator responded to a balance of payments problem by issuing a regulation requiring that goods procured by the government for use outside the United States must be produced in the United States unless the government has excess foreign currency available for foreign purchases.²¹ The Administrator cited only the Federal Property and Administrative Services Act as authority for his action.²² In 1973, President Nixon issued Executive Order No. 11,755²³ to continue the exclusion of certain state prisoners from employment on federal contract work. The Order cited no statutory authority but apparently relied on the Federal Property and Administrative Services Act.

Both of these isolated instances involved directives closely patterned on precedent.²⁴ The most prominent use of presidential procurement policy, arguably relying on Federal Property and Administrative Services Act authorization, is a series of antidiscrimination and affirmative action orders for federal contractors. These orders were less dependent on specific statutes than the foregoing examples.

The early antidiscrimination orders were issued pursuant to the President's war powers and special wartime legislation. Executive Order Nos. 8802,²⁵ 9346,²⁶ and 9664²⁷ cited no specific statutory authority and were premised apparently on the President's war powers.²⁸ None

21. 41 C.F.R. § 1-6.8 (1979).

22. See 41 C.F.R. § 1-6 at 369 (1979). The Buy American Act, 41 U.S.C. §§ 10a-10d (1976), did not govern this situation. This Act does not apply to goods to be used outside of the United States. *Id.* § 10a.

23. 3 C.F.R. 837 (1971-1975 Compilation), reprinted in 18 U.S.C. § 4082 note (1976). This Order was based on President Theodore Roosevelt's Executive Order No. 325A (1905), which forbade employment of state prisoners on federal contract work.

24. See notes 22-23 *supra*.

25. 3 C.F.R. 957 (1938-1943 Compilation). Executive Order No. 8802 established a Committee on Fair Employment Practice, and required that all defense contractors covenant not to discriminate against any worker because of race, creed, color, or national origin.

26. 3 C.F.R. 1280 (1938-1943 Compilation). Executive Order No. 9346 extended the covenant required by Executive Order No. 8802 to all government contracts rather than to defense contracts only.

27. 3 C.F.R. 480 (1943-1948 Compilation). Executive Order No. 9664 extended the term of the Committee on Fair Employment Practice created by Executive Order No. 8802.

28. The federal government is one of enumerated powers; therefore, an Executive order, like other presidential action, must be authorized either by the Constitution or by statutory delegation

of these orders could have relied on the Federal Property and Administrative Services Act, since they were all issued before the Act's passage in 1949. Executive Order No. 9001²⁹ cited the First War Powers Act of 1941³⁰ as authority; Executive Order No. 10,210³¹ cited the Act of January 12, 1951,³² and Executive Order No. 10,308³³ cited the Defense Production Act of 1950.³⁴

Presidents Eisenhower and Kennedy continued the program with

of congressional authority, which authority in turn derives from a constitutional grant of power to that branch.

These principles were clearly stated in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), wherein the Supreme Court struck down for lack of authority an Executive order directing seizure of the nation's steel mills to assure continued production in the face of a threatened strike. The Court stated that "[t]he President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to [act] as he did here." *Id.* at 585. With regard to the claim of constitutional authorization the Court held:

Nor can the [Executive order] be sustained because of the several constitutional provisions that grant executive power to the President. In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent [nor] equivocal about who shall make laws which the President is to execute. The first section of the first article says that "All legislative Powers herein granted shall be vested in a Congress of the United States" After granting many powers to the Congress, Article I goes on to provide that Congress may "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President. The preamble of the order itself, like that of many statutes, sets out reasons why the President believes certain policies should be adopted, proclaims these policies as rules of conduct to be followed, and again, like a statute, authorizes a government official to promulgate additional rules and regulations consistent with the policy proclaimed and needed to carry that policy into execution. The power of *Congress* to adopt such public policies as those proclaimed by the order is beyond question.

343 U.S. at 587-88 (emphasis added). See notes 139-49 *infra* and accompanying text.

29. 3 C.F.R. 1054 (1938-1943 Compilation). Executive Order No. 9001 granted to the War and Navy Departments and the Maritime Commission broad contracting authority and directed that a nondiscrimination clause be deemed incorporated by reference into all such contracts.

30. Pub. L. No. 77-354, 55 Stat. 838 (codified at 50 U.S.C. app. §§ 601-605 (1964)) (repealed 1966).

31. 3 C.F.R. 390 (1949-1953 Compilation). Executive Order No. 10,210 transferred the contracting authority granted by Executive Order No. 9001, see note 29 *supra*, to the Department of Defense, continuing the provision incorporating the nondiscrimination clause by reference.

32. Pub. L. No. 81-921, 64 Stat. 1257 (codified at 50 U.S.C. app. § 611 (1964)) (repealed 1966).

33. 3 C.F.R. 837 (1949-1953 Compilation). Executive Order No. 10,308 created a Committee on Government Contract Compliance, which was charged with the duty of enforcing the nondiscrimination contract covenant.

34. Pub. L. No. 81-774, 64 Stat. 798 (current version at 50 U.S.C. app. §§ 2061, 2062, 2071-2073, 2091-2094, 2151-2169 (1976)).

Executive Order Nos. 10,479,³⁵ 10,557,³⁶ 10,925,³⁷ and 11,114.³⁸ In 1965 President Johnson transferred the policy enforcement to the Secretary of Labor in Executive Order No. 11,246.³⁹ None of these orders relied on substantive statutes as authority; it has been argued that only the Federal Property and Administrative Services Act could have provided statutory support during the period from 1953 to 1964.⁴⁰

2. *A New Use of the Presidential Procurement Policymaking Authority.* The first Executive order designed to achieve broad national policy goals through the federal procurement system that explicitly claimed to be authorized by section 205(a) of the Federal Property and Administrative Services Act was Executive Order No. 12,092,⁴¹ issued in 1978 by President Carter. This Order also cited sections 2 and 3(a) of the Council on Wage and Price Stability Act⁴² and "the authority vested in [the President] as President and as Commander in Chief of the Armed Forces by the Constitution."⁴³ The Order, entitled "Prohibition against Inflationary Procurement Practices," authorizes the Council on Wage and Price Stability (Council)⁴⁴ to establish voluntary wage and price standards "in order to encourage noninflationary pay and price behavior by private industry and labor, and to provide for

35. 3 C.F.R. 961 (1949-1953 Compilation). Executive Order No. 10,479 revoked Executive Order No. 10,308, 3 C.F.R. 837 (1949-1953 Compilation), and transferred the enforcement function of the Committee on Government Contract Compliance to a new Government Contract Committee, which was also authorized to receive complaints of violations and to encourage educational programs to reduce discrimination.

36. 3 C.F.R. 203 (1954-1958 Compilation). Executive Order No. 10,557 revised the required contract provision to require contractors to impose antidiscrimination obligations on subcontractors and the posting of appropriate notices.

37. 3 C.F.R. 448 (1959-1963 Compilation). Executive Order No. 10,925 enlarged the notice requirements, see note 36 *supra*, and specified that the President's Committee on Equal Employment Opportunity could impose sanctions for violation of the nondiscrimination contract provision.

38. 3 C.F.R. 774 (1959-1963 Compilation). Executive Order No. 11,114 required that the nondiscrimination provision in all federal contracts, see notes 25-26 *supra*, also be included in all federally assisted construction contracts.

39. 3 C.F.R. 339 (1964-1965 Compilation), *reprinted in* 42 U.S.C. § 2000e note (1976).

40. *AFL-CIO v. Kahn*, No. 79-1564, slip op. at 14-15 (D.C. Cir. June 22, 1979), *cert. denied*, 99 S. Ct. 3107 (1979).

41. 3 C.F.R. 249 (1979), *reprinted in* 41 U.S.C.A. § 403 (West Supp. 1979).

42. 12 U.S.C. § 1904 notes (1976), *as amended by* Act of May 10, 1979, Pub. L. No. 96-10, 93 Stat. 23. Section 6 of the 1979 Act is now codified at 15 U.S.C.A. § 1022a (West Supp. 1980).

