

**NLWJC - Kagan**

**Counsel - Box 022- Folder 011**

**EPA Executive Order [2]**

→ 40 USC 486a

3 USC 301

Strike replacement - NB - no replacements on any work (i.e. - bar not lhd to work done for fed govt)

Min wage on all? or only on wh done under K w/ feds?

1. Reviewable?
2. Nexus?
3. Preemptive?

Good copy here.

1. Reviewable?

- a. Not a const claim; a stat claim (only that acting in excess of stat auth ≠ const claim)
- b. Stat claims <sup>are</sup> reviewable if stat commits decision to P's discretion.
- c. FPA/FAA does this.
- d. Unrec that stat bars review
- e. And - no rev under APA - because it does not apply to P.
- f. But implies of this anal (Dalton) are unclear - maybe can review as a const claim. Go to merits.

2. Nexus? i.e. - Authorized under FPA/FAA?

485(a) - P. may prescribe directives to implement leadership role in setting govt's procurement policy  
Khan - (DC Cir) 618 F2d 784

Must accord w/ values of econ, ethic - e.g., price quality, suitability, availability of goods/services  
Deference to P's intent of unrec auth - a la Chorren - espec. given imprecise def. of pres auth + summary breadth of auth.

NB also - absence of any response to exercise of this  
auth over the yrs (acquiescence)

See also  
Farmer  
329 F2 3  
(3c 1964)

→ Contractors Assn 442 F2d 159 (3rd Cir) (1971)  
Approval of EO re Kers submitting AA  
plans.

(ch)

NB - only Ks on federally assisted construction projects  
Ker - racial discrimination costs, less service  
[what's the argument here!!]

Koku - impos of wage/price controls on Kers.

Carmen 669 F2d 815 - requiring ees to give up pky

oe Nixon EO - banned emp of prisoners in all fed Kerk  
(11755)

Postal EOs - prohibits Kers from entering into pre-  
line ags - reqs them to post notice re not to  
join a union.

Reas nexus.

It is not evaluating econ judgment

See Koku - not well if govt's procurement costs - govt  
may have to bypass low bidder.

But det to P's judgment that then costs would  
be offset by advants gained under syst of wage  
controls.

NB - weaker  
arg  
here.

Ker here - prolonged lbr disputes, unstable lbr rels adversely  
affect Fed govt. Also replacements not as gd whrs.

As in Kass, order contains limitations indicating that goals of economic law have been given full consid.

- King afs can veto termin. of existing ks.
- Can do bus w/ disqual ER it can/only reasons
- Ltd to org units that perm replace
- ends when the dispute resolved

No need for empirical proof - see Kahn

### 3. Preemption?

Can states have an, higher min wage? (No reason why they would want.)

NCPA - no express preemption

Garmon preemption - no st/local reg of activs that are arguably protected or prohibited under Act.

Machinists preemption - activs that they intended to leave to econ forces

ben'l doctrine?

ck.

Preemp doc applies only when govt is involved in reg, rather than proprietary activ. Bostu Harbor - 113 SCT 1190. When govt acts as proprietor, not subj to NCPA preemption

Setting the terms of business = proprietary.

That's what this is.

No need that govt act like typical priv enterprise - w that it do what priv cos. do.

This is, of course, available to priv phys. - That's all that mtrs.

Williams 472 F2d 1261 (7c)

No preemption -

ST law may provide higher

min wages or lower max which

Att - may op as to whos exempt from  
FLSA

Same 784 F2d 952 (9c)

ST law - higher min wage for teachers

FLSA 29 USC 201 et seq

218 - No provision shall excuse noncompliance w/ any  
fed or ST law or munic ord estab'ing a  
min wage higher than the min wage estab'ed  
under this chapter

~~Contractors Assn~~

Kaku -

send Ks to cos that don't comply w/ vst.  
ways / price stds.

Fairly extensive disc. of why this is likely to be in  
best interests of govt as procurer. (Bad name)

rule is not - only must be reas.

govt is - This is right!

govt

But - pro. Chevron!



U. S. Department of Justice

Office of Legal Counsel

Washington, D.C. 20530

DATE: August 2, 1995

FACSIMILE TRANSMISSION SHEET

FROM: Rosemary Hart

OFFICE PHONE: 514-2027

TO: Elena Kagan

OFFICE PHONE: 456-7000

NUMBER OF PAGES: 33 PLUS COVER SHEET

FAX NUMBER: 456-6279

REMARKS:

Elena -

I never heard from EPA yesterday, but have a call in to Gary Guzy (Dep. G.C.) this morning. I'll send you a copy of whatever I get and look forward to hearing your comments & ideas.

In the meantime, here is the replacement Striker EO and the D.C. Dist. Ct. opinion upholding the President's Action. IF YOU HAVE ANY QUESTIONS REGARDING THIS FAX, PLEASE CONTACT KATHLEEN MURPHY OF KEVIN SMITH ON 514-2057

OFFICE OF LEGAL COUNSEL FAX NUMBER: (202) 514-0563  
FTS NUMBER: (202) 368-0563

Rosemary

G. L. SMITH

EPA - draft - late aft.  
comments back from OLC.  
then to OMB for final distribution.  
final draft. Then WD formally approves

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this cowardly act. I want to thank the Government of Pakistan for the excellent cooperation it has already provided.

Our hearts go out to the families of Cary Durell, a communicator, and Jacqueline van Landingham, a consulate secretary, who were killed. We pray for the speedy recovery of Mark McCloy, a consulate spouse, who was wounded.

Attacks such as these should make the international community rededicate itself to efforts to stamp out terrorism everywhere.

### Message on the Observance of Saint Patrick's Day, 1995

March 8, 1995

Warmest greetings to everyone celebrating Saint Patrick's Day.

More than 1500 years ago, Saint Patrick escaped the bonds of slavery and brought his message of faith and opportunity to the Emerald Isle. His extraordinary courage and conviction inspired the Irish people and heralded a new era of enlightenment and peace for his adopted homeland. Today, Saint Patrick's legacy continues to endure, in Ireland and beyond, as we strive for the hope embodied by his teachings and his life's work.

On this feast of the patron saint of Ireland, we rejoice in our Irish heritage and honor the Irish Americans who have made immeasurable contributions to our nation and our culture. Since the earliest days of our republic, the sons and daughters of Ireland have symbolized the American dream. Overcoming political, economic, and social struggles, Irish Americans have achieved tremendous success in all realms of American life—from politics to education, business to the arts.

This Saint Patrick's Day has a special importance to all friends of Ireland for it is the first in a generation to occur in a peaceful Northern Ireland. Let us today join together to build on the progress of the past year and advance the cause of peace and reconciliation.

Across our country today, in parades, in classrooms, and in churches, millions of Irish Americans will celebrate the spirit of Saint

Patrick that lives on in all of us. Best wishes to all for a wonderful holiday.

Bill Clinton

### Executive Order 12954—Ensuring the Economical and Efficient Administration and Completion of Federal Government Contracts

March 8, 1995

Efficient economic performance and productivity are directly related to the existence of cooperative working relationships between employers and employees. When Federal contractors become involved in prolonged labor disputes with their employees, the Federal Government's economy, efficiency, and cost of operations are adversely affected. In order to operate as effectively as possible, by receiving timely goods and quality services, the Federal Government must assist the entities with which it has contractual relations to develop stable relationships with their employees.

An important aspect of a stable collective bargaining relationship is the balance between allowing businesses to operate during a strike and preserving worker rights. This balance is disrupted when permanent replacement employees are hired. It has been found that strikes involving permanent replacement workers are longer in duration than other strikes. In addition, the use of permanent replacements can change a limited dispute into a broader, more contentious struggle, thereby exacerbating the problems that initially led to the strike. By permanently replacing its workers, an employer loses the accumulated knowledge, experience, skill, and expertise of its incumbent employees. These circumstances then adversely affect the businesses and entities, such as the Federal Government, which rely on that employer to provide high quality and reliable goods or services.

**Now, Therefore,** to ensure the economical and efficient administration and completion of Federal Government contracts, and by the authority vested in me as President by the Constitution and the laws of the United States of America, including 40 U.S.C.

1995

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486(a) and 3 U.S.C. 301, it is hereby ordered as follows:

**Section 1.** It is the policy of the executive branch in procuring goods and services that, to ensure the economical and efficient administration and completion of Federal Government contracts, contracting agencies shall not contract with employers that permanently replace lawfully striking employees. All discretion under this Executive order shall be exercised consistent with this policy.

**Sec. 2. (a)** The Secretary of Labor ("Secretary") may investigate an organizational unit of a Federal contractor to determine whether the unit has permanently replaced lawfully striking workers. Such investigation shall be conducted in accordance with procedures established by the Secretary.

**(b)** The Secretary shall receive and may investigate complaints by employees of any entity covered under section 2(a) of this order where such complaints allege lawfully striking employees have been permanently replaced.

**(c)** The Secretary may hold such hearings, public or private, as he or she deems advisable, to determine whether an entity covered under section 2(a) has permanently replaced lawfully striking employees.

**Sec. 3. (a)** When the Secretary determines that a contractor has permanently replaced lawfully striking employees, the Secretary may make a finding that it is appropriate to terminate the contract for convenience. The Secretary shall transmit that finding to the head of any department or agency that contracts with the contractor.

**(b)** The head of the contracting department or agency may object to the termination for convenience of a contract or contracts of a contractor determined to have permanently replaced legally striking employees. If the head of the agency so objects, he or she shall set forth the reasons for not terminating the contract or contracts in a response in writing to the Secretary. In such case, the termination for convenience shall not be issued. The head of the contracting agency or department shall report to the Secretary those contracts that have been terminated for convenience under this section.

**Sec. 4. (a)** When the Secretary determines that a contractor has permanently replaced

lawfully striking employees, the Secretary may debar the contractor, thereby making the contractor ineligible to receive government contracts. The Secretary shall notify the Administrator of the General Services Administration of the debarment, and the Administrator shall include the contractor on the consolidated list of debarred contractors. Departments and agencies shall not solicit offers from, award contracts to, or consent to subcontracts with these contractors unless the head of the agency or his or her designee determines, in writing, that there is a compelling reason for such action, in accordance with the Federal Acquisition Regulation.

**(b)** The scope of the debarment normally will be limited to those organizational units of a Federal contractor that the Secretary finds to have permanently replaced lawfully striking workers.

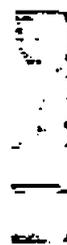
**(c)** The period of the debarment may not extend beyond the date when the labor dispute precipitating the permanent replacement of lawfully striking workers has been resolved, as determined by the Secretary.

**Sec. 5.** The Secretary shall publish or cause to be published, in the *Federal Register*, the names of contractors that have, in the judgment of the Secretary, permanently replaced lawfully striking employees and have been the subject of debarment.

**Sec. 6.** The Secretary shall be responsible for the administration and enforcement of this order. The Secretary, after consultation with the Secretary of Defense, the Administrator of the General Services, the Administrator of the National Aeronautics and Space Administration, and the Administrator of the Office of Federal Procurement Policy, may adopt such rules and regulations and issue such orders as may be deemed necessary and appropriate to achieve the purposes of this order.

**Sec. 7.** Each contracting department and agency shall cooperate with the Secretary and provide such information and assistance as the Secretary may require in the performance of the Secretary's functions under this order.

**Sec. 8.** The Secretary may delegate any function or duty of the Secretary under this order to any officer in the Department of Labor or to any other officer in the executive



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branch of the Government, with the consent of the head of the department or agency in which that officer serves.

**Sec. 9.** The Secretary of Defense, the Administrator of the General Services, and the Administrator of the National Aeronautics and Space Administration, after consultation with the Administrator of the Office of Federal Procurement Policy, shall take whatever action is appropriate to implement the provisions of this order and of any related rules, regulations, or orders of the Secretary issued pursuant to this order.

**Sec. 10.** This order is not intended, and should not be construed, to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or its employees. This order is not intended, however, to preclude judicial review of final agency decisions in accordance with the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*

**Sec. 11.** The meaning of the term "organizational unit of a Federal contractor" as used in this order shall be defined in regulations that shall be issued by the Secretary of Labor, in consultation with affected agencies. This order shall apply only to contracts in excess of the Simplified Acquisition Threshold.

**Sec. 12.** (a) The provisions of section 3 of this order shall only apply to situations in which contractors have permanently replaced lawfully striking employees after the effective date of this order.

(b) This order is effective immediately.

**William Jefferson Clinton**

The White House,  
March 8, 1995.

[Filed with the Office of the Federal Register,  
1:49 p.m., March 8, 1995]

NOTE: This Executive order was published in the *Federal Register* on March 10.

**Message to the Congress  
Transmitting the Report of the  
Federal Council on the Aging  
March 8, 1995**

*To the Congress of the United States:*

In accordance with section 204(f) of the Older Americans Act of 1965, as amended

(42 U.S.C. 3015(f)), I transmit herewith the Annual Report for 1994 of the Federal Council on the Aging. The report reflects the Council's views in its role of examining programs serving older Americans.

