

OBSERVATIONS ON THE CONSISTENCY OF FEDERAL PROCUREMENT POLICIES WITH OTHER GOVERNMENTAL POLICIES

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Consistency thou art a jewel.

—An old saying

I

INTRODUCTION

The central importance of the federal procurement dollar to the American economy is one of the commonplaces of the day. Even more truistic is the fact that military supply is by far the largest segment of the procurement budget. As long ago as 1951, economist John Perry Miller observed that for more than a decade “military appropriations and expenditures have been the principal exogenous factors affecting the levels of employment, output, and expenditure in the economy.”¹ From the perspective of a law professor, Robert Braucher, the government contract is “an institution playing a major part in the economic, social, and political life of the nation.”² The federal contract (and its partner, the grant) is at once a technique for obtaining the goods and services required by a proliferating government; an economic force of great and probably growing magnitude; a political bone of contention continually gnawed over by divers members of Congress, as well as the magnet which draws assorted varieties of influence peddlers, “five-percenters,” and various other fauna to the banks of the Potomac; a matter of concern in the conduct of American foreign relations (*e.g.*, in the administration of the Buy American Act); the dynamo of the scientific-technological revolution that is transforming the structure of American society; a major factor in the economic viability of some of the most prosperous states (*e.g.*, California, Texas, and Arizona); the lifeblood of a number of our largest corporations, which could not operate without it; not an inconsiderable factor in the budgets of some of our most prestigious universities (for a few of them, it is probably indispensable to their viability, the counterpart of the land grant college of the nineteenth century being the federal grant university of this century); a device increasingly used to achieve certain regulatory ends of the

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¹ Miller, *Military Procurement Policies: World War II and Today*, 42 AM. ECON. REV. PAPERS AND PROCEEDINGS 453 (1952).

² Braucher, Book Review, 3 J. PUB. L. 247, 248 (1954).

public administration; and a means by which certain congressional statutes may be, and are being, circumvented.³

The federal contract is all that—and more. How much more cannot be stated with any degree of precision. Perhaps more important, the actual operative impact of federal expenditures in a quantitative sense is yet to be determined. Some statements can be made with at least partial validity, but it is, for example, not known precisely what the over-all economic effect of federal contracts is. (Perhaps it is asking too much of economists to develop such conclusions; then again, it may be that their tools are not adequate to the need.⁴) Nor is it known, on a lesser level, what in fact the impact of federal expenditures is upon employment (to take but one example). No one disputes that the federal contract is important, but the details are lacking. There is, thus, a requirement for a comprehensive analysis of the federal contract (and grant) in all of its aspects. The literature is increasing and is becoming more sophisticated, but the field is still wide open. This symposium is a contribution to a greater understanding of the socio-legal instrument of the public contract.

The object of this paper is to probe into one corner of the field, to raise and to pose some of the questions which seem relevant concerning the extent to which federal procurement policies and programs are consistent: (a) with certain basic societal goals; (b) internally, that is, as between themselves; and (c) externally, with other governmental objectives. Such answers as may be given and such conclusions as may be reached are mainly tentative in nature. The subject matter is too large and complex to be reducible to the scope of a brief article; hence the development below will be in the form of questions. An important threshold inquiry is the extent to which consistency may be expected in governmental policies hammered out in the American political process.

Before tackling that question, a definition and an assumption should be stated. Consistency, the dictionary tells us, means harmony or agreement or coherence among the parts of a whole—in the present case, the field of public policy. The question is whether federal procurement policies are congruous or compatible with the spectrum of public policies—those running from, on the one end, the highest and most abstract theories and principles of constitutional government to quite precise and specific statutory and administrative norms, on the other end. That question is not easily answered, except insofar as certain statutes or regulations may conflict in their express terms. The problem is the *impact* of given programs or policies—and that calls for a type of economic or sociological analysis which has

³ See Miller, *Administration by Contract: A New Concern for the Administrative Lawyer*, 36 N.Y.U. L. REV. 957 (1961), as well as many of the works cited elsewhere in the present article, dealing with the "nonprocurement" aspects of federal contracting.

⁴ For an economist's questioning of some of the tools of economic analysis, see OSKAR MORGENSTERN, *ON THE ACCURACY OF ECONOMIC OBSERVATIONS* (2d ed. 1963). See also MARK S. MASSEL, *COMPETITION AND MONOPOLY: LEGAL AND ECONOMIC ISSUES* (1962), for a development of the shortcomings of the manner in which lawyers and economists usually approach the government-business relationship.

not been produced by the social scientists and for which lawyers *qua* lawyers have no special competence.

Emerson once said in a famous sentence that "a foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines." He went on to assert in his essay on *Self-Reliance* that "with consistency a great soul has simply nothing to do." Great souls, whoever they may be in this workaday world, perhaps can be so aloof, but students of the public administration should be and lawyers must be concerned with the consistency question. Public policies can be cancelled out, or at least rendered partially nugatory, by others not compatible with them; and the legal rights and privileges of millions of persons (natural and artificial) may turn on some aspect of inconsistent federal policies or be greatly affected thereby.

The assumption is this: consistency in public policies is a Good Thing. The ideal would be a corpus of policies, interacting and mutually exclusive, consistent one with the other and with the entire body. This assumption is stated in an a priori fashion, although we hasten to add that the goal is not that of Emerson's "foolish consistency," whatever America's sage may have meant by that label.

To what extent is that ideal attainable, given the nature of the policy-making structure of American government? Are national policies, by some built-in aspect of the constitutional order, fated to be at least partially inconsistent? The short answer seems to be "yes." However, how the question is answered depends in the first instance upon which model of the governmental decision-making process one may have in mind. The testimony of several observers of the political process may be cited to underpin the affirmative answer given above. Thus, economist Ewald T. Grether, speaking in a somewhat different context, answered the consistency question in this way:⁵

We need to think clearly on this matter. Our democratic federal system with its mechanism of checks and balances and combination of centralization and decentralization in decision making, tends inherently to allow and even make for some inconsistencies. Furthermore, there is nothing in our constitutional protections that would guarantee full consistency. Our protections go only to basic freedoms and rights to avoid unreasonable discrimination. Within these broad and elastic boundaries, federal, state, and local legislators may and do enact all sorts of contradictory legislation in the name of freedom and public safety, the public interest and the general welfare. To some extent, the courts set limits—but never in terms of absolutes. Historically, "political balance rather than economic consistency has been the more powerful drive."

A moment's reflection by anyone familiar with the American constitutional system will reveal the validity of that statement, even though it refers mainly to the diversity of policies permitted by a federal system and does not get to the question of con-

⁵ Grether, *Consistency in Public Economic Policy With Respect to Private Unregulated Industries*, 53 AM. ECON. REV. PAPERS AND PROCEEDINGS 26 (1963). Cf. Lewis, *Ambivalence in Public Policy Toward Regulated Industries*, *id.* at 38. See also the commentary by Professors Robert F. Lanzillotti and Jesse W. Markham on those two papers, *id.* at 53, 57.

sistency within the corpus of national governmental policies. (Should such geographical diversity be deplored, particularly if the local policy-makers of the federal system deal with separate constituencies? Doubtless in the nineteenth century a number of different social and economic policies were feasible, but technological advance and organizational growth have now changed the picture. Thus, national American corporations, to cite but one example, are subject to a bewildering variety of tax policies, emanating from more than 100,000 separate tax-collecting units. In that respect, at least, the inconsistencies inherent in a federal system do produce knotty problems as well as many inequities. The manner in which the Supreme Court in recent years has been "nationalizing" such matters as education and criminal administration is testimony of a basic change. So, too, has Congress tended toward uniformity in its many grant-in-aid programs.)

Professor Emmette Redford, writing in 1958, reached basically similar conclusions to those of Dr. Grether. He, however, spoke of national policies themselves; in Redford's view,⁶ full consistency in public policy should not be expected.

In a dynamic, free, pluralistic society the balance of forces which play upon government and which interact within it is constantly shifting. Within government, moves made contemporaneously at different points may not be synchronized—may even have conflicting effects—and moves made over a period of time may reflect great changes in purposes and effects.

The governmental decision-making process, in Redford's opinion, is too sensitive to divergent outside forces "to hope or to fear for the congruency of policies anticipated in a vision of a planned society." While the stark dichotomy that Redford poses—between rampant fluidity in policy-making, on the one hand, and a "planned society," on the other—certainly does not dispose of the range of choices available in any given situation, his views as to the failure of public policy to achieve congruency are of interest.

In 1940 Professor Merle Fainsod, in discussing the federal process of regulation, asserted that the pattern tended to be one of a fluid equilibrium, one dynamic and always moving. Accordingly, public policy tended to be "the resultant of a parallelogram of operative forces; the substance of public policy is the resultant of the balance of power shifts." To Fainsod, government, far from being all-powerful, has to account for these power struggles and in fact tends to be "deprived of independent creative force," government institutions being "mere pawns in a struggle for supremacy."⁷ Such a system can scarcely produce consistent public policies. Professor Fainsod possibly overstated his case a bit, although how much so is debatable; as will be developed below, there are many who would agree with his analysis of how decisions are made.

⁶ Redford, *The Never-Ending Search for the Public Interest*, in IDEALS AND PRACTICE IN PUBLIC ADMINISTRATION 108, 136 (Emmette S. Redford ed. 1958).

⁷ Fainsod, *Some Reflections on the Nature of the Regulatory Process*, in PUBLIC POLICY: YEARBOOK OF THE HARVARD GRADUATE SCHOOL OF PUBLIC ADMINISTRATION 297, 298 (Friedrich & Mason eds. 1940). Cf. Lindblom, *The Science of "Muddling Through,"* 19 PUB. ADMIN. REV. 79 (1959).

Lawyers, too, have noted inconsistencies in public policies and in legal doctrine. There is the anomaly of the government suing itself, which seems to make sense to the bureaucracy but which tends to perplex the outsider. Thus, in 1949 the Supreme Court decided *United States v. Interstate Commerce Commission*,⁸ in which the Department of Justice sought to set aside a Commission ruling concerning freight rates and reparations allegedly due to the United States (*i.e.*, the War Department). The executive branch of government is not such a monolith that its intramural disputes do not at times get into the courts. In these instances, congruency of policy is, again, not attained.

Furthermore, within the law itself—the “common law,” *i.e.*, the judge-made law of any jurisdiction—inconsistencies in doctrine and in result may be found. (As between jurisdictions, they are of course obvious.) The law is not such a consistent whole as some believe and as classical jurisprudence maintained. When case outcomes are carefully analyzed, it may be seen that consistency *in result* is often not present within the confines of a given category of law—however much the results may be explained in judicial opinions in language that seems consistent on its face. The application of a “jurisprudence of consequences” will reveal, it is submitted, substantial conflicting results in cases roughly similar in their factual situations. (This may be seen most clearly, perhaps, in the manner in which courts interpret statutes. The running battle between legislature and court runs far back into history, and is still going on. While at least lip service is paid to legislative pronouncement, often a court will seem to act contrary to legislative will.)

Holmes believed that the growth of the law was in the direction of the erection of external standards of judgment (*e.g.*, in torts and contracts),⁹ to the extent that this is valid, subjectivity is supposedly eliminated and predictability (*i.e.*, consistency) in the law maintained. Even so, there seems to be at least partial validity in the view that legal principles tend to travel in pairs of opposites. Cardozo noted this tendency, although he limited it to a small percentage of the cases brought before the New York Court of Appeals.¹⁰ A much more sweeping acceptance of the proposition is asserted by Professor Myres S. McDougal, who maintains that a Principle of Doctrinal Polarity operates within the technical legal doctrine of any legal order.¹¹ Under this principle, parallel lines of inconsistent doctrine are available to the advo-

⁸ 337 U.S. 426 (1949), discussed in Stern, “Inconsistency” in *Government Litigation*, 64 HARV. L. REV. 759 (1951).