43. Exec. Order No. 12,092, 3 C.F.R. 249 (1979), *reprinted in* 41 U.S.C.A. § 403 (West Supp. 1979).

44. The Council was established by Congress in 1974 to monitor inflationary wage and price developments in the private sector of the economy and the inflationary impact of federal government programs and policies. Council on Wage and Price Stability Act, 12 U.S.C. § 1904 notes (1976), *as amended by* Act of May 10, 1979, Pub. L. No. 96-10, 93 Stat. 23. The Council's existence was extended for one year in 1979.

the procurement by Executive agencies and Military Departments of personal property and services at prices and wage rates which are noninflationary”⁴⁵ The Order specifies general standards for noninflationary wages and prices⁴⁶ and directs the chairman of the Council to monitor company compliance, promulgate regulations and procedures, provide for appropriate exemptions and exceptions, and publish the names of noncomplying individuals or companies.⁴⁷ In addition, the Order requires that government contracts incorporate “a clause which requires compliance by the contractor, and by his subcontractors and suppliers, with the standards set forth”⁴⁸

On January 4, 1979, the Office of Federal Procurement Policy⁴⁹ issued a final Policy Statement⁵⁰ providing that companies that the Council determines are not in compliance with the standards are ineligible for federal contract awards anticipated to exceed \$5,000,000.⁵¹ If the Council determines that a contractor to whom an award has been made was in wilful violation when he certified otherwise, the Council may terminate the contract or require the contractor to accept an equitable reduction of the contract price and come into compliance.⁵² In addition, contractors must require a subcontractor’s certificate of com-

45. 3 C.F.R. 249 (1979), *reprinted in* 41 U.S.C.A. § 403 (West Supp. 1979).

46. Executive Order No. 12,092, § 1-102 states:

Noninflationary wage and price behavior shall be measured by the following standards:

(a) For prices, noninflationary price behavior is the deceleration by companies of their current rate of average price increase by at least 0.5 percentage 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.

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

3 C.F.R. 249 (1979), *reprinted in* 41 U.S.C.A. § 403 (West Supp. 1979).

47. Exec. Order No. 12,092, § 1-101, 3 C.F.R. 249 (1979), *reprinted in* 41 U.S.C.A. § 403 (West Supp. 1979).

48. *Id.* § 1-103.

49. The Office of Federal Procurement Policy, a part of the Office of Management and Budget, was created by Office of Federal Procurement Policy Act, Pub. L. No. 93-400, 88 Stat. 796 (1974) (codified at 41 U.S.C. § 401 (1976)). It directs federal contracting policies, procedures, regulations, and forms.

50. 44 Fed. Reg. 1229 (1979).

51. The Policy Statement also notes that as the government gains experience with the non-compliance sanction the dollar threshold for contracts covered by the program may be lowered. Compliance with the standards may be waived if an agency chief determines in writing that “(i) the agency’s need for the product or service is essential to National security or public safety, and there are no [feasible] alternative sources of supply . . . ; or (ii) [nonwaiver] would result in serious financial hardship and threaten the contractor’s or subcontractor’s ability to survive” *Id.* 1231.

52. *Id.* 1230.

pliance with the standards before awarding any first tier subcontract that exceeds \$5,000,000.⁵³

With the \$5,000,000 threshold requirement, the standards apply directly to expenditures comprising approximately fifty percent of all government procurement funds.⁵⁴ In effect, however, the standards will actually apply to sixty-five to seventy percent of the procurement funds because "in any of the companies that must certify compliance for contracts exceeding \$5,000,000 also routinely bid on smaller contracts."⁵⁵ Moreover, program administrators anticipate that "observance of the standard by large numbers of individual firms who supply the government will put competitive pressure on other suppliers to do the same, tending to spread the cost-reducing consequences more broadly across the spectrum of procurement."⁵⁶ Thus, the effectiveness of the federal contract debarment sanction depends on its impact on contracts other than federal contracts. The government anticipated this impact and relied on it to make the wage-price standards substantially affect the national economy.

II. *AFL-CIO v. KAHN*

In May 1979, the AFL-CIO and nine of its affiliated international unions challenged Executive Order No. 12,092⁵⁷ and its implementing regulations.⁵⁸ The unions first argued that the wage-price standards were incompatible with the congressional policy against wage-price controls, as expressed in section 3(b) of the Council on Wage and Price Stability Act,⁵⁹ in Congress' refusal to extend the Economic Stabilization Act,⁶⁰ and in prior patterns of wage-price legislation. Thus, the unions argued that an affirmative congressional policy that inflation be combatted by free market forces rather than wage-price regulation precluded presidential action to the contrary.⁶¹

53. *Id.*

54. Affidavit of James D. Currie, *supra* note 1, at 3.

55. *Id.*

56. *Id.* 4.

57. 3 C.F.R. 249 (1979), reprinted in 41 U.S.C.A. § 403 (West Supp. 1979).

58. 44 Fed. Reg. 1229 (1979); see *AFL-CIO v. Kahn*, No. 79-802 (D.D.C. May 31, 1979), *rev'd*, No. 79-1564 (D.C. Cir. June 22, 1979), *cert denied*, 99 S. Ct. 3107 (1979).

59. 12 U.S.C. § 1904 notes (1976), as amended by Act of May 10, 1979, Pub. L. No. 96-10, 93 Stat. 23. Section 3(b) of that Act provides: "Nothing in this Act . . . authorizes the continuation, imposition, or reimposition of any mandatory economic controls with respect to prices, rents, wages, salaries, corporate dividends, or any similar transfers . . ." 12 U.S.C. § 1904 notes § 3(b) (1976).

60. Pub. L. No. 91-379, 84 Stat. 799 (1970) (expired 1974), reprinted in 12 U.S.C. § 1904 notes (1976).

61. See notes 108-12 *infra* and accompanying text.

The unions next charged that the Federal Property and Administrative Services Act did not authorize the President to use the procurement process to pursue national objectives that were essentially unrelated to procurement. Since the wage-price program was said to be primarily designed to combat inflation, facilitating government procurement only indirectly, the unions claimed the Federal Property and Administrative Services Act alone would not support the President's order. In this context, the unions claimed that the series of antidiscrimination executive orders,⁶² which may have relied at least in part on Federal Property and Administrative Services Act authority, were inapposite to the wage-price case since none of the orders cited the Act as authority. Similarly, the unions claimed that Executive Order No. 12,092 did not intrude upon a field historically occupied by Congress.⁶³

The government conceded that the Council on Wage and Price Stability Act did not *authorize* the wage-price program, but argued that the Act did not restrict presidential power to promulgate such standards under some other statutory authority.⁶⁴ Further, the government argued that section 3(b) of that Act, which denies that the Act authorizes "any *mandatory* economic controls,"⁶⁵ would not bar the "*voluntary*" wage-price standards of the sort set forth in the Order. The government countered the unions' claim that wage-price regulations are historically within Congress' domain by emphasizing the antidiscrimination Executive orders and arguing that the "construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong."⁶⁶ Thus, the government focused primarily on the broad grant of authority given the President by section 205(a) of the Federal Property and Administrative Services Act, claiming that the President could indeed pursue non-procurement objectives thereunder, provided only that the President reasonably believed that the goals of the Act, economy and efficiency, would be promoted by the regulations.

In granting the unions' motion for summary judgment, the federal

62. See notes 35-40 *supra* and accompanying text.

63. See notes 35-40 *supra* and accompanying text and notes 126-38 *infra* and accompanying text. The unions also argued that the wage-price standards contravene the national labor policy favoring free collective bargaining. The district court did not reach this argument, and the court of appeals summarily rejected it. *See* AFL-CIO v. Kahn, No. 79-1564, slip op. at 27 (D.C. Cir. June 22, 1979), *cert. denied*, 99 S. Ct. 3107 (1979).

64. 12 U.S.C. § 1904 notes (1976), *as amended by* Act of May 10, 1979, Pub. L. No. 96-10, 93 Stat. 23. See notes 68 & 71 *infra*.

