

6-1-2003

AFL-CIO v. Allbaugh: The D.C. Circuit Limits the President's Authority to Influence Labor Relations

Cheralynn M. Gregoire

Follow this and additional works at: <https://readingroom.law.gsu.edu/gsulr>

 Part of the [Law Commons](#)

Recommended Citation

Cheralynn M. Gregoire, *AFL-CIO v. Allbaugh: The D.C. Circuit Limits the President's Authority to Influence Labor Relations*, 19 GA. ST. U. L. REV. (2003).

Available at: <https://readingroom.law.gsu.edu/gsulr/vol19/iss4/1>

This Article is brought to you for free and open access by the Publications at Reading Room. It has been accepted for inclusion in Georgia State University Law Review by an authorized editor of Reading Room. For more information, please contact mbutler@gsu.edu.

AFL-CIO v. ALLBAUGH: THE D.C. CIRCUIT LIMITS THE PRESIDENT'S AUTHORITY TO INFLUENCE LABOR RELATIONS

INTRODUCTION

Congress passed the National Labor Relations Act (NLRA) in 1935 to create a “system for unionization and collective bargaining” and to “mak[e] it illegal for employers to discipline or discharge employees because they engage in union activity and other protected concerted activities.”¹ Section 8(e) of the NLRA generally prohibits, as an unfair labor practice, contracts or agreements that may act as a boycott on another employer, except for agreements “between a labor organization and an employer in the construction industry.”² Section 8(f) of the NLRA establishes the parameters of this exception.³ Specifically, section 8(f)(2) authorizes employers in the construction industry to enter into pre-hire agreements with labor organizations that require “as a condition of employment” membership in such labor organizations.⁴

On November 7, 2001, the U.S. District Court for the District of Columbia, in *AFL-CIO v. Allbaugh*,⁵ permanently enjoined the enforcement of President George W. Bush’s Executive Order 13,202 (Order), which prevented federal executive agencies and private contractors engaged in federally assisted construction projects from prohibiting or requiring the use of project labor agreements (PLAs).⁶

1. Gregg D. Adler, *The National Labor Relations Act*, 15 No. 3 G.P. SOLO & SMALL FIRM LAW. 40, 40-41 (1998); see generally National Labor Relations Act, 29 U.S.C. § 158 (2000).

2. 29 U.S.C. § 158(e) (2000).

3. *Id.* § 158(f).

4. *Id.*

5. Bldg. & Constr. Trades Dep’t, *AFL-CIO v. Allbaugh*, 172 F. Supp. 2d 138 (D.D.C. 2001), *rev’d* 295 F.3d 28 (D.C. Cir. 2002), *cert. denied*, 123 S. Ct. 992 (2003).

6. *Allbaugh*, 172 F.Supp.2d. at 142. “PLAs are ‘pre-hire’ collective bargaining agreements that are generally prohibited by the NLRA [except in the construction industry]. . . . A PLA is negotiated between an employer that has control over a particular construction project and a group of unions in order to meet the specific labor needs of the project.” *Id.*

The district court found that the President did not have constitutional or statutory authority to issue the Order and that the NLRA preempted it.⁷ In so holding, the district court's decision in *Allbaugh* followed an earlier D.C. Circuit Court decision, *Chamber of Commerce v. Reich*.⁸ In *Reich*, the U.S. Court of Appeals for the D.C. Circuit held that the NLRA preempted former President Bill Clinton's Executive Order 12,954, which barred the federal government from contracting with employers that hired permanent replacement workers during a lawful strike.⁹ In this decision, the D.C. Circuit arguably adopted an overly broad interpretation of the *Machinists* preemption doctrine,¹⁰ concluding that Congress intended to leave the issue of permanently replacing striking workers to the "free play of economic forces."¹¹ Relying on *Reich*, the D.C. District Court in *Allbaugh* concluded that President Bush's Order "impermissibly interfere[d] with the free play of economic forces" when construction employers and unions engage in the bargaining process.¹² These two decisions are examples of the D.C. Circuit's attempts to narrow the scope of the President's power to influence the labor market through the issuance of executive orders.

However, the Government appealed the District Court's permanent injunction against Executive Order 13,202, and the D.C. Circuit Court of Appeals reversed, holding that the Order was a constitutionally valid exercise of President Bush's proprietary authority.¹³ The D.C. Circuit Court of Appeals therefore broadened the scope of the President's power to influence labor relations through executive orders, making a notable move away from its

7. *Id.* at 160, 162.

8. 74 F.3d 1322 (D.C. Cir. 1996).

9. *See id.* at 1338-39.

10. The *Machinists* preemption doctrine forbids executive regulation of areas Congress intended to leave "unregulated and to be controlled by the free play of economic forces." *Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Employment Relations Comm'n*, 427 U.S. 132, 144 (1976).

11. *See* Charles Thomas Kimmett, Comment, *Permanent Replacements, Presidential Power, and Politics: Judicial Overreaching in Chamber of Commerce v. Reich*, 106 YALE L.J. 811, 827-35 (1996) (arguing *Reich* was an example of judicial overreaching because the court improperly extended the preemption doctrine developed in *Machinists* to the actions of the President of the United States contrary to the Supreme Court's recent trend toward limiting the doctrine).

12. *Allbaugh*, 172 F. Supp. 2d at 168.

13. *Bldg. & Constr. Trades Dep't, AFL-CIO v. Allbaugh*, 295 F.3d 28, 29 (D.C. Cir. 2002).

narrower view of the President's proprietary authority set out in *Reich*.¹⁴

Part I of this Comment provides a general overview of two NLRA preemption principles developed by the Supreme Court—*Garmon*¹⁵ and *Machinists*—that the courts have used to invalidate executive orders. Part I also provides an overview of the President's power to issue executive orders, particularly to implement social and economic change in the labor market. Part II discusses *AFL-CIO v. Kahn*,¹⁶ where the D.C. Circuit found that an Executive Order issued by former President Jimmy Carter did *not* conflict with the NLRA, as backdrop from which to analyze the *Allbaugh* decision. Part III reviews the *Reich* decision and the problems with the D.C. Circuit's expansion of the *Machinists* preemption to invalidate former President Clinton's Executive Order. Part IV discusses the D.C. District Court's decision in *Allbaugh* and the problems with that decision. Part V examines the D.C. Circuit Court of Appeals' decision in *Allbaugh* and attempts to define the current scope of presidential power to influence the labor market through the issuance of executive orders. This Comment concludes that the D.C. Circuit Court of Appeals correctly found that President Bush's Executive Order was a constitutionally valid exercise of his authority and was not preempted by the NLRA.

I. THE TENSION BETWEEN NLRA PREEMPTION PRINCIPLES AND EXECUTIVE ORDERS THAT INFLUENCE LABOR RELATIONS

A. *The Supreme Court's Development of the Garmon and Machinists Preemption Principles*

When Congress enacted the NLRA, it preempted most state regulation of labor relations.¹⁷ However, since the NLRA's

14. *See id.* at 35.

15. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959).

16. 618 F.2d 784 (D.C. Cir. 1979).

17. *See* Brian P. Keane, *NLRA Does Not Preempt an Otherwise Lawful Prehire Agreement When the State Acts as Market Participant: Building & Construction Trades Council v. Associated Builders & Contractors*, 35 B.C. L. REV. 462, 463 (1993).

inception, the U.S. Supreme Court has also established two separate NLRA preemption doctrines.¹⁸

In *San Diego Building Trades Council v. Garmon*,¹⁹ the Supreme Court developed *Garmon* preemption. In *Garmon*, union co-partners of an employer's lumber business picketed the employer when it refused to execute a contract that required it to employ only union workers.²⁰ The employer brought suit against the union, and the San Diego County Superior Court enjoined the union from picketing until a collective bargaining agent was designated.²¹ The Supreme Court granted certiorari to resolve the issue of whether the California Supreme Court could award damages stemming from the union activity.²² The Court concluded that California could not provide a damages remedy because the union's activity was "arguably" protected by sections 7 and 8 of the NLRA.²³ The Court reasoned, "to allow States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy."²⁴ Therefore, *Garmon* preemption prohibits state regulation of labor activities that are "arguably within the compass" of the NLRA.²⁵

In *International Association of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission*,²⁶ the Supreme Court developed a second NLRA preemption doctrine.²⁷ The Supreme Court granted certiorari in this case to decide whether the NLRA preempted "the authority of a state labor relations board to grant an employer . . . an order enjoining a union" from refusing to

18. *Id.*

19. 359 U.S. 236 (1959).