⁹ OLIVER WENDELL HOLMES, *THE COMMON LAW* 135 (1881). See MARK DEWOLFE HOWE, *JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS, 1870-1882* (1963), reviewed in Touster, *Holmes: The Years of The Common Law*, 64 COLUM. L. REV. 230 (1964).

¹⁰ See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921); *THE GROWTH OF THE LAW* 60 (1924): “Nine-tenths, perhaps more, of the cases that come before a court are predetermined—predetermined in the sense that they are predestined—their fate pre-established by inevitable laws that follow them from birth to death. The range of free [judicial] activity is relatively small”; *THE PARADOXES OF LEGAL SCIENCE* c. I (1928), discussing the “clash of opposites” and the antinomies of the law. Cf. Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037 (1961).

¹¹ See, for example, McDougal, *The Ethics of Applying Systems of Authority: The Balanced Opposites of a Legal System*, in *THE ETHIC OF POWER: THE INTERPLAY OF RELIGION, PHILOSOPHY, AND POLITICS* 221 (Harold D. Lasswell & Harlan Cleveland eds. 1962).

cate, and to the judicial decision-maker, for any given factual situation. (This seems to be obvious in constitutional adjudication, particularly when it is said that the task of the Supreme Court is to "balance the interests" involved in a case. But McDougal would apply it to any legal category.) The problem of the judge, then, is to choose between these conflicting legal rules.

That view of course stands in direct contradiction to the more traditional position of law and the judicial process—the position that for every social dispute that ends in litigation there is an ascertainable legal rule to guide the decision. This position once reflected legal orthodoxy, but it has long been under attack. The "pretense," as Dean Levi put it in 1948,¹² is that "the law is a system of known rules applied by a judge," but few, perhaps no, legal theorists of any stature now accept it. This is not the time nor the place to discuss the question further. Suffice it to say that for appellate courts, if not for trial courts, McDougal's position seems to offer a more accurate description of the adjudicative process than does the traditional view. (The adversary system of litigation may well be based on the Principle of Doctrinal Polarity, so far as appellate litigation goes.) If so—and this is our only point—inconsistency is imbedded in the law itself, not only as between the units of the federal system but also within any particular jurisdiction.

One underlying reason for the existence of inconsistency in legal doctrine is the fact that change is a "constant" in the social order. As the sociologist, W. Lloyd Warner, recently put it,¹³

The processes of change are in themselves integral parts of the social system, [and] the very nature of the system, if it persists in being what it is, must be in continual change. . . . Each part has within it something coming into being and something ceasing to be. . . . Our society cannot fulfill itself and be what it is at any moment in time unless it is always changing and becoming something else. . . . Innovations themselves are constantly being reorganized and revaluated in terms of the old. . . . nothing is static . . . all is movement and change.

Traditional jurisprudence, perhaps because it grew out of a relatively static society, never came to terms with the factor of change. It is only today, when the scientific-technological revolution is sweeping the world with hurricane winds that are altering time-honored institutions, that legal scholars have begun to recognize and to cope with the factor of change in the legal order.

The final statement is that of Judge Henry J. Friendly, who in the Holmes Lectures in 1962 called for "better definition of standards" by federal regulatory agencies. The agencies, in Judge Friendly's opinion, have failed to erect standards by which decisions are made; this has led to inconsistent and even erratic decisions, which in turn has made it highly difficult, if not impossible, for the lawyer to be able to counsel his client. He put the matter in these terms:¹⁴

¹² EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING I* (1949).

¹³ W. LLOYD WARNER, *THE CORPORATION IN THE EMERGENT AMERICAN SOCIETY* 18 (1962).

¹⁴ HENRY J. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION*

A prime source of justified dissatisfaction with . . . federal administrative action . . . is the failure to develop standards sufficiently definite to permit decisions to be fairly predictable and the reasons for them to be understood.

The reasons for the need for better definition of standards include: the "law should provide like treatment under like circumstances"; the "social value in encouraging the security of transactions"; and, most importantly for present purposes, "the clear statement of the standards the agency is applying if administrative adjudication is to be consistent with the democratic process."

In sum, then, considerable testimony exists that federal policies, within themselves, are at times inconsistent, that the constitutional system of federalism is productive of a diversity of policies only accidentally consistent, and even that the law itself in the form of judicial decisions may be said to conflict. That background will help to put the question of the congruity of federal procurement policies in perspective. We should not expect a higher degree of consistency in one segment—*i.e.*, procurement—of policy than in any other.

II

SOME CONSTITUTIONAL QUESTIONS

The over-arching question is the compatibility of the entire federal procurement program with the constitutional order itself and with the basic tenets of the American system of democracy. A beginning into this complicated problem may well begin with what doubtless is the most quoted statement by President Eisenhower:¹⁵

In the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex. The potential for the disastrous rise of misplaced power exists and will persist.

We must never let the weight of this combination endanger our liberties or democratic processes. We should take nothing for granted. Only an alert and knowledgeable citizenry can compel the proper meshing of the huge industrial and military machinery of defense with our peaceful methods and goals so that security and liberty may prosper together.

Mr. Eisenhower went on to point out that another development must also be watched and guarded against: the "domination of the nation's scholars" by federal research and development procurement. With the vastly increased expenditure by government in research and development, a government contract, said Mr. Eisenhower, "becomes virtually a substitute for intellectual curiosity."

In that statement, the former President raised the specter of what Professor Harold D. Lasswell had previously termed the "garrison state": a state "in which the specialists on violence are the most powerful group in society."¹⁶ The question we

OF STANDARDS 5-6, 21 (1962), discussed in Miller, "Malaise in the Administrative Scheme": *Some Observations on Judge Friendly's Call for Better Definition of Standards*, 9 How. L.J. 68 (1963).

¹⁵ The statement may be found in the N.Y. Times, Jan. 18, 1961, p. 22.

¹⁶ HAROLD D. LASSWELL, *THE ANALYSIS OF POLITICAL BEHAVIOUR* 146 (1948).

pose now is the extent to which, if at all, important segments of public policy are being made in fact, if not in theory, through the operation of a "military-industrial" complex welded together with the legal instrument of the federal contract. (An analogous question also arises in the area of science and technology, much of which is presently supported by federal money, either on contract or grant. Mr. Eisenhower, in the statement quoted above, went on to assert that Americans should guard against the "danger that public policy [may become] the captive of a scientific-technological elite.") In the three years since the warnings were uttered, much has been said and written about whether such a complex existed and, if so, what its implications were. Some commentators have seized upon the term, "military-industrial complex," and have maintained that not only does such a decision-making apparatus exist superimposed upon the constitutional structure of power in the national government, but that the power so exercised has aspects of impropriety. Thus journalist Fred J. Cook, in *The Warfare State*, sets forth an extremist view of the allegedly sinister nature of the military-industrial complex and the manner in which it has, in his view, been able to accelerate the arms race.¹⁷ And another journalist, Julius Duscha, writing in *Harper's Magazine*,¹⁸ asserts that a substantial part of military spending (via contract) is needless in that it contributes nothing to the nation's armed strength. Items are procured for reasons other than military strength, including economic growth and full employment.

The other point of view is perhaps best stated by two economists, Merton J. Peck and Frederic M. Scherer, in their book entitled *The Weapons Acquisition Process: An Economic Analysis*.¹⁹ Published in 1962, this book is a statement of the factors that go into choice of contractor by military contracting officers. The authors did not address themselves to a specific analysis of the "military-industrial complex" question but take for granted that given weapons systems that are procured are in fact necessary for national security.

The debate, if that it be, cannot be settled here, but it does involve fundamental aspects of the federal procurement process and the ends to which that process is being and should be put. The question is one of the highest importance to the

¹⁷ FRED J. COOK, *THE WARFARE STATE* (1962). Cf. DOUGLASS CATER, *POWER IN WASHINGTON* (1964).

¹⁸ Duscha, *Arms and the Big Money Men: Congressmen, Contractors, and the "Defense" Pork Barrel*, *Harper's Magazine*, March, 1964, p. 39.

¹⁹ MERTON J. PECK & FREDERIC M. SCHERER, *THE WEAPONS ACQUISITION PROCESS: AN ECONOMIC ANALYSIS* (1962). However, the authors do note and discuss the politics of arms acquisition insofar as choice of contractor is concerned; for example, they state on page 95: "Since the development and production of weapons is by far the largest single element of government spending, political variables are obviously reflected in the weapons acquisition equation." But they conclude (page 381): "In general, we would conclude that political considerations have not played a really major role in the choice of contractors for advanced weapons programs. . . . [P]olitical influences seldom lead to decisions which are seriously uneconomic from both short-run and long-run points of view."

It is fair to say that these conclusions are not buttressed with much, if any, empirical evidence. As the text of the present article indicates, see note 23 *infra*, the political game *is* played; is it to be considered an empty charade? Note, however, that Peck and Scherer address themselves to contractor selection; in this respect, the question is different from that which Duscha discusses, at least in part: the need—the requirement, in military terms—for the weapons themselves in the amounts in which they have been procured.

American constitutional order, and should, at the very least, be the subject of detailed and continuing studies by all interested in the proper use of power in government. We do no more here than pose the question, and note that it is still unanswered. But if, as some assert, decisions are made to procure certain military supplies ("weapons systems") for reasons other than strict national security considerations, it is appropriate to ask just what those other purposes might be. Mr. Duscha talks about the "work-relief" nature of some of the contracts, and Professor David Riesman has written about "military Keynesianism" in the same vein. The term "military W.P.A." has been bandied about. The charge is that the military contract is being used to further full-employment policies, economic growth, the continuing viability of certain corporations, as well as other non-security purposes.²⁰ This comes about through the operations of a relatively small group of people—a few congressmen, some high military officers, some corporation executives, and some officials within the executive branch. If this is the situation—and we do no more than describe the existence of such an opinion, without subscribing to its validity or invalidity—then it comes close to approximating what the late Professor C. Wright Mills called the "power elite" in his model of the governmental decision-making process—without, however, the sinister conspiracy features that Mills thought existed.

It will be recalled that Mills, in his book *The Power Elite*,²¹ maintained that major decisions about war and peace are made, not through the formal structures established by the Constitution, but through the deliberate actions of a small number of persons and groups acting in a sort of interlocking directorate he called "the power elite." This elite group, which Mills asserted really governs the United States, come from three basic groups: corporation executives, military officers, and high-ranking politicians. Whether such an elite exists and does exert power as Mills maintained has been, and is being, strongly disputed. Mills failed to provide any examples of the exercise of such power. There can be little doubt that the basis of power in America has been markedly changed since 1787, but the new structures of power in government cannot be wedged into such a simplistic model. What does seem to be somewhat closer to the mark, for present purposes, is the "subgovernment" that exists superimposed upon the constitutional structure with respect to the procurement of military supplies and other large expenditures via contract (*e.g.*, in space activities). Here it does not seem to be extreme to say that the federal contract has become the biggest political "pork barrel" in our history. Vast sums have been expended, in the words of one observer, not because of some "secret conspiracy of malefactors," in "repeated instances of wasteful expenditure, of proliferation of weapon systems without regard for military necessity, of failure to cut

²⁰ Duscha pointedly makes this charge in his article cited in note 18, *supra*.