65. For the text of this section, see note 59 *supra*.

66. Brief for Appellants at 16, AFL-CIO v. Kahn, No. 79-1564 (D.C. Cir. June 22, 1979) (quoting *Miller v. Youakim*, 440 U.S. 125, 144 n.25 (1979) (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969) (footnote omitted))), *cert. denied*, 99 S. Ct. 3107 (1979).

district court for the District of Columbia quickly dismissed the Council on Wage and Price Stability Act as the statutory basis for the Order by noting that the Council's functions as prescribed by the statute were "essentially hortatory" and provided no authority for the Council or the President to impose sanctions.⁶⁷ Instead, the court observed that "[t]he parties agree that the President does not have the power to impose a system of mandatory wage and price controls. . . . [T]he history of wage-price legislation demonstrates that Congress has authorized mandatory controls only pursuant to positive legislation."⁶⁸ The court then analyzed the Council on Wage and Price Stability Act's legislative history and section 3(b), which provides 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."⁶⁹ The court concluded that the Order's wage-price standards were "mandatory" since the government contract debarment threat created an "element of compulsion" affecting any company that does substantial business with the government.⁷⁰ Thus, the wage-price program could not be authorized by the Council on Wage and Price Stability Act.⁷¹ Further, the court stated that the mandatory nature of the program conflicted with ex-

67. *AFL-CIO v. Kahn*, No. 79-802, slip op. at 8 (D.D.C. May 31, 1979), *rev'd*, No. 79-1564 (D.C. Cir. June 22, 1979), *cert. denied*, 99 S. Ct. 3107 (1979).

68. No. 79-802, slip op. at 19 (D.D.C. May 31, 1979). As authority for its conclusion, the court noted that "[t]he President has acknowledged that he lacked the legal authority to promulgate mandatory controls." *Id.* at 19 n.23; see *Interview with the President*, 14 WEEKLY COMP. OF PRES. DOC. 2039, 2040 (Nov. 16, 1978) ("One of the differences that exists now with the experiment Nixon pursued with wage and price controls that were mandatory is that I don't have the legal authority to do it"). At the oral argument before the court of appeals, counsel for the government conceded that "[i]f the court were to conclude that these guidelines [established by the Executive order] were an exercise of mandatory economic controls within the . . . full meaning of that term . . . the government would lose." *AFL-CIO v. Kahn*, No. 79-1564, slip op. at 1 (D.C. Cir. June 22, 1979) (Robb, J., dissenting) (quoting counsel for the government), *cert. denied*, 99 S. Ct. 3107 (1979). It is not clear why the government conceded this point; nothing in the close nexus test would preclude "mandatory" as against "voluntary" standards per se, and the court of appeals accepted the government's argument that section 3(b) of the Council on Wage and Price Stability Act is not an absolute bar on mandatory controls but rather simply disclaims *that Act's* authorization of such controls. Perhaps the government anticipated that congressional intent would play a more active role in the court's decision than it finally did. See text accompanying notes 105-06 *infra*. Or, perhaps the government was merely hasty.

69. 12 U.S.C. § 1904 notes (1976), *as amended by* Act of May 10, 1979, Pub. L. No. 96-10, 93 Stat. 23.

70. No. 79-802, slip op. at 22 (D.D.C. May 31, 1979).

71. 12 U.S.C. § 1904 notes (1976), *as amended by* Act of May 10, 1979, Pub. L. No. 96-10, 93 Stat. 23. The government claimed in the district court that this Act was an alternative basis for the wage-price program. Points and Authorities in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendants' Cross-Motion for Summary Judgment at 15-18, *AFL-CIO v. Kahn*, No. 79-802 (D.D.C. May 31, 1979), *rev'd*, No. 79-1564 (D.C. Cir. June 22, 1979), *cert. denied*, 99 S. Ct. 3107 (1979). The government dropped the allegation on appeal, presumably

pressed congressional intent to eliminate government wage-price controls,⁷² raising a separation of powers issue.⁷³

The court then rejected the Federal Property and Administrative Services Act as an alternative statutory basis for the wage-price program. The court first examined the legislative history of the Act,⁷⁴ and concluded that “[s]uch an indirect and uncertain means of achieving economy in government buying was certainly not contemplated nor would it appear that Congress would have desired such a result when it enacted the [Act].”⁷⁵ The court distinguished the antidiscrimination Executive orders by noting that Congress took notice of and approved that Executive order program.⁷⁶ In contrast, Congress had historically occupied the wage-price regulation field, delegating power to the President only sparingly. Further, the court found no evidence of any tacit congressional approval of the wage-price program.⁷⁷

In reversing the district court’s judgment for the plaintiff unions, the Court of Appeals for the District of Columbia Circuit first stated that the case did not raise a separation of powers issue, but rather was primarily a difficult problem of statutory interpretation.⁷⁸ The circuit court then rejected what it perceived as a decision by the district court that section 3(b) of the Council on Wage and Price Stability Act barred the wage-price standards because they were mandatory.⁷⁹ First, the court stated that the standards were *not* mandatory because they did not contain “those elements of coercion and enforceable legal duty that are commonly understood to be part of any legally mandated requirement”⁸⁰ and, further, because “no one has a right to a Government contract.”⁸¹ The court then concluded that the standards would not fall even if they were mandatory, because section 3(b) merely disclaimed *authorizing* such controls and the court had decided that the Federal

due to the district court’s emphasis on congressional intent as embodied in section 3(b) of the Act. See text accompanying notes 72-73 *infra*.

72. No. 79-802, slip op. at 17-23 (D.D.C. May 31, 1979).

73. *See id.* at 7-8.

74. See text accompanying notes 8-20 *supra*.

75. No. 79-802, slip op. at 11 (D.D.C. May 31, 1979).

76. *Id.* at 17.

77. *Id.* at 11-16. See note 28 *supra*.

78. No. 79-1564, slip op. at 6-7 (D.C. Cir. June 22, 1979).

79. It is not clear whether the district court decided that section 3(b) of the Council on Wage and Price Stability Act prevented promulgation of the standards as “mandatory,” or whether the court was merely using that section as one example to support its thesis that Congress had expressed an affirmative policy against government wage-price control that restricted presidential prerogatives. The former interpretation of the district court’s opinion was adopted by the court of appeals. *Id.* at 21.

80. *Id.* at 22.

81. *Id.*

Property and Administrative Services Act provided an independent statutory basis for the wage-price program.⁸²

The court used its discussion of section 3(b) to dismiss the element of congressional intent that the district court had found so important. The circuit court pointed out that two months before the decision, while the suit was pending in the district court, Congress had authorized a one-year extension of the Council on Wage and Price Stability.⁸³ The court implied that this action constituted tacit congressional approval of the programs even though, as it pointed out, the legislative history of the 1979 extension contained several explicit assertions that Congress did not intend to make any statement at all on the pending case.⁸⁴ Additionally, the court gave no weight to a "sense of the Senate" resolution of September 1978, which stated that neither the Federal Property and Administrative Services Act nor any other statute authorized the President to impose mandatory economic controls.⁸⁵ The court noted that the resolution predated the President's announcement of the program at issue by one month, had no force of law, and was inapplicable to a "nonmandatory" program.⁸⁶ There was no discussion of the history of congressional control over wage-price regulation.

What the court did emphasize was the nature of the authority given the President by section 205(a) of the Federal Property and Administrative Services Act.⁸⁷ First, the court examined the Act's legislative history, interpreting section 205(a)'s general phrases "not inconsistent with" the Act and "to effectuate the provisions" of the Act to mean that presidential action under the Federal Property and Administrative Services Act must be taken in pursuit of the Act's goals of economy and efficiency.⁸⁸ The court then suggested that the antidiscrimination orders supported the contention that presidential authority under the Act could seek to advance policies not directly related to procurement objectives.⁸⁹ Finally, the court sought to limit this power by insisting that a program proposed under section 205(a) bear a "close nexus" to procurement. So long as there is a "close nexus" between the President's action and the Act's goals of economy and efficiency in gov-

82. *Id.* at 21-24.

83. *Id.* at 25.

84. *Id.* at 25-26. *See, e.g.*, H.R. REP. NO. 33, 96th Cong., 1st Sess. 3 (1979).

85. No. 79-1564, slip op. at 25 n.59 (D.C. Cir. June 22, 1979) (discussing 124 CONG. REC. S16,781 (daily ed. Sept. 30, 1978)).

86. No. 79-1564, slip op. at 25 n.59 (D.C. Cir. June 22, 1979).

87. 40 U.S.C. § 486(a) (1976).