**William J. Clinton**

The White House,  
March 8, 1995.

**Message to the Congress  
Transmitting a Report on Railroad  
Safety  
March 8, 1995**

*To the Congress of the United States:*

I transmit herewith the 1993 annual report on the Administration of the Federal Railroad Safety Act of 1970, pursuant to section 211 of the Act (45 U.S.C. 440(a)).

**William J. Clinton**

The White House,  
March 8, 1995.

**Message to the Congress  
Transmitting the Trade Policy  
Agenda and the Trade Agreement  
Report  
March 8, 1995**

*To the Congress of the United States:*

As required by section 163 of the Trade Act of 1974, as amended (19 U.S.C. 2213), I transmit herewith the 1995 Trade Policy Agenda and 1994 Annual Report on the Trade Agreements Program.

**William J. Clinton**

The White House,  
March 8, 1995.

**Letter to Congressional Leaders on  
Iraq  
March 8, 1995**

*Dear Mr. Speaker: (Dear Mr. President:)*

Consistent with the Authorization for Use of Military Force Against Iraq Resolution (Public Law 102-1), and as part of my effort to keep the Congress fully informed, I am

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

CHAMBER OF COMMERCE OF THE )  
 UNITED STATES OF AMERICA, )  
 et. al., )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 ROBERT B. REICH, Secretary, )  
 U.S. Department of Labor )  
 )  
 Defendant. )

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Civil Action No. 95-0503

FILED

JUL 31 1995

Clerk, U.S. District Court  
District of Columbia

MEMORANDUM - OPINION

This case presents a challenge to the authority of the President of the United States to issue an Executive Order, pursuant to the Federal Property and Administrative Services Act ("FPASA"), 40 U.S.C. § 471, et seq., authorizing the Secretary of Labor to disqualify employers, with federal contracts exceeding \$100,000, who hire permanent replacement workers during a lawful economic strike.

This Court originally held that the case, in the posture then presented, was not ripe for judicial review and dismissed Plaintiffs' requests for declaratory and injunctive relief. Chamber of Commerce v. Reich, No. 95-0503, 1995 WL 307399 (D.D.C. May 9, 1995). On appeal, the Court of Appeals held, because the implementing regulations had become final and both the "fitness and hardship prongs" of Abbott Laboratories v. Gardner, 387 U.S. 136, 148-9 (1967) had been satisfied, that the case was ripe for judicial review and remanded it for expedited consideration.

Chamber of Commerce v. Reich, No. 95-5135, 1995 U.S. App. LEXIS 15537 (D.C. Cir. June 21, 1995) (per curiam).

On remand, this Court now concludes that judicial review is precluded under Dalton v. Spacter, 114 S. Ct. 1719 (1994). Despite that conclusion, the Court has determined, for the following reasons, that the public interest and the interest of the litigants will be best served by reaching the merits of all the legal issues presented: the full implications of the Dalton opinion are decidedly unclear at this point,<sup>1</sup> and it is not unlikely that either the Court of Appeals or the Supreme Court (where all parties acknowledge that this case is heading) may, upon reflection, reach a conclusion that differs from this Court's; the parties raise important issues regarding the extent of Presidential power and the scope of national labor relations policy; and judicial economy and efficiency dictate that all of these difficult questions be resolved as expeditiously as possible in one unitary proceeding rather than in a piecemeal fashion.

On the merits of the issues presented, the Court concludes, first, that the Executive Order is authorized under the FPASA, and demonstrates a sufficiently close nexus between the statutory goals of economy and efficiency in government procurement and the specific provisions of the Order.

Second, the Court concludes that the Executive Order applies

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<sup>1</sup>The Court could find only one case in which Dalton has been cited since its issuance. That case, Public Citizen v. Kantor, 864 F. Supp. 208 (D.D.C. 1994), did not contain any extended discussion of Dalton's reasoning.

to activities in which the government is engaging in its proprietary capacity as a purchaser of goods and services, not to activities of a regulatory or policy-making nature. Consequently, the preemption doctrines enunciated by the Supreme Court under the Labor Management Relations Act ("LMRA") and the National Labor Relations Act ("NLRA"), 29 U.S.C. § 141 et seq.<sup>2</sup>, are not applicable. Therefore, the government is free to insist, as a condition of its entering into federal contracts, that employers not hire permanent replacements for economic strikers even though such a condition would, in the private collective bargaining sector, fall into the "free zone from which all regulation, 'whether federal or state,' is excluded," Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 111 (1989).

Finally, the Court concludes, after balancing all the relevant factors, that an injunction pending appeal is warranted because the irreparable injury claimed by Plaintiffs from not granting such a stay will far outweigh any loss to be suffered by the government or the public by granting it.

I. Statement of Facts<sup>3</sup>

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<sup>2</sup>The LMRA includes, primarily, the provisions of the NLRA as originally enacted in 1935 and subsequent amendments to the NLRA enacted in the Taft-Hartley Act of 1947.

<sup>3</sup>Both Plaintiffs and Defendants filed Statements of Material Fact pursuant to Local Rule 108(h). The Court treats all facts that were not disputed as conceded. Id.

The Court is entitled to consider affidavits, depositions, exhibits, court judgments and orders, letters, transcripts of prior court proceedings, matters of public record and other materials outside the pleadings in considering a motion under Federal Rule of Civil Procedure 12(b). See 5A. C. Wright & A. Miller, Federal

On March 8, 1995, President William J. Clinton issued Executive Order 12954, 60 Fed. Reg. 13023 (1995) ("Executive Order" or "Order"). The Order's stated purpose is "to ensure the economical and efficient administration and completion of Federal Government contracts." *Id.* at 13023. The Order states that "[i]t is the policy of the executive branch in procuring goods and services that ... contracting agencies shall not contract with employers that permanently replace lawfully striking employees." *Id.* The Order applies to government contracts in excess of \$100,000. On May 25, 1995, the Secretary of Labor, who is charged with implementing the Order, issued final regulations. See Permanent Replacement of Lawfully Striking Employees by Federal Contractors, 60 Fed. Reg. 27,856 (May 25, 1995) (to be codified at 29 C.F.R. ch. II & pt. 270) (effective date June 26, 1995).

On March 15, 1995, Plaintiffs, Chamber of Commerce of the United States of America, American Trucking Associations, Inc., Labor Policy Association, National Association of Manufacturers and Bridgestone/Firestone, Inc. filed suit for declaratory and injunctive relief seeking to immediately enjoin implementation of the Order and to declare it unlawful. On May 9, 1995, this Court granted the government's Motion to Dismiss, and dismissed the complaint on grounds of prematurity. On June 21, 1995, the Court of Appeals reversed and remanded the case for a decision on the merits. At this juncture, the parties' cross-motions for summary

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Practice and Procedure, (2d Ed. 1990 and 1994 supp.) § 1364, at 475 - 481, and nn. 25 - 44.

judgment are once again before the Court.

## II. Judicial Review is Precluded under Dalton v. Specter

In Dalton v. Specter, 114 S. Ct. 1719, 1728 (1994), Chief Justice Rehnquist, writing for a unanimous Court,<sup>4</sup> ruled that the plaintiff's claim that the President exceeded his authority under the Defense Base Closure and Realignment Act of 1990, 10 U.S.C. § 2687 (1988 Ed., Supp. IV), "is not a constitutional claim, but a statutory one." 114 S. Ct. at 1728. In examining such a statutory claim, the Court held that where a statute such as the 1990 Defense Base Closure Act "commits decisionmaking to the discretion of the President, judicial review of the President's decision is not available." Id. Finally, while acknowledging that courts may review claims that a President acted unconstitutionally, Dalton emphasized that "simply alleging that the President has exceeded his statutory authority" does not turn statutory claims into constitutional ones subject to judicial review. 114 S. Ct. at 1726.

This case fits squarely within the parameters of Dalton. Plaintiffs are asserting that the Executive Order is unconstitutional because it violates the doctrine of separation of powers. However, Plaintiffs' separation of powers claim is based on the perceived conflict between the Executive Order and various provisions of the NLRA and the LMRA. In reality, what Plaintiffs seek to paint as their "constitutional" claim, in order to obtain

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<sup>4</sup>Although all Justices agreed on the results, Justice Blackmun filed a partial concurrence and Justice Souter filed a partial concurrence on behalf of Justices Blackmun, Stevens, and Ginsburg.

judicial review under Dalton, is simply a claim that the provisions of the Executive Order violate other existing statutes. In short, it is a claim that the President abused or exceeded his statutory powers.

That is precisely the rationale explicitly rejected by the Supreme Court when it reversed the Third Circuit in Dalton. That court of Appeals had "reasoned, ...that whenever the President acts in excess of his statutory authority, he also violated the constitutional separation of powers doctrine." 114 S. Ct. at 1725. Concluding that this analysis relied upon by the Third Circuit "is flawed", the Supreme Court explained that

[o]ur cases do not support the proposition that every action by the President, or by another executive official, in excess of his statutory authority is ipso facto in violation of the Constitution. On the contrary, we have often distinguished between claims of constitutional violations and claims that an official has acted in excess of his statutory authority. 114 S. Ct. at 1725.

Applying the Court's reasoning to this case, the same conclusion must be reached: namely that the claim being asserted is a statutory one, and not a constitutional one.

In an effort to avoid the consequences of this reasoning, Plaintiffs try to differentiate between situations in which the actions of the President, taken pursuant to statutory authority, are inconsistent with provisions of the statute upon which he is relying and situations in which his actions, taken pursuant to statutory authority, are inconsistent with provisions of statutes other than the one upon which he is relying for his authority. The distinction is an illusory one, however, since in either case it is

statutes--not Constitutional provisions--which are defining and confining the President's authority to act.

While Dalton reaffirms the holding in Franklin v. Massachusetts, 505 U.S. , 112 S. Ct. 2767 (1992), that presidential decisions are reviewable for claims genuinely raising constitutional issues, i.e., that the President violated a specific Constitutional right or relied solely on the Constitution for asserting his authority, that holding does not advance Plaintiffs' position. In reaffirming this principle, the court cites as an example, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952), where the "only basis of authority asserted was the President's inherent constitutional power as the Executive and the Commander-in-Chief of the Armed Forces." 114 S. Ct. at 1726. In the instant case, neither Plaintiffs nor Defendant are claiming Presidential reliance on inherent constitutional authority as justification for issuance of Executive Order 12954. It is perfectly clear that the only authority being asserted by the President to support issuance of the Executive Order is the FPASA-- i.e., a statutory basis.

When we turn to the Supreme Court's analysis of claims that the President has violated a statutory mandate, we see that "such review is not available when the statute in question commits the decision to the discretion of the President." Id.<sup>5</sup> That is

<sup>5</sup>Dalton does "assume for the sake of argument that some claims that the President has violated a statutory mandate are judicially reviewable outside the framework of the APA." 114 S.Ct. at 1727. However, after making this assumption, Chief Justice Rehnquist then immediately cautions that "longstanding authority holds that such review is not available when the statute in question commits the

exactly what the FPASA does. It sets forth a general goal of achieving an "economical and efficient system for... procurement and supply." 40 U.S.C. § 471. Within the broad limits of furthering economy and efficiency, 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." 40 U.S.C. § 471.

This is precisely the kind of broad discretionary authority given to the President by the 1990 Defense Base Closure Act at issue in Dalton and by the joint Congressional resolution at issue in Dakota Central Telephone Co. v. South Dakota ex rel. Payne, 250 U.S. 163, 184 (1919), the case relied upon so heavily by Chief Justice Rehnquist in his Dalton opinion.

Plaintiffs try to distinguish Dalton by arguing that it only applies to bar review of statutory claims where the statute itself

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decision to the discretion of the President." Id. Moreover, the case cited in that passage, Dames & Moore v. Regan, 453 U.S. 654 (1981), concerned whether statutory authority existed to justify the Presidential suspension of claims of United States nationals against Iran. Unlike that case, there is no disagreement amongst the parties in the instant case that the FPASA is the source of the President's authority to issue Executive Order 12954.

"Under the joint resolution at issue in Dakota Central, H.J. Res. 309, 65th Cong., 2d Sess., 40 Stat. 904 (1918), Congress empowered the President to supervise or obtain control of communications systems "whenever he shall deem it necessary for the national security or defense." The plaintiffs asserted that the facts necessary to justify the President's exercise of this power did not exist. Id. at 184. The Court rejected the claim, stating that the plaintiffs were asking the Court to review a "mere excess or abuse of discretion in exerting a power given," not "a want of power." Id. Refusing to review whether the President's acts were "necessary for the national security or defense," the Court held that such a claim "involves considerations which are beyond the reach of judicial power." Id.

precludes such review. The simple answer is that there was no explicit provision in the 1990 Defense Base Closure Act which precluded judicial review, and therefore it cannot be said that the Court's rationale rested on that premise. The Court reasoned that Congress "foreclosed" judicial review by committing the decisions of the President to his broad discretion not by enacting a specific statutory section barring judicial review.' 114 S. Ct. at 1727.