²¹ C. WRIGHT MILLS, *THE POWER ELITE* (1956). See WILLIAM C. MITCHELL, *THE AMERICAN POLITY* c. 4 (1962) for a discussion of this and other models of the decision-making process. In analyzing the distribution of power in the American system, Mitchell identifies two other basic models: the "popular rule" and the "pluralistic group" models. He finds shortcomings in each of the three as an adequate description of the manner in which decisions are in fact made in the American polity.

costs on projects such as the nuclear plane even after they had demonstrably failed."²²

It should be noted—and emphasized—that there is a large constituency for the operation of the subgovernment of defense. The group includes not only those directly employed on government contracts and their families, but the millions of others who profit indirectly from large government payrolls in their vicinities. Thus Cater doubtless is correct that this (to the extent it exists) is no secret conspiracy, but the deliberate manifestation of public policy in the modern era.

Whatever the validity of Mills' thesis and whatever power is in fact exercised by the military-industrial complex for whatever purposes, the importance of the question to the American constitutional order is obvious. The basic decisional process established by the Constitution is warped to the extent that the complex exercises power in any respect and is distorted when used for non-military purposes. (That when used for non-military purposes it cannot be consistent with the purported objectives of the contracting process is also obvious.) Military Keynesianism may possibly be justified by some extreme reading of the Employment Act of 1946 and the governmental obligations stated there. But is the gain worth the price? Not only does the system pyramid defense costs, it expends public money for products which at times allegedly have little or no merit militarily. This diverts public funds from other areas of national concern—*e.g.*, education, slum clearance, transportation—in which the end-items do have some intrinsic merit. Defense must be had, and it is costly, but should it be made even more so through contracting for items of dubious value militarily?

There are a number of other questions of constitutional importance; these will be listed with merely brief discussions.

1. *The politicization of the contract-award process:* To the extent (if at all) that the thesis propounded by Cook and Duscha and Riesman is valid, the contracting process has been and is being politicized. Law, in the terms of statute or administrative regulation, is being flouted.

Other forces are at work to turn the federal contract into some sort of political football. There is the system whereby contract awards are announced for hometown consumption by members of Congress prior to the official releases by the Pentagon. This, in the words of the *Wall Street Journal*, is a "slick political stratagem" that enables military officers, executive officials, and Senators and Representatives "to bamboozle the naïve" back home. The members of Congress so favored are of course those in strategic positions on congressional committees or are stalwart members of the faithful of the party then in political power. The

²² DOUGLASS CATER, *POWER IN WASHINGTON* 42-43 (1964). Cater, a journalist, discusses *inter alia* what he calls the "subgovernment" of defense, and accordingly tends to agree with Duscha without taking the gloom-and-doom view of Fred J. Cook.

The concept of "waste" in procurement has two aspects: (a) the question whether given items are needed in the first place, and (b) lack of efficiency in production once an item has been put on contract. For the most part, Cater, Duscha, and Cook discuss the first aspect.

system is defended as a relatively harmless bit of political hocus-pocus which does not fool the knowledgeable person in Washington.²³

But it is not that harmless. Ostensibly getting a federal contract, according to one observer, may mean the difference for some congressman between being re-elected or not. What is at work here is a subtle erosive effect upon public confidence in the impartiality of the contracting process. The clear public impression is that the politician who announces a contract award is responsible for the award to a firm in his constituency. Political campaigns are run with slogans that "so-and-so can do more for the state" in getting federal contracts. The system is not consistent with the standards of good government in this country. The fact that both Republicans (under Eisenhower) and Democrats (under Kennedy and Johnson) do it is no excuse for its existence.

2. "*Contracting-out*" certain managerial tasks to private contractors: For a number of years the legal instrument of contract has been employed by government officials, not only in the Pentagon but elsewhere (including Congress itself), to obtain certain managerial services which were deemed not available under existing civil service laws. Much of this has come in the research and development area, and in advanced weapons technology. The system, described by Dean Don K. Price as "federalism by contract,"²⁴ is one which raises a number of difficult constitutional problems. These have been discussed elsewhere, and footnote references must suffice at this time.²⁵ Nevertheless, it may be well to underscore one aspect of this system: that of the intertwining of what purportedly is public and what ostensibly is private in many of the nation's major corporations and universities as to make the dichotomy meaningless. "Government, faced with public expectation that it will expand its functions but not expand its bureaucracy, freely farms out to private organizations staggering proportions of the public business."²⁶ The line between public and private is being blurred. Public and private functions have become so intertwined that in large segments of the economy business "is no longer merely a supplier but a participant in the management and administration of a public function." Government permeates business—and vice versa. We mentioned this above in discussing the so-called "military-industrial complex" and emphasize it now in noting the importance of the system of "contracting-out" and the problems it raises.

3. *The impact upon the employment relation of certain governmentally-imposed*

²³ Wall Street Journal, Oct. 14, 1963. See PECK & SCHERER, *supra* note 19, at 380-82 for other sanguine views of the politicization of the contract-award process.

²⁴ DON K. PRICE, *GOVERNMENT AND SCIENCE* (1954).

²⁵ See, for example, Miller, *Administration by Contract: A New Concern for the Administrative Lawyer*, 36 N.Y.U. L. REV. 957 (1961); *Symposium, Administration by Contract: An Examination of Governmental Contracting-Out*, 31 GEO. WASH. L. REV. 685 (1963); Price, *supra* note 24; Dupre & Gustafson, *Contracting for Defense: Private Firms and the Public Interest*, 77 POL. SCI. Q. 161 (1962); Cleveland, *The Blurred Line Between "Public" and "Private,"* in *ETHICS AND BIGNESS: SCIENTIFIC, ACADEMIC, RELIGIOUS, POLITICAL, AND MILITARY* at xxiii (Harlan Cleveland & Harold D. Lasswell eds. 1962).

²⁶ Cleveland, *supra* note 25, at xxv.

norms. These standards may emanate from Congress (*e.g.*, in such labor legislation as the Walsh-Healey Act and the Davis-Bacon Act) or they may be creations of the Executive (as in the industrial security program and the mandatory non-discrimination-in-employment clause).²⁷ Whatever their origin, their cumulative effect is intervention into the employment relation, which by statute is otherwise left to the private volition of collective bargaining, and thereby determination to some extent of who shall be hired by contractors and the wages and hours that may be paid. As such, they represent, whatever their individual or collective merits may be thought to be, important controls upon the operations of the federal contractor, controls which make up a system of regulation by contract. Less than thirty years ago the power of government so to condition its contracts was a question of considerable constitutional importance. The 1940 decision by the Supreme Court in *Perkins v. Lukens Steel Co.*,²⁸ which seems to say and has been interpreted by executive branch officials to mean that any conditions deemed desirable by one of the political branches of government may be attached to federal contracts, is the cornerstone of the legal authority for the practice.

Perkins involved the validity of the Walsh-Healey Act and administrative determinations of minimum wages made thereunder. The Court treated the problem as one of justiciability and decided that a contractor (or disappointed bidder, for that matter) did not have the requisite "standing" to challenge the validity of the Secretary of Labor's order. In an opinion far from noteworthy for its logic—the finding of lack of standing is a classic case of circular reasoning—Mr. Justice Black made a statement which has since been often cited to uphold placement of mandatory clauses in federal contracts: "Like private individuals and businesses, the government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases." Thus, the nondiscrimination-in-employment clause, under the terms of which the contractor must and does promise not to discriminate in his employment practices because of race, color, creed, or national origin, has been a part of federal contracts since 1942—and wholly by executive provenience. So, too, with the labor clauses, although they are of legislative origin. A judicial determination *on the merits* has never been made on any of them; thus

²⁷ The labor legislation was, for the most part, enacted in the 1930s when it was thought that Congress did not have power under article I, section 8 of the Constitution to regulate in certain areas of business. As such, the statutes are hangovers from the period of limited congressional power; but they have never been repealed and still exist on the statute books and in the contract clauses. Included *inter alia* are: the Walsh-Healey Public Contracts Act, 41 U.S.C. § 35 *et seq.*; the Davis-Bacon Act, 40 U.S.C. § 276(a); the Eight-Hour Law, 40 U.S.C. § 321 *et seq.* For the most part, these statutes tend to be anachronisms; it is questionable whether they serve any useful purpose today.

Other labor standards are derived from the Executive's power to condition contracts, upheld (according to officials in the executive branch) in *Perkins v. Lukens Steel Co.*, *infra* note 28. The nondiscrimination-in-employment clause and its implementation may be found in 1 CCH, GOV'T CONTR. REP. ¶ 6300 *et seq.* (1964); the industrial security program is discussed *infra* note 29.

See Miller, *Government Contracts and Social Control: A Preliminary Inquiry*, 41 VA. L. REV. 27 (1955); Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960).

²⁸ 310 U.S. 113 (1940).

the power of government to condition its expenditures might be said to be an unresolved constitutional question, at least as to its outward limits, even though in practice the usual contract is loaded with such examples of the regulatory use of the contracting power.

The most important challenge to the power to condition contracts came in *Greene v. McElroy*,²⁹ involving the industrial security program. Instituted after the Second World War to deal with the handling of contractor personnel considered to be "security risks," it was challenged in the *Greene* case by a person who had been discharged by a federal contractor on government order after findings that he had associated at one time with persons known to be members of the Communist Party. The Court, in a long and rambling opinion by Chief Justice Warren which discussed due process and the lack of confrontation by Greene of the witnesses against him, based its decision on the finding that the program was not authorized by statute nor by executive order; it, accordingly, held that Greene's discharge was improper. (In the second *Greene* case, decided in 1964, the Court held that he was entitled to monetary restitution, the Pentagon having refused to make payment to him despite the first decision.) The defect of authority was soon cured, in the eyes of Pentagon officials at least, by the issuance of Executive Order 10865, dated February 20, 1960.³⁰

Another example of the control power of government via contract conditions bears mention, although it has not as yet occasioned litigation—and may well not. Some 1963 regulations issued by the Atomic Energy Commission constitute controls not only of on-the-job activities of contractor personnel, but also regulate them during their off-duty time:³¹

Sec. 9-12.5404. *Outside Employment of Contractor Employees.*

Employees of a contractor are entitled to the same rights and privileges with respect to outside employment as other citizens. Therefore, there is no general prohibition against employees having outside employment. However, no employee of a contractor performing work on a full-time basis under an AEC contract shall engage in employment outside his official hours of duty or while on leave if such employment will

(a) in any manner interfere with the proper and effective performance of the duties of his position;

(b) appear to create a conflict of interests situation, or

(c) appear to subject the AEC or the contractor to public criticism or embarrassment.

Such a regulation raises several intriguing questions. There is, of course, the initial hurdle of ambiguity to be clarified: who—an employee or the contractor—is "performing work on a full-time basis"? If the regulation refers merely to an employee hired by a given contractor to work full-time on AEC work, it is one thing; but it is quite another if the contractor is the referent, for then the regulation

²⁹ 360 U.S. 474 (1959).

³⁰ The industrial security program is delineated in 2 CCH, GOV'T CONT. REP. ¶ 8600 *et seq.* (1964). The second *Greene* case is *Greene v. United States*, 376 U.S. 149 (1964).