88. No. 79-1564, slip op. at 7-11 (D.C. Cir. June 22, 1979).

89. *Id.* at 12-17.

ernment procurement, the action is authorized by section 205(a). The court reasoned that since the wage-price standards are part of an effort to control inflation and since inflation raises the government's costs along with those of the general public, the wage-price standards are authorized by the Federal Property and Administrative Services Act.⁹⁰

III. LIMITS ON THE BROAD GRANT OF PRESIDENTIAL POWER IN SECTION 205(A)

The court of appeals recognized the need to formulate a test that distinguishes between presidential actions that use procurement authority as a pretext for the President to take actions otherwise not permitted by the Constitution or statutes, and presidential actions legitimately designed to increase the economy and efficiency of government procurement. This is obviously a difficult task, because almost every possible executive action has some impact on the economy and is therefore important to the federal government as a consumer. The difficulty of the task corresponds with its importance, however, because without such limits presidential action may be outside the scope of the statutory authority, thus violating the constitutional principles of separation of powers.⁹¹ In this respect, the dispute over the power granted by the Federal Property and Administrative Services Act illustrates important principles governing the power enjoyed by the executive branch under any broad statutory grant, including the nature of the relationship between the action taken and the grant given, the limits imposed by expressions of congressional intent set forth in the authorizing statute and elsewhere, and the restrictive function of constitutional doctrines.

A. *AFL-CIO v. Kahn: The District of Columbia Circuit's Close Nexus Text.*

The primary inadequacy of the District of Columbia Circuit's decision in *Kahn* is its failure to provide a clear description of the required nexus between presidential action and the Federal Property and Administrative Services Act, or to identify the factors that should be considered in determining whether a given action has a sufficiently close nexus. The court's guidance is sketchy and inconsistent. This is attributable mainly to the court's understandable difficulties in finding logical limits to the broad authority granted by section 205(a) of the Act.

90. *Id.* at 17-20.

91. See note 28 *supra*.

The court first stated that "[a]ny order based on Section 205(a) must accord with the values of 'economy' and 'efficiency.'"⁹² Then the court explained that the nexus was not too remote simply because there might be instances when the wage-price program resulted in a contract not being awarded to the lowest or most efficient bidder, because the program anticipates that such instances will be outweighed by an overall slowing of inflation and concomitant price decreases to the government.⁹³ Finally, the court cautioned that the decision "does not write a blank check for the President to fill in at his will. . . . The procurement power must be exercised consistently with the structure and purposes of the statute that delegates that power."⁹⁴

The negative example of the failure to award to the lowest bidder is the only substantive content the court gave to the nexus test.⁹⁵ One might draw an inference from the court's heavy reliance on the antidiscrimination orders as precedent that those orders also satisfied the nexus test and thus provide an example that gives the test greater substance.⁹⁶ However, this inference is questionable, because the court used the analogy only to show past presidential use of a procurement power, not to validate the orders retroactively according to its new close nexus test.

Although the court gave little guidance as to the scope of the required nexus, three conclusions are nevertheless clear. First, the court did not limit presidential authority under section 205(a) to prescribing mechanical, procedural aspects of the procurement process.⁹⁷ By upholding the wage-price program and alluding to the antidiscrimination orders, the decision recognized presidential power to use government contract leverage to implement broader national policies. Second, there is some suggestion that the close nexus analysis need not focus on the primary thrust of the order or program, but that a court may find a secondary purpose or effect that satisfies the test. This conclusion does not derive from the court's findings on the wage-price program where the primary goal of curbing inflation relates to economy in government purchasing; rather, the notion stems from the analogy to

92. No. 79-1564, slip op. at 17 (D.C. Cir. June 22, 1979).

93. *Id.* at 18-20.

94. *Id.* at 20 (footnote omitted).

95. *Id.* at 20 n.50. The opinion does refer to a hypothetical abuse suggested by amicus curiae, but the court refused to comment on it.

96. For a suggestion that the court refused to recognize crucial differences between the antidiscrimination orders and the wage-price program that would have substantial impact on the application of the close nexus test, see notes 126-27 *infra* and accompanying text.

97. This result is supported by the fact that section 205(a) allows the President to prescribe "policies and directives," implying a broader scope than only a power to establish procedures.

the antidiscrimination orders. The court quoted *Contractors Association v. Secretary of Labor*,⁹⁸ which stated, in support of an alternative holding that the antidiscrimination Executive orders were authorized by the Federal Property and Administrative Services Act, that "it is in the interest of the United States in all procurement to see that its suppliers are not over the long run increasing its costs and delaying its programs by excluding from the labor pool available minority workmen."⁹⁹ The primary purpose of the antidiscrimination orders was to encourage intergration of the national work force,¹⁰⁰ not merely to pursue economy and efficiency in government contracting. Nevertheless, the *Contractors Association* court examined a second "purpose" of the

98. 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

99. *AFL-CIO v. Kahn*, No. 79-1564, slip op. at 16-17 (D.C. Cir. June 22, 1979) (quoting *Contractors Ass'n v. Secretary of Labor*, 442 F.2d 159, 170 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971)), *cert. denied*, 99 S. Ct. 3107 (1979).

100. Executive Order No. 8802, 3 C.F.R. 957 (1938-1943 Compilation), stated that

it is the policy of the United States to encourage full participation in the national defense program by all citizens of the United States, regardless of race, creed, color, or national origin, in the firm belief that the democratic way of life within the Nation can be defended successfully only with the help and support of all groups within its borders

Executive Order No. 9346, 3 C.F.R. 1280 (1938-1943 Compilation), states substantially the same policy.

Executive Order No. 10,479, 3 C.F.R. 961 (1949-1953 Compilation), states that

[i]t is the policy of the United States Government to promote equal employment opportunity for all qualified persons employed or seeking employment on government contracts because such persons are entitled to fair and equitable treatment in all aspects of employment on work paid for from public funds; and . . . it is the obligation of the contracting agencies of the United States Government and government contractors to insure compliance with, and successful execution of, the equal employment opportunity program of the United States Government; and . . . the practices and procedures relating to compliance with the nondiscrimination provisions must be revised and strengthened to eliminate discrimination in all aspects of employment

Executive Order No. 10,925, 3 C.F.R. 448 (1959-1963 Compilation), especially emphasized constitutional principles and national policy:

discrimination because of race, creed, color, or national origin is contrary to the Constitutional principles and policies of the United States; and . . . it is the plain and positive obligation of the United States Government to promote and ensure equal opportunity for all qualified persons, without regard to race, creed, color, or national origin, employed or seeking employment with the Federal Government and on government contracts; and . . . it is the policy of the executive branch of the Government to encourage by positive measures equal opportunity for all qualified persons within the Government

Executive Order No. 11,114, 3 C.F.R. 774 (1959-1963 Compilation), stated that

it is the policy of the United States Government to encourage by affirmative action the elimination of discrimination because of race, creed, color, or national origin in employment on work involving Federal financial assistance, to the end that employment opportunities created by Federal funds shall be equally available to all qualified persons

Executive Order No. 11,246, 3 C.F.R. 339 (1964-1965 Compilation), stated that

[i]t is the policy of the Government of the United States to provide equal opportunity in Federal employment for all qualified persons, to prohibit discrimination in employment because of race, creed, color, or national origin, and to promote the full realization of equal employment opportunity through a positive, continuing program in each executive department and agency. The policy of equal opportunity applies to every aspect of Federal employment policy and practice.

orders and used that secondary purpose to support Federal Property and Administrative Services Act authorization. This justification process resembles the "rational basis" test used to test congressional action under the commerce clause¹⁰¹ in that the actual motive for passing the regulation is irrelevant—the courts defer to the legislative choice if there is a rational basis upon which Congress *could* find a relation between the regulation and commerce. That basis need not even be supported by legislative history since the courts will merely state that the Congress *might* have considered the secondary purpose.¹⁰² It is, however, frequently sufficient that *courts* can conceive of a rational basis for the legislation.¹⁰³

Third, it is clear that the presidential program will be evaluated in terms of its intended long-term effect. Particular circumstances where the program is at odds with procurement goals will not defeat Federal Property and Administrative Services Act authorization of the program. This was demonstrated by the *Kahn* court's treatment of the possibility that under the wage-price standards some contracts may not be awarded to the lowest bidders.¹⁰⁴ The scope thus afforded a program is uncertain; it is unclear, for example, whether a program would be allowed to impede substantially the procurement process for a period of time in return for long-term improvements in economy and efficiency.