20. *See id.* at 237.

21. *Id.* at 237-38. The National Labor Relations Board (NLRB) had previously declined to intervene because the amount of money in controversy did not meet its jurisdictional standards. *Id.* at 238.

22. *See id.* at 239. The Supreme Court had previously granted certiorari in the case, holding that the NLRB's decision to not exercise jurisdiction did not allow the states to exercise "power over activities they otherwise would be pre-empted from regulating." *Id.* at 238-39.

23. *Id.* at 246.

24. *Id.*

25. *Id.*

26. 427 U.S. 132 (1976).

27. *Id.* at 144.

work overtime.²⁸ The Court held that Wisconsin's labor relations board did not have the authority to enjoin the union, relying on a line of preemption cases in which the Court concluded that "Congress meant to leave some activities unregulated and to be controlled by the free play of economic forces."²⁹ The majority in *Machinists* reasoned that the forum in which these claims are brought should not determine what types of "economic weapons" would be available to the parties.³⁰ The Court found that to hold otherwise would be "inconsistent" with federal law that "leaves the parties free to" choose.³¹

In his dissent, Justice Stevens, joined by Justices Stewart and Rehnquist, noted that Congress had evidenced no intent to legislate on the partial strike activity at issue.³² Justice Stevens stressed that the Court's holding, which overruled established precedent, was "particularly inappropriate" because it "purport[ed] to implement the intent of Congress with respect to an issue that Congress ha[d] yet to address."³³

B. The President's Power to Issue Executive Orders

Throughout our nation's history, presidents have issued Executive Orders—"orders directed at subordinates within the executive

28. *Id.* at 133.

29. *Id.* at 144.

30. *Id.* at 153.

31. *Id.* The Court held that "[s]ince the federal law operates here, in an area where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the State." *Id.* (quoting *Teamsters Union v. Oliver*, 358 U.S. 283, 296 (1959)). See generally Eileen Silverstein, *Against Preemption in Labor Law*, 24 CONN. L. REV. 1, 5-6 (1991) (noting three categories of preemption: (1) *Garmon* preemption, where "conduct is actually or arguably protected by section 7 or prohibited by section 8 of the Act"; (2) *Machinists* preemption, "for conduct clearly neither protected by section 7 nor prohibited by section 8" but holding that the "conduct is permitted because Congress intended to control 'by the free play of economic forces'"; and (3) preemption based on section 301 of the NLRA that "require[s] the parties to use [an] agreement's grievance-arbitration machinery and to abandon state-based claims" when a party's conduct "arguably breaches a collective bargaining agreement"). *Id.* Section 301 preemption will not be discussed in this Comment because it was not applicable in either *Allbaugh* or *Reich*.

32. See *Machinists*, 427 U.S. at 157 (Stevens, J. dissenting).

33. *Id.* at 158. In a similar vein, one commentator has suggested that a standard of "actual conflict" with the NLRA would rest on the "legitimacy of political objectives set at the state and local levels" and that the resulting "enactment of state legislation would provide a much needed barometer of popular support for extension of collective rights." See Silverstein, *supra* note 31, at 49-50.

branch”—for various purposes, including responding to emergency situations such as World War I, World War II, and the Great Depression.³⁴ According to one commentator, since the time of former President Theodore Roosevelt, “[t]he use of executive orders to reshape national policy is simply the kind of thing that presidents routinely do now, from the very beginning of their terms and throughout their years in office.”³⁵

Additionally, a President’s authority to issue executive orders, while broad, must be derived from the Constitution or from statutory delegations.³⁶ However, this “authority to issue directives may be express, implied, or inherent in the substantive power granted to the President.”³⁷ In the seminal case of *Youngstown Sheet & Tube v. Sawyer*,³⁸ the Supreme Court invalidated an executive order issued by former President Harold Truman.³⁹ In that case, the Supreme Court found that former President Truman had exceeded the scope of his authority to issue an executive order, pursuant to his constitutionally delegated war powers, which directed the federal government’s seizure and operations of the nation’s privately owned steel mills.⁴⁰ In his famous concurring opinion, Justice Jackson established a framework for determining whether a President’s executive order is valid:⁴¹

When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum

. . . .

When the President acts in absence of either congressional grant or denial of authority, he can only rely upon his own independent

34. See Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 155-57 (Apr. 1999); see also Todd F. Gaziano, *The Use and Abuse of Executive Orders and Other Presidential Directives*, 5 TEX. REV. L. & POL. 267, 295 (Spring 2001) (noting that since 1862, “[a]pproximately thirteen thousand executive orders have been issued”).

35. See Moe & Howell, *supra* note 34, at 158.

36. See Gaziano, *supra* note 34, at 282.

37. *Id.* at 276.

38. 343 U.S. 579 (1952).

39. *Id.* at 589.

40. See *id.* at 582, 589.

41. *Id.* (Jackson, J., concurring); see Moe & Howell, *supra* note 34, at 173.

powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which the distribution is uncertain.

....

When the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb⁴²

Thus, a court may invalidate an executive order that it deems is issued without statutory or constitutional authorization.⁴³

C. Presidential Use of the Executive Order to Implement Social and Economic Changes in the Labor Market

Presidents have long used executive orders to implement national policy contrary to congressional sentiment.⁴⁴ Beginning with World War II through the mid-sixties, executive orders have been used to implement the federal government's policy of prohibiting race discrimination and promoting affirmative action in the workplace.⁴⁵ One commentator researched 113 executive orders issued since 1941 that either affected collective bargaining or prevented discriminatory employment practices.⁴⁶ That commentator described the historical development of executive power used "to promote policies opposed by Congress."⁴⁷

[This] historical development of executive power . . . promote[d] policies opposed by Congress. . . . No branch of the federal government in the 1950s was more hostile to the principle of integrating African Americans than Congress. . . .Congress . . .

42. *Youngstown*, 343 U.S. at 635-38; see *Moe & Howell*, *supra* note 34, at 173.

43. See *Moe & Howell*, *supra* note 34, at 149.

44. *Id.* at 160.

45. See Michael H. LeRoy, *Presidential Regulation of Private Employment: Constitutionality of Executive Order 12,954 Debarment of Contractors Who Hire Permanent Striker Replacements*, 37 B.C. L. REV. 229, 230 (1996) [hereinafter *LeRoy, Presidential Regulation*]; Debra A. Millenson, *W(h)ither Affirmative Action: The Future of Executive Order 11,246*, 29 U. MEM. L. REV. 679 (1999).

46. See *LeRoy, Presidential Regulation*, *supra* note 45, at 235-63.

47. *Id.* at 287.

was the last branch to do something to end segregation, and its 1957 legislation was limited compared to *Brown v. Board of Education* and Eisenhower's executive orders. . . .

It follows, therefore, that the constitutionality of an executive order is not determined by its popularity with Congress.⁴⁸

Among the numerous executive orders prohibiting employment discrimination are: former President Roosevelt's Orders 8,802 and 9,001, which prevented defense contractors from engaging in race or national origin discrimination;⁴⁹ former President Truman's Executive Order 9,664, which promoted continuing the policies of previous anti-discrimination orders; and Executive Orders 9,001 and 10,210, which prohibited federal contractors and subcontractors from engaging in racial discrimination.⁵⁰ former President Dwight D. Eisenhower issued Executive Order 10,479 to promote the "progressive 'policy of the United States Government to promote equal employment opportunity for all qualified persons employed or seeking employment on government contracts.'"⁵¹ That Order created a compliance system overseeing agency practices and procedures, including a reporting system for complaints received by a contracting agency.⁵² Former President Eisenhower also issued Executive Order 10,557, which prohibited specific types of discriminatory employment practices.⁵³ Former President John F. Kennedy issued Executive Orders 10,925 and 11,114, which required federal contractors and federally assisted contractors to "take

48. *Id.* at 287-89; see also Millenson, *supra* note 45, at 685 (contending that such executive orders promoted governmental efficiency in procurement practices by preventing employment discrimination based on race, gender, and national origin because such policies "encourage the broadest possible group of qualified individuals to enter the . . . applicant pool"). But see John A. Sterling, *Above the Law: Evolution of Executive Orders (Part Two)*, 31 UWLA L. REV. 123, 124 (commenting that former Presidents Eisenhower's and Kennedy's idealism, reflected in their use of executive orders, "although noble and worthy of pursuit, [was] arguably not within the scope of legitimate federal authority as contemplated by the U.S. Constitution").