³¹ 28 Fed. Reg. 2350-2353 (March 12, 1963). Emphasis is added.

appears to cover *all* employees of a contractor, whether or not they are individually working on an AEC contract. Consider what this does to, say, a university with an AEC contract. If the latter interpretation is correct, then all who draw salaries from the university could have their off-duty, outside work supervised by the AEC; the power, at least, is there, for under section 9-7.5006-6(c) of the same AEC regulations, the contractor must establish "such standards and procedures as are necessary to implement" the provisions of section 9-12.54, including the above-quoted segment, and these are subject to the approval of the AEC. Under this interpretation, any faculty member of the university which has an AEC contract is subject to the control of the AEC in his outside activities.

But if section 9-12.5404 refers only to the employee doing work full-time on an AEC contract, then what is involved is that his off-duty employment is in fact severely curtailed. What does "public criticism or embarrassment" mean? Does someone who "moonlights" a bit by driving a taxi subject his employer or the AEC to criticism or embarrassment? Note further that it applies to employees "on leave" from their principal employment; suppose a law professor who happens to be doing work on an AEC contract (we know of no such contracts) takes a leave of absence to engage in civil rights activities as a participant with the Congress for Racial Equality. Would this violate the regulation? Certainly there would likely be some "public criticism or embarrassment."

These are hypothetical problems, and perhaps may be dismissed as unreal.⁸² But they do represent control not only of the employment conditions of a federal contractor, but also of what employees do with their nonwork hours. One need not be thought to be a doom-crier to maintain that such controls as the AEC regulation could have great significance for what Clark Kerr, President of the University of California, calls the "federal grant multiversity."⁸³ Already the economic viability of a number of our most prestigious universities depends upon a continuing flow of federal funds in contracts and grants (*e.g.*, Cal Tech, MIT, the University of California, Yale), for, as Kerr notes, the bulk of federal funds via contract and grant have been concentrated in less than twenty institutions.⁸⁴ Just, as will be discussed below, the military services find it expedient to deal with a few big businesses, so the science and technology aspects of government find it desirable to deal with a baker's dozen "nonprofit" organizations. The point is not that this is *ipso facto* wrong or improper; it is, rather, that the federal government has, perhaps by design, enhanced the wealth of the already rich and prosperous universities and, in so doing, has made it possible for control via conditions attached to contracts and grants. Kerr discounts the idea that controls are now imposed, but the potential is there nevertheless.

⁸² We know of no application of these regulations to contractors or their employees. The control power is present, nonetheless, available for use should someone in the AEC consider a situation to warrant it.

⁸³ CLARK KERR, *THE USES OF THE UNIVERSITY* (1963).

⁸⁴ *Ibid.*

The constitutional problems of conditioning contracts refer not only to the general power to do so and in what instances; this, as stated above, seems to be an unresolved question in the sense that there has yet to be a definitive statement by the Supreme Court. Also involved are separation-of-powers questions: can the President act without prior congressional approval? Can he act in the face of congressional consideration of, but failure to reach a vote upon, certain issues? These latter questions are present in the constitutional basis of contractual conditions of purely executive derivation; they, too, may be said to be unresolved constitutional matters. Their consistency with the Constitution is still to be decided. Over and above the legal question, however, is the extent to which controls are placed upon the activities of what hitherto have been considered to be private organizations. A number of observers have noted the progressive blurring of the line between what is public and what purportedly is private, but not all have the bland assurance of President Kerr that all is well.

4. *Presidential impounding of appropriated funds.* Another unsettled constitutional question is the extent to which appropriations by Congress for designated purposes may be impounded, at least in part, by the Executive. Such a practice runs back as far as 1942 when President Roosevelt refused, in the interests of national defense, to spend certain sums.³⁵ Each President since then has asserted similar power, although substantial doubt exists both in Congress and within the executive branch of the legal basis for, and extent of, that power. The problem, of course, lies in refusing to contract for certain items or services deemed desirable by Congress, and thus differs somewhat from other instances in this categorization when the problem is whether the award of contracts is inconsistent with certain policies. Here the question is the extent to which the *refusal* to award contracts is inconsistent with the letter and spirit of the Constitution. (It is the subject of a forthcoming article by the senior author of this paper.³⁶)

5. *State taxation and regulation of federal contractors.* An unstated though nonetheless existent policy of the national government is to avoid state taxation and regulation of its contractors. The result is a direct impact upon the federal system in that substantial segments of the business community are withdrawn, at least in part, from state power over them. The Supreme Court has, by and large, gone along with this policy, and has thereby given it constitutional legitimacy. The last authoritative pronouncements came in 1963, in *Paul v. United States*,³⁷ and in 1958, in *Murray v. City of Detroit*.³⁸ In *Paul*, it was held that California could not fix the price of milk sold to the United States, even though the price-fixing scheme was

³⁵ For an account, see ROBERT ASH WALLACE, CONGRESSIONAL CONTROL OF FEDERAL SPENDING 144-47 (1960).

³⁶ Miller, *Presidential Power to Impound Appropriated Funds: An Exercise in Constitutional Decision-Making* (forthcoming).

³⁷ 371 U.S. 245 (1963). See Miller, *State Power Over Federal Contractors: A Problem in Federalism*, 11 VAND. L. REV. 175 (1957).

³⁸ 355 U.S. 489 (1958).

part of an otherwise constitutional program, while in *Murray* the Court, for the first time, held that federal property could in some situations be taxed locally.

Whatever the merits of these decisions (surely there is ground for questioning the desirability of such a complete denial of state power over the federal contractor) the consequence is that the contracting system has an adverse impact upon the federal system. It is diluted, and central power enhanced, to the extent that the taxing and regulatory power of state governments over businesses within their jurisdictions is denied. With the procurement budget at the size it has been and likely will continue to be, this impact is no small factor in the continuing erosion of traditional American federalism.

An allied situation comes in the award of federal contracts, particularly in research and development (R&D) which in recent years has displayed a pattern of certain states receiving the bulk of such awards with others getting little or none. For whatever reasons, California has received and continues to receive almost half of the R&D contracts awarded by the federal government; the remainder are concentrated in other states mainly along the East and West coasts.³⁹ The Middle West gets few, a situation which has caused anguished reactions from politicians from that area. The situation is a serious one, the problem vexatious; in the words of the House Select Committee on Research: "there is a growing feeling of concern that more than a generous share" of the R&D funds is "concentrated in a handful of states." "It is clear," said the Committee, "that our national security must not be impaired by regional considerations in research and development expenditures." However, the Committee went on to note that it is "equally clear that, to an extent perhaps not yet accurately measurable, these same expenditures have an extraordinarily powerful impact on the educational, industrial, and employment sectors of every region's vitality."⁴⁰

Thus contracting officials, for what are doubtless irreproachable military reasons, persist in treating the federal contract as any other contract and refuse to face up to the imbalances which occur in the economy. But the federal contract, when viewed institutionally, is not to be equated with the consensual agreements of private parties; it is something far more than that. Nevertheless, how the question of imbalance in contract awards is to be resolved is difficult to foretell. What can be said with accuracy is that the future will bring increased controversy over *where* contracts should be placed and *where* other federal money should be spent. The day is not far off when governmental officials will have to come to grips with the problem of regionalism and do something about it. Until they do so, the inconsistency of the federal procurement program with a strong and viable federal system may be shown on two fronts: first, in the area of state power over the contractor, and second, in the concentration of contract awards geographically.

³⁹ For a discussion of the manner in which space contracts are concentrated geographically, see the N.Y. Times, March 1, 1964, p. 1.

⁴⁰ STAFF OF HOUSE SELECT COMM. ON GOVERNMENT RESEARCH, 88TH CONG., 2D SESS., FIRST PROGRESS REPORT, FEDERAL RESEARCH AND DEVELOPMENT PROGRAMS 8 (Comm. Print 1964).

This has been an impressionistic view of the constitutional aspect of the consistency question so far as federal contracting is concerned. No attempt has been made to make an exhaustive listing of all constitutional problems nor to probe into any one of them in depth. The effort has been to pose the question and to suggest the need for deep and systematic research and analysis. By way of conclusion, it is valid to state that the system of federal contracting, as it has arisen and as it is now administered, raises some basic and troublesome problems going to the core of the problem of government in the modern age. This does not mean, however, that such problems are insurmountable and that they will not be resolved in a manner which will preserve the values inherent in a free society. After all, the American Constitution has always been a "living" document and has survived major changes before.⁴¹ Ancient ways and usages do not necessarily retain the wisdom that once was behind them; it is, as Holmes once remarked, odious to have no reason other than history to do a particular thing. The fact of new practices and procedures should not, merely because of their novelty, cause undue concern. In other words, inconsistency of present governmental practice (and constitutional doctrine) with the past does not in and of itself condemn it.

Nevertheless the fact remains that new ways of meeting problems, which by and large have been superimposed upon the constitutional order of the 1787 vintage, can and do raise age-old problems of *constitutionalism*, *i.e.*, of "good" government, of limited government, of ways to prevent despotism, of the preservation of human freedom. Thus while inconsistency with the past is to be expected in the practices of government, at least on some level, imbedded in the list of problems set forth above are challenges to the very nature of a free society. The dangers against which Mr. Eisenhower warned have not disappeared; if anything, they have become more evident. Saying this is not to denigrate those who labor in the procurement process; but it is well to remember the words of Mr. Justice Brandeis:⁴²

Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in the insidious encroachment by men of zeal, well-meaning but without understanding.

III

INTERNAL INCONSISTENCIES

It is convenient, in analyzing the federal procurement program for instances of inconsistency, to divide the policies that affect government contracting into two classes—internal and external. Those statutes and regulations, such as the small business set-asides, the labor surplus preferences, and the Buy American Act, whose

⁴¹ See Miller, *Notes on the Concept of the "Living" Constitution*, 31 GEO. WASH. L. REV. 881 (1963).

⁴² *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (dissenting opinion).

primary implementation is through the procurement program, may be considered as parts of the procurement program itself, thus internal forces. On the other hand, those statutes, regulations, and policies, such as the antitrust laws, free trade, and the civil service laws, whose purposes and primary effects are independent of the procurement program may be considered as external forces having consequences for the program (and vice versa). These classifications are not so neat as to preclude some overlap. They are desirable, however, primarily because, in attempting to resolve conflicts between the operative effects of various policies, resolution may be easier among the policies classified as internal than among the external. Internal policies are theoretically designed to complement the objects of procurement, though admittedly their primary purposes may be directed elsewhere. While some internal policies, such as those to be discussed here, are enacted as amendments to, or sections of, statutes aimed at aiding small business or alleviating unemployment or the like, they are written as part of the procurement-contract requirements and are included in the Armed Services Procurement Regulation.⁴³ On the other hand, external policies are seldom enacted with any analysis given to their effects on procurement laws or policies; thus, there is no prior attempt at resolving possible inconsistencies. Indeed, resolution conceivably might result in the purposes of one or the other being completely frustrated.

A "functional" analysis seems desirable, that is, one looking to the purposes of these statutes and regulations, rather than solely to their explicit language. It is their effects that are of interest—their impact in the social order. In federal contracting, the primary function is to acquire and dispose of property and use and dispense services; but various others exist. The functions of public policy implementation, involving such issues as undue influence and regionalism, have been examined earlier; here we concentrate only on the primary function of federal contracting, proceeding on the assumption that its ultimate object is "efficiency"—obtaining goods and services of the highest possible quality, at the lowest possible cost, and, particularly in Defense Department purchasing, with the speediest possible delivery. These objectives are not attained in any situation where a product or service must be purchased through methods which hamper efficiency. There are many situations where efficiency does not seem to be the most pressing desire. It is these which create inconsistencies.