Outside of these three spare inferences, the court of appeals left uncertain the nature of the close nexus inquiry. Although the *Kahn* court made no attempt to balance the overall benefit of the policy against possible short-term detriments it is, nevertheless, unclear whether the President would be entirely free to make that judgment without restraint. On the other hand, it would be difficult for the judiciary to undertake a full assessment of the efficacy costs and benefits of executive policies. Thus, the court was in a dilemma: it did not seem appropriate to allow the President unbridled authority under the Federal Property and Administrative Services Act, but the court was not prepared to substitute its own assessment of the desirability of the program for that of the President's.

101. U.S. CONST. art. I, § 8, cl. 3.

102. See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

103. See, for example, cases cited in note 102 *supra*. For a brief summary of the rational basis test, see J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 150-51 (1978).

104. See text accompanying note 93 *supra*.

B. *Narrowing the Breadth of the Statutory Grant: The Use of Congressional Intent to Create a Workable Close Nexus Test.*

The court of appeals recognized the difficulties posed by the close nexus test as described, and suggested a possible limit on presidential authority: the action must be consistent with the structure and purposes of the statute.¹⁰⁵ The *Kahn* court, however, paid slight attention to this limiting factor.¹⁰⁶ Other approaches for designing manageable restrictions would focus on congressional intent regarding the particular program proposed, including evidence that Congress monitored the area very closely and delegated discretion sparingly.

These suggested methods offer alternate mechanisms for evaluating power granted to the President by a broad statute. Rather than testing the order for its closeness to an expansive authorization, and thus experiencing the difficulties faced by the District of Columbia Circuit, these inquiries seek expressions of congressional intent that more narrowly define the grant of power and thereby restrict the actions legitimately available to the President.

1. *Direct Limitation Within the Federal Property and Administrative Services Act.* The court of appeals sensibly suggested that any program authorized by the Federal Property and Administrative Services Act must be consistent with the purposes and provisions of that statute.¹⁰⁷ Presumably, this means that even though a close nexus to the broad goals of economy and efficiency has been established, the program will nevertheless be disallowed if it conflicts with more specific procurement procedures detailed in the statute. The wage-price case raised two examples of conflict between Federal Property and Administrative Services Act policies and the presidential order that should be considered to illustrate the role of statutory limitations.

The first possible conflict involves the nature of the procurement system described in the Federal Property and Administrative Services Act.¹⁰⁸ Congress clearly intended that the government's procurement functions be carried out in a competitive system. The Act provides for

105. *AFL-CIO v. Kahn*, No. 79-1564, slip op. at 20 (D.C. Cir. June 22, 1979), *cert. denied*, 99 S. Ct. 3107 (1979).

106. See notes 107-17 *infra* and accompanying text.

107. See text accompanying note 94 *supra*.

108. A report by the General Accounting Office that concludes that the wage-price program is not authorized by the Federal Property and Administrative Services Act discusses this conflict. See GENERAL ACCOUNTING OFFICE, AUTHORITY FOR THE PRESIDENT'S PROGRAM APPLYING MANDATORY WAGE AND PRICE STANDARDS TO GOVERNMENT PROCUREMENT (EXECUTIVE ORDER 12092), *reprinted in Adequacy of the Administration's Anti-Inflation Program (Part I): Hearings*

two methods of awarding contracts—advertising for bids and negotiation. Advertising for bids is the preferred method,¹⁰⁹ and section 253(a) of the Act requires that this method be utilized with “such full and free competition as is consistent with the procurement of types of property and services necessary to meet the requirements of the agency concerned.”¹¹⁰ Negotiation may be used in certain circumstances,¹¹¹ but even when allowed, “[n]egotiated procurement [is] on a competitive basis to the maximum practical extent.”¹¹²

The wage-price program directly conflicts with these free market policies by controlling not only wages paid by contracting companies but also the prices they charge or bid.¹¹³ The conflict is a material one, but the court of appeals did not deal with it. The closeness of the program's nexus to broad economy and efficiency goals should have at least been questioned, because the program was arguably contrary to the very procurement method specified in the statute.

The second possible conflict between the wage-price program and the Federal Property and Administrative Services Act involves a section of the Act that suggests that the Act may not have been intended to authorize (or otherwise affect) economic stabilization programs. The wage-price standards, of course, in trying to stem inflation were part of such a stabilization program.

Section 474 of the Act states:

Nothing in this Act shall impair or affect any authority of— . . .

*(2) any executive agency with respect to any phase (including, but not limited to, procurement, storage, transportation, processing, and disposal) of any program conducted for purposes of resale, price support, grants to farmers, stabilization, transfer to foreign governments, or foreign aid, relief, or rehabilitation*¹¹⁴

Before a Subcom. of the House Comm. on Government Operations, 96th Cong., 1st Sess. 41, 56-57 (1979).

109. 41 C.F.R. § 1-2.102(a) (1978), a government procurement regulation, states:

Procurement shall be made by formal advertising whenever such method is feasible and practicable under the existing circumstances even though such conditions and circumstances would otherwise satisfy the requirements of [contracts that may be negotiated]. In accordance with this requirement, procurements shall generally be made by soliciting bids from all qualified sources of supplies or services deemed necessary by the contracting officer to assure full and free competition consistent with the procurement of the required property or services.

See also 41 U.S.C. § 252(c) (1976), which is the statutory basis for the above policy statement.

110. 41 U.S.C. § 253(a) (1976). *See also* 41 C.F.R. § 1-1.301-2 (1979).

111. 41 U.S.C. § 252(c) (1976) sets out 15 circumstances in which government contracts *may* be negotiated. *But see* 41 C.F.R. § 1-2.102 (1979).

112. 41 C.F.R. § 1-3.101(d) (1979).

113. *See* Exec. Order No. 12,092, 3 C.F.R. 249 (1979), *reprinted in* 41 U.S.C.A. § 403 (West Supp. 1979); 44 Fed. Reg. 1229 (1979) (implementing regulations). *See also* notes 45-56 and accompanying text.

114. 40 U.S.C. § 474(2) (1976) (emphasis added).

This section suggests that the Act was not intended to “affect” stabilization programs, and the section even specifies the procurement phase of such programs. If “affect” is read to include supporting or authorizing, use of the Act to provide the sole statutory authorization for an economic stabilization program such as the wage-price program would seem contradictory to the intent expressed by section 474.

The court of appeals summarily rejected the argument. First, it claimed that the term “stabilization” only refers to “the farm commodity support programs of the federal government, without any direct relevance to procurement policy generally.”¹¹⁵ Second, after conceding that “stabilization” could indeed refer to wage-price controls, the court suggested that section 474 “prescribes only that procurement shall not *obstruct* stabilization programs”¹¹⁶

Judge MacKinnon in his dissent criticized the majority’s reasoning. On the first point, he noted that the majority ignored the use of the word “procurement” and failed to employ the common definition of the word “stabilization.” On the second point, he observed that the majority’s transformation of “impair or *affect*” into “obstruct” had no basis, and violated the fundamental canon of statutory interpretation that insists that the plain and ordinary meaning of statutory language controls, and that such language must be interpreted so as to exclude surplus language.¹¹⁷

Thus, there are arguably two serious conflicts between the wage-price program and the Federal Property and Administrative Services Act. The court of appeals’ failure to confront these inconsistencies contributed to the confusion about the scope of the close nexus test. On the one hand, the court emphasized the existence of limits on Federal Property and Administrative Services Act authority; two of the six majority judges individually concurred for the sole purpose of reemphasizing the narrowness of the interpretation. On the other hand, the court substantially ignored these rather obvious conflicts between the wage-price controls and the Federal Property and Administrative Services Act. Theoretically, then, a program’s inconsistency with Federal Property and Administrative Services Act provisions will prevent its authorization by that Act. Practically, however, it appears that this court at least was willing to ignore specific inconsistencies so long as it could find a nexus to more general statutory goals. A better approach would take cognizance of the congressional limits implicit in the statute

115. *AFL-CIO v. Kahn*, No. 79-1564, slip op. at 11 n.24 (D.C. Cir. June 22, 1979), *cert. denied*, 99 S. Ct. 3107 (1979).

116. No. 79-1564, slip op. at 11 n.24 (D.C. Cir. June 22, 1979).

117. *Id.* at 10, 11 (D.C. Cir. June 22, 1979) (MacKinnon, J., dissenting).

itself: When an evaluation of the statute reveals that the grant of authority is constrained by other provisions of the statute and is thus narrower than it appears on its face, actions taken pursuant to the grant of authority may not exceed the implicit statutory limits and still find authorization in the statutory grant.