Finally, Plaintiffs do not strongly press their argument that the President's authority to issue the Executive Order is reviewable under the Administrative Procedure Act, ("APA"), 5 U.S.C. § 701 et seq. It is a fundamental principle of administrative law that the APA provides a statutory basis for judicial review of actions taken by federal agencies. However, as Franklin v. Massachusetts held, 112 S. Ct. at 2773, and Dalton reaffirmed, 114 S. Ct. at 1723, "the APA does not apply to the President." Even though Plaintiffs have chosen to sue Secretary Reich as Defendant, it is clear that their real challenge is to the President's authority to issue the Executive Order, not to Secretary Reich's implementation of it.

For all of the reasons stated, the Court concludes that the holding and underlying rationale of Dalton v. Specter compel the conclusion that there is no judicial review of the President's

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'It is true that Justice Souter's concurrence states that "the text, structure, and purpose of the Act compel the conclusion that judicial review of the Commission's or the Secretary's compliance with it is precluded." 114 S.Ct. at 1729. However, none of his many statutory citations refer to any specific foreclosure of judicial review. Rather, they refer to "a series of tight and rigid deadlines...for decision and implementation" of the timetable set forth in the Act. 114 S.Ct. at 1729, 1730.

issuance of Executive Order 12954. Despite having reached that conclusion the Court is taking the unusual step of proceeding to decide the remaining legal issues raised by the parties.

As indicated earlier the full implications of Dalton are decidedly unclear and there has been no appellate application of its principles since it was decided less than a year ago. Even the Supreme Court, at the end of its opinion, acknowledged the fears of the litigants "that failure to allow judicial review here would virtually repudiate Marbury v. Madison, 1 Cranch 137, 5 U.S. 137, 2 L.Ed. 60 (1803), and nearly two centuries of constitutional adjudication." 114 S. Ct. at 1728. Plaintiffs in the instant case have voiced similar grave concerns, many of which this Court shares.<sup>9</sup> In sum, it may well be that, upon reflection, there will

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<sup>9</sup>See, for example, The Supreme Court, 1993 Term--Foreward: Leading Cases, 108 Harv. L. Rev. 139, 300-310 (1994), in which the writer noted that "[t]he precise import of this decision, which the Court announced in an almost off-handed way...is not clear. The distinction upon which the Court relies--a distinction between actions in excess of statutory authority and actions altogether lacking statutory authority--is precisely the sort of formalism that dissolves upon close inspection. Nor is it clear how the distinction might be tightened to provide guidance to the lower courts--," 108 Harv. L. Rev. at 300-301. The writer goes on to note that "[t]he unfortunate result of this unreflective line-drawing is to cast into doubt the whole notion of constitutional restraints on executive power." Id. at 305.

Echoing the words of the opinion itself, the writer states that "if, as seems likely, the Court did not intend to set aside centuries of jurisprudence, some further principle must define the bounds of acceptable executive action pursuant to statutes." Id. at 308. The writer concludes by saying that the "Court's distinction [between action in excess of statutory authority and action without statutory authority] thus lacks both precision and rationale...However, coupled with the Court's well-established doctrine that executive action is not reviewable for abuse of discretion, the effect will often be, as in the instant case, to place executive action beyond review. It is unfortunate that the Supreme Court, in a unanimous decision that betrays not even a

be either a narrowing or a fuller explication of Dalton by the Court of Appeals or the Supreme Court itself which will necessitate a change of outcome on the issue of judicial review.

Given that possibility, given the significance of the legal issues raised regarding the extent of Presidential power under the FPASA and its relationship to our national labor relations laws, and given the desire to reduce the delay and costs of this litigation to all concerned, the Court has concluded that it will serve both the public interest and the interest of the litigants to now turn to the merits of the legal issues.

III. Executive Order 112954 Is Authorized Under the FPASA

The Federal Property and Administrative Services Act, 40 U.S.C. § 471 et seq., enacted in 1949 in response to the recommendations of the Hoover Commission, "was designed to centralize Government property management and to introduce into the public procurement process the same flexibility that characterizes such transactions in the private sector." APL-CIO v. Kahn, 618 F.2d 784, 787 (D.C. Cir. 1979) (en banc), cert. denied 443 U.S. 915 (1979).

In order to effectuate the congressional policy set forth in Section 471 "to provide for the Government an economical and efficient system" of procurement and property management, the

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passing acquaintance with the difficulties its decision raised, placed its imprimatur on a constitutional distinction that cuts so close to the heart of the constitutional principle of separation of powers." Id. at 309-310.

While these comments may well embody a certain youthful hyperbole, nonetheless, the underlying dangers are very real.

President is authorized in Section 485 (a) to "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." The Khan court found that "by emphasizing the leadership role of the President in setting Government-wide procurement policy on matters common to all agencies, Congress intended that the President play a direct and active part in supervising the Government's management functions." Id. at 788.

Construing this broad statutory language, the legislative history of the Act, and executive branch practice since its enactment, the Court of Appeals for our Circuit concluded that any executive order based on Section 486 (a) "must accord with values of 'economy' and 'efficiency'." Id. at 792. Although recognizing that the definition of presidential authority to be exercised under Section 486 (a) is "imprecise", the Circuit Court noted that the governing values of "economy" and "efficiency" are not narrow and that "they encompass those factors like price, quality, suitability, and availability of goods or services that are

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<sup>3</sup>The range of government activities covered by the Congressional declaration of policy contained in Section 471 is extraordinarily broad. It is this range of activities which the President is mandated to provide "policies and directives" for in Section 486 (a). Thus, Section 471 covers:

(a) the procurement and supply of personal property and nonpersonal services, including related functions such as contracting, inspection, storage, issue, specifications, property identification and classification, transportation and traffic management, establishment of pools or systems for transportation of Government personnel and property by motor vehicle within specific areas, management of public utility services, repairing and converting, establishment of inventory levels, establishment of forms and procedures, and representation before Federal and State regulatory bodies; (b) the utilization of available property; (c) the disposal of surplus property; and (d) records management.

involved in all acquisition decisions." Id. at 789.

In determining whether a presidential directive--in this case, the Executive Order--is consistent with the statutory goals of economy and efficiency, "the President's view of his own authority under a statute is not controlling, but when that view has been acted upon over a substantial period of time without eliciting congressional reversal, it is 'entitled to great respect.' [citations omitted]." Id.

This deference to the President's interpretation of his own statutory authority, so long as it is reasonable and not inconsistent with the plain language of the statute, is analogous to the deference accorded to an agency's interpretation of the statute it is charged with administering. See Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 844 (1984).

Under the Chevron doctrine, if a statute is silent or ambiguous with respect to a particular issue, a reviewing court asks only whether the agency's response is a "permissible construction" of the statute. Id. at 843. That construction is entitled to "considerable weight" by the reviewing court, id. at 844, and will be upheld so long as it is "rational and consistent" with the statute. Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990).

Surely, as Khan suggests, the President is entitled to no less institutional deference than the administrative agencies he oversees. Moreover, the "imprecise definition of presidential authority", as well as the "direct and broad ranging authority"

granted to the President by the FPASA "in order to achieve a flexible management system capable of making sophisticated judgments in pursuit of economy and efficiency", Khan, 618 F.2d at 789, combine to make deference to the President's construction of the statute's mandate particularly appropriate.<sup>10</sup>

Over the years, the courts and in particular this Circuit have consistently upheld the broad interpretation given to the FPASA by Presidents charged with its administration, especially in light of the absence of any Congressional response to the exercise of that statutory authority. Presidents have relied on their authority under the FPASA to issue a number of Executive Orders and policy directives which directly affect the relationship between government contractors and their employees.

Thus, in Contractors Assn. v. Secretary of Labor, 442 F.2d 159, 171 (3d. Cir.), cert. denied 404 U.S. 854 (1971), the Court of Appeals for the Third Circuit rejected a challenge to the President's authority under the FPASA to issue an Executive Order

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<sup>10</sup>The flexibility given to the President is highlighted when we compare it with the statutory constraints placed by the FPASA on the authority of the Administrator of General Services (the "Administrator") and the heads of the different federal agencies. See e.g. 40 U.S.C. § 481 (c) (specifying conditions under which regulations promulgated by the Administrator may authorize acquisitions of personal property); id. § 481 (e) (specifying conditions under which heads of executive agencies may exchange or transfer excess medical materials or supplies and imposing limits on regulations promulgated by the Administrator); id. § 483 (a) (requiring Administrator to prescribe policies and methods to promote the maximum utilization of excess property and requiring the Administrator to make determinations of fair value and appropriate price for transfer of excess property between agencies. In contrast, the statute places no similar constraints on the broad grant of power given the President in Section 486 (a).

requiring bidders on federally-assisted construction projects to submit an affirmative action plan." The Court reasoned that the government had an interest in assuring that suppliers did not, in the long run, increase costs and decrease the timeliness of delivery of goods by refusing or failing to hire available minority workers. Id. at 170. Rejecting the argument that the President was engaging in "social legislation" under the guise of procurement management, the Third Circuit noted that since the affirmative action order covered only contractors on federally-assisted construction projects, the President "acted in the one area in which discrimination in employment was most likely to affect the cost and progress of projects in which the federal government had both financial and completion interests." Id.

Subsequently, this Circuit issued two major decisions upholding the President's statutory authority under FPASA. In Khan, supra, the Court of Appeals upheld Executive Order 12092, issued by President Jimmy Carter, requiring that government

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"Prior to successfully defending this legal challenge, different Presidents had issued--without challenge--a number of executive orders relating to this subject. It was not until 1964, when President Lyndon Johnson directed by Executive Order that federal contractors not discriminate on the basis of age, Executive Order 11141, 3 C.F.R. 179 (1964-65 Compilation), reprinted in 5 U.S.C. § 3301 note (1976), that a legal challenge was brought to test this reliance on the authority of the FPASA. See Farner v. Philadelphia Electric Co., 329 F.2d 3 (3d Cir. 1964), where the court held that these orders were a proper exercise of presidential authority under the FPASA as well as the Defense Production Act of 1950, and that an employee alleging racial discrimination in work assignments had no private right of action.

For a listing of the Executive Orders dealing with anti-discrimination requirements for government contractors, see Khan, 618 F.2d at 750, nn. 32 and 33.

contractors accept price and wage controls. In American Fed'n of Gov't Employees v. Carmen, 669 F.2d 815 (D.C. Cir. 1981), an Executive Order requiring federal employees to give up their free parking privileges was sustained as being sufficiently related to government efficiency and economy.

Relying upon the authority of the FPASA, President Nixon banned employment of certain state prisoners in all federal contract work. Executive Order 11755, 3 C.F.R. 837 (1973). Recently, President George Bush issued Executive Orders 12800 and 12818. Executive Order 12800 required federal contractors to post notices advising employees of their right not to join or maintain membership in a union. Executive Order 12800, 57 Fed. Reg. 12985 (1992). Executive Order 12818 prohibited government contractors from entering into pre-hire agreements in the construction industry. Executive Order 12818, 57 Fed. Reg. 48713 (1992).<sup>12</sup>

Executive Order 12818, which never faced a legal challenge, poses a situation that is a direct analogue of the one presently before the Court. That Executive Order required, as a condition of securing contracts with the federal government, that contractors agree to refrain from engaging in certain business conduct, i.e. entering pre-hire agreements, which is legal and permissible under the National Labor Relations Act, just as here Executive Order 12954 requires, as a condition of securing contracts with the federal government, that contractors agree to

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<sup>12</sup>Executive Order 12800 and Executive Order 12818 were rescinded by President Clinton on February 1, 1993. Executive Order 12836, 58 Fed. Reg. 7085 (1993).

refrain from engaging in certain business conduct, i.e., hiring permanent replacements for economic strikers, which is also legal and permissible under the National Labor Relations Act.

In determining whether the President has acted in conformity with his authority under the FPASA, the Court of Appeals for this Circuit has asked only whether there is a reasonable nexus between his actions and the pursuit of economy and efficiency in the management of federal property. Khan, 618 F.2d at 793. Emphasizing that the President was not being given "a blank check...to fill in at his will", Khan noted the breadth of the FPASA requirement that the President "make procurement policy decisions based on considerations of economy and efficiency." Id. Despite that breadth, the Court concluded that "this standard can be applied generally to the President's actions to determine whether those actions are within the legislative delegation." Id. at 793 n. 51.