49. See Millenson, *supra* note 45, at 685; LeRoy, *Presidential Regulation*, *supra* note 45, at 254.

50. See LeRoy, *Presidential Regulation*, *supra* note 45, at 254-55.

51. *Id.* at 256 (quoting the policy preamble of Exec. Order No. 10,479, 18 Fed. Reg. 4899 (Aug. 13, 1953)).

52. *Id.* at 255.

53. See *id.* at 257 (noting that Executive Order 10,557's language later served as a model for Title VII of the Civil Rights Act of 1964).

affirmative action to ensure that applicants are employed, and that employees are treated during [their] employment, without regard to their race, creed, color, or national origin.”⁵⁴

These executive orders represent the highlights of many such orders issued since the 1940s, which regulate collective bargaining and prohibit employment discrimination.⁵⁵ Some commentators contend that these orders are an unconstitutional violation of separation of powers principles, insisting that lawmaking is solely for the legislature, not for the President.⁵⁶ However, as another commentator has noted, if these numerous executive orders had not been issued by the Executive, Congress would likely have perpetuated discrimination and segregation in the workplace.⁵⁷

Executive orders have allowed presidents to implement broad social and economic policies in furtherance of delegated authority—often pursuant to the Federal Property and Administrative Services Act (FPASA).⁵⁸ Because such executive policies were deemed sufficiently “advantageous to the Government in terms of economy, efficiency, or service,”⁵⁹ they were “entitled to deference” by the judiciary.⁶⁰

54. Millenson, *supra* note 45, at 687 (quoting Exec. Order No. 10,925, 3 C.F.R. § 450 (1959), 26 Fed. Reg. 1977 (Mar. 6, 1961)); *see also* LeRoy, *Presidential Regulation*, *supra* note 45, at 258-60. LeRoy comments that Executive Order 10,925 “marked a critical turning point in presidential regulation of private employment” because its authority to set affirmative action policy was partly derived from “executive orders . . . suggesting that these had become something like a culminating body of common law for federal procurement.” *Id.* at 260.

55. *See generally* LeRoy, *Presidential Regulation*, *supra* note 45.

56. *See* Sterling, *supra* note 48, at 132 (arguing that “[l]iberty is always at stake when one or more of the branches seek to transgress the separation of powers”); Ronald Turner, *Banning the Permanent Replacement of Strikers by Executive Order: The Conflict Between Executive Order 12954 and the NLRA*, 12 J.L. & POL. 1, 1-6 (1995) (contending that executive orders issued without any “statutory or constitutional basis can be inconsistent with the principle of the separation of powers” because they allow the president to enact “sweeping” policy decisions without the legislature’s consent).

57. *See* Leroy, *Presidential Regulation*, *supra* note 45, at 302; *see also* Moe & Howell, *supra* note 34, at 160 (“Presidents, by moving ahead on civil rights issues, were knowingly and quite publicly acting contrary to the will of Congress on matters of major importance to the country. They were acting as leaders, and taking the nation in directions Congress refused to go.”).

58. 40 U.S.C. § 481(a) (2000).

59. *Id.*

60. *See* Millenson, *supra* note 45, at 688-89; *see also* Case Comment, *Imposition of Affirmative Action Obligations on Nonconsenting Government Contractors: United States v. New Orleans Public Service, Inc.*, 91 HARV. L. REV. 506, 507-08 (1977) (discussing a case in which the Fifth Circuit held Executive Order 11,246, prohibiting almost every government contractor from discriminating “in

II. *AFL-CIO v. KAHN*'S "SUFFICIENT NEXUS" TEST: GRANTING THE EXECUTIVE BROAD DISCRETION TO SET FEDERAL PROCUREMENT POLICY

*AFL-CIO v. Kahn*⁶¹ illustrates how the D.C. Circuit Court's subsequent application of *Machinists* preemption in *Reich* to invalidate an executive order led to judicial review of presidential policy decisions "where it had not previously existed."⁶²

In *Kahn*, the court considered former President Carter's Executive Order 12,092 requiring the Council on Wage and Price Stability to establish voluntary wage and price standards to combat inflation in the economy.⁶³ Executive Order 12,092 allowed the President to reject government contracts for more than \$5 million with companies that refused to comply with the suggested wage and price standards.⁶⁴ The plaintiff labor unions contended that the wage and price program interfered with their right to bargain collectively and that former President Carter had exceeded the scope of his authority delegated by the FPASA.⁶⁵ The D.C. District Court, relying on *Youngstown*, invalidated the order.⁶⁶ However, the D.C. Circuit Court of Appeals distinguished *Youngstown* because it involved the unconfirmed constitutional powers of the President—not statutory powers delegated to him by Congress.⁶⁷ Instead, the Court of Appeals determined that the central issue was whether the FPASA granted the President the authority to issue Executive Order 12,092.⁶⁸

The court concluded that a "sufficiently close nexus" existed between the wage and price program and the FPASA to validate the

employment on the basis of race, color, religion, sex, or national origin and to take affirmative action to provide equal opportunity," a "proper use of the executive authority over procurement, to further social and economic objectives").

61. 618 F.2d 784 (D.C. Cir. 1979).

62. Kimmitt, *supra* note 11, at 843-44.

63. *See Kahn*, 618 F.2d at 785-86.

64. *Id.* at 786. This decision was made pursuant to a policy letter issued by the Office of Federal Procurement Policy, which was put in charge of the procurement compliance program. *Id.* at 785-86.

65. *Id.* at 786.

66. *Id.*

67. *See id.*

68. *Kahn*, 618 F.2d at 786.

order.⁶⁹ In arriving at this conclusion, the court first looked to the legislative history of the FPASA.⁷⁰ The court found that the FPASA was enacted pursuant to a recommendation of the Hoover Commission to streamline and modernize the Government's procurement methods to provide the "same flexibility that characterizes such transactions in the private sector."⁷¹ Furthermore, the vague language of section 205(a) of the FPASA, which provides that 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 the Act," was added by Congress to guarantee that "Presidential policies and directives shall govern—not merely guide—the agencies under the FPASA."⁷² Therefore, the court concluded that Congress intended that the President play a "direct and active part in supervising the Government's management functions."⁷³

The court also considered the history of the Executive's application of the FPASA since its enactment, including the numerous anti-discrimination orders issued pursuant to the statute.⁷⁴ Specifically, the court reviewed executive orders issued by former Presidents Roosevelt and Truman that dealt with fair employment practices,⁷⁵ and Executive Orders issued by former Presidents Eisenhower, Kennedy, and Lyndon Johnson, which all promoted the federal government's anti-discrimination policy.⁷⁶ The court noted that these orders, unchallenged until 1964, were previously found by the Third Circuit to be a valid exercise of presidential procurement

69. *Id.* at 792.

70. *See id.* at 787-88.

71. *Id.*

72. *Id.* at 788.

73. *Kahn*, 618 F.2d at 788.

74. *See id.* at 790-91. The court noted that the FPASA was the sole statutory authorization for these anti-discrimination orders from 1953 to 1964. *Id.* at 791.