Our focus initially will be upon the small business program, "full employment" policy, and the Buy American Act. The primary purpose of each of these policies, as distinct from their subsidiary melding, or lack of it, with the basic procurement objective, will be examined in order to ascertain how successfully it has been achieved.

⁴³ See, e.g., Small Business Act, 72 Stat. 384 (1958), 15 U.S.C. §§ 631-47 (1958), implemented by 32 C.F.R. §§ 1.700-708 (Supp. 1963).

A. The Small Business Program

Political pressures, plus a genuine concern that the existence of the small business firm as a viable and important segment of the economy was seriously threatened, led to measures during World War II to provide an ever-expanding program of technical and financial assistance to smaller firms. Of course, in one sense the anti-trust laws were aimed, at least partially, in the same direction. In any event, they were viewed by adherents of the classical-economic goal of a broadly-based supplier program as the most important bulwark against the evils of concentration. But these statutory measures were ineffective in the government contract area, chiefly, perhaps, because the monopolistic prohibitions of the Sherman Act⁴⁴ do not operate against the government.⁴⁵ Therefore, new approaches were sought, beginning in 1941 with the establishment of a unit in the Department of Commerce to study the small business segment of the nation's industries, determine the problems encountered by smaller firms because of their size, and plan a program of assistance. During the next eleven years the unit progressed through several stages, culminating in 1953 with the statutory creation of the first independent agency charged with the duty of promoting small business interests.⁴⁶ During this period the importance of the government contract as a method of promoting small business was recognized. Aid to small business, accordingly, is a goal set forth in both the Armed Services Procurement Act of 1947⁴⁷ and the Federal Property and Administrative Services Act of 1949⁴⁸—"it is the declared policy of the Congress that a fair proportion of the total purchases and contracts for supplies and services for the Government shall be placed with small-business concerns."⁴⁹

In the late 1950s, at the very time when oligopoly, if not monopoly, was dominating the economy (and even acquiring some intellectual approval), the Congress, perhaps in a last-ditch effort, extolled the merits of the "little man" and sought to counter the trend of economic development through expansion of the Small Business Administration's powers and duties. The Small Business Act of 1958 reaffirmed that free competition, "the essence of the American economic system," could not be realized "unless the actual and potential capacity of small business is encouraged and developed."⁵⁰ The Small Business Administration (SBA) became the principal spokesman within the government for the administration of efforts to insure small-firm receipt of "a fair share" of government contracts. Section fifteen of the new statute empowered the SBA and contracting officers to "set-aside"

⁴⁴ 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-3 (1958).

⁴⁵ See, e.g., *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135-36 (1961).

⁴⁶ See generally Barnes, *What Government Efforts Are Being Made to Assist Small Business?*, 24 *LAW & CONTEMP. PROB.* 3-8 (1959).

⁴⁷ 62 Stat. 21 (1948), as amended, 10 U.S.C. §§ 2301-2613 (1958), as amended, 10 U.S.C.A. §§ 2304-2681 (Supp. 1963).

⁴⁸ 63 Stat. 393 (1949), as amended, 41 U.S.C. §§ 251-60 (1958).

⁴⁹ *Id.* at 393, 41 U.S.C. at § 252(b).

⁵⁰ Small Business Act § 2(a), 72 Stat. 384 (1958). 15 U.S.C. § 631 (1958).

procurements for competition solely among small business concerns,⁵¹ defined, by regulation, generally as any firm employing less than 500 persons.⁵²

The basic objective of these measures is economic viability of the small business concern. Since the percentage of government contracts let to such firms is only one segment of the total program, this objective could possibly be achieved, while at the same time removing the "special privileges" accorded small firms and probably foreclosing their access to most primary or secondary government contracts, through such existing measures as tax benefits, loans, and investment credits. However, all of these depend upon a demand for goods or services created by sources outside of governmental control, whereas, through the contract mechanism, the government, at least theoretically, is able to expand the demand for small business output. The most direct form of government assistance to small business appears to be the procurement contract. Consequently, a decrease or even leveling in the percentage of government contracts being let to small firms, either immediately or ultimately through subcontracts, would compel the conclusion that the small business program has been at least a partial failure.

The latest available statistics suggest that such a leveling or moderate decrease has indeed occurred, although some observers have professed to note an upward trend. Nevertheless, there is little dispute that in recent years the small business "share" of government purchasing contracts has declined despite vigorous legislative and administrative efforts to stay this tendency. In fiscal year 1954, the Department of Defense's military procurement expenditures totaled over \$11 billion, and by fiscal year 1961 that amount nearly doubled. Yet during the same period the small business "share" dropped from 25.3 per cent to 15.9 per cent.⁵³ In fiscal year 1961, 100 companies received 74.2 per cent of military procurement expenditures. Though this share declined almost two percentage points in fiscal year 1962, the drop is probably attributable, not to a reversal of the trend, but "principally to a phasing

⁵¹ 72 Stat. 395 (1958), 15 U.S.C. § 644 (1958), which states in pertinent part:

"Small business concerns . . . shall receive any award . . . for the sale of government property, as to which it is determined by the Administration and the contracting procurement or disposal agency (1) to be in the interest of maintaining or mobilizing the nation's full productive capacity, (2) to be in the interest of war or national defense programs, (3) to be in the interest of assuring that a fair proportion of the total purchases and contracts for property and services for the government are placed with small business concerns, or (4) to be in the interest of assuring that a fair proportion of the total sales of government property be made to small-business concerns . . ."

⁵² Congress had defined a small business as one "which is independently owned and operated and which is not dominant in its field of operation," Small Business Act § 3, 72 Stat. 384 (1958), 15 U.S.C. § 632 (1958), but left the "detailed definition" to "the Administrator." *Ibid.* Pursuant to this the Small Business Administration promulgated regulations establishing a small business firm in government procurement as one "whose number of employees does not exceed 500 persons," 13 C.F.R. § 121.3-8(a)(1) (1963), or 1000 persons in "cases where there is a high concentration of output in a few large companies and there are a limited number having 500 or fewer employees," *id.* at § 121.3-8(c)(1). Recently while maintaining these two general categories, the Small Business Administration detailed separate requirements for different industries and in some cases now defines a small firm in terms of "average annual receipts" or output. 13 C.F.R. § 121-3-8 (Supp. 1964).

⁵³ Office of Secretary of Defense, Military Prime Contract Awards and Subcontract Payments, July-September 1962, in Suss, *Small Business and Government Procurement 1961*, 13 MERCER L. REV. 356 (1961-62).

down in some aircraft programs . . . and an increase in the procurement of equipment for the Army modernization program."⁵⁴ Those who foretell a contrary trend also mark the rise of the small business "share" of Defense Department procurement in fiscal 1962 to 17.7 per cent;⁵⁵ however, this is still a relative decline since 1954; more importantly, for the first half of fiscal year 1963, the small-firm total of prime military contracts dropped \$15.5 million dollars while the total of all prime military contracts rose \$724.5 million.⁵⁶

There appear to be several related causes for this continued low percentage. Discarding for the moment a possible lack of vigorous Small-Business-Act implementation by the government and a reluctance by large firms to share the profits, the major cause appears to be the inconsistency between the small business program and the requirements of government procurement, particularly military weapons systems and research and development. The quality, speed, and surety of delivery demanded for national security reasons have often necessitated virtual abandonment of contract-letting in this area to smaller firms.

The two major federal procurement statutes require bids to be let by "formal advertising," with "negotiation" the exception.⁵⁷ At one time the only exceptions were public exigencies or emergencies and contracts for personal services,⁵⁸ but the list has been expanded to a total of fifteen (seventeen in purchase contracts of the armed services and the National Aeronautics and Space Administration), including the very important field of research and development.⁵⁹ The basic preference for formal advertising, we are told, should lead to more competition and perhaps thereby aid the small-businessman. Senator William Proxmire has recently restated the standard belief that "with formally advertised bidding small business gets up to 50 per cent, whereas they get 10 per cent of the negotiated."⁶⁰ The 1960 Report of the Subcommittee of the Joint Economic Committee urged that "every effort should be made to use the time-honored, formally advertised, full

⁵⁴ STAFF OF SUBCOMM. ON DEFENSE PROCUREMENT, JOINT ECONOMIC COMM., 88TH CONG., 1ST SESS., BACKGROUND MATERIAL ON ECONOMIC ASPECTS OF MILITARY PROCUREMENT AND SUPPLY 9 (Comm. Print 1963) [hereinafter cited as BACKGROUND MATERIAL].

⁵⁵ *Id.* at 10.

⁵⁶ 6 1963 Gov't CONT. REP. ¶ 80,061.

⁵⁷ Armed Services Procurement Act of 1947 § 2(c), 62 Stat. 21 (1948), as amended, 10 U.S.C. § 2304 (1958), as amended, 10 U.S.C.A. § 2304(a)(14)(g) (Supp. 1963). Federal Property and Administrative Services Act § 302(c), 63 Stat. 393 (1949), as amended, 41 U.S.C. § 252(c) (1958). Often *competitive bidding* is used as a synonym for *formal advertising*; however, a recent article has contended that, at least prior to 1962, "competition is required in negotiated procurement. The law removes formality only in the means by which public procurement for the national government is achieved." McClelland, *Negotiated Procurement and the Rule of Law: The Fiasco of Public Law 87-653*, 32 *FORDHAM L. REV.* 411, 425 (1964).

⁵⁸ REV. STAT. § 3709 (1875).

⁵⁹ Armed Services Procurement Act of 1947 § 2(c), 62 Stat. 21 (1958), as amended, 10 U.S.C. § 2304 (1958), as amended, 10 U.S.C.A. § 2304(a)(14)(g) (Supp. 1963). Federal Property and Administrative Services Act § 302(c), 63 Stat. 393 (1949), as amended, 41 U.S.C. § 252(c) (1958).

⁶⁰ *Hearings on Impact of Military Supply and Service Activities on the Economy Before the Subcommittee on Defense Procurement of the Joint Economic Committee*, 88th Cong., 1st Sess. 37 (1963) [hereinafter cited as 1963 *Hearings*].

competitive bid procedure . . . in lieu of the subjective negotiation procedures⁶¹ . . . [since] genuine written bids . . . permit the free forces of competition to play . . ."⁶² Presumably this "free play" as a resultant of formally advertised bids is designed to aid small businesses.

However, it is not at all clear that formal advertising does aid in contract dispersion among small as well as large businesses. Because of such factors as (1) placing of high dollar-amount military orders in industries, such as aircraft, which are already dominated by large corporations; (2) incapability of many smaller firms to handle orders for complex or heavy equipment; (3) availability in large corporations of larger resources for publicity and lobbying; (4) greater reliability of larger firms because of past experience and know-how; and (5) greater number of executives from large corporations who are able to do work as government employees without compensation, advertised bids in military procurement result in most contracts being awarded to large corporations. Furthermore, formal advertising requires at least six ingredients: a foolproof specification; prior public announcement; award primarily on price; automatic rejection of any bid which differs in any significant detail from the invitation; public opening and reading; and award on a firm fixed-price or fixed-price with "escalation basis."⁶³ Otherwise, the contract must be negotiated. Because of the rigidity of these requirements, the percentage of negotiated bids in military procurement has remained very high (86.6 per cent of the total dollar amount in the first half of fiscal year 1964)⁶⁴ and, in fact, has increased since a low of 82.6 per cent in 1957.⁶⁵

A substantial portion of the negotiated contracts—from fifty-seven per cent in 1956 to 72.3 per cent in 1961⁶⁶—are used in the purchase of major "hard goods" (aircraft, missile systems, ships, tanks, weapons, ammunition, electronic and communication equipment). The purchase of these usually requires the "weapons system" type of procurement, whereby a single contractor is vested with the responsibility for developing and producing the end-items, including purchasing all needed components, and then either assembling the item in a government facility or arranging for a private prime contractor to assemble the components. As the prime

⁶¹ SUBCOMM. ON DEFENSE PROCUREMENT, JOINT ECONOMIC COMM., 86TH CONG., 2D SESS., REPORT ON ECONOMIC ASPECTS OF MILITARY PROCUREMENT AND SUPPLY 46 (Comm. Print 1960).