Moreover, Khan demonstrates that the Court of Appeals does not review a presidential directive for the business acumen of the President's economic judgment; rather the Court will uphold such a directive so long as it is reasonably related to economic considerations. The lower court in Khan, reviewing the Executive Order imposing wage and price controls on federal contractors, expressed concern that the Order would increase the government's procurement costs rather than promote economy. It speculated that the defendant's proposed nexus between price and wage controls and the economy and efficiency goals of the FPASA "ignores another possible result, namely, that the government, in the name of

'economy' will be forced to pass over the low bidder in order to do business with an adherent to the wage guidelines." AFL-CIO v. Kahn, 472 F. Supp. 88, 95 (D.D.C. 1979). The Court of Appeals dismissed the District Court's worries: "we find no basis for rejecting the President's conclusion that any higher costs incurred in those transactions will be more than offset by the advantages gained" under a system of wage controls. Kahn, 618 F.2d at 793. Significantly, the court refused to require proof that presidential directives issued pursuant to the FPASA would produce advantageous economic results for the government. Because it found a "reasonable nexus" between the Order and the price and wage controls, the Court of Appeals concluded that the President had acted within his broad statutory powers. Id.

In this case, Plaintiffs argue that the Executive order's findings fail to establish a sufficient nexus between the withdrawal of business from contractors who hire permanent striker replacements during economic strikes and the FPASA's goals of economy and efficiency. While the findings contained in the Executive Order are less than expansive, this Court concludes that they are "in accord with the 'economy and efficiency' touchstone of the FPASA", id., required by Khan.

Fundamentally, Executive Order 12954 reflects the President's judgment that there is a negative relationship between satisfaction of the government's procurement needs and the use of permanent striker replacements by government contractors. As noted earlier, it declares that

"[i]t is the policy of the executive branch in procuring goods and services that . . . contracting agencies shall not contract with employers that permanently replace lawfully striking employees." 60 Fed. Reg. 13023 (1995).

The Order authorizes the Secretary of Labor to terminate the existing contracts of such employers and to disqualify such employers from competing for future government contracts. Id. at 13023-24 (§§ 3 & 4).

The Order states that government contractors' prolonged labor disputes and unstable labor relations adversely affect the Federal Government's operations. In addition, the Order notes that strikes involving permanent striker replacements are longer in duration than other strikes, that the use of permanent striker replacements undermines cooperative labor relations, and that the permanent replacement of an existing workforce reduces the effectiveness of an employer. The Order explains that the Government, in order to ensure timely delivery of goods and quality services, must assist federal contractors in attaining the balance of employer and worker rights most conducive to cooperative and stable labor relations. Id.

The Order's findings demonstrate a reasonable relation between the disqualification of contractors who permanently replace their striking workers and the Government's proprietary interests. Moreover, as was the case in Contractors Association, the Order contains limitations indicating that the goals of economy and efficiency have been given full consideration.

For example, the contracting agencies can, by filing a written

objection, veto the termination of existing contracts. Id. at 13024 (§ 3(b)). They can also do business with an employer that the Secretary has disqualified if the contracting agency determines that there are compelling reasons to do so. Id. (§ 4(a)). Finally, disqualification of employers is limited to those organizational units of a Federal contractor that the Secretary finds to have permanently replaced lawfully striking employees, id. (§4(b)), and ends when the Secretary determines that the labor dispute leading up to the permanent replacement has been resolved, id. (§ 4(c)).

In challenging the inadequacy of the nexus between the provisions of the Order and the statutory goals of economy and efficiency, Plaintiffs are reiterating their fundamental policy and factual disagreements with the President. In particular, they dispute the validity of the conclusion that use of permanent striker replacements increases the duration of strikes, undermines cooperative labor relations, and decreases the quality and reliability of goods produced.

The Court is well aware that there is substantial disagreement over these issues, that the House and Senate have in the past few years held hearings on different approaches to the problem although no legislation has in fact been enacted, and that the debate itself is rather emotional. But Kahn makes clear that, in order to uphold the President's exercise of authority under the FPASA, the validity of his policies (as embodied in directives or executive orders) need not be established by empirical proof.

Nothing could have been more controversial than the long-term efficacy of wage and price controls imposed by President Carter to curb the inflation which was soaring at the time the Executive Order was issued. The Kahn court did not address the economic merits of whether price and wage controls decrease costs or increase quality of goods produced for the government; to the contrary, it specifically rejected the "possible result" feared by the District Court that the government would be forced by the Executive Order to pass over the lowest bidder if that bidder was not complying with the guidelines. Rather, Khan focused its attention on the relationship--or nexus--between the action the President was taking in his Executive Order and his statutory authority to promote economy and efficiency in government management. So long as the policy adopted by the President is premised on and related to such economy and efficiency, the wisdom and merits of the policy per se are not to be evaluated by the court.

The reason for that approach is clear. It is the task of elected officials to make those policy choices--provided a statutory basis for them exists. The words of Chief Justice Rehnquist in Dalton v. Specter, 114 S. Ct. at 1728, although written in a different context, are apt: "How the President chooses to exercise the discretion Congress has granted him is not a matter for our review."

For the reasons stated, the Court concludes that Executive Order 112954 is authorized by the FPASA, and that its provisions

are rationally related to providing an economical and efficient system of federal procurement and property management.

IV. Executive Order 112954 Is Not Subject to the NLRA Pre-emption Doctrine

In the recent case of Building & Constr. Trades Council v. Associated Builders & Contractors, Inc., ("Boston Harbor"), 113 S. Ct. 1190 (1993), the Supreme Court summarized the development of the pre-emption doctrine under the National Labor Relations Act. Whether that well-established doctrine applies to the facts of this case is the key legal determination which must be made.

The Court began its analysis with a discussion of the general principles of pre-emption doctrine and noted, as a preliminary matter, that the NLRA "contains no express pre-emption provision" and, therefore, that it was "reluctant to infer pre-emption." Id. at 1190. The Court then articulated the two basic principles which it has applied over the years to define those activities that are pre-empted under the NLRA.

First, "Garmon pre-emption" forbids state and local regulation<sup>13</sup> of activities that are, arguably, either protected or prohibited under Sections 7 and 8 of the NLRA. San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244 (1959); Wisconsin Dept.

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<sup>13</sup>It should be noted, preliminarily, that all the cases establishing the parameters of the pre-emption doctrine have involved challenges to the activities of state and local governmental entities. None have directly addressed the pre-emption of federal, and in particular, presidential, activities. Since neither party to this case is questioning the application of NLRA pre-emption principles to the actions of the President, and in light of the ultimate conclusion reached by the Court on the inapplicability of the doctrine to the facts of this case, it is not necessary to reach that issue.

of Industry v. Gould, Inc., 475 U.S. 282, 286 (1986). The Garmon pre-emption doctrine protects the exclusive jurisdiction of the National Labor Relations Board to determine the scope of protected and prohibited activity and to administer the statutory scheme of remedies and sanctions. Boston Harbor, 113 S. Ct. at 1194-95.

Second, "Machinists pre-emption" forbids state and local regulation of activities that are neither "protected nor prohibited" under Garmon pre-emption, but that Congress intended to be left to the "free play of economic forces." Lodge 76, Intl. Assn. of Machinists v. Wisconsin Employment Relations Commission, 427 U.S. 132, 147 (1976). The Machinists pre-emption doctrine preserves the intentional balance created by Congress "between the uncontrolled power of management and labor to further their respective interests." Golden State Transit Corp. v. Los Angeles (Golden State I), 475 U.S. 608, 614 (1986). It is based on the premise that the NLRA "creates a free zone from which all regulation... is excluded." Golden State Transit Corp. v. City of Los Angeles (Golden State II), 493 U.S. 103, 111 (1989).

In short, NLRA pre-emption doctrine prevents a State from regulating within a protected zone, whether it be a zone protected and reserved for market freedom, see Machinists, or for NLRB jurisdiction, see Garmon.

However, the pre-emption doctrine applies only when governmental entities are involved in regulatory as opposed to proprietary activities. Boston Harbor, 113 S. Ct. at 1196. When the government acts as proprietor, rather than as regulator or

policy-maker, it is not subject to NLRA pre-emption. Id. at 1195.

In Boston Harbor, the Court held that the Massachusetts Water Resources Authority ("MWRA"), an independent government agency charged with the duty of cleaning up Boston Harbor, could require private contractors bidding on its project to enter into a prehire agreement negotiated between the agency's project manager and a council of trade unions--because the MWRA had imposed the requirement in its proprietary capacity. Id. at 1197.

In explaining that its "decisions in the area support the distinction between government as regulator and government as proprietor," Id. at 1196, the Court gave as an example of the latter instances "[w]hen a state owns and manages property...[and] must interact with private participants in the marketplace." Id. The Court's explanation suggests that the concept of "proprietary" activities is a common-sense one: "proprietary" activities are, quite simply, those commercial undertakings which are a concomitant of the ownership and management of property.

In reviewing its earlier pre-emption decisions demonstrating the importance of the distinction between government as regulator and government as proprietor, the Court emphasized that "[w]e have held consistently that the NLRA was intended to supplant state labor regulation, not all legitimate state activity that affects labor." Id. at 1196 (emphasis added).

The Court made this point, again, in its analysis of Golden State I and Golden State II. In the former case, the Court held that Los Angeles could not condition renewal of taxicab franchises,

including Golden State Transit's, on the settlement of a labor dispute. Under Machinists pre-emption, the state could not regulate the union's right to strike and the taxicab company's use of its economic power to resist a strike.

Significantly, the Boston Harbor court recognized that a

very different case would have been presented had the City of Los Angeles purchased taxi services from Golden State in order to transport city employees...In that situation, if the strike had produced serious interruptions in the services the city had purchased, the city would not necessarily have been pre-empted from advising Golden State that it would hire another company if the labor dispute were not resolved and services resumed by a specific deadline. Id. at 1196.

Thus, the Court recognized that this hypothetical would be a "very different case" because Los Angeles would be setting the terms on which it was willing to do business. Setting the terms on which a governmental unit is willing to do business is one concomitant of the ownership and management of property. The Court understood that as owner and manager of property, rather than as regulator or policymaker, government needs to "participate freely in the marketplace," id. at 1197, in the same manner as a private owner and manager of property.

Similarly, the President, in issuing Executive Order 112954, was acting in his capacity as manager of the federal government's property. The federal government, like state and local governments, owns and manages large amounts of property. It too, must interact with private participants in the marketplace. The Executive Order merely specifies one of the terms (refusal to hire permanent striker replacements) on which it is willing to do

business. In short, there is no difference between the capacity in which the President is acting in issuing Executive Order 112954, relating to the procuring of government goods and services (see section 1), and the capacity in which the MWRA was acting in contracting with various contractors and sub-contractors for the revitalization of Boston Harbor.

Plaintiffs try to distinguish Boston Harbor on the ground that the MWRA was acting in a proprietary capacity "because it did the same things that private entities were authorized to do and did do."<sup>14</sup> The simple answer to Plaintiffs' argument is that Boston Harbor imposes no such requirement--i.e., that private entities, acting in their proprietary capacity, as part of their negotiations require the agreement included in the Executive Order. Nor is there any indication in Boston Harbor, as Plaintiffs insist, that the government must in the course of its market participation act just like the "typical" private participant in order to be acting in a proprietary capacity.<sup>15</sup>

The Court simply noted that the MWRA was insisting on a contractual requirement that private entities "may" exact, that "analogous private conduct would be permitted," and that the state agency was exercising an option that was "available" to private

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<sup>14</sup>See Reply Memorandum of Plaintiffs and Mosler Inc. and Opposition to Defendant's Motions to Dismiss and Defendant's Motions for Summary Judgment, pp. 3 and 25.

<sup>15</sup>Indeed, it is difficult to imagine how the government would establish how a "typical" private participant acts.

contractors. Id. at 1198.<sup>16</sup> The same is of course true here.<sup>17</sup> Even if private employers have a right, under the NLRA, to hire permanent replacements for economic strikers, NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938), that does not mean that two private participants in the market place would be prohibited under the NLRA from entering into a contract in which one or both of them gave up that right if they believed it served their economic interests.

In attempting to limit Boston Harbor's exemption of proprietary activities from NLRA pre-emption, Plaintiffs rely on

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<sup>16</sup>At oral argument, Plaintiffs questioned the extent of the government's ability, even when acting in its proprietary capacity as a purchaser of goods and services, to impose contract conditions which would force abrogation of NLRA rights. While that weighty issue need not be decided at this time, it may well be that there is a significant analytical difference between requiring those who do business with the government to give up rights (such as the right to belong to a labor union) which fall under the Garmon rubric, and requiring those who do business with the government to give up rights to engage in activity which must be left to the free play of economic forces (such as the freedom to hire permanent striker replacements) which fall under the Machinists rubric.

<sup>17</sup>The Supreme Court has also recognized this same distinction between a governmental entity acting as a market participant and a governmental entity acting as a market regulator in the context of challenges to state activities brought under the Commerce Clause. See White v. Massachusetts Council of Constr. Employers, 460 U.S. 204, 206 (1983); Raeves, Inc. v. Stake, 447 U.S. 429, 436-37 (1980); Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 809-810 (1976).