75. *See id.* at 790 n.32, 791 n.33 (discussing former President Roosevelt's Executive Orders 8,802, 9,001, and 9,046; former President Truman's Executive Orders 9,664, 10,210, and 10,308; former President Eisenhower's Executive Orders 19,479, 10,557 and 10,925, former President Kennedy's Executive Order 11,144, and former President Johnson's Executive Order 11,246; and noting that Congress did not approve of such orders until the 1970s); *see also* discussion *supra* Part I.C.

76. *Id.* at 790 n.32, 791 n.33.

authority.⁷⁷ The court noted that these orders were “authorized by the [FPASA’s] broad grant of procurement authority.”⁷⁸ However, the court did caution that its decision to interpret the FPASA’s presidential procurement authority broadly did not constitute writing a “blank check for the President to fill in at his will.”⁷⁹ Nonetheless, the court found that former President Carter had not exceeded his authority and that his order was consistent with Congress’ purpose in enacting the FPASA:⁸⁰

The congressional declaration of policy for the FPASA sets forth the goal of an “economical and efficient system for . . . procurement and supply.” Section 201 directs that the Administrator of General Services chart policy and procure supplies in a manner “advantageous to the Government in terms of *economy, efficiency, or service*” This language recognizes that the Government generally must have some flexibility to seek the greatest advantage in various situations.⁸¹

The court determined that former President Carter’s Executive Order would likely lower the Government’s procurement costs immediately because it would combat inflation and thus “eliminate the need for either business or labor to seek price and wage increases.”⁸²

In summary, the Court of Appeals in *Kahn* held that the FPASA grants the President broad discretion to set national procurement

77. *Id.* at 791.

78. *Id.* at 792 (quoting *Contractors Ass’n of E. Pa. v. Sec’y of Labor*, 442 F.2d 159, 170 (3d Cir. 1971)). In *Contractors*, the court concluded that “it is in the interest of the United States in all procurement to see that its suppliers are not over the long run increasing its costs and delaying its programs by excluding from the labor pool available minority workmen,” and “[i]n the area of Government procurement Executive authority to impose non-discrimination contract provisions . . . [represents] action pursuant to the express or implied authorization of Congress.” *Contractors*, 442 F.2d at 170. Also, the court in *Kahn* noted that in 1961, the Fifth Circuit held that former President Kennedy’s executive order requiring contractors to engage in affirmative action was valid under the FPASA. *See Kahn*, 618 F.2d at 791.

79. *Id.* at 793.

80. *Id.*; *see also LeRoy, Presidential Regulation*, *supra* note 45, at 290 (explaining that the court in *Kahn*, after reviewing the legislative history of the FPASA, determined that Congress intended to grant the President “broad discretion” in making federal procurement policy).

81. *Kahn*, 618 F.2d at 788-89 (quoting sections 471 and 481(a) of the FPASA).

82. *Kahn*, 618 F.2d at 792-93.

policy.⁸³ As long as the criteria of a President's executive order has a "sufficiently close nexus to the statute's policy of promoting economy and efficiency" in government business, then it is a valid exercise of the President's delegated procurement authority.⁸⁴

III. *CHAMBER OF COMMERCE V. REICH*: A CABINING OF THE EXECUTIVE'S BROAD GRANT OF PROCUREMENT AUTHORITY

On March 8, 1995, former President Clinton issued Executive Order 12,954, which prohibited federal agencies from contracting with employers that permanently replace lawfully striking employees.⁸⁵ Former President Clinton's rationale for issuing the order was that the "'balance' between allowing businesses to operate during a strike and preserving worker rights is disrupted when an employer hires permanent replacements during a strike."⁸⁶ The order also reported findings that longer strikes resulted when permanent replacements were hired, causing the employer to lose the striking workers' "accumulated knowledge, experience, skill and expertise."⁸⁷ The Secretary of Labor Reich was required to implement regulations for its enforcement.⁸⁸ However, prior to implementation of the regulations, the Chamber of Commerce and various other employer associations brought suit against Secretary Reich in the D.C. District Court, seeking an injunction against his enforcement of the Order.⁸⁹ The plaintiffs argued that (1) the Order overstepped an employer's right under the NLRA to replace strikers with permanent

83. See *supra* note 81 and accompanying text.

84. *Kahn*, 618 F.2d at 792; cf. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2246, 2320 (2001) (suggesting that "most statutes granting discretion to the executive branch . . . should be read as leaving ultimate decisionmaking authority in the hands of the President. This rule of statutory construction appropriately derives from an effort to determine congressional intent as well as . . . an effort to promote good lawmaking practices.").

85. See *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1324 (D.C. Cir. 1996). Former President Clinton's executive order was issued pursuant to authority delegated to him under the FPASA. *Id.* at 1324; see also Exec. Order No. 12,954, 60 Fed. Reg. 13,023 (Mar. 8, 1995). The effect of this executive order on the labor market was not minimal; the court noted that "22% of the labor force [was] employed by federal contractors and subcontractors." *Id.* at 1324.

86. *Id.* at 1324.

87. *Id.* (quoting Exec. Order No. 12,954).

88. *Id.*

89. *Id.* at 1325.

replacements, (2) the Order violated the FPASA because the President did not provide reasons why the order would help the government save procurement costs, and therefore, (3) “[such] lack of presidential findings independently violate[d] the Constitution . . . [as] an unconstitutional delegation.”⁹⁰

First, the court addressed the issue of whether it had authority to review the President’s order.⁹¹ The government argued, relying on *Dalton v. Specter*,⁹² that the President’s actions were not judicially reviewable.⁹³ However, the court disagreed and found that judicial review of presidential action was “well-established.”⁹⁴

The court then addressed the plaintiff’s claim that the Order was preempted by the NLRA.⁹⁵ The court found that the NLRA “guarantee[d] the right to hire permanent replacements.”⁹⁶ However, the court’s conclusion was misleading because the NLRA does not expressly reserve that right to employers.⁹⁷ Instead, the court relied on the Supreme Court’s dictum in *NLRB v. Mackay Radio & Telegraph Co.*,⁹⁸ stating that an employer is not prohibited from permanently replacing striking workers to “protect and continue his

90. *Id.*

91. *See id.* at 1325-26.

92. 511 U.S. 462 (1994). In *Dalton*, the Supreme Court upheld former President George H.W. Bush’s decision, made pursuant to a recommendation by the Defense Base Closure and Realignment Commission, to close the Philadelphia Naval Shipyard. *Id.* at 464. The Court concluded “longstanding authority holds that [judicial] review is not available when the statute in question commits the decision to the discretion of the President.” *Id.* at 474.

93. *See Reich*, 74 F. 3d at 1326.

94. *Id.* at 1328 (citing *Franklin v. Massachusetts*, 505 U.S. 788, 815 (1992)).

95. *Id.* at 1332.

96. *Id.* at 1339.

97. *See Kimmitt*, *supra* note 11, at 815 (stating that the NLRA “does not explicitly address an employer’s use of permanent replacements [during a lawful strike]; instead, the right to replace workers permanently is derived from dicta contained in the *Mackay* decision of 1938”); *see* Michael H. LeRoy, *The Mackay Radio Doctrine of Permanent Striker Replacements and the Minnesota Picket Line Peace Act: Questions of Preemption*, 77 MINN. L. REV. 843, 856-59, 864 [hereinafter *Leroy, Mackay Radio*] (discussing the Minnesota Picket Line Peace Act, which mirrored then pending legislation in Congress as well as former President Clinton’s Executive Order 12,954 prohibiting Minnesota private and public employers from hiring permanent replacements during a strike and “conflict[ing] with no provision of the NLRA, because the NLRA is completely silent on the matter of an employer’s right to hire permanent replacements”).