⁶² *Id.* at 23.

⁶³ BACKGROUND MATERIAL 75 (Statement of Secretary of Defense McNamara, App. 2).

⁶⁴ 6 1964 GOV'T CONT. REP. ¶ 80,061 (Summary of Directorate for Statistical Services, Office of Secretary of Defense, Military Prime Contract Awards and Subcontract Payments, July-December 1963). This total does represent a slight drop from 87.0 per cent during fiscal year 1963. *Ibid.*

⁶⁵ SUBCOMM. ON DEFENSE PROCUREMENT, JOINT ECONOMIC COMM., 88TH CONG., 1ST SESS., REPORT ON IMPACT OF MILITARY SUPPLY AND SERVICE ACTIVITIES ON THE ECONOMY 4 (Comm. Print 1963) [hereinafter cited as DOUGLAS REPORT].

It should be noted that the newly created Defense Supply Agency has had some success in spurring competitive procurement for "standard, common use" items. In the first six months of its existence 40.4 per cent of its procurement was by formal advertising. *Ibid.* By the end of the first three-quarters of fiscal year 1963 this percentage had climbed to 44.8 per cent. *Id.* at 35.

⁶⁶ Office of Secretary of Defense, Military Prime Contract Awards and Subcontract Payments, July-September 1962, in Suss, *supra* note 53, at 359.

contractor has responsibility for producing the end product, he is given a large measure of independence over the selection of his subcontractors and suppliers. This power, in the opinion of the Congressional Small Business Committee, has been exercised to the detriment of the small-businessman.⁶⁷

One major area for normal use of negotiated contracts is research and development.⁶⁸ Three-fourths of all military research and development is accomplished through contracts, totalling billions of dollars annually. The Armed Services Procurement Act, while not expressly granting research authority, is the statute under which the Department of Defense awards research and development contracts. These contracts were made an express exception to the formal advertising requirements due to the impossibility of drawing "up specifications in advance and [making] firm fixed-price contracts with selection based on price alone."⁶⁹ Compared to production contracting, research and development contracting entails more vague quality preferences, performance rather than design specifications, tentative delivery schedules, and, of course, no assurance of product completion, at least in the form contemplated. Assistant Secretary of Defense Morris has stated:

In research and development and in the production of aircraft and missile systems, we have very limited opportunities to make awards on the basis of price competition. These two segments accounted for \$12.3 billion, or 44 per cent, of our procurement awards in fiscal year 1962. Research and development can rarely be placed under a firm fixed-price contract, which is a requisite to price competition. There are several reasons for this. First, the unknowns and the risks are far too great for most contractors to assume, and second, we are buying creative effort where rare technical competence and technical concepts of bidders are of greater importance than price alone, which is at best a matter of estimation in such work. In these situations an undue emphasis on cost reduction may deteriorate the quality of the development. Third, the production of new aircraft and missile systems cannot be economically procured on the basis of price competition due to the high start-up costs, and the leadtime required to introduce a new production source after a long period of development.⁷⁰

Thus selective negotiation is almost an imperative here. Twenty-five per cent of the research and development in the United States is through the government "contracting-out" program, which has reached six billion dollars per year—19.4 per cent of all negotiated procurement in fiscal 1962.⁷¹

While approximately eight per cent of the Department of Defense research and development funds go to education and nonprofit organizations,⁷² forty-three per cent

⁶⁷ See H.R. REP. No. 271, 85th Cong., 2d Sess. 151 (1959). It has been charged recently that there is no express authority for the weapons system type of procurement. See McClelland, *supra* note 57, at 415.

⁶⁸ This broad phrase encompasses concept studies, feasibility studies, design and development, prototype production, production engineering, and final production.

⁶⁹ 1963 *Hearings* 21 (remarks of Secretary of Defense Robert McNamara).

⁷⁰ 1963 *Hearings* 41. (Emphasis omitted.)

⁷¹ BACKGROUND MATERIAL 40.

⁷² OFFICE OF THE SECRETARY OF DEFENSE, FIVE YEAR TRENDS IN DEFENSE PROCUREMENT 1958-1962, at 60 (1963) [hereinafter cited as *PROCUREMENT TRENDS*].

are placed with industrial contractors using their own facilities.⁷³ Usually these have been the almost exclusive province of the manufacturing titans, particularly when complex weapons systems such as the TFX aircraft are desired. Some critics, including Professor Eugene V. Rostow, have maintained that research and development is handled better and cheaper by small firms.⁷⁴ Nevertheless, weapon systems development contracts, because of their very size and complexity, must be let to large prime contractors in the hope that subcontracts will be parceled out to smaller firms through the Small Business Subcontracting Program, administered under section 8(b)(5) of the Small Business Act⁷⁵ and implemented by the Armed Services Procurement Regulation. All government contracts valued at over \$500,000 must include a "Small Business Subcontracting Program" clause.⁷⁶ This provides, among other things, that prior to the letting of a subcontract where there has been no small firm solicitation, the prime contractor must receive the contracting officer's consent, if such is required by a "Subcontracts" clause. The latter will investigate the availability of small firms and may require their consideration. However, the effectiveness of this provision appears to be greatly weakened by a clause which reads that "in no case will the procurement action be held up when to do so would, in the Contractor's judgment, delay performance under the contract."⁷⁷ Thus the very person to whom the contracting officer must apply pressure has a partial option to negate the effect of this pressure. And often, due to the prime contractor's natural inclination to produce as many subsystems and components as possible (thus retaining the profit), even though available small firms might produce them faster, better, and at a lower cost, the subcontracting program, like the set-aside program, has largely failed.

It is, in brief summary, entirely valid to say that, in spite of governmental efforts to aid small business, there is a marked concentration of government contracts in large corporations. The very existence of this concentration seems to demonstrate that if the small business program achieved the full measure of its proponents' original expectations, assuming the concentration to result from competitive inefficiencies in a free market, a higher total cost basis would necessarily be introduced into the government procurement program.

B. The Program to Alleviate Unemployment

Chronic and persistent unemployment and underemployment has been a specter on the American economic scene since the depression days of the 1930s. Several approaches have been suggested as solutions. Most have been founded on the con-

⁷³ Lazure, *Why Research and Development Contracts Are Distinctive*, 17 FED. B.J. 255, 259 (1957).

⁷⁴ E. V. ROSTOW, *PLANNING FOR FREEDOM* 268 (1959).

⁷⁵ 72 Stat. 390 (1958), 15 U.S.C. § 637(b)(5) (1958), as amended, 15 U.S.C. § 637(d) (Supp. III, 1961).

⁷⁶ 32 C.F.R. § 1.707-3(b) (Supp. 1963). "Prime contractors who are to be awarded contracts that do not exceed \$500,000 but which, in the opinion of the purchasing activity, offer substantial subcontracting possibilities, shall be urged to accept the clause." *Ibid.* (Emphasis added.)

⁷⁷ *Id.* at § 1.707-3(b)(5).

cept of federal "pump-priming" as the most immediately effective stimulant to economic prosperity sufficient to soak up or redistribute surplus labor. One of the more recent means developed to pump federal government funds into the economy in the specific areas of "persistent" or "substantial" unemployment⁷⁸ is to designate certain geographic areas of the country where labor surpluses exist for preference in the award of procurement contracts and subcontracts. Firms in these areas are preferred so far as is consistent with efficient performance and at prices no higher than those obtainable elsewhere.

The program was launched in the early fifties by Secretary of Defense George C. Marshall, in a directive to the Secretaries of the military departments, seeking to effectuate a broadened mobilization base.⁷⁹ His action was reinforced by the Office of Defense Mobilization Policy No. 1⁸⁰ and by a presidential directive on manpower mobilization, requesting that "wherever feasible . . . production facilities, contractors, and significant subcontractors . . . be located"⁸¹ at existing sources of manpower. The Department of Defense initially resisted, contending that the requirement in the Armed Services Procurement Act of 1947 that "awards shall be made . . . to the responsible bidder whose bid . . . will be most advantageous to the Government, price and other factors considered"⁸² prohibited it from awarding a contract to other than the lowest qualified bidder. However, after the Comptroller General reversed his earlier position and validated the payment of price differentials,⁸³ the Director of the Office of Defense Mobilization issued Defense Manpower Policy No. 4 (DMP-4).⁸⁴ Under the original wording of DMP-4, both the Defense Department and the General Services Administration were authorized to award bids in designated unemployment areas even if the price were higher. This authorization, while apparently never actually utilized, provoked vocal opposition, particularly from such regions as the rapidly industrializing South, where new industry was being established in response to lower labor and material costs. The opposition, aided by lingering doubt as to the statutory authority and perhaps even doubt as to the constitutional basis of DMP-4,⁸⁵ forced passage, as a rider to the 1954

⁷⁸ Regions experiencing severe unemployment are classified by the Department of Labor into two basic categories, "Areas of Substantial and Persistent Labor Surplus" and "Areas of Substantial Labor Surplus," with the former receiving contract-award preference over the latter. See 32 C.F.R. § 1.801-2(a) and § 1.804-1(b) (Supp. 1963).

⁷⁹ Dec. 18, 1950.

⁸⁰ "Background of Defense Manpower Policy No. 4 in Operation," Minutes of Office of Defense Mobilization, Executive Office of the President, Oct. 1, 1952.

⁸¹ National Manpower Mobilization Policy, Jan. 17, 1951, § 7(1). See generally Dillon, *Channeling Government Contracts Into Depressed Areas*, 16 THE WESTERN POLITICAL Q. 279 (1963).

⁸² § 3(b), 62 Stat. 23 (1958). A nearly identical provision continues in force today, § 2305(b), 70A Stat. 130 (1956), as amended, 10 U.S.C. § 2305(c) (1958).

⁸³ 31 DECS. COMP. GEN. 279 (1952). See Maness, *The Emergence of the Current Interest in the Defense, Small Business and Labor Surplus Area Subcontracting Programs*, 18 MILITARY L. REV. 119, 134-35 n.50 (1962); also Dillon, *supra* note 81, at 280 and 280 n.7.

⁸⁴ "Placement of Procurement and Facilities in Areas of Current or Imminent Labor Surplus," 17 Fed. Reg. 1196 (1952).

⁸⁵ See Miller, *Government Contracts and Social Control: A Preliminary Inquiry*, 41 VA. L. REV. 27, 41-42 (1955). For a recent attack on the legality of set-aside procurement, both labor surplus and small

Defense Appropriations Act, of a provision which prohibited "payment of a price differential . . . for the purpose of relieving economic dislocations."⁸⁶ A similar provision has been re-enacted every year since.⁸⁷ Also abolished was the concomitant policy of bid-matching, whereby a firm in a labor surplus area could obtain a contract for the entire requirement of any one procurement by matching the best "outside" offer. Substituted was the present approach—the system of "partial set-asides."