In those cases, as in Boston Harbor, the Court's analysis did not require that a governmental entity act in conformity with private practice to be acting as a "market participant." Nor did the Court ask whether the government was acting as a "typical" market participant. Rather the Court fully acknowledged that the government based its market decisions on considerations that might not enter into the proprietary decisions of a "typical" private business.

Wisconsin Dept. of Industry v. Gould, Inc., 475 U.S. 282, 287-288 (1986), where the Supreme Court held that the NLRA pre-empted a Wisconsin statute which automatically debarred from state contracts firms which had been found to have violated the NLRA three or more times. However, Gould is totally distinguishable because, even though the State of Wisconsin was acting through its procurement power, the state conceded that its purpose was to punish labor law violators and did not even purport to offer a proprietary rationale for its statute.

As the Court itself explained in Boston Harbor, 113 S. Ct. at 1197:

Because the statute at issue in Gould addressed employer conduct unrelated to the employer's performance of contractual obligations to the State, and because the State's reason for such conduct was to deter NLRA violations, we concluded: "Wisconsin 'simply is not functioning as a private purchaser of services'... [and therefore,] for all practical purposes, Wisconsin's debarment scheme is tantamount to regulation."

The Court concluded this explanation by repeating what it emphasized in Gould, namely, that it was not saying "that state purchasing decisions may never be influenced by labor considerations." Id. (quoting Gould, 475 U.S. at 291).

Executive Order 112954 does not establish a requirement for contractors that is unrelated to the performance of government contracts nor does it establish any sanction for violation of the NLRA. It is reasonably related to the statutory goals of economic and efficient management of the government. It conditions government contracts on an agreement that private entities "may" exact and that "would be permitted." The Supreme Court cautioned

in Boston Harbor, that "[i]n the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues its purely proprietary interest, and where analogous private conduct would be permitted, this Court will not infer such a restriction." Id. at 1198. This Court will follow the Supreme Court's lead, and "not infer such a restriction."

For all the foregoing reasons, the Court concludes that Executive Order 112954 is not subject to the NLRA pre-emption doctrine because its issuance was an exercise of proprietary, rather than regulatory, functions.

#### IV. An Injunction Pending Appeal Is Warranted

Plaintiffs have requested injunctive, as well as declaratory, relief against the Defendant. Because the Court has concluded that Dalton v. Specter precludes judicial review, the Defendant's Motions must be granted and the Complaint must be dismissed. In their final Supplemental Submission, Plaintiffs have requested, in the event of an adverse decision, an order staying enforcement of the Executive Order pending appeal.

The Court has discretion to grant such relief, pursuant to Fed. R. Civ. P. 62 (c). In exercising that discretion, it must weigh four factors: (1) the likelihood that the adversely affected party will prevail on the merits of the appeal; (2) the likelihood that the adversely affected party will be irreparably harmed absent an injunction; (3) the prospect that other interested parties will be harmed if the Court grants the injunction; and (4) the public interest in granting the injunction. Cuomo v. United States

Regulatory Comm'n., 772 F.2d 972, 974 (D.C.Cir. 1985); WMATA v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977).

This four-part test requires a judicious balancing of all the equities, focusing primary attention on the issue of irreparable harm. As the Court of Appeals has explained, "[t]o justify the granting of a stay, a movant need not always establish a high probability of success on the merits. Probability of success is inversely proportional to the degree of irreparable injury evidenced." Cuomo, 772 F.2d at 974.

Upon balancing the four factors cited, the Court concludes that the equities favor granting an injunction pending appeal against the Defendant's enforcement of Executive Order 12954.

As to the first factor, likelihood of success on appeal, the Court has already concluded that on both procedural and substantive grounds, Plaintiffs' challenge to Executive Order 12954 must fail. However, in a case in which the balance of equities sharply favors the party seeking injunctive relief because of the irreparable harm it will suffer, a court clearly has discretion to grant an injunction pending appeal despite the adverse ruling. WMATA, 559 F.2d at 844-45. That adversely affected party need only have raised a "serious legal question":

To justify a temporary injunction it is not necessary that the plaintiff's right to a final decision, after a trial, be absolutely certain, wholly without doubt; if the other elements are present (i.e. the balance of hardships tips decidedly toward plaintiff), it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus more deliberative investigation. Id. (quoting Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 740 (2d Cir. 1953)).

The questions raised in this case--in particular, the scope of judicial review of presidential actions taken pursuant to statute and the effect of the NLRA on the President's authority under the FPASA--are sufficiently serious, substantial, and difficult, to make them "a fair ground for litigation and...more deliberative investigation."

Second, Plaintiffs have demonstrated that they will be subject to irreparable harm "for which there is no adequate legal remedy" if the Executive Order is implemented and they are forced to choose between surrendering the use of an economic weapon integral to the balance of labor relations power established under the NLRA and foregoing government contracts. Taylor v. Resolution Trust Corporation, No. 95-5001, 1995 U.S.App. LEXIS 15536, \*22 (D.C. Cir. June 23, 1995). Surrender of their ability to use permanent striker replacements will, they contend, harm their ability to operate during an economic strike by altering the balance of power in collective bargaining. On the other hand, giving up the right to all government contracts will constitute a direct and substantial harm to their business. The Court of Appeals has already concluded that the choice forced on Plaintiffs by the mere existence of the Executive Order--"between taking immediate action to their detriment and risking substantial future penalties for non-compliance, presents a paradigm case of 'hardship'..." Chamber of Commerce v. Reich, No. 95-5135, 1995 U.S. App. LEXIS 15537, \*5 (D.C. Cir. June 21, 1995) (per curiam).

While mere economic harm, in and of itself, does not always constitute "irreparable" harm sufficient to warrant equitable relief, Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958), such economic harm can be "irreparable" if it is an enduring restraint on the manner in which a business is conducted rather than simply a temporary economic loss which can be compensated monetarily. WMATA, 559 F.2d at 843, n.2. For example, in WMATA, the court found irreparable harm because a limousine tour service was prohibited from converting its operations and establishing a bus tour service.

In the instant case, not only will the inability to hire permanent striker replacements have an enduring effect upon the relative bargaining power of employers and the unions representing their workers, but the Executive Order constitutes a radical departure from long-established prior policy. Entry of an injunction pending appeal will serve the primary purpose of such relief, preservation of the status quo.

As to the third and fourth factors, the effect of such injunctive relief on the Defendant and the public interest, the Court concludes that there will be little, if any, adverse effect. As noted above, there will be no disruption to any long-standing, well-established government procurement policy. This is not a "disappointed bidder" case where injunctive relief could substantially delay, interfere with, and increase the costs of essential government services. While economy and efficiency may well be served by implementation of the Executive Order, there is

no way to quantify how immediate or concrete those benefits will be.

In conclusion, because Plaintiffs allege they will suffer permanent, irreparable, uncompensable harm to their collective bargaining position and to their ability to operate during an economic strike; because they have raised serious, substantial, and difficult legal questions which are far from free from doubt; and because neither the Defendant nor the public interest will be seriously adversely impacted by the delay in implementation of the Executive Order for the period of time required for the processing of an appeal by the Court of Appeals, the Court concludes that, despite its rulings on the procedural and substantive merits of Plaintiffs' claims, an injunction pending appeal is warranted.

*July 31, 1995*  
DATE

*Gladys Kessler*  
GLADYS KESSLER  
United States District Judge

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National Right to Work Committee  
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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

CHAMBER OF COMMERCE OF THE )  
 UNITED STATES OF AMERICA, )  
 et. al., )  
 Plaintiffs, )  
 v. )  
 ROBERT B. REICH, Secretary, )  
 U.S. Department of Labor )  
 Defendant. )

---

Civil Action No. 93-0503

FILED

JUL 31 1995

Clerk, U.S. District Court,  
District of Columbia

ORDER

This matter is before the Court upon Plaintiffs' Motions for Preliminary Injunction, Defendant's Motion to Dismiss, or in the Alternative, for Summary Judgment and Defendant's Cross-Motion for Summary Judgment.

For the reasons stated in the accompanying MEMORANDUM-OPINION, it is, this 31st day of July, 1995, hereby

ORDERED, that Plaintiffs' Motion for Preliminary Injunction is denied, and it is further

ORDERED, that Defendant's Motion to Dismiss, or in the alternative, for Summary Judgment is hereby granted in its entirety, and it is further

ORDERED, that Plaintiffs' Motion for Summary Judgment is denied, and it is further

ORDERED, that Plaintiffs' Motion for Injunction Pending Appeal is hereby granted, and, it is hereby

ORDERED, that judgment shall be entered in favor of Defendant, and that Plaintiffs' Complaint be dismissed in its entirety, and it

is hereby

ORDERED, that a stay of the Secretary of Labor's enforcement of Executive Order 12954 pending appeal is hereby granted. The stay pending appeal will remain in effect until disposition of the appeal now pending before the United States Court of Appeals for the District of Columbia Circuit.

*July 31, 1995*  
DATE

*Gladys Kessler*  
GLADYS KESSLER  
United States District Judge

Copies to:

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**U.S. DEPARTMENT OF JUSTICE  
OFFICE OF LEGAL COUNSEL  
WASHINGTON, D.C. 20530**

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**FACSIMILE TRANSMISSION SHEET**

DATE: 8/31/95

FROM: Teresa Roseborough

OFFICE PHONE: ( ) 514-3694

TO: Elena Kagan

OFFICE PHONE: ( ) 456-7594

NUMBER OF PAGES: ~~22~~<sup>3</sup> (NOT INCLUDING COVER SHEET)

FACSIMILE NUMBER: ( ) 456-1647

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**REMARKS:**

## Memorandum



Subject  Minimum Wage Executive Order	Date  August 30, 1995
---	-----------------------------

To  
Robert Damus  
General Counsel  
OMB

From  
Teresa Wynn Roseborough *TWR*  
Deputy Assistant Attorney  
General  
Office of Legal Counsel

We have reviewed the draft executive order entitled "Ensuring the Economical and Efficient Administration and Completion of Federal Government Contracts" and the accompanying draft documents.<sup>1</sup> We believe that the determination that economy and efficiency in procurement will be promoted by the specific provisions of the order is legally available, if the assertions made in the order can be substantiated. That is, if the President determines, in good faith, that increasing the minimum wage of persons employed by federal contractors would promote economy and efficiency in federal procurement, we believe the issuance of the order would be authorized by the Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 471 *et seq.* See Chamber of Commerce v. Reich, 886 F. Supp. 66 (D.D.C. 1995).

The supporting documents, however, do not suggest economy and efficiency in government procurement would be promoted by proposed provisions that would link the application of the order to CEO pay or company profits. Accordingly, we suggest that such provisions be eliminated from consideration. Below are our suggestions for strengthening the draft order and supporting documents:

A. The Executive Order.

We believe that the preamble articulates an economy and efficiency argument that may be sufficient to support the issuance of this order with the following alterations:

(1) The first and third paragraphs should be deleted because they weaken the economy and efficiency argument and seem to be contradictory and confusing. However, it may be possible

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<sup>1</sup> This memorandum provides our initial comments and observations. OLC review for form and legality is not yet complete.

to fit the penultimate sentence of the first paragraph into the second paragraph.

(2) The President's authority to issue the proposed order is contingent upon his determination that it will promote economy and efficiency. Therefore, in the third sentence of the second paragraph, we believe the word "may" should be replaced with a less equivocal formulation, such as "I find that this order would . . . ." If the President cannot make such a finding, the basis for issuing the order would be doubtful. (While it is not necessary for the President to be absolutely certain that the proposed order will promote economy and efficiency, we believe that language that suggests a higher degree of certainty than "may" is necessary. In that regard, we suggest that, where possible, the language of this paragraph should be strengthened to reflect that the President holds a good faith belief that the proposed order will promote economy and efficiency in government procurement. See, e.g., Executive Order 12954, "Ensuring the Economical and Efficient Administration and Completion of Federal Government Contracts.")

(3) Finally, we suggest that the penultimate sentence of the second paragraph be amended to read as follows: "By paying a higher wage to low-wage workers, federal contractors will increase worker productivity, **improve the stability of their workforce, attract better qualified employees, and produce higher quality goods. Procuring goods from such contractors will promote economy and efficiency in federal procurement by (fill in the blank).**" (addition in bold) The last sentence of the second paragraph should be deleted.

The Striker Replacement Order provides that the Secretary's exercise of discretion under the order must be consistent with the policy stated in section 1 of the order. We believe that the Secretary's exercise of discretion under section 3(a) of the proposed order should be similarly limited. We therefore suggest the insertion of the following sentence at the end of section 3(a): "All discretion under this section shall be exercised consistent with the policy enunciated in section 1 of this order."

#### B. The Discussion Memorandum for the President.

We believe that the Memorandum does a very good job presenting the pros and cons of issuing this proposed order. Therefore, we limit our comments to three points.

First, the Memorandum fails to reveal the view of the Secretary of Labor as to whether the proposed order will promote economy and efficiency in procurement and does not include his recommendation as to whether the President should issue the proposed order. We believe that the President's determination

that economy and efficiency in government procurement will be promoted by the proposed order would be substantially bolstered if it were supported by the recommendation of the Secretary.