98. 304 U.S. 333 (1938).

business.”⁹⁹ Thus, the court seemed to substitute the Supreme Court’s dictum in *Mackay* for an express provision of the NLRA.¹⁰⁰

The government, relying on *Kahn*, argued that the FPASA granted the President broad discretion in setting federal procurement policy.¹⁰¹ However, the court concluded that even though a long history existed regarding the issuance of executive orders that promoted social and economic policies,¹⁰² including former President Carter’s Order in *Kahn*, those Orders were valid because they did not conflict with any federal statute.¹⁰³

Notwithstanding the court’s earlier statement that the NLRA undisputedly allowed employers to permanently replace strikers,¹⁰⁴ the court concluded that “some tension” existed between Executive Order 12,954 and the NLRA.¹⁰⁵ The court proceeded to analyze whether such tension actually rose to the level of an “unacceptable conflict.”¹⁰⁶ The court concluded that *Machinists* preemption, which “prohibits regulation of areas that Congress intended to be left ‘unregulated and to be controlled by the free play of economic forces,’” was also applicable to federal action.¹⁰⁷ As one commentator noted, the court’s application of *Machinists* preemption to an executive order was “without precedent in labor law.”¹⁰⁸

The court’s primary justification for finding that former President Clinton’s Order conflicted with the NLRA was that it could upset the

99. *Reich*, 74 F.3d at 1332 (quoting *Mackay*, 304 U.S. at 345-46).

100. *Cf. Leroy, Mackay Radio*, *supra* note 97, at 864 (discussing whether the Supreme Court dictum in *Mackay* is the “constitutional equivalent of express statutory law for the purpose of preempting conflicting state law”).

101. *Reich*, 74 F.3d at 1332.

102. *See supra* Part I.C.

103. *Reich*, 74 F.3d at 1333; *Kimmitt*, *supra* note 11, at 829 (noting that the court in *Reich* never cited an example of an executive order that was found to conflict with the NLRA).

104. *See Reich*, 74 F.3d at 1332.

105. *Id.* at 1333.

106. *Id.* at 1334.

107. *Id.* (quoting *Machinists*, 427 U.S. 132, 144 (1976)).

108. *Kimmitt*, *supra* note 11, at 827. Additionally, the court’s application of *Machinists* preemption was arguably limited by a previous Supreme Court decision. *See id.* at 827. In *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983), the Court refused to use a rigid application of the *Machinists* preemption doctrine to invalidate state labor legislation. *Kimmitt*, *supra* note 11, at 827-28. The Court in *Belknap* concluded that “[i]f a federal law forecloses this suit, more specific and persuasive reasons than those based on *Machinists* must be identified to support any such result.” *Belknap*, 463 U.S. at 507.

“delicate balance” the NLRA strikes between labor and management.¹⁰⁹ However, the main problem with that justification, as one commentator has noted, is that “virtually every federal regulatory statute reflects a delicate balance among competing interests, and if the courts conclude that such a balance should have a preemptive effect,” then the President’s authority to issue executive orders effecting labor relations would be severely limited.¹¹⁰

Thus, in *Reich*, the D.C. Circuit limited the President’s broad authority to issue executive orders that affect labor relations via the FPASA that was previously granted to him in *Kahn*.¹¹¹ In so deciding, the court extended the scope of *Machinists* preemption, which originally applied to state actions, to federal executive orders.¹¹² Thus, the court established a precedent “for mounting successful attacks on policies as far-ranging as race discrimination and wage and price controls.”¹¹³

IV. *AFL-CIO v. ALLBAUGH*: CONTINUED JUDICIAL RELIANCE ON REICH?

A. *Background of Executive Order 13,202*

Soon after entering office, President George W. Bush signed four executive orders designed to cut back organized labor’s influence over government contracting.¹¹⁴ On February 17, 2001, President

109. *Reich*, 74 F.3d at 1337. See generally Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 HASTINGS CONST. L.Q. 69, 75-79 (1988) (discussing how the “delicate balance” theory “poses a significant threat to the states’ regulatory authority” and has been used by litigants with significant success in the labor field, under *Machinists* preemption, to limit states’ authority to regulate union activity).

110. Cf. Wolfson, *supra* note 109, at 81-83 (noting that, with regard to state preemption, the Supreme Court has replaced this *Machinists* balancing test with the theory that Congress instead occupies a smaller field regarding the collective bargaining process under the NLRA).

111. See *supra* note 78 and accompanying text.

112. See *supra* notes 108, 109 and accompanying text.

113. LeRoy, *Presidential Regulation*, *supra* note 45, at 284 (comparing former President Clinton’s Executive Order 12,954 to the “broad classes of presidential orders affecting private employment” including those prohibiting employment discrimination and affecting collective bargaining).

114. See Frank Swoboda, *Bush to Sign Orders Curtailing Labor’s Influence*, WASHINGTON POST, Feb. 17, 2001, at E-01, available at 2001 WL 2544655 [hereinafter Swoboda, *Bush to Sign Orders*]; *Quartet of Labor-Related Executive Orders Seen As Assault on Unions*, 43 No. 8 GOV’T CONTRACTOR p. 85 (Feb. 28, 2001) [hereinafter *Assault on Unions*]. President Bush’s reinstatement of Executive Order 13,202 arose from a long-standing partisan dispute over the use of PLAs in federal contracting.

Bush signed Executive Order No. 13,202, one of the four orders.¹¹⁵ Executive Order 13,202 prohibited federal agencies and contractors engaged in federally funded construction projects from implementing mandatory PLAs.¹¹⁶ However, the Order did not prevent contractors or subcontractors from entering into PLAs voluntarily.¹¹⁷ According to AFL-CIO President John Sweeney, the President's Orders, including 13,202, were "mean spirited and anti-worker" and constituted "'pure retribution' for labor's support of Democratic candidates in the last elections."¹¹⁸ However, according to a Bush administration spokeswoman, the President believed that Executive Order 13,202 would "promote efficiency and fairness in federal contracting."¹¹⁹ Against this politically-charged backdrop, the AFL-CIO wasted little time before challenging Executive Order 13,202 in *AFL-CIO v. Allbaugh*.¹²⁰

See Government Contracts: President Clinton to Sign Order on Project Labor Agreements, Gore Says, WASHINGTON INSIDER (BNA), Apr. 15, 1997 (discussing former President Clinton's decision to issue an executive order encouraging federal agencies to use mandatory project labor agreements for federally-funded construction projects).

115. *See Swoboda, Bush to Sign Orders, supra* note 114; *Assault on Unions, supra* note 114. An identical executive order was originally issued by his father, former President George H.W. Bush, during his administration but was later rescinded by former President Clinton. *See Swoboda, Bush to Sign Orders, supra* note 114.

116. Executive Order 13,202, Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally Funded Construction Projects (amended Apr. 6, 2001), was codified in 48 C.F.R. 36.202:

(1) The Government, or any construction manager acting on behalf of the Government, must not (i) Require or prohibit offerors, contractors, or subcontractors to enter into or adhere to agreements with one or more labor organizations . . . on the same or other related construction projects; or (ii) Otherwise discriminate against offerors, contractors, or subcontractors for becoming, refusing to become, or remaining signatories or otherwise adhering to agreements with one or more labor organizations, on the same or other related construction projects.

48 C.F.R. § 36.202 (2001).

117. *See Assault on Unions, supra* note 114.

118. *See Swoboda, Bush to Sign Orders, supra* note 114.

119. Greg Garland, *Bush's Directive on Bridge Blocked Glendening Sees Judge's Order as OK for I-95 Wilson Span; Project Labor Pacts at Issue*, BALTIMORE SUN, Aug. 14, 2001, at 1A, available at 2001 WL 6167251.

120. *Compare* Executive Order 13,202, 48 C.F.R. § 36.202 (Feb. 17, 2001), with Bldg. & Constr. Trades Dep't, *AFL-CIO v. Allbaugh*, 172 F. Supp. 2d 67 (D.D.C. 2001).