Under this system a specified portion of the quantity desired is reserved for exclusive negotiation with firms in labor surplus areas, provided certain conditions are met. The authority for negotiation, rather than formal advertising, is derived principally from exceptions (1) and (16) of the seventeen exceptions to formal advertising in the Armed Services Procurement Act of 1947.⁸⁸ These two exceptions refer to purchases (1) under a declared national emergency (existing now) and (16) for the maintenance of the mobilization base of national defense in case of an emergency. In determining the feasibility of making this partial set-aside, the contracting officer must decide that "the procurement is severable into two or more economic production runs or reasonable lots [and that] one or more labor surplus area concerns are expected to have the technical competency and productive capacity to furnish a severable portion . . . at a reasonable price,"⁸⁹ which now can be no higher than the highest price awarded on the unreserved portion.⁹⁰ Because of this last requirement, firms in labor surplus areas are considered for negotiation only if their bids on the reserved portion are at a unit price within 120 per cent of the highest unreserved portion awarded.⁹¹ These set-asides enjoy preference over the small business set-asides; and "in case of a tie bid, a firm located in a labor surplus area is given preference, even though the procurement may not have been set aside for labor-surplus area firms."⁹²

The subcontracting program is considered to be the most important method of furnishing procurement assistance to labor surplus areas.⁹³ Under DMP-4 all pro-

business, see McClelland, *supra* note 57, at 448-56. He states that "the legislative history of the national emergency exception . . . clearly shows that it is designed *not* to permit the payment of price differentials or to promote socio-economic objectives . . . but solely to provide procedures . . . requiring . . . action at the time the emergency is declared as not to permit the delay incident to advertising." *Id.* at 449.

⁸⁶ 67 Stat. 357 (1953).

⁸⁷ See, e.g., Dep't of Defense Appropriation Act, 1964, § 523, 77 Stat. 254.

⁸⁸ § 2304(a)(1), (16), 70A Stat. 128 (1956), 10 U.S.C. § 2304(a)(1), (16) (1958). See generally SUBCOMM. ON RETAILING, DISTRIBUTION, AND MARKETING PRACTICES, SENATE SELECT COMM. ON SMALL BUSINESS, 88TH CONG., 1ST SESS., REPORT ON IMPACT OF DEFENSE SPENDING ON LABOR SURPLUS AREAS 12-13 (Comm. Print 1963) [hereinafter cited as HUMPHREY REPORT].

⁸⁹ 32 C.F.R. § 1.804-1(i)-(ii) (1961), as amended, 32 C.F.R. § 1.804-1(a)(ii) (Supp. 1963). This last amendment liberalized the former requirement allowing a set-aside only if two or more concerns met the qualifications, but in the process removed one more cloak of competitive bidding.

⁹⁰ 32 C.F.R. § 1.802 (1961).

⁹¹ 32 C.F.R. § 1.804-2(b) (Supp. 1963).

⁹² HUMPHREY REPORT 8.

⁹³ "Approximately half of all prime contracts for military hard goods are sub-contracted" PROCUREMENT TRENDS at iv.

curement agencies must encourage, though with few exceptions they cannot force, prime contractors to award subcontracts to firms performing a substantial portion of the contract in these areas. The prime contractors, in contracts valued between \$5,000 and \$500,000, undertake "the simple obligation of using [their] best efforts" to place subcontracts with manufacturing concerns having one-half of their contract costs in areas of substantial unemployment.⁹⁴ Contracts over \$500,000 require a "Labor Surplus Subcontracting Program" clause similar to the small business subcontracting clause.⁹⁵

As thus organized and with the congressional admonition that "the procurement agencies energetically implement [DMP-4] by assuring that firms in distressed areas participate to the maximum extent . . ."⁹⁶ the program superficially appears to be a positive cure. However, like many panaceas for economic shortcomings, it apparently has been far less than successful in achieving its principal objective. While it may be impossible to measure accurately the effectiveness of efforts to channel contracts into depressed areas owing to the complex of shifting factors and economic imponderables, the following figures portray a definite trend and force the conclusion that this program has failed to attain even its initial objective of reorienting a significant percentage of government procurement contracts towards the unutilized sectors of the labor market. Although the present unemployment rate of 5.5 per cent⁹⁷ obviously is due principally to factors other than failure of the labor surplus preference program, the figures on the percentage of government contracts in these areas clearly demonstrate that, at the least, the program has not mitigated the extremely uneven distribution of contracts between regions of relative full employment and those with serious unemployment. In fiscal 1962 only four per cent of all the prime defense contracts were placed in areas of persistent and substantial labor surplus, while less than thirty per cent were located in areas of substantial labor surplus. More importantly, only 0.24 per cent of these contracts in persistent and substantial labor surplus areas and 0.42 per cent in substantial labor surplus areas were the resultant of set-asides—and these figures represent a decrease since fiscal 1961.⁹⁸

Several causes have been suggested for this surprisingly low percentage, including the elimination of total set-asides by disallowance of a price differential, a shift in the work force "from several types of employment to engineering employment,"⁹⁹ and the reluctance on the part of officials charged with the program's implementation. It is probably true that "at the operating level the officials with the authority to make

⁹⁴ 32 C.F.R. § 1.805-2 (Supp. 1963).

⁹⁵ *Id.* at § 1.805-3.

⁹⁶ *Hearings on Area Redevelopment—1961 Before the Subcomm. of the Senate Comm. on Banking and Currency*, 87th Cong., 1st Sess. 59 (1961).

⁹⁷ The 5.9 per cent rate of a year ago has dropped, reaching a sixteen month low of 5.4 per cent in February 1964. *Wash. Post*, March 7, 1964, § A, p. 4, col. 4.

⁹⁸ HUMPHREY REPORT 27.

⁹⁹ *Id.* at 4.

awards and set-asides . . . were frequently too busy, too satisfied with established routine, and too apt to select well-known producers to bother with the extra work involved in partial set-asides which might be awarded to an unknown firm and might require extra surveying and examination."¹⁰⁰ Likewise, it may be that the shift in the type of goods being purchased by the Defense Department—from tank-automotive vehicles, weapons, ammunition, and production equipment to missiles, electronic equipment, and research and development contracts—has caused a shift in the work force towards engineering employment.¹⁰¹ The chief villain, however, appears to be the restriction annually imposed by Congress in section 523 of the Defense Department Appropriations Act "that no funds herein appropriated shall be used for the payment of a price differential on contracts . . . for the purpose of relieving economic dislocations."¹⁰² This provision severely handicaps the program since the partial set-aside which currently is used requires that the total quantity of goods to be bought must be divisible into two or more economic production runs. "The variation in quantity requirements is such that the percentage *which can be divided will never be large enough to make this system a technique of major significance.*"¹⁰³ One of the more vocal critics, Senator Hubert Humphrey, recently introduced an amendment to the fiscal year 1964 Defense Department appropriations bill to initiate a program of total set-asides comparable to that of the small business program.¹⁰⁴ However, despite an impressive list of co-sponsors, the amendment failed.

Though total set-asides, particularly if used in conjunction with the recent recommended procedures for stepping-up the subcontracting program,¹⁰⁵ undoubtedly will increase the percentage of prime contracts awarded to these areas, just how large an increase is difficult to predict. A main obstacle to increased dispersion under this program is the change in the types of goods purchased by the Defense Department. Particularly significant is the increased role of research and development, a trend almost certain to continue. These contracts, for a variety of reasons, have been concentrated heavily in states with average unemployment,¹⁰⁶ such as California (forty per cent of the research and development contracts awarded in fiscal year 1962), New York (eleven per cent), and Massachusetts (six per cent),¹⁰⁷ while the East North-Central states, experiencing fairly severe unemployment, have "lost" 6.1 billion dollars in total defense contracts since the Korean military action.¹⁰⁸

¹⁰⁰ Dillon, *supra* note 81, at 287-89.

¹⁰¹ See HUMPHREY REPORT 4.

¹⁰² Dep't of Defense Appropriation Act, 1964, § 523, 77 Stat. 254.

¹⁰³ *Hearings on Impact of Defense Spending on Labor Surplus Areas Before the Senate Select Comm. on Small Business*, 87th Cong., 2d Sess. 70 (1962) (remarks of Ronald M. Linton, Director of Economic Utilization Policy, Dep't of Defense).

¹⁰⁴ H.R. 7179, 88th Cong., 1st Sess. (1963).

¹⁰⁵ See HUMPHREY REPORT 14-24 (a list of over 30 recommendations by the Humphrey Subcomm.).

¹⁰⁶ See PROCUREMENT TRENDS at vi; also 109 CONG. REC. 14304 (daily ed. Aug. 15, 1963) (listing of areas of persistent and substantial labor surplus—compare Michigan, 43, with California and New York, 11 each).

¹⁰⁷ BACKGROUND MATERIAL 41-42.

¹⁰⁸ HUMPHREY REPORT 5.

The subcontracting program has to date apparently enhanced "the selective distribution of government contract funds, rather than spread them uniformly around the country"¹⁰⁹ for the same reasons that the small business subcontract program has failed to achieve its desired objective. The Pacific region received not only 26.9 per cent of military prime contracts in fiscal year 1961 but also 42.4 per cent of the subcontracts let by prime contractors' facilities.¹¹⁰

Of course, the proposed total set-aside program is intended to offset this by providing for negotiated contracts and a government-supervised reallocation. As pointed out above, this might not be effective. More significant, however, is the probable result if total set-asides are initiated and are successful. The cost to the Defense budget is bound to be increased and the basic procurement objective of highest quality at lowest possible price thwarted, because of the utilization of resources shown previously to be inefficient. Also, importantly, any increase in the scope of the program will certainly add to the additional administrative costs incurred in activating and continuing the labor surplus program. The largest percentage of such costs are directly traceable to the added personnel.

Senator Humphrey argues that "total set-asides are no more likely to result in the payment of a price differential than negotiated contracts. . . ."¹¹¹ Assuming this to be true, it demonstrates merely that total set-asides for labor surplus will continue to frustrate the aim of lower defense costs through competitive bids as much as do negotiated bids. Furthermore, the utilization of older, existing facilities prevents the replacement of obsolescent plant equipment. As the post-World War II resurgence of the German iron, steel, and shipbuilding industries demonstrates, where very large scale adjustments are necessary, it is often more expensive and time-consuming to replace existing facilities with more advanced equipment (*i.e.*, in the Mid-West) than to start anew from the ground up (as in California). Additionally, since many of the new employment positions must be filled by engineers, or skilled workers, and not unskilled or semi-skilled, the reallocation may add to the unemployment figures rather than subtract. The lack of skilled manpower, especially engineers—one of the reasons for the shift to California, and so forth—will still exist in the labor surplus areas and severely handicap efficient research and development and even production. Though Congress has taken recent steps to retrain, through section sixteen of the Area Redevelopment Act¹¹² and the Manpower Development and Training Act of 1962,¹¹³ these ameliorative measures hardly seem sufficient, at least immediately, to offset the lack of highly skilled workers.

Moreover, if the small business program is viewed as compatible with the ultimate

¹⁰⁹ 2 STANFORD RESEARCH INSTITUTE, THE INDUSTRY-GOVERNMENT AEROSPACE RELATIONSHIP, MAY 1963, at 58 (unpublished) (prepared for Aerospace Industries Ass'n of America, Inc.).

¹¹⁰ *Id.* at 58 (Table D-III).

¹¹¹ 109 CONG. REC. 14304 (daily ed. Aug. 15, 1963).

¹¹² 75 Stat. 58 (1961), 42 U.S.C. § 2513 (Supp. III, 1962). See H.R. REP. No. 186, 87th Cong., 1st Sess. (1961).