Second, we believe that when discussing the different options for announcing the order it should be made clear that congressional retaliation in the appropriations/reconciliation/debt ceiling process is a possibility regardless of the approach the President decides to take. While the memorandum only lists this possibility as a factor to be considered in the "sign immediately" approach, we believe that it is also a possibility if the President decides to announce his intention to act if Congress fails to enact legislation within a certain time period. In fact, utilization of the latter approach may provoke Congress to block the operation of the order through a prospective appropriation's rider.

Finally, we believe the discussion of the litigation risks associated with the order should be expanded. In addition to recognizing that the proposed order will almost certainly be challenged, we note that the issuance of the proposed order may have an adverse impact on the Chamber of Commerce litigation, which is presently pending before the Court of Appeals in the District of Columbia. The court may be more reluctant to accept assertions of Presidential authority in Chamber of Commerce knowing that this potentially would lead to broader assertions of authority. If the court were to view the proposed order as an indication that the President intends to legislate other than through bicameralism and presentment, this too could color the result of the litigation in Chamber of Commerce.

cc: Jennifer O'Connor  
Chris Cerf

**U.S. DEPARTMENT OF JUSTICE  
OFFICE OF LEGAL COUNSEL  
WASHINGTON, D.C. 20530**

---

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**REMARKS:**

THE WHITE HOUSE  
WASHINGTON

August 30, 1995

MEMORANDUM FOR ERSKINE BOWLES

AB MIKVA  
LAURA TYSON  
CAROL RASCO  
ALICE RIVLIN  
JACK QUINN  
DOUG SOSNIK  
PAT GRIFFIN  
ALEXIS HERMAN  
KITTY HIGGINS  
TODD STERN  
JACK LEW  
STEVE KELMAN  
MIKE SCHMIDT  
DOROTHY ROBYN  
ELGIE HOLSTEIN  
KAREN HANCOX  
SUSAN BROPHY  
KATE CARR  
STEVE SILVERMAN

FROM: JENNIFER O'CONNOR *JNO*  
SUBJECT: Minimum Wage Executive Order

Attached is a draft Executive Order, prepared by the Department of Labor, which would require federal contractors to pay the President's proposed new minimum wage of \$5.15 per hour. The package includes a description of the pros and cons, as well as backup material.

Please have the appropriate person on your staff review the draft Executive Order and contact me with comments by 5:00pm today (Wednesday, August 30). Comments can be faxed to me at 456-7929, e-mailed to me, or called in to me at 456-6350. My apologies for the rapid turn-around, but there is discussion of moving this very quickly.

## Discussion

### I. Increasing the Minimum Wage for Employees of Federal Contractors

#### A. How the Executive Order Would Work

This draft executive order would establish that "[i]t is the policy of the executive branch in procuring goods and services that . . . federal agencies shall contract with companies that pay their employees no less than \$5.15 an hour." This policy would be enforced in two ways. First, every government contract entered into after the effective date of the executive order (the date you sign it) would include a clause in which the contractor agrees to pay a minimum wage of \$5.15 per hour. Second, any contractor that pays below \$5.15 could have all of its government contracts terminated. The executive order does not provide for any exceptions.

The Secretary of Labor would enforce and administer the order. If the Secretary finds that a contractor is not paying a minimum wage of \$5.15, he would transmit a finding to the heads of contracting agencies or departments who, in turn, must terminate all contracts with the contractor unless the contractor pays all of its employees at least \$5.15 per hour within a time specified by the Secretary.

Like the "striker replacement" executive order, this draft order is premised on the authority delegated to the President by Congress in the Federal Property and Administrative Services Act of 1949 "to provide for the Government an economical and efficient system for . . . procurement and supply." Some economic theories suggest that increasing the wages of low-wage workers will result in an increase in those workers' productivity and, in turn, to increases in efficiency that will offset the cost to federal contractors of the higher wages. Thus, the federal government would, according to these theories, procure its goods and services from more efficient, more economical federal contractors.

#### B. Possible Variations in this Executive Order

(1) Use CEO Pay as a Trigger: The executive order could be made to apply only to federal contractors that pay their chief executive officer (or other top executive) more than 100 times the lowest wage paid to their employees. This approach would dramatize the growing wage disparity in our economy. On the other hand, it undermines the central moral argument which supports raising the minimum wage: every worker is entitled to a living wage, regardless of who employs them or how much others in their organization earn. Further, using a CEO pay trigger may weaken the nexus to economical and efficient procurement, the legal prerequisite for presidential action of this type.

(2) Use Profits as a Trigger: The executive order could also be made to apply only to federal contractors that earn above average profits. This approach would juxtapose the huge economic returns being yielded by capital (e.g., the soaring stock market) with the decline in

middle and working class family incomes. On the other hand, it suffers from both of the infirmities outlined above (i.e., undermining the moral argument and attenuating the procurement nexus), plus it would require an administrative apparatus to decipher each contractors' profits.

### C. Arguments For and Against the Executive Order

(1) Pro: This draft executive order will demonstrate your commitment to increasing working families' wages (particularly for the lowest wage workers) and distinguish you from a congressional majority that refuses to even consider your legislative proposal to increase the minimum wage. The minimum wage has fallen 27% in real terms since 1979 and, without adjustment, will fall to its lowest real value in forty years in 1996. It is arguable that the growing disparity in family incomes and wealth is the most pressing issue for middle and working class families. This executive order would make your moral position clear --- you will not allow the federal government to do business with any company that contributes to declining real wages for low-wage workers.

(2) Con: This executive order is premised entirely on economic theory, much of which will be difficult to explain in simple terms to the public, that is outside the mainstream of scholarly economic thought; accordingly, it is unclear whether reliable third parties will validate the arguments set forth in the preamble. Further, it is unclear whether theory alone is adequate to support an executive order. Even accepting the theories as true, it is also unclear whether the nexus between a minimum wage increase and efficient and economical procurement is sufficiently close to pass judicial scrutiny.

Preliminary research has not disclosed any executive order, outside the context of President Roosevelt's extraordinary powers during World War II, that directly sets wages for employees of federal contractors; that is, this executive order could be unprecedented. The closest analogy may be President Carter's Executive Order No. 12092 which required federal contractors to certify that they were in compliance with voluntary wage and price guidelines established by the President's Council on Wage and Price Stability. Finally, this executive order could lend support to attacks that President Clinton and the Democrats want big government. A slippery slope argument is easily made: "If Bill Clinton can require federal contractors to pay a higher minimum wage, is he going to require a pay increase for all workers? Will he require all federal contractors to follow his health plan? To finance abortions through their health plans?"

(3) Likely Constituency Responses: The labor movement and other advocates for low-wage workers will likely support the executive order. Federal contractor groups and representatives of the business community (e.g., the Chamber of Commerce, the National Association of Manufacturers), as well as the Republican congressional majority, will oppose the executive order. Since a substantially larger group of federal contractors will be affected, it is reasonable to expect a much more vigorous negative response from the business community than the striker replacement executive order evoked. Litigation and congressional

action (e.g., efforts to overturn the executive order, appropriations riders blocking enforcement of the order) will likely result.

#### D. The EO's Costs Are Difficult to Estimate

A very rough estimate of the costs of the executive order suggests that it will cost federal contractors not more than \$2.1 billion per year. Please note, however, that the data needed to make a precise estimate of the cost of the minimum wage executive order are not available. Estimates of worker wages and the number of workers involved do, however, permit this crude projection.

The assumptions employed to reach the above estimate likely bias the estimate upward. First, many federal contractors (e.g., construction, service) are required to pay a prevailing wage above the minimum wage by the Davis-Bacon Act and the Service Contract Act. Second, federal contractors' firms tend to be larger and, as a result, may have a smaller percentage of minimum wage workers than firms in the economy as a whole. Accordingly, the total number of workers affected by the executive order is probably smaller than that assumed in the calculations to reach the above estimate. Certain structural changes to the executive order (e.g., adding a threshold, narrowing the definition of "federal contractor") would further reduce the number of workers covered and the commensurate costs.

On the other hand, this estimate does not take into account any "ripple" effect that minimum wage increase might have on the wages of workers that currently earn \$5.15 or slightly more. The ripple effect would tend to increase the costs of the executive order to federal contractors.

## II. Two Approaches to Announcing the Executive Order

Should you decide to proceed, you should consider two approaches to announcing the executive order.

You could announce the executive orders in a speech --- such as your forthcoming address to the Alameda Central Labor Council's Labor Day Picnic --- or radio address and then sign the order soon before, the same day, or soon thereafter. This approach gives the White House control over timing and press arrangements. It also provides an opportunity to brief potential supporters without tipping off opponents. On the other hand, it could inspire congressional retaliation in the appropriations/reconciliation/debt ceiling process.

Or, you could announce in a speech or radio address that you are giving Congress a 90-day (or until Christmas or New Year's Eve) deadline before which it must enact your proposed 90-cent increase in the statutory minimum wage. If it does not act by the time the deadline is reached, you would issue the executive order. This approach puts the onus



squarely on Congress' shoulders. It also allows you to wield all of your available authority to keep the minimum wage from falling to its lowest real value in 40 years (which it will in 1996 if there is no adjustment). On the other hand, this approach allows opponents time to organize and, possibly, to seek judicial intervention. It also offers words when bold action might send a stronger and clearer message.

Attachments

DRAFT 4  
August 25, 1995

ENSURING THE ECONOMICAL AND EFFICIENT ADMINISTRATION AND  
COMPLETION OF FEDERAL GOVERNMENT CONTRACTS

PREAMBLE

Some economic theories suggest that requiring federal contractors to pay a higher minimum wage will lead to increases in efficiency that will offset the cost to federal contractors of the higher wage. The minimum wage has fallen 27% in real terms since 1979 and, without adjustment, will fall to its lowest real value in forty years at the end of 1996. Meanwhile, labor productivity has increased 17% since 1979.

These theories suggest that the productivity of low-wage workers is depressed when the minimum wage falls significantly in real terms. These conditions can lead to greater levels of "shirking" (i.e., reduced efforts by workers), higher turnover, lower morale, and longer periods in which needed jobs remain unfilled. Raising the minimum wage may lead to efficiency gains among federal contractors that employ low-wage workers by reducing shirking, lowering turnover, increasing morale, and reducing the periods of time during which needed jobs remain unfilled. In sum, productivity is lower when workers are paid an obsolete minimum wage and, as a result, the federal government receives lower quality, less reliable, and less timely goods for each taxpayer dollar. By paying a higher wage to low-wage workers, federal contractors will increase worker productivity, improve the

The federal government will procure its goods and services from more efficient, more economical federal contractors.

The market may not address this problem on its own. The problems of turnover, shirking, low morale, and extended job-slot vacancies likely result from a minimum wage which is too low to attract new workers and retain incumbent workers. However, employers cannot lure a new worker into a particular job with a higher wage without giving everyone else in that job a pay increase. Thus, in the absence of a requirement that they pay a higher wage, employers choose lower levels of employment and output rather than increasing the wages paid to all of their low-wage workers.

NOW, THEREFORE, to ensure the economical and efficient administration and completion of Federal Government contracts, and by the authority invested in me as President by the Constitution and the laws of the United States of America, including 40 U.S.C. 471 and 486(a) and 3 U.S.C. 301, it is hereby ordered as follows:

Section 1: It is the policy of the executive branch in procuring

stability of  
their workforce  
and  
attract better  
qualified  
employees,  
and produce  
higher  
quality  
goods.  
Procuring  
goods from  
such  
contractors  
will promote  
economy  
efficiency  
in federal  
procurement

by -----

goods and services that, to ensure the economical and efficient administration and completion of Federal Government contracts, Federal agencies shall contract only with companies that pay their employees no less than \$5.15 per hour of work. All Government contracting agencies shall include in every Government contract hereafter entered into the following provision:

"During the course of the contract the contractor agrees that all employees of the contractor will be paid no less than \$5.15 an hour."

Sec. 2.(a) The Secretary of Labor ("Secretary") may investigate any Federal contractor to determine whether the contractor is paying any of its employees less than \$5.15 per hour of work.

(b) The Secretary shall receive and may investigate complaints that the contractor is paying any employee less than \$5.15 per hour of work.

(c) The Secretary may hold such hearings, public or private, as he or she deems advisable, to determine whether any contractor is paying any employee less than \$5.15 per hour of work.

Sec. 3. (a) When the Secretary determines that a contractor has paid any employee less than \$5.15 per hour of work, the Secretary may make a finding that it is appropriate to terminate the contract for convenience. The Secretary shall transmit the finding to the head of any department or agency that contracts with the contractor. All Government contracts with the contractor shall be immediately terminated unless the contractor commences within a time specified by the Secretary to pay all of its employees no less than \$5.15 per hour of work.