2. *Collateral Expressions of Congressional Intent.* If a program is found to have a close nexus to the Federal Property and Administrative Services Act's goals and is not barred by inconsistencies with the statute itself, it has passed the initial hurdles of statutory authorization. There may, however, be other congressional expressions that restrict a statutory grant that would otherwise be fairly read as so broad a grant of power that virtually any presidential action would survive the "close nexus" inquiry. The *Kahn* dispute is an excellent illustration. Section 205(a) of the Act obviously makes a broad grant of authority. Nevertheless, the congressional grant of authority in section 205(a) dates back to 1949 and, as construed by the court of appeals, is quite general. Recent expressions by Congress relating to the specific area addressed by the presidential program, wage-price controls, are an appropriate source of a reasonable interpretation of the discretion allowed under this expansive grant.

Several arguments support reliance on collateral expressions of congressional intent to help define the statutory grant and thereby clarify the nexus analysis. Such an approach is consistent with precedent established in the antidiscrimination orders, with the interpretation of broad grants of presidential power, and with doctrines prohibiting excessive delegation of power.

a. *Antidiscrimination orders.* A comparison of collateral expressions of congressional intent regarding antidiscrimination orders with similar expressions in the wage-price area illustrates the importance of these expressions. The *Kahn* court analogized Executive Order No. 12,092 to the series of Executive orders establishing antidiscrimination requirements for government contractors, arguing that while the early antidiscrimination orders were issued pursuant to the President's war powers and special wartime legislation,¹¹⁸ only the Federal Property and Administrative Services Act could have provided statutory support for the Executive orders from 1953 to 1964.¹¹⁹ If the Act was the authority for those orders, they arguably served as precedent for the

118. *Id.* at 14 n.32. See notes 26-33 *supra* and accompanying text.

119. See text accompanying note 40 *supra*.

wage-price standard order of 1979.¹²⁰

The *Kahn* court could cite no decision directly upholding the validity of the 1953-64 antidiscrimination Executive orders on the basis of Federal Property and Administrative Services Act authorization. The majority's strongest precedent, *Contractors Association v. Secretary of Labor*,¹²¹ involved a challenge to the legality of a program requiring affirmative action in state construction projects in the Philadelphia area—the "Philadelphia Plan"—promulgated pursuant to Executive Order No. 11,246.¹²² In that case, the Third Circuit offered several alternative grounds for holding that the Plan was a lawful exercise of presidential authority.¹²³ The *Kahn* majority in the court of appeals seized on the alternative that claimed that the Plan was "authorized by the broad grant of procurement authority with respect to Titles 40 and 41"¹²⁴ As the district court pointed out, however, *Contractors Association* does not support the argument that the procurement power alone supported the presidential antidiscrimination action: "[The *Contractors Association* statements quoted above] are unsupported dicta. The . . . holding itself was much narrower—carefully qualified by reference to the various ways Congress had ratified the executive order

120. Exec. Order No. 12,092, 3 C.F.R. 249 (1979), reprinted in 41 U.S.C.A. § 403 (West Supp. 1979).

121. 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854 (1971).

The court also cited two cases that decided whether the antidiscrimination orders created a private right of action. In holding that they did not, both courts summarily concluded that the orders themselves were valid; because the issue of validity was not squarely before the courts, however, the brief statements were only dicta. See *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).

Counsel for the AFL-CIO, petitioning for a writ of certiorari to the United States Supreme Court, pointed out that, while the court of appeals discussed decisions of other circuits, it ignored the Supreme Court's opinion in *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), that expressly left open the question of

whether Executive Order 11,246 as amended is authorized by the Federal Property and Administrative Services Act, Titles VI and VII of the Civil Rights Act of 1964, the Equal Employment Opportunity Enforcement Act of 1972, or some more general notion that the Executive can impose reasonable contractual requirements in the exercise of its procurement authority.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit at 22, *AFL-CIO v. Kahn*, No. 79-1564 (D.C. Cir. June 22, 1979) (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 304-06 (1979)) (footnotes omitted), cert. denied, 99 S. Ct. 3107 (1979).

122. 3 C.F.R. 339 (1964-1965 Compilation), reprinted in 42 U.S.C. § 2000e note (1976).

123. In addition to the arguable Federal Property and Administrative Services Act authorization, the *Contractors Ass'n* court suggested that the affirmative action program was "within the implied authority of the President" and also implicitly authorized by Congress in its appropriation of funds for the federal assistance program, of which the "Philadelphia Plan" was a part. 442 F.2d 159, 171 (3d Cir.), cert. denied, 404 U.S. 854 (1971).

124. 442 F.2d at 170 (citation omitted).

program."¹²⁵

The district court's observation pierces to the heart of the issue—congressional approval or disapproval may affect the validity of presidential action taken pursuant to section 205(a). Indeed, the presence of congressional approval may well be the factor that distinguishes the antidiscrimination orders from the wage-price standards.¹²⁶ It is generally agreed that the antidiscrimination Executive orders were, for the most part, backed by tacit congressional approval and subsequently were explicitly ratified by Congress.¹²⁷ Further, it is possible to argue that the President did not need the Federal Property and Administrative Services Act to issue the antidiscrimination Executive orders; indeed, none of the orders issued during the period even cited the Act as a basis of authority.¹²⁸

In contrast, there was neither congressional accord with nor ratification of the President's wage-price program; if anything, the opposite is true. The district court carefully traced the history of wage-price controls, pointing out that each time such standards were imposed prior to those promulgated by President Carter, Congress had expressly granted and carefully limited the executive authority.¹²⁹ The 1942 Emergency Price Control Act¹³⁰ and the Stabilization Act¹³¹ of the same year authorized the President to limit wages and agricultural prices for a specified period, tying the need for controls into government procurement by declaring one of the purposes to be ensuring

125. *AFL-CIO v. Kahn*, No. 79-802, slip op. at 16 (D.D.C. May 31, 1979), *rev'd*, No. 79-1564 (D.C. Cir. June 22, 1979), *cert. denied*, 99 S. Ct. 3107 (1979). See also *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), in which the Supreme Court states that "these [*Contractors Ass'n*] suggestions were dicta and made without any analysis of the nexus between the Federal Property and Administrative Services Act and the Executive Orders." *Id.* at 304 n.34.

126. The district court so decided after a careful comparative analysis:

The essential distinction is that Congress has taken favorable cognizance of the executive order equal opportunity program in a variety of ways; it has not treated the wage-price program at issue here in similar fashion. After years of acquiescence in the equal opportunity program, Congress in the early 1970's explicitly refused to strike down orders requiring contractors to practice affirmative action. . . . By contrast, in the area of wage and price control, Congress historically has occupied the field, delegating power to the executive branch very sparingly. Nor is there any evidence of tacit Congressional approval of the President's current wage-price control programs. Indeed, the evidence is contrary.

No. 79-802, slip op. at 13 (D.D.C. May 31, 1979) (citation omitted).

127. See, e.g., *United States v. New Orleans Pub. Serv., Inc.*, 553 F.2d 459, 467-68 (5th Cir. 1977), *vacated on other grounds*, 436 U.S. 942 (1978); *Contractors Ass'n v. Secretary of Labor*, 442 F.2d 159, 170 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

128. See notes 29-40 *supra* and accompanying text.

129. No. 79-802, slip op. at 17-18 (D.D.C. May 31, 1979).

130. Pub. L. No. 77-421, 56 Stat. 23 (1942) (codified at 50 U.S.C. app. §§ 901-924 (1946)) (repealed 1946).

131. Pub. L. No. 77-729, 56 Stat. 765 (1942) (codified at 50 U.S.C. app. §§ 961-971 (Supp. III 1940)) (expired 1947).

“that defense appropriations are not dissipated by excessive prices.”¹³² Congress again authorized wage and price controls of a specifically limited duration during the Korean conflict in the 1950 Defense Production Act.¹³³ In 1970 Congress enacted the Economic Stabilization Act,¹³⁴ authorizing the President to take measures to stabilize wages and prices. That Act expired in April 1974; in August 1974, Congress enacted the Council on Wage and Price Stability Act¹³⁵ to take its place. The Council on Wage and Price Stability Act clearly rejected wage-price controls in favor of a “task force on inflation” and “grant[ed] no mandatory or standby control over the economy.”¹³⁶ It is highly unlikely that Congress would so explicitly reject wage-price controls in one statute while leaving the President an independent statutory basis for implementing widespread economic controls.¹³⁷ In fact, Congress had no reason to suspect such an independent executive power existed, for it had never been claimed prior to Executive Order No. 12,092. Thus, there is a clear distinction between the antidiscrimination Executive orders and the order authorizing the current wage-price standards in terms of congressional intent and occupation of the field.¹³⁸

b. *Youngstown analysis*. A second source of support for an approach that considers collateral expressions of congressional intent is the landmark case of *Youngstown Sheet & Tube Co. v. Sawyer*,¹³⁹ which

132. Emergency Price Control Act, Pub. L. No. 77-421, 56 Stat. 23 (1942) (codified at 50 U.S.C. app. §§ 901-924 (1946)) (repealed 1946). See in addition Stabilization Act, Pub. L. No. 77-729, 56 Stat. 765 (1942) (codified at 50 U.S.C. app. §§ 961-971 (Supp. III 1940)), (expired 1947).