B. *The Wilson Bridge Project*

The suit in *Allbaugh* initially evolved around the Wilson Bridge Construction Project, for which Congress had appropriated over \$1.5 billion in federal funding.¹²¹ The State of Maryland had, prior to the issuance of the Order, authorized the Building and Construction Trades Department, AFL-CIO (BCTD) to negotiate a PLA for the project.¹²² The resulting PLA covered six separate contract packages for the six-year project, and the parties agreed that the PLA would apply to any successful bidder for the project.¹²³

Pursuant to federal regulation, Maryland's State Highway Administrator submitted the PLA to the Federal Highway Administration (FHWA) for approval on January 9, 2001.¹²⁴ On February 21, 2001, the FHWA informed Maryland that it could not approve the PLA because of Executive Order 13,202.¹²⁵ After the PLA was nullified, the contract package for the foundation part of the project was readvertised without the PLA and subsequently awarded to Tidewater Construction Corporation.¹²⁶ Afterward, BCTD approached Tidewater about possibly entering into a PLA for the foundations portion of the contract.¹²⁷ However, "Tidewater made it very clear that it would not enter into any labor agreement of any kind."¹²⁸ BCTD then filed suit in the U.S. District Court for the District of Columbia to enjoin FHWA from enforcing the Order on future contracts for the Wilson Bridge project.¹²⁹

121. See *Allbaugh*, 172 F. Supp. 2d at 71. Although the federal government owned the Wilson Bridge, Maryland and Virginia agreed to take ownership of the bridge and maintain it once "Congress agreed to provide \$1.586 billion in federal funds to rebuild" it. See *Transportation: MINETA Approves States' Agreement For Sharing Ownership of Wilson Bridge*, WASHINGTON INSIDER (BNA), Aug. 13, 2001, at d3 [hereinafter *Transportation*].

122. See *Allbaugh*, 172 F. Supp. 2d at 72.

123. *Id.*

124. See *id.*

125. See *id.*

126. See *id.*

127. See *id.* at 74.

128. *Id.*

129. See *NLRA Preempts Executive Order Banning Project Labor Agreements; Court Enjoins Enforcement*, 43 No. 31 GOV'T CONTRACTOR p. 330 (Aug. 22, 2001) [hereinafter *NLRA Preempts*].

The district court granted a preliminary injunction prohibiting the enforcement of BCTD's PLA with Maryland.¹³⁰ In so holding, the court relied heavily on *Reich*, which "made plain that NLRA preemption principles . . . apply . . . to Presidential Executive Orders."¹³¹ The court preliminarily determined that the Order conflicted with Sections 8(e) and 8 (f) of the NLRA, which authorize the use of PLAs in the construction industry, and therefore was preempted under both *Machinists* and *Garmon*.¹³² The court compared President Bush's Order to former President Clinton's Order in *Reich*: "this Executive Order also interfere[d] with [the free play of] economic forces by placing the unions on notice that, in attempting to negotiate a PLA, they [would] be bargaining against the weight of the Government's promised financial assistance."¹³³ Because the order conditioned federal funding of construction projects on the "absence of mandatory PLAs," the court concluded that it "place[d] additional restrictions on public owners that contradict[ed] the NLRA."¹³⁴ The court also concluded that the Order was preempted under *Garmon* because it "strip[ed] from construction owners and managers, and from unions seeking to bargain with those entities, the right to negotiate the kind of agreement expressly protected by Section 8(e)."¹³⁵

C. Executive Order 13,202 Permanently Enjoined

On November 7, 2001, the D.C. District Court granted summary judgment for BCTD¹³⁶ and permanently enjoined the enforcement of

130. See *Allbaugh*, 172 F. Supp. 2d at 78-79.

131. *Id.* at 76.

132. *Id.* at 77-78. In fact, in 1959 Congress amended sections 8(e) and 8(f) to specifically allow pre-hire agreements for the construction industry because its "short term nature . . . makes post-hire bargaining difficult" and because of "the main contractors' need for predictable costs and a steady supply of skilled labor, and the long standing custom of such conduct in the industry." Brian P. Keane, *NLRA Does not Preempt An Otherwise Lawful Prehire Agreement When the State Acts as a Market Participant*: Building & Construction Trades Council v. Associated Builders & Contractors, 35 B.C. L. REV. 462, 466-67 (1993).

133. *Allbaugh*, 172 F. Supp. 2d at 77.

134. See *NLRA Preempts*, *supra* note 129.

135. *Allbaugh*, 172 F. Supp. 2d at 78.

136. Costa Building and Construction Trades Council and the City of Richmond were also plaintiffs to the suit; however, these parties were not named in the court's preliminary injunction decision. Bldg.

Executive Order 13,202.¹³⁷ In seeking the permanent injunction, the plaintiffs claimed that President Bush did not have either “constitutional or statutory authority to promulgate” the order and that it was preempted by the NLRA.¹³⁸

1. President Lacks Constitutional and Statutory Authority to Issue Section Three of Executive Order 13,202

The court, citing to *Youngstown Sheet & Tube Co. v. Sawyer*,¹³⁹ found that President Bush’s authority to issue Executive Order 13,202 did not “stem either from an act of Congress or from the Constitution itself.”¹⁴⁰ The court concluded that the FPASA “clearly” did not authorize the President to impose conditions on federal funding “of projects owned or conducted by parties other than the federal government” and therefore the President did not have statutory authority to issue Section Three of the Order.¹⁴¹ According to the court, “[t]he Procurement Act, which addresses contracting by the federal government, simply is not relevant to conditions placed on the funding of projects owned and conducted by parties other than the federal government.”¹⁴²

In response, the government contended that the President did have general constitutional authority to promulgate Section Three of the Order under Article II of the Constitution.¹⁴³ According to the government, Article II gives the President power to “supervise and

& Constr. Trades Dep’t, *AFL-CIO v. Allbaugh*, 172 F. Supp. 2d 138, 142 (D.D.C. 2001). According to the court, Richmond had plans to negotiate PLAs with plaintiff Contra Costa BCTC for two federally-funded construction projects, including the Richmond Transit Village and a Ford Assembly Plant. *Id.* However, the City Council refused to authorize the PLAs, because they believed Executive Order 13,202 would “bar federal funding needed to complete the projects.” *Id.* at 144.

137. *Allbaugh*, 172 F. Supp. 2d at 172.

138. *Id.* at 146. The government also contended that the plaintiffs did not have standing to challenge the order. *Id.* However, the court rejected the government’s standing argument, finding that all plaintiffs had standing. *Id.* The government’s standing argument and the court’s related analysis are beyond the scope of this Comment.

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

140. *Allbaugh*, 172 F. Supp. 2d at 158 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952)).

141. *Id.* at 159.

142. *Id.*

143. *Id.*

guide subordinate executive officials to ensure the consistent execution of the laws.”¹⁴⁴ The government claimed that because the Order contained the language that it was to be enforced “to the extent permitted by law,” it was “simply a directive by the President to agencies to guide their implementation of existing statutes.”¹⁴⁵ However, the court rejected this argument, finding that Section Three of the Order went beyond the President’s authority to execute the law and into the sphere of regulation or lawmaking.¹⁴⁶ According to the court, “[a]s the *Youngstown* Court concluded, the Constitution does not independently authorize such a legislative action by the President absent a direct Congressional authorization.”¹⁴⁷

The government argued that the Order was valid under the general statutory authority of 31 U.S.C. § 6701(1), which provides the Director of the Office of Management and Budget (OMB) the authority to “issue interpretive guidelines for the use of procurement contracts.”¹⁴⁸ However, the court held the OMB statute did not authorize Section Three’s conditioning of the receipt of federal funds on the absence of PLAs.¹⁴⁹

2. *NLRA Preemption of Executive Order 13,202*

Noting that D.C. Circuit had foreshadowed the present controversy in *Chamber of Commerce v. Reich*,¹⁵⁰ the district court held that Sections One and Three of the Order were preempted by the NLRA.¹⁵¹ The district court found that the Order’s prohibition of a PLA requirement for “private recipients of federal funding who act as

144. *Id.*

145. *Id.*

146. *Allbaugh*, 172 F. Supp 2d at 159-60.

147. *Id.* at 160.

148. *Id.*

149. *See id.* at 162. The government also argued that the President had statutory authority to issue the Order under “individual grant authorizing statutes.” *Id.* at 160. However, the court concluded that the government did not point to any supporting statutory language that would authorize a “blanket prohibition” on the receipt of federal funding for projects using a PLA. *Id.* The court reasoned that “[h]ad Congress intended to prohibit funding recipients from requiring the use of PLAs on each of these . . . projects” it could have provided such language in the statutes. *Id.*

150. *Id.* at 163.