(b) Each contracting agency shall cooperate with the Secretary and provide such information and assistance as the Secretary may require in the performance of the Secretary's functions under this order.

Sec. 4.(a) The Secretary shall be responsible for the administration and enforcement of this order. The Secretary may adopt such rules and regulations and issue such orders as may be deemed necessary and appropriate to achieve the purposes of this order.

(b) The Secretary may delegate any function or duty of the Secretary under this order to any officer in the Department of Labor or to any other officer in the executive branch of the Government, with the consent of the head of the department or agency in which that officer serves.

Sec. 5. This order is not intended, and should not be construed, to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its



agencies, its officers, or its employees. The order is not intended, however, to preclude judicial review of final agency decisions in accordance with the Administrative Procedure Act, 5 U.S.C. 701 et seq.

Sec. 6. This order is effective immediately.

THE WHITE HOUSE

## **PRESIDENT CLINTON ANNOUNCES INCREASE IN MINIMUM WAGE**

**Friday, February 3, 1995**

To reward work in an economy that in 1994 saw the best job growth in a decade, President Clinton will today announce his proposal to raise the minimum wage to \$5.15 an hour over two years -- through two 45 cent increases.

This news comes in the midst of more good news today for the economy under the Clinton administration. This morning, the Department of Labor reported that more than 6 million jobs have been created since President Clinton took office. In addition, the unemployment rate has dropped 20 percent to date under President Clinton.

A fact sheet and charts on the President's minimum wage proposal are attached.

House Minority Leader Richard Gephardt (D-MO) will open the announcement in the Rose Garden today, followed by Senate Minority Leader Tom Daschle (D-SD). The Vice President will then speak and introduce the President for his remarks.

## REWARDING WORK: THE CASE FOR INCREASING THE MINIMUM WAGE

*The President's proposal would increase the minimum wage from \$4.25 to \$5.15 over two years, through two 45 cent increases. The last increase, passed by an overwhelming, bipartisan vote in 1989, and implemented in 1990 and 1991, was also a 90 cent increase in two 45 cent stages. For a full-time, year-round worker at the minimum wage, a 90 cent increase would raise yearly income by \$1,800 -- as much as the average family spends on groceries in over 7 months.*

**MAINTAINING THE HISTORIC VALUE OF WORK:** If the minimum wage were to stay at its current level of \$4.25, it would fall to its lowest real level in 40 years. Indeed, the real value of the minimum wage is now 27% lower than it was in 1979, and has fallen 54 cents in real value since its last increase in April 1991. The first half of the President's 90 cent proposal simply restores the minimum wage to its value at the time of the last increase.

**RAISING THE MINIMUM WAGE PRIMARILY HELPS ADULT WORKERS -- MOST OF WHOM RELY ON THEIR MINIMUM WAGE JOB TO SUPPORT THEIR HOUSEHOLDS:** Nearly two-thirds of minimum wage workers are adults (64%); over one-third of minimum wage workers (39%) are the sole breadwinners in their families; and the average minimum wage worker brings home half of his or her family's earnings. Thus, a rise in the minimum wage is a significant boost to the standard of living of millions of households.

**REWARDS WORK OVER WELFARE:** The minimum wage increase provides another crucial measure to reward work and ensure that there is a strong incentive to choose work over welfare.

**NEARLY 11 MILLION WORKERS WOULD BENEFIT FROM THE PRESIDENT'S PROPOSAL TO INCREASE THE MINIMUM WAGE:** Nearly 11 million workers, paid by the hour, earn between \$4.25 and \$5.14. Research indicates that an increase in the minimum wage to \$5.15 could have a "ripple" effect on the couple million workers who earn within 50 cents of the new minimum wage.

**EMPIRICAL EVIDENCE SHOWS THE PRESIDENT'S PROPOSAL CAN INCREASE WAGES WITHOUT COSTING JOBS:** Over a dozen empirical studies have found that moderate increases in the minimum wage do not have significant effects on employment. These studies include state-specific research that shows that large state increases in the minimum wage did not result in significant job impacts. As Nobel Laureate Robert Solow stated: "[T]he evidence of job loss is weak. And the fact that the evidence is weak suggests that the impact on jobs is small."

**A 90 CENT INCREASE IN THE MINIMUM WAGE WILL LIFT A FAMILY OF FOUR OUT OF POVERTY.** The dramatic extension of the Earned Income Tax Credit helped lift hundreds of thousands of working families out of poverty. Yet, by 1996, even the EITC is not enough to lift above the poverty line a family of four making the minimum wage. With the 90-cent minimum wage increase, food stamps, and the EITC, a family of four with a full-time, year round minimum wage worker would be lifted above the poverty line.

**THE LAST MINIMUM WAGE INCREASE -- ALSO 90 CENTS -- GARNERED STRONG BIPARTISAN SUPPORT.** In 1989, the minimum wage was passed by votes of 382 to 37 (135 Republicans) in the House, and 89 to 8 in the Senate (36 Republicans) and was supported by Senator Dole and Representative Gingrich.

Appendix Table. Value of the Minimum Wage, 1955-1995

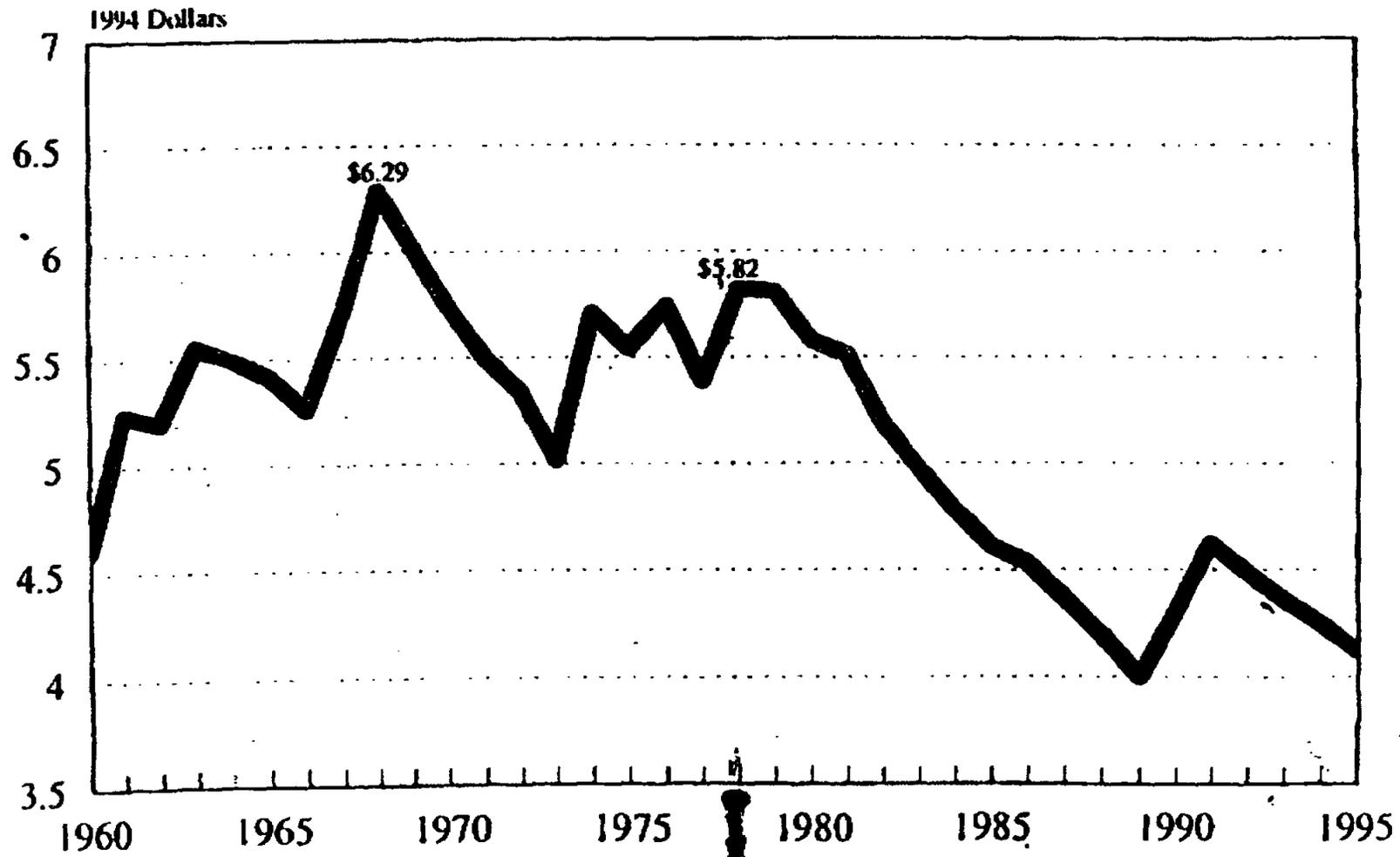
<u>Year</u>	<u>Value of the Minimum Wage, Nominal Dollars</u>	<u>Value of the Minimum Wage, 1995 Dollars*</u>	<u>Minimum Wage as a Percent of the Average Private Nonsupervisory Wage</u>
1955	\$0.75	\$3.94	43.9%
1956	1.00	5.16	55.6
1957	1.00	5.01	52.9
1958	1.00	4.87	51.3
1959	1.00	4.84	49.5
1960	1.00	4.75	47.8
1961	1.15	5.41	53.7
1962	1.15	5.36	51.8
1963	1.25	5.74	54.8
1964	1.25	5.67	53.0
1965	1.25	5.59	50.8
1966	1.25	5.43	48.8
1967	1.40	5.90	52.2
1968	1.60	6.49	56.1
1969	1.60	6.21	52.6
1970	1.60	5.92	49.5
1971	1.60	5.67	46.4
1972	1.60	5.51	43.2
1973	1.60	5.18	40.6
1974	2.00	5.89	47.2
1975	2.10	5.71	46.4
1976	2.30	5.92	47.3
1977	2.30	5.56	43.8
1978	2.65	6.00	46.6
1979	2.90	5.99	47.1
1980	3.10	5.76	46.5
1981	3.35	5.68	46.2
1982	3.35	5.36	43.6
1983	3.35	5.14	41.8
1984	3.35	4.93	40.3
1985	3.35	4.76	39.1
1986	3.35	4.67	38.2
1987	3.35	4.51	37.3
1988	3.35	4.33	36.1
1989	3.35	4.13	34.7
1990	3.80	4.44	37.9
1991	4.25	4.77	41.1
1992	4.25	4.63	40.2
1993	4.25	4.50	39.2
1994	4.25	4.38	n/a
1995	4.25	4.25	n/a

\*Adjusted for inflation using the CPI-U-XI.

Source: Center on Budget and Policy Priorities

# The Real Minimum Wage

## 1960-1995



NOTE: Minimum wage is in 1994 CPI-U-X1 Dollars. The inflation rate for 1995 is assumed to be 3.2 percent.

## THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release

May 19, 1995

REMARKS BY THE PRESIDENT  
AT WOMEN'S BUREAU RECEPTION

The South Lawn

5:38 P.M. EDT

THE PRESIDENT: Thank you very much.

Sitting here listening to my marvelous wife speak, I was thinking, you know, I've been seeing her lately long distance, on Oprah Winfrey and on the -- (laughter) -- Morning Show this morning. And I thought, boy, I'm glad she lives here. (Laughter and applause.)

I want to thank Secretary Reich and the Women's Bureau Director, Karen Nussbaum. She has done a wonderful job. I am very grateful to her and to him. (Applause.) . . . .

. . . . But I think it's important that we recognize that women in the workplace are caught in a lot of cross-currents today, because all American workers, or at least more than half of us, are working longer hours for the same or lower pay that we were making 10 years ago. And therefore, more and more parents are working harder for the same or less and spending less time with their children. Women feel this pressure very deeply insofar as they have either sole, primary or even just half of the responsibility for taking care of their children as well as earning a living. Because male workers over the age of 45, on average, have lost 14 percent of their earning power in the last 10 years, women in the work force and in the home feel the anxiety of their husband's sense of loss and insecurity and frustration and anger.

What is causing all this and what are we to do about it? Well, what is causing it all is the impact of the global economy and the dramatic revolution in technology on our society -- opening up all kinds of new changes in ways that are perfectly wonderful if you can access them, but terrifying if you cannot.

For example -- we don't have the figures yet on '94, but I think '94 will confirm '93's trend -- in 1993 we had the

largest number of new businesses started in America in any year in history, and the largest number of new millionaires in America in any year in history. And that is a good thing. That is a good thing. And that is happening because so many of us are now able to access the world of the future. Many of you in this room are part of the trend toward a brighter, bigger, broader tomorrow.

But there is also a fault line in our society that is splitting the middle class apart, putting unbearable pressures on families, making them less secure and making them less able to live up to the fullest of their abilities. You know it, and I know it.

That's why the Family and Medical Leave Law was important. If people are going to be working for smaller companies, not bigger ones, and moving around, at least they ought to know they can take some time off without losing a job if there's someone sick in their family or if a baby is born or some other emergency arises. (Applause.) That's why it was important. (Applause.)