133. Pub. L. No. 81-774, 64 Stat. 798 (1950) (codified at 50 U.S.C. app. §§ 2101-2112 (1952)) (repealed 1953).

134. Pub. L. No. 91-379, 84 Stat. 799 (1970) (expired 1974), *reprinted in* 12 U.S.C. § 1904 notes (1976).

135. Pub. L. No. 93-387, 88 Stat. 750 (1974), *reprinted in* 12 U.S.C. § 1904 notes (1976).

136. S. REP. NO. 1098, 93d Cong., 2d Sess. 1 (1974).

137. For a discussion of the widespread impact of the wage-price program, see text accompanying notes 54-56 *supra*.

138. Moreover, unlike in the field of antidiscrimination, the Supreme Court has not promulgated extensive “judicial legislation” regarding wage-price standards. A Justice Department memorandum supporting the wage-price program stated the problem this way:

Thus, when the court finally came to pass on the validity of [an antidiscrimination order], the authority to issue that order and its predecessors was well established as an historical matter. In contrast the history of general mandatory wage and price controls from World War II to the present suggests a pattern of tight congressional control over both the delegation of power to the President to impose across the board controls and the exercise of the power which has been delegated. Moreover, the control of the wages and prices of government contractors have [sic] always been treated as part of general controls over the entire economy.

Justice Department, Memorandum Re Legality of Applying Wage and Price Standards in Government Procurement, [1978] 5 GOV'T CONT. REP. (CCH) ¶ 90,165.

139. 343 U.S. 579 (1952).

remains the leading case on the separation of power between the President and Congress. In *Youngstown*, the Supreme Court considered the constitutionality of an Executive order directing the Secretary of Commerce to seize the nation's steel mills in order to assure continued steel production to meet military requirements. President Truman claimed the order was supported by the President's "inherent authority" as commander-in-chief and by the executive power generally.¹⁴⁰ The Court held that the order and the seizure of the mills were unconstitutional actions in excess of the President's power.¹⁴¹

The court of appeals in *Kahn* distinguished *Youngstown* on its facts, noting that President Truman claimed "inherent powers" as his authority, while Executive Order No. 12,092 relied on the statutory authority of the Federal Property and Administrative Services Act.¹⁴² Thus, the court concluded, "separation of powers between Congress and the President was the dominant issue in *Youngstown* . . . [but the case at bar primarily involves] a difficult problem of statutory interpretation. . . . [T]he central issue in this case is whether the [Federal Property and Administrative Services Act] indeed grants to the President the powers he has asserted."¹⁴³

While the two cases are plainly distinguishable on this ground, the *Youngstown* analysis is nevertheless useful in cases involving statutory as well as constitutional grants. In both instances, the courts are attempting to discover whether the President has exceeded the authority contained in a grant of power and in both the inquiry focuses on the scope of the grant and the relation of the presidential action to the grant. In *Youngstown*, the basis for the Court's opinion was that "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his function in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad."¹⁴⁴

140. *Id.* at 584.

141. See note 28 *supra*.

142. *AFL-CIO v. Kahn*, No. 79-1564, slip op. at 5 n.10, 6-7 (D.C. Cir. June 22, 1979), *cert. denied*, 99 S. Ct. 3107 (1979).

143. No. 79-1564, slip op. at 6-7 (D.C. Cir. June 22, 1979).

144. 343 U.S. at 587-88. Perhaps such strong language in this leading Supreme Court case on presidential power persuaded the government in the *Kahn* case not to rely on implied constitutional authorization, for Executive Order No. 12,092 was vulnerable to the same criticisms. It, too, had a preamble setting out reasons for adoption of the particular policy, in this case "to encourage noninflationary pay and price behavior by private industry and labor, and to provide for the procurement by Executive agencies and Military Departments of personal property and services at prices and wage rates which are noninflationary . . ." Exec. Order No. 12,092, 3 C.F.R. 249 (1979), *reprinted in* 41 U.S.C.A. § 403 (West Supp. 1979). It, too, proclaimed the policy—specified wage and price standards—as rules of conduct to be followed; and it, too, authorized a govern-

It was equally important to several justices that Congress had previously considered and rejected the idea of giving the authority at issue to the President and, indeed, when requested to ratify this particular seizure had refused to do so.¹⁴⁵ These facts are strikingly similar to the circumstances surrounding the wage-price program. During the Council on Wage and Price Stability Act debates, Congress considered and rejected various forms of wage-price controls.¹⁴⁶ Nevertheless, the executive program, which concededly relies on the procurement sanctions to compel the widespread compliance necessary for the program's economic success,¹⁴⁷ adopted essentially the same approach Congress rejected.

Mr. Justice Jackson's frequently cited concurrence in *Youngstown* is also helpful. He stated that "[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."¹⁴⁸ He then developed his famous three-part analysis of executive powers:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures of independent presidential responsibility. . . .

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a

ment official, the Chairman of the Council on Wage and Price Stability, to promulgate additional rules and regulations necessary to execute the order. 3 C.F.R. 249 (1979), *reprinted in* 41 U.S.C.A. § 403 (West Supp. 1979).

The government thus did not rely on implied constitutional authority, or on the Council on Wage and Price Stability Act, see note 71 *supra*, but argued rather that section 205(a) of the Federal Property and Administrative Services Act, 40 U.S.C. § 486(a) (1976), provided statutory authority for Executive Order No. 12,092.

145. 343 U.S. 579, 583, 586 (1952); *id.* at 658-69 (Burton, J., concurring); *id.* at 665-67 (Clark, J., concurring).

146. *See, e.g.*, 120 CONG. REC. 28,886-911 (1974). The Senate tabled amendments by Senators Stevenson and Javits that would have empowered the President to defer or to stay for a specified period wage or price increases deemed to have a major inflationary impact.

147. *See* text accompanying notes 54-56 *supra*.

148. 343 U.S. at 635 (Jackson, J., concurring).

power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.¹⁴⁹

The court of appeals, distinguishing *Youngstown*, stated that "[t]he Supreme Court . . . held that the seizure of the steel mills might fall in Justice Jackson's second category, but most likely belonged in the third. . . . But the Government here claims to be within the first category, where the President's power is greatest."¹⁵⁰ Although the court made no further reference to this contention by the government, it implicitly upheld *one aspect* of it by holding that the Federal Property and Administrative Services Act authorizes the President to institute non-procurement programs through the procurement process where there is a sufficiently "close nexus" between the program and "economy" and "efficiency" in government procurement. Thus, the general authority of the Act qualifies the President's program for Jackson's first category ("pursuant to an express or implied authorization of Congress").¹⁵¹ Because this delegation of authority is so general and somewhat dated,¹⁵² however, the specific program for which the Act is cited as authority should also be scrutinized under analysis similar to Jackson's. Such analysis would conclude that unilateral presidential imposition of wage-price standards, like seizure of the steel mills, "might fall in Justice Jackson's second category, but most likely belong[s] in the third."¹⁵³ A court applying the close nexus test would then be guided at least by Justice Jackson's admonition that on the particular issue the President's power "is at its lowest ebb"¹⁵⁴ and accordingly would evaluate the program's nexus to Federal Property and Administrative Services Act goals rather strictly.

c. *Excessive delegation.* Finally, courts should use both collateral expressions of congressional will and the internal limits of a statute to narrow broad grants of statutory authority in order to save a statute from being an unconstitutionally excessive delegation of power.¹⁵⁵

149. *Id.* at 635-38 (Jackson, J., concurring) (footnotes omitted).