151. *Id.* at 162-63.

employers in construction projects” was in direct conflict with Section 8 of the NLRA and was preempted under *Garmon*.¹⁵² The court then went on to invalidate both Sections One and Three of Executive Order 13,202 under the *Machinists* preemption doctrine.¹⁵³ According to the court, the Order “impermissibly attempt[ed] to create an ideally balanced state of bargaining according to the President’s conception of open competition among labor and management.”¹⁵⁴ Relying on *Reich*, the court determined that the Order removed an “economic weapon from the arsenals,” a PLA requirement in their contracts, of both federal agencies and the recipients of federal funding.”¹⁵⁵

The court based this determination¹⁵⁶ on *Building and Constructions Trades Council v. Associated Builders & Contractors of Massachusetts/Rhode Island (Boston Harbor)*.¹⁵⁷ In *Boston Harbor*, Massachusetts required a PLA to be included in its bid specifications for the Boston Harbor clean-up project.¹⁵⁸ The Supreme Court held that the PLA requirement did not violate either *Garmon* or *Machinists* preemption principles because the State was acting as a market participant.¹⁵⁹ According to the court, to hold otherwise would constitute “a form of governmental regulation of the labor market, [that] could run afoul of *Machinists* preemption principles.”¹⁶⁰

Even though the Court in *Boston Harbor* was referring to the effect of “its own decision on actors in the labor market,” the court in *Allbaugh* concluded, “there [was] no material difference between a judicial action and [an] Executive Order as forms of government regulation.”¹⁶¹ The court held that because Executive Order 13,202 denied “recipients of federal funding the option of requiring a PLA in

152. *Id.* at 167.

153. *Id.* at 167-71.

154. *Id.* at 167.

155. *Id.*

156. *Id.* at 168

157. 507 U.S. 218 (1993).

158. *Allbaugh*, 172 F. Supp. 2d at 168.

159. *Id.*

160. *Id.* (citing *Boston Harbor*, 507 U.S. at 232).

161. *Id.*

their bid specifications,” it “impermissibly interfere[d] with the free play of economic forces that only Congress can regulate.”¹⁶²

Additionally, the court found that the Order also removed an “economic weapon from the arsenal of labor organizations.”¹⁶³ Again relying on *Reich*, the court noted, “no state or federal official or government entity can alter the delicate balance of bargaining and economic power that the NLRA establishes, whatever his or her purpose may be.”¹⁶⁴

However, the government, also relying on *Boston Harbor*, countered that the Order was valid because it constituted an act of the federal government as a market participant that could not be preempted by the NLRA.¹⁶⁵ The court rejected this argument: “Both *Boston Harbor* and *Reich* made clear that the nature of a *regulatory versus proprietary* action is a separate question from the question of whether that action interferes with something either regulated by the NLRA or left for the free play of economic forces.”¹⁶⁶ The district court concluded:

[B]y imposing a general condition for all federal agencies and all recipients of federal funding under all funding statutes, the government has acted in a regulatory capacity. The fact that no one other than the agencies or the funding recipients may be sanctioned does not alter the broad policy implications of [Executive Order] 13,202. The government is using the power of its purse to control and regulate the behavior of other market participants.¹⁶⁷

162. *Id.*

163. *Id.*

164. *Id.* (quoting *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1337 (D.C. Cir. 1996)).

165. *Id.* at 169.

166. *Id.* at 170 (emphasis added).

167. *Id.* (citing *Boston Harbor*, 507 U.S. 218 (1993)).

D. Problems with the D.C. District Court's Decision in *Allbaugh*

The district court's reliance in *Allbaugh* on *Reich* to invalidate President Bush's Order is troubling.¹⁶⁸ As one commentator has noted:

[T]he *Reich* decision, if not overturned, could eventually be interpreted as a flat prohibition on any and all government activity dealing with labor issues previously left unregulated by Congress. As a result, the federal government could find itself impotent to protect its proprietary interests . . . to deter lengthy labor disputes. . . .

The ultimate fate of [the *Reich*] Order rightfully rested with the politically accountable executive or legislature, not with the politically unaccountable judiciary.¹⁶⁹

The district court may have made this commentator's fears a temporary reality.¹⁷⁰ This use of *Garmon* and *Machinists* preemption continued the D.C. Circuit's failure since *Reich* to "acknowledge the right of the executive to contribute to labor policy in areas undefined by the legislature" and "ignores the fact that the executive branch is coequal with the legislative and judiciary branches."¹⁷¹ By invalidating the order, the district court created preemption based on rights not even "arguably" provided by the NLRA.¹⁷² "Questions of arguable *Machinists* protection are resolved entirely by the courts, and ultimately, if it chooses to involve itself, the Supreme Court. An activist Court could radically alter the landscape by inferring expansive 'rights' from the Act's silence."¹⁷³

168. See generally Kimmett, *supra* note 11.

169. Kimmett, *supra* note 11, at 844. But see Gordon M. Clay, Comment, *Executive (AB) Use of the Procurement Power: Chamber of Commerce v. Reich*, 84 GEO. L.J. 2573 (1996).

170. Cf. Kimmett, *supra* note 11, at 827-33.

171. *Id.* at 832.

172. See Michael H. Gottesman, *Rethinking Labor Law Preemption: State Laws Facilitating Unionization*, 7 YALE J. ON REG. 355, 381 (1990).

173. *Id.* Furthermore, the court referred to dictum in *Reich* regarding *Boston Harbor*, where the Court indicated that "the result would have been entirely different [in *Boston Harbor*] . . . if Massachusetts had passed a general law or the Governor had issued an Executive Order requiring all construction contractors doing business with the state to enter into collective bargaining agreements." Kimmett,

In sum, the court's application of *Garmon* and *Machinists* preemption to invalidate Executive Order 13,202 significantly limited the President's power to issue future executive orders involving government procurement to affect labor policy—even when the action is not even arguably prohibited by the NLRA.

V. THE D.C. CIRCUIT COURT OF APPEALS DECISION: REVERSING THE D.C. CIRCUIT'S JUDICIAL RELIANCE ON *REICH*

The government appealed the district court's decision, and on July 12, 2002, the U.S. Court of Appeals for the District of Columbia Circuit, addressing the issue de novo, reversed the lower court and vacated its permanent injunction of Executive Order 13,202.¹⁷⁴ The government again contended on appeal that the President had authority to issue Section Three of the order pursuant to Article II of the Constitution as a “proprietary rather than a regulatory act and therefore not subject to preemption by the NLRA.”¹⁷⁵

The court first addressed whether the President “had constitutional authority to issue [section] 3 of the Executive Order, which [] applies to ‘any agency issuing grants, providing financial assistance, or entering into cooperative agreements for construction projects.’”¹⁷⁶ The court concluded that Section Three of the Order was indeed authorized by Article II, Section 1 of the Constitution, which “encompasses ‘general administrative control of those executing the laws,’ throughout the Executive Branch of government.”¹⁷⁷ The

supra note 11, at 837 (quoting *Reich*, 74 F.3d at 1337). However, this dictum clearly discusses state, not federal, executive action acting pursuant to the congressional delegation. *Id.* Furthermore, as one commentator noted:

Such a distinction [between the *Reich* Order and the *Boston Harbor* Order] . . . loses force as a justification for invalidating [the *Reich*] Order considering that previous executive orders that imposed equal employment requirements upon *all* those contracting with the federal government were upheld by the judiciary, despite their broad application.

Kimmitt, *supra* note 11, at 837. The same rationale could also apply to Executive Order 13,202.

174. Bldg. & Constr. Trades Dep't, *AFL-CIO v. Allbaugh*, 295 F.3d 28, 29, 32. (D.C. Cir. 2002).

175. *Id.* at 32.