That's why the efforts of the Secretary of Labor and the Secretary of Education to create a fabric, a seamless fabric of lifelong learning -- whenever people lose their jobs or feel that they're underemployed -- it's terribly important. (Applause.)

And that's why I believe it is especially important to women that we raise the minimum wage this year. (Applause.) Women represent three out of five minimum wage workers, but only half the work force.

I have done everything I could to create a climate in which people are encouraged to choose work over welfare, in which people are encouraged to be successful parents and successful workers. I believe that. That's what the Earned Income Tax Credit was all about in 1993. (Applause.)

Let me tell you what that meant -- that meant this year that the average family of four with an income under \$27,000 got a \$1,000 tax cut below what they paid before this administration came into office. And it means three years from now, if the Congress will stick with it and not repeal it, we will be able to say that no one who works full-time and has children at home, when they go home from work, will live below the poverty line. That is the best war against welfare we could wage. (Applause.)

But it isn't enough. If we do not raise the minimum wage this year, next year it will be in real dollar terms, the lowest it has been in 40 years. Now that is not my idea of what the 21st century American economy is all about. I want a smart work, high-wage economy, not a hard-work, low-wage economy. And

the working women of America and their children and their husbands deserve it as well. (Applause.)

You know, I have a -- I don't get to watch a lot of kind of extra television, but the other night, just by accident, I was watching a news program where a special was being done on the minimum wage. And -- I don't even know if it was a national program or one of the state networks around here, but they went down south to a town that had a lot of minimum wage workers. And they went in this plant to interview a remarkable woman who worked in this plant at a minimum wage. And they said to this lady: You know, your employer says if we raise the minimum wage that they'll either have to lay people off or put more money into machinery and reduce their employment long-term. What do you say to that? I could not have written the script. (Laughter.) This lady sort of threw her shoulders back and looked into the eyes of the television reporter and said: Honey, I'll take my chances. (Laughter and applause.)

If we are going to bring our budget deficit into balance, which will be good for all of us; if we're going to have to over a period of years cut back on expenditures that the government used to make, that makes it even more important for people who do go out into the private sector and work full-time, play by the rules, and want to make their own way without public assistance, to be rewarded for that work. This is a huge issue.

. . . . I thank you all. Please stay around. Have a good time. We're delighted to see you. Good-bye. Thank you. (Applause.)

END 5:58 P.M. EDT

**Legislative Background - Minimum Wage - 1989**

\* Last increase (from \$3.35/hour to \$3.80 on 4/1/90 and \$4.25/hour on 4/1/91) passed Congress in 1989 in a bi-partisan agreement following an earlier veto by President Bush:

- o Senate Vote: 89 - 8
  - o House Vote: 382- 37
- (see attached list of votes)

\* President Bush proposed the increase to \$4.25 an hour and refused to accept any increase above that;

\* President Bush had vetoed a Democratic attempt to raise minimum wage to \$4.55 over three years and Congress failed to override the veto - his first successful veto as President;

\* Cong. Goodling (R-PA) was quoted at the time as stating that Republican lawmakers were "uneasy" about President Bush's position and "don't want to go to the wall a second time." Cong. Goodling introduced his own minimum wage bill that proposed a three year phase to \$4.25/hour, a training wage and expansion of the earned-income tax credit. He voted for final passage of the minimum wage increase;

\* The Labor Secretary at the time was Elizabeth Dole;

\* The Senate and the House were both controlled by Democrats;

\* The bill signed by President Bush included a training wage for teenagers between 16 and 19;

\* Sen. Dole (R-Kan) (voted for final passage)

"I think that many of us feel that this is not an issue where we ought to be standing and holding up anybody's getting a 30- to 40-cents-an-hour-increase, at the same time we are talking about capital gains. I never thought the Republican Party should stand for squeezing every last nickel from the minimum wage."

\* The Senate tabled an amendment by Sen. Hatch that would have barred Congress from passing any legislation that would increase the costs of certain small business (the small business exemption from the minimum wage was increased to cover small businesses with sales of less than \$500,000 (from \$362,500) by the bill itself;

\* The Senate tabled an amendment by Sen. Gramm (R-Tex) which would have removed the provision which prevented farmers from using the training wage for teenage farmworkers;

\* Much of the current Senate and House Leadership voted for minimum wage increase in 1989 - including Dole, Lott, Gramm, Gingrich and Kassebaum. However, Armey, Delay, Livingston - voted against (see attached list);

\* Key Senate Republicans supporters in 1989 (supported an attempt at a Dem. compromise)

Sen. Cohen (R-Maine)  
Sen. Hatfield (R-Ore.)  
Sen. Jeffords (R-Vermont)  
Sen. Packwood (R-Ore.)  
Sen. Pressler (R-SD)  
Sen. Specter (R-Penn)

\* Key Senate Republicans in Opposition:

Sen. Mack (R-Florida)  
Sen. Nickles (R-OK)  
Sen. Helms (R-NC)  
Sen. Hatch (R-Utah)

\* Governor Wilson voted for the minimum wage increase as a Senator in 1989.

\* Senate Democrats of concern (voted against Dem. compromise at \$4.55 or cloture in 1989):

Sen. Hollings (D-SC)  
Sen. Bennett Johnston (D-La)  
Sen. Heflin (D-Al)  
Sen. Exon (D - NE)

Sen. Campbell (D-Col) (voted to uphold Bush's veto in House)

Senators in the Democratic and Republican Leadership their votes  
on H.R. 2710 final passage (minimum wage).

**SENATE LEADERSHIP**

**YES**

Democrats

Breaux -- Deputy Whip  
Byrd -- Ranking on Appropriations  
Daschle -- Minority Leader  
Ford -- Minority Whip  
Harkin -- Ranking on the Appropriations, Labor Subcommittee  
Kennedy -- Ranking on the Labor Committee  
Mikulski -- Secretary of the Democratic Party  
Reid -- Co-Chair of the Democratic Polciy Committee

Republicans

Cochran -- Chair Republican Conference  
Dole -- Majority Leader  
D'Amato -- Campaign Committee Chair  
Lott -- Majority Whip  
Kassebaum -- Chairman of Labor Committee  
Hatfield -- Chair of Appropriations Committee  
Specter -- Chair of the Appropriations Labor Subcommittee

**NO**

Democrats

None

Republicans

Mack -- Policy Committee  
Nickles -- Chair of the Republican Policy Committee

SENATE VOTES ON HR 2710 (Minimum wage -- Final Passage)  
Members that are still in the Senate for the 104th Congress)

YES

Democrats

Biden  
Bingaman  
Bradley  
Breaux  
Bryan  
Bumpers  
Byrd  
Conrad  
Daschle  
Dodd  
Exon  
Ford  
Glenn  
Graham  
Harkin  
Heflin  
Hollings  
Inouye  
Johnston  
Kennedy  
Kerrey  
Kerry  
Kohl  
Lautenberg  
Leahy  
Levin  
Lieberman  
Mikulski  
Moynihan  
Nunn  
Pell  
Pryor  
Reid  
Robb  
Rockefeller  
Sarbanes  
Shelby  
Simon

Additional Democratic Senator that did not vote or express a position  
Baucus

**SENATE VOTES ON HR 2710 (Minimum wage -- Final Passage)  
Members that are still in the Senate for the 104th Congress)**

**YES**

**Republicans**

Bond  
Burns  
Chafee  
Coats  
Cochran  
Cohen  
D'Amato  
Dole  
Domenici  
Gorton  
Gramm  
Grassley  
Hatfield  
Jeffords  
Kassebaum  
Lott  
Lugar  
McCain  
McConnell  
Murkowski  
Packwood  
Pressler  
Roth  
Simpson  
Specter  
Stevens  
Thurmond  
Warner

**SENATE VOTES ON HR 2710 (Minimum wage -- Final Passage)  
Members that are still in the Senate for the 104th Congress)**

**NO**

**Democrats (0)**

**Republicans**

**Hatch**

**Helms**

**Mack**

**Nickles**



HOUSE LEADERSHIP VOTES ON FINAL PASSAGE OF HR 2710

HOUSE

Democrats

YES

- Gephardt
- Bonior
- Clay
- Obey

NO

None

Republicans

YES

- Gingrich
- Goodling
- Porter

NO

- Armev
- Delay
- Livingston

HOUSE VOTES ON FINAL PASSAGE OF HR 2710 (MINIMUM WAGE) FOR  
MEMBERS OF THE 104TH CONGRESS

YES

Democrats

A

Ackerman

B

Beilenson

Berman

Bevill

Bonior

Borski

Boucher

Browder

Brown, George

Bryant, John

Burton, Dan

C

Cardin

Chapman

Clay

Clement

Coleman

Collins, Cardiss

Condit

Costello

Coyne

D

Dellums

DeFazio

de la Garza

Dicks

Dingell

Dixon

Durbin

E

Engel

Evans

F

Fazio  
Flake  
Foglietta  
Frank  
Frost

G

Gejdenson  
Gephardt  
Geren  
Gibbons  
Gonzalez  
Gordon

H

Hall, Ralph  
Hall, Tony  
Hamilton  
Hayes  
Hefner  
Hoyer

J

Jacobs  
Johnson, Tim  
Johnston, Harry

K

Kanjorski  
Kaptur  
Kennedy, Joe  
Kennelly  
Kildee  
Kleczka

L

LaFalce  
Lantos  
Laughlin  
Levin  
Lewis, John  
Lipinski  
Lowey

**M**

Manton  
Markey  
Martinez  
Matsui  
McDermott  
McNulty  
Mineta  
Mfume  
Mollohan  
Montgomery  
Murtha

**N**

Neal, Richard

**O**

Oberstar  
Obey  
Ortiz  
Owens, Major

**P**

Pallone  
Parker  
Payne, Donald  
Payne, Lewis  
Pelosi  
Pickett  
Poshard

**R**

Rahall  
Rangel  
Richardson  
Rose

S  
Sabo  
Sawyer  
Schroeder  
Schumer  
Sisisky  
Skaggs  
Skelton  
Slaughter  
Spratt  
Stark  
Stenholm  
Stokes  
Studds

T  
Tanner, John  
Taylor, Gene  
Tauzin  
Torres  
Toricelli  
Towns  
Traficant

V  
Vento  
Visclosky  
Volkmer

W  
Waxman  
Williams, Pat  
Wilson  
Wise  
Wyden

Y  
Yates

Additional Democrats that did not vote yes or no

Did not vote or make a position known  
Conyers  
Moakley

Announced For  
Ford, Harold

HOUSE MEMBERS THAT VOTED FOR FINAL PASSAGE OF HR 2710 (minimum wage) that are in the 104th Congress

YES

Republicans

B

Ballenger  
Bateman  
Bliley  
Boehlert  
Bereuter  
Bilirakis

C

Coble  
Clinger

D

Duncan

E

Emerson

F

Fields

G

Gekas  
Gillmor  
Gilman  
Gingrich  
Goodling  
Gunderson

H

Hastert  
Herger  
Houghton  
Hunter  
Hyde

J

Johnson, Nancy

K

Kasich  
Kolbe

## L

Leach  
Lewis, Jerry  
Lightfoot

## M

McCrery  
McDade  
Meyers, Jan  
Moorhead  
Morella  
Myers, John

## P

Packard  
Petri  
Porter

## Q

Quillen

## R

Regula  
Roberts, Pat  
Rogers  
Ros-Lehtinen  
Roth  
Roukema

## S

Saxton  
Schaefer  
Schiff  
Sensenbrenner  
Shaw  
Shays  
Shuster  
Skeen  
Smith, Christopher  
Smith Lamar  
Soloman  
Spence  
Stearns

## T

Thomas, William

## U

Upton

V

Vucanvoich

W

Walker

Walsh

Weldon, Curt

Wolf

Y

Young, Don

Young, C.W. "Bill"

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Additional Republican members that did not vote yes or no

Did not vote or express an opinion

Molinari

HOUSE VOTES ON FINAL PASSAGE OF HR 2710 (MINIMUM WAGE) FOR ALL  
MEMBERS OF THE 104TH CONGRESS

NO

Democrats

Miller, George (California)

Republicans

A

Archer  
Armey

B

Baker, Richard  
Barton  
Bunning  
Burton

C

Callahan  
Crane  
Combest  
Cox

D

DeLay  
Dornan  
Drier

F

Fawell

G

Gallegly  
Goss

H  
Hansen  
Hancock  
Hefley  
Hunter

L  
Livingston

M  
McCollum

R  
Rohrabacher

O  
Oxley

P  
Paxon

S  
Stump

**MEMBERS OF THE SENATE THAT WERE IN THE HOUSE AND VOTED  
ON FINAL PASSAGE OF HR 2710**

YES -- Democrats

Boxer  
Akaka

YES -- REPUBLICANS

Craig  
Snowe  
DeWine  
Inhofe