150. *AFL-CIO v. Kahn*, No. 79-1564, slip op. at 7 n.13 (D.C. Cir. June 22, 1979), *cert. denied*, 99 S. Ct. 3107 (1979).

151. 343 U.S. at 635 (Jackson, J., concurring).

152. *See* Federal Property and Administrative Services Act of 1949, Pub. L. No. 81-152, § 2, 63 Stat. 377 (codified at 40 U.S.C. § 471 (1976)).

153. *AFL-CIO v. Kahn*, No. 79-1564, slip op. at 7 n.13 (D.C. Cir. June 22, 1979), *cert. denied*, 99 S. Ct. 3107 (1979). *See* text accompanying note 150 *supra*.

154. 343 U.S. at 637 (Jackson, J., concurring).

155. For a more extensive discussion of the excessive delegation doctrine, see 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* 149-223 (2d ed. 1978); L. FISHER, *THE CONSTITUTION BETWEEN FRIENDS: CONGRESS, THE PRESIDENT, AND THE LAW* 22-36 (1978); B. SCHWARTZ, *ADMINISTRATIVE LAW* 31-86 (1976).

While the nature of our governmental system is such that Congress must delegate much discretionary authority to the executive branch, Congress cannot avoid its legislative duties assigned by the Constitution. These competing values have found their way occasionally into Supreme Court decisions.¹⁵⁶ The Court has not forbidden delegation per se, but it has objected to delegation with insufficient statutory guidance.¹⁵⁷ The requisite guidance, however, is usually found—if not in the statute itself, then in congressionally mandated due process standards or in acts like the Administrative Procedure Act of 1946,¹⁵⁸ which establish standards for agency rulemaking and procedural fairness. Indeed, there have been only two cases in which the Supreme Court has struck down congressional legislation due to delegation with inadequate statutory guidance.¹⁵⁹

The failure of the courts to invalidate statutes on this basis has not prevented challengers from raising this defect.¹⁶⁰ Amicus curiae in the *Kahn* case charged that section 205(a) of the Federal Property and Administrative Services Act violated the excessive delegation doctrine. The court of appeals disagreed, stating that the Act, by setting goals of economy and efficiency and general administrative standards, provided sufficient guidance for the use of the delegated authority.¹⁶¹ Given the unwillingness of courts to strike down a statute on the basis of excessive

156. Compare *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1958) with *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1938). See also I K. DAVIS, *supra* note 155, at 149-223.

157. See, e.g., *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935). But see I K. DAVIS, *supra* note 155, §§ 3:6-3:7. See note 159 *infra*.

158. 5 U.S.C. §§ 551-576, 701-706 (1976).

159. *Panania Ref. Co. v. Ryan*, 293 U.S. 388 (1935), struck down section 9(c) of the National Industrial Recovery Act, ch. 90, § 9(c), 48 Stat. 195 (1933), which authorized the President to prohibit the interstate commerce transportation of oil produced or withdrawn from storage in excess of the amount allowed by state law. In *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), the Court struck down section 3 of the same Act, which empowered the President to establish fair competition codes for the regulation of industry, violations of which were criminally punishable.

160. For example, the Emergency Price Control Act of 1942, Pub. L. No. 77-421, 56 Stat. 23 (codified at 50 U.S.C. app. §§ 901-924 (1946)) (repealed 1946), gave a "price administrator" the authority to establish maximum prices in a manner consistent with the purposes of the Act whenever he thought the free market price rise inconsistent with the Act. The Supreme Court, in *Yakus v. United States*, 321 U.S. 414 (1944), sustained the statute against an excessive delegation allegation on the ground that the requirements that fixed ceiling prices should be "fair and equitable" and should be fixed "so far as practicable" on a specified base period were sufficiently definite. *Id.* at 423-27 (1944). For additional examples, see authorities cited in note 155 *supra*.

161. *AFL-CIO v. Kahn*, No. 79-1564, slip op. at 20-21 n.51 (D.C. Cir. June 22, 1979), cert. denied, 99 S. Ct. 3107 (1979). The court noted that the wage-price standards compared favorably with standards found sufficient in *Amalgamated Meat Cutters & Butcher Workmen v. Connally*, 337 F. Supp. 737, 744-63 (D.D.C. 1971).

delegation, the effect of the doctrine today is that a court interpreting a statute will recognize that guidelines for executive exercise of the power are necessary to ensure that the party receiving the delegated authority is not given unbridled legislative power. Thus, in accordance with the doctrine that a statute will be interpreted so as to preserve its constitutionality,¹⁶² courts interpret legislative grants of power restrictively, emphasizing whatever statutory guidelines may exist. The court of appeals in *Kahn* recognized such guidelines but did not treat them as restrictive. In the interest of confining the legislative grant, future courts may consider the delegation doctrine as grounds for giving greater attention both to the guidelines furnished by the statute in question¹⁶³ and to those implicit in collateral expressions of congressional will.

d. *A framework for analyzing collateral expressions of congressional intent.* An alternative analysis that would account for congressional intent would inquire first into the nature of the collateral expressions of congressional intent. The weight to be given such expressions is illustrated by considering the effect of a very explicit withdrawal of authority: legislation explicitly stating that section 205(a) does not authorize the imposition of wage-price control standards on government contractors. The courts would surely find an absence of presidential authority in this case. In contrast, in the complete absence of collateral congressional expressions, section 205(a)'s broad grant of power would stand undiminished.

Most cases, of course, will fall at neither the extreme of explicit congressional direction nor that of total congressional silence. In such instances, expressions ranging from very clear to very opaque and extremely strong to very mild are conceivable. The stronger and clearer the expression, the more it should bear on the judicial inquiry. One method of analysis would account for these variations in degree by creating a direct relationship between the strength and clarity of the congressional disapproval and the specificity of the authorization that arguably overcomes that disapproval. The stronger and clearer the congressional prohibition, the narrower the reading of the statutory grant. As the grant is read more narrowly, actions that would be in close nexus to the broader grant are no longer in close nexus to the reinterpreted grant. Alternatively, the rule could be that collateral expressions of congressional intent would have no bearing at all on the close nexus test unless the expressions are explicitly prohibitory. The

162. See *Rescue Army v. Municipal Court*, 331 U.S. 549, 568-74 (1947); J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 103, at 83-85.

163. See notes 107-17 *supra* and accompanying text.

former approach seems superior. It takes realistic account of the need to interpret broad statutory grants within the context of congressional intent, and thus limits executive power by tying the close nexus test to the intent of Congress to narrow the general statutory grant. Hence, in the procurement area, strong congressional expressions of a desire to occupy the field effectively narrow the President's options and limit the President to actions in close nexus with the procurement functions as reinterpreted in light of congressional statements. Further, this approach is consistent with the approach in *Youngstown*, the leading case describing the President's authority to act when the action is based on a broad grant of power arguably insufficient to support the action and undercut by expressions of congressional will.

IV. CONCLUSION

The court of appeals' decision in *AFL-CIO v. Kahn*¹⁶⁴ has opened a broad new avenue of presidential power with inadequate guidance as to the scope of that power. Analysis of the court's reasoning in upholding the wage-price program suggests that the court would similarly uphold almost any program so long as an argument could be made linking it even indirectly to purchasing economy and efficiency. Closer examination of the court's actual statement of the close nexus test and restrictions necessarily implicit in any test relating a program to a general grant of statutory authority, however, makes apparent limits that would more precisely define the President's power under section 205(a).

Future presidential actions taken under section 205(a) authority and future court decisions examining such authorization should be cognizant of the implicit limits on the statutory grant imposed by restrictions of the Federal Property and Administrative Services Act itself and by the impact of collateral expressions of congressional intent on the nature of the program. Failure to incorporate such limits into the section 205(a) authority will lead to the "blank check for the President to fill in at his will" disclaimed by the court of appeals,¹⁶⁵ and to the potential for serious abuse of presidential power unchecked by the judiciary and uncheckable by Congress except through explicit prohibition.

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164. No. 79-1564, (D.C. Cir. June 22, 1979), *cert. denied*, 99 S. Ct. 3107 (1979).

165. No. 79-1564, slip op. at 20 (D.C. Cir. June 22, 1979).