176. *Id.*

177. *Id.* (quoting *Myers v. United States*, 272 U.S. 52, 164 (1926)). In so reasoning, the court relied on *Sierra Club v. Costle*, 657 F.2d 298, 406 n.524 (D.C. Cir. 1981), in which it concluded:

court reasoned that Section Three of the Order was not executive overreaching because the President directed his subordinates to implement the Order only “to the extent permitted by law.”¹⁷⁸ The court dispelled the district court’s comparison of the Order to former President Truman’s Executive Order directing the government to seize private steel mills in *Youngstown* by distinguishing President Bush’s Order as self-executing.¹⁷⁹ “Indeed, had President Truman merely instructed the Secretary of Commerce to secure the Government’s access to steel ‘to the extent permitted by law,’ *Youngstown* would have been a rather mundane dispute over whether the Secretary had statutory authority to act as he did.”¹⁸⁰ The court also dismissed the plaintiff’s argument that the Order could be rendered unconstitutional by a particular agency’s invalid implementation of its directive.¹⁸¹

The court then addressed the issue of whether the Order conflicted with the NLRA.¹⁸² First, the court indicated that “the principles of the NLRA [*Garmon* and *Machinists*] preemption come into play only when the Government is regulating within a protected zone and not when it is acting as a proprietor, ‘interacting with private participants in the marketplace.’”¹⁸³ According to the court:

The relevant distinction is whether, in placing a labor-related condition upon its award either of a construction contract or of funds to another entity that will award the construction contract, the Government “acts just [as] a private contractor would act, and conditions its purchasing upon the very sort of labor

The ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power, and he may properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the law which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone.

Allbaugh, 295 F.3d at 32.

178. *Id.* at 33 (quoting Exec. Order No. 13,202, § 3).

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* at 34.

183. *Allbaugh*, 295 F.3d at 34.

agreement that Congress explicitly authorized and expected frequently to find,” . . . or instead seeks to affect conduct “unrelated to the employer’s performance of contractual obligations to the [Government].”¹⁸⁴

Despite the plaintiff’s argument that Sections One and Three of the Order constituted regulatory action, the court concluded that those sections were proprietary in nature.¹⁸⁵ According to the court, Section One was proprietary because it gave government contractors the freedom to choose whether to require PLAs on government contracts.¹⁸⁶ Although the plaintiffs contended that Section Three was regulatory in nature because it applied to federally-funded projects instead of government owned projects, the court concluded that this argument “proceed[ed] from too crabbed an understanding of proprietorship.”¹⁸⁷ Instead, the court found no relevant distinction between federally funded and federally owned projects, finding that the Government also acts as a proprietor when it is a “lender or benefactor” of a project.¹⁸⁸

On appeal, the plaintiffs also relied on *Reich* to argue that the Order was regulatory in nature because it allegedly acted as a blanket rule to be followed by federal contractors and recipients of federal funds.¹⁸⁹ However, the court concluded that the plaintiffs “misread” *Reich*.¹⁹⁰ “In *Chamber of Commerce*, we held that Executive Order 12,954 was regulatory not because it decreed a policy of general application . . . but because it disqualified companies from contracting with the Government on the basis of conduct unrelated to any work they were doing for the Government.”¹⁹¹ Instead, the court relied on *Kahn* when it concluded that Executive Order 13,202 was not regulatory, noting that “under [the] Procurement Act, [the]

184. *Id.* at 34-35 (quoting *Chamber of Commerce v. Reich*, 74 F.3d 1332, (D.C. Cir. 1996)).

185. *Id.* at 35.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Allbaugh*, 295 F.3d at 34. In *Reich*, the court had found that because Executive Order No. 12,954 did not constitute an ad hoc contracting decision, it was regulatory in nature. *Id.*

190. *Id.*

191. *Id.*

President may exercise ‘authority over those larger administrative and management issues that involve the Government as a whole.’”¹⁹² According to the court, an executive order is only regulatory when it “‘addresses employer ‘ conduct unrelated to the employer’s performance of contractual obligations to the [Government].’”¹⁹³ Therefore, the Order was not regulatory because it “d[id] not address the use of PLAs on projects unrelated to those in which the Government has a proprietary interest.”¹⁹⁴ Thus, the court held that the President has constitutional authority to issue the Order as an expression of executive proprietary policy not subject to NLRA preemption.¹⁹⁵ BTCDC filed a petition for certiorari with the Supreme Court on October 2, 2002, but certiorari was denied in January 2003.

A. The Current Scope of Presidential Authority to Influence the Labor Market Via Executive Orders

As one commentator has noted, in *Reich*, “Judge Silberman declined to address the most important issue in the case—the scope of executive authority under the Procurement Act.”¹⁹⁶ After the D.C. Circuit Court of Appeals decision in *Allbaugh*, the scope of executive authority under the FPASA is now more clearly defined. Prior to the D.C. Circuit Court of Appeals decision in *Allbaugh*, any executive order the President may have issued that conflicted with *express* provisions of the NLRA would likely have been struck down as an unconstitutional executive encroachment into areas already legislated by Congress under *Garmon* preemption.¹⁹⁷ Additionally, it would also have been possible that even if an executive order was not preempted under *Garmon*, it may still have been struck down under *Machinists*, as was Section One of Executive Order 13,202 in the district court’s *Allbaugh* decision.¹⁹⁸

192. *Id.* at 35-36 (quoting *AFL-CIO v. Kahn*, 618 F.2d 784, 789 (D.C. Cir. 1979)).

193. *Id.* at 36 (quoting *Boston Harbor*, 507 U.S. 218 at 228-29 (1993)).

194. *Allbaugh*, 295 F.3d at 36.

195. *Id.*

196. Clay, *supra* note 169, at 2596.

197. *See supra* notes 150-67 and accompanying text.

198. *See supra* Part IV.

Furthermore, the D.C. District Court's reliance on *Reich* to invalidate President Bush's Order constituted continued judicial justification for "substantial judicial review of the means by which the government chooses to protect its proprietary interest" in areas where Congress has not expressly or impliedly enacted legislation to the contrary.¹⁹⁹ However, the D.C. Circuit Court of Appeals reversed its trend toward cabining the President's authority to affect labor relations via executive orders by holding that Executive Order 13,202 was a constitutionally valid exercise of the President's proprietary power.²⁰⁰

The scope of the President's power to influence the labor market via executive orders is now broader in scope than the D.C. Circuit previously determined under *Reich*. The Supreme Court may ultimately determine whether the judiciary may continue to rely on *Reich* to review and strike down a President's social or economic policy decision "solely on the basis of political differences."²⁰¹ Continued judicial reliance on this line of precedent could restrict presidents from "follow[ing] in the traditions of [former Presidents] Roosevelt, Eisenhower, and Kennedy in using the government's vast purchasing power to lead the nation"—especially when that power is used to implement "unpopular and . . . unwanted change in institutions, customs, peoples, and individuals."²⁰²

CONCLUSION

Twenty-two years ago in *AFL-CIO v. Kahn*, the U.S. Court of Appeals for the District of Columbia concluded that the FPASA granted the President broad discretion over procurement decisions—even if those decisions implemented broad social and economic policies such as affirmative action.²⁰³ However, in *Chamber of*

199. Kimmet, *supra* note 11, at 844. "The role of the judiciary would be expanded to include judgments of both policy and legality. Such a dual role is troubling as it gives the politically unaccountable judiciary the power to strike down legal policy decisions of the executive, even solely on the basis of political differences with the elected executive." *Id.*

200. *Allbaugh*, 295 F.3d at 36.

201. *Id.* at 843-44.

202. See LeRoy, *Presidential Regulation*, *supra* note 45, at 299-302.

203. See *supra* Part II.

Commerce v. Reich, that same court subsequently limited the President's authority to issue orders that influence the labor market through an unprecedented application of *Machinists* preemption to executive orders—thereby allowing the court to invalidate any executive order dealing with an area of labor relations on which the NLRA is silent.²⁰⁴

In *AFL-CIO v. Allbaugh*, the D.C. District Court further limited the President's power to influence labor relations by using *Machinists* preemption to invalidate Section One of President Bush's Executive Order 13,202.²⁰⁵ However, the D.C. Circuit Court of Appeals reversed this trend in holding that Executive Order 13,202 was a constitutionally valid exercise of the President's authority over federal procurement decisions—harkening back to its earlier holding in *Kahn*.

Cheralynn M. Gregoire

204. See *supra* Part IV.C.2.b.

205. See *supra* Part IV.D–E.