¹¹³ 76 Stat 23 (1962), 42 U.S.C. §§ 2571-2620 (Supp. IV, 1963).

aim of procurement policy, at least to the extent that a wider base with less concentration tends to lower purchasing costs, then inconsistency between it and the labor surplus program resulting in at least partial frustration of the small business program is a detriment to basic procurement policy.¹¹⁴ That frustration does still exist is evidenced by the priorities for set-asides which favor persistent labor surplus area concerns, even if they are not small businesses, before favoring "outside" small business concerns.¹¹⁵ The labor surplus reduction program, therefore, may in application favor concentration at the expense of wider dispersion and presumably to the detriment of competition, which supposedly leads to lower procurement costs. And lastly, it should be noted that the Armed Services Procurement Regulation provides that when an entire industry is economically depressed, the Director of Civil and Defense Mobilization, under authority of DMP-4, may establish preferences on an industry-wide basis rather than geographic.¹¹⁶ Such a preference could run counter to the dispersion of contracts to areas of labor surplus since an area with distressed companies in one industry could be a non-labor surplus area as a whole.

Whatever is the more desirable objective—maximum efficiency in government procurement or maximum employment—it is clear that at present neither policy is obtainable even in theory. The inability of government planners to predict the result of the many diverse, obscure, and illusive factors that coalesce to produce a given policy effect prevents this policy from ever attaining its full objective. A fortiori when two policies tend toward conflicting results in theory, the attainment of either objective becomes that much more difficult. This is nowhere more evident than in the area of the labor surplus preference program.

C. Protectionism and the Buy American Act

One of the most complex areas of governmental policy is that centering around the procurement of foreign goods, whether for home or overseas consumption. Interwoven in this area are three diverse, and often either theoretically or practically conflicting, policies: the basic aim of procurement purchases—lowest possible price and highest possible quality; the panorama of meanings and emotions attached to the elusive phrase "free trade"; and "protectionism" as embodied in the Buy American Act.

There is a paucity of meaningful statistics demonstrating the total increase in procurement costs occasioned by protectionism, though numerous specific examples exist. Most of the studies that have examined the Buy American Act vis-à-vis free trade have concentrated on a finding of inconsistency and the resultant economic burden on the whole United States economy. However, the very fact that the act

¹¹⁴ See Maness, *supra* note 83, at 138, where he cites a 1952 file memorandum from the Office of Defense Mobilization expressing concern that the small business set-aside program "might be upset if large concerns within distressed areas received priority over small concerns outside such areas."

¹¹⁵ 32 C.F.R. § 1.804-2(b) (Notice of Labor Surplus Area Set-Aside) (Supp. 1963).

¹¹⁶ 32 C.F.R. § 1.806-1 (1961).

favors higher domestic bidders over foreign suppliers indicates that government purchasers procure less efficiently, in an economic sense, under the operation of these policies. Granting this, the proponents of protectionism nevertheless contend that the interests of national security and the goal of full employment, among others, argue for continuation of protectionism.

Nationalism, combined with widespread unemployment and underselling of domestic goods by foreign goods and buttressed by plausible arguments that national security dictates military procurement domestically to insure the availability of replacement parts, and so on, provides the impetus for legislation similar to the Buy American Act of 1933.¹¹⁷ Its sponsors were motivated by at least four, not necessarily complementary, desires. They were primarily concerned with relief from the unemployment of the Depression and concurrently interested in placing dampers on German competition in the domestic heavy electric equipment industry. Additional motivation was readily supplied by a retaliatory desire against foreign "buy-at-home" policies and by the discovery of a loophole in an existing Buy American statute¹¹⁸ that, supposedly erroneously, allowed the Postmaster General to avoid favoring the domestic cotton industry.¹¹⁹ Not surprisingly the most vociferous present proponents of the Buy American Act are the diverse sections of domestic industry desiring protection from the inroads of cheaper foreign goods.¹²⁰

Essentially, the act prohibits the government from procuring foreign raw materials or manufactured articles for domestic use. There are four primary exceptions: if the foreign goods are purchased for off-shore use; or if domestic materials or products do not exist in "reasonably available commercial quantities"; or where the head of the procuring agency determines either that domestic procurement is inconsistent with the public interest or that the domestic cost is unreasonable.¹²¹

The exceptions for unavailable quantity or quality have "not given rise to any controversy or difficulty."¹²² The off-shore procurement exception is of tangential concern here. Similarly the "public interest" exception, though a catchall phrase incapable of precise definition and thus broad enough to include all the other express exceptions (unreasonable cost, unavailability, or impracticality), has remained relatively quiescent. It should be noted, however, that this exception has become more important lately, being utilized, for instance, as a basis for the pro-

¹¹⁷ 47 Stat. 1520 (1933), as amended, 10 U.S.C. § 10 (1958), as amended, 10 U.S.C. § 10(c), (d) (Supp. III, 1962).

¹¹⁸ The Treasury-Post Office Appropriation Act, 1933, 47 Stat. 580, 604 (1932).

¹¹⁹ See Gantt & Speck, *Domestic v. Foreign Trade Problems in Federal Government Contracting: Buy American Act and Executive Order*, 7 J. PUB. L. 378, 379 (1958).

¹²⁰ It has also been argued that the United States loses tax revenue when a bid is awarded to a foreign firm, see 106 CONG. REC. 17528 (1960) (remarks of Representative Dent), and that domestic buying has a multiplier effect on wages and consumer buying, see 105 CONG. REC. 10867-68 (1959) (remarks of Representative Simpson).

¹²¹ See generally Gantt & Speck, *supra* note 119, at 384-96.

¹²² Knapp, *The Buy American Act: A Review and Assessment*, 61 COLUM. L. REV. 430, 431 (1961).

vision of the Armed Services Procurement Regulation that treats Canadian end-products as domestic end-products not subject to the act's restrictions.¹²³

The chief controversy has concerned the "unreasonable cost" exception¹²⁴ as a source of relief for foreign sellers desiring government contracts. In 1934, the Treasury Department by circular letter fixed the test of reasonableness at twenty-five per cent differential.¹²⁵ Twenty years later Executive Order No. 10582¹²⁶ lowered the differential to six per cent (or ten per cent excluding import duty and costs incurred after arrival in the United States).¹²⁷ The practical effect of this liberalization has been blunted, however, by section five of the executive order permitting the agency head some discretion over a determination of what constitutes unreasonableness. This provision recently has been interpreted by the Comptroller General as allowing the Army to prefer a domestic supplier whose bid was nine per cent higher even though the General Services Administration had refused preference to similar domestic bids having a differential as low as seven per cent.¹²⁸ Of greater significance was the provision in the executive order allowing acceptance of a domestic bid even though it exceeds the six per cent differential if the bid qualified under any of three primary exceptions: (1) interest of national security; (2) assistance to domestic small business; or (3) promotion of production in substantial unemployment areas. While at the same time the criterion for determining what constitutes supplies manufactured "substantially all" from United States supplies was greatly liberalized from twenty-five per cent, as demanding labeling as foreign, to fifty per cent, these three exceptions mitigated against the order's supposed objective to remove the Buy American Act's stringent provisions.¹²⁹ For example, the unemployment exceptions, though discretionary on the surface, later became rigidly fixed at a differential of twelve per cent as opposed to the basic six.¹³⁰

There has been widespread condemnation of these restrictions on many grounds, including their conflict with liberal trade policies and injury to the relations between the United States and its allies. The point stressed here is the increase in costs.¹³¹ An unpublished 1960 survey demonstrated not only the exceedingly low level of

¹²³ 32 C.F.R. § 6.103-5 (1961), as amended, 32 C.F.R. § 6.103-5(a) (Supp. 1963). The validity of this provision was sustained under the Armed Services Procurement Regulation, Comp. Gen. Op. No. B-150183, April 17, 1963, and under the Buy American Act, Comp. Gen. Op. No. B-151898, Aug. 22, 1963.

¹²⁴ Buy American Act § 2, 47 Stat. 1520 (1933), as amended, 41 U.S.C. § 10a (1958). See 32 C.F.R. §§ 6.103-3, 6.104-4 (1961).

¹²⁵ Branch of Supply, Procurement Division, Treasury Department, Circular Letter No. 6, March 31, 1934, and Circular Letter No. 37, June 20, 1934.

¹²⁶ 19 Fed. Reg. 8723 (1954).

¹²⁷ But if the bid is less than \$25,000, "the sum shall be determined by computing ten per centum of such price exclusive only of applicable duty." *Ibid.*

¹²⁸ Comp. Gen. Op. No. B-150471, April 30, 1963.

¹²⁹ Some critics have contended that Exec. Order No. 10582 is "in conflict with the letter and spirit of the Buy American Act." 107 CONG. REC. 9198 (1961) (remarks of Representative Shelley).

¹³⁰ 2 1960 Gov't CONT. REP. ¶ 32616.

¹³¹ Several years ago the staff of the Randall Commission estimated that roughly \$100 million dollars might be saved through elimination of the Buy American restrictions. STAFF PAPERS 318 (Comm'n on Foreign Economic Policy 1954). See also Knapp, *supra* note 122, at 458-62.

foreign procurement (\$39 million out of a total procurement by ten agencies of \$22 billion) but that the direct and indirect savings were considerable.¹³² In addition to outright savings by acceptance of lower foreign bids, their presence tends to drive down the price of domestic bids, as was graphically demonstrated in the electric equipment industry, particularly by the *Chief Joseph* cases.¹³³

IV

EXTERNAL INCONSISTENCIES

A. The Antitrust Laws

The basic objectives of government procurement ostensibly enhance the attainment of the goals of the antitrust laws. As stated in the report of the Attorney General's National Committee to Study the Antitrust Laws, "the general objective of the antitrust laws is promotion of competition in open markets . . . the goal of competition provides powerful and pervasive incentives for product innovations and product development, and for long-run cost-reduction."¹³⁴ Since the basic objective of government procurement is purchase at the lowest possible cost and the highest possible quality, procurement officials should be similarly desirous of preserving competition as a means of obtaining low prices. Two tenets of procurement policy are the preferences for formal advertising over negotiation and for a broadly-based supplier program. Competitive bids are said to lower cost by twenty-five per cent and to increase the "probability of small business participation."¹³⁵

In practice, however, the operation of the procurement program often results in a lessening of competition. The Federal Property Act itself indicates the limit that the government places on permissible competition: "[I]nvitations for bids shall permit such full and free competition as is consistent with the procurement of types of supplies and services necessary to meet the requirements of the agency concerned."¹³⁶ The desire for high quality, certainty of supply, and speed of delivery often dictate an abandonment of procurement in the open market. Other government policies, such as Buy American legislation, small business and labor surplus preferences, and access to patent monopolies through government contracts, also minimize competition.¹³⁷

¹³² Exec. Dep't Survey of Operations under Exec. Order No. 10582, 1960 (unpublished) (cited and explained by Knapp, *supra* note 122, at 450).

¹³³ See, e.g., Knapp, *supra* note 122, at 435-43.

¹³⁴ ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS, REPORT 1, 316 (1955) [hereinafter cited as ATT'Y GEN. REPORT].

¹³⁵ DOUGLAS REPORT 3.

¹³⁶ Federal Property and Administrative Services Act § 303, 63 Stat. 395, 41 U.S.C. § 253 (1958); see also Armed Services Procurement Act of 1947 § 3(b), 10 U.S.C. § 2305(a) (1958).

¹³⁷ See also the exemption from the antitrust laws and the Federal Trade Commission Act granted in certain instances to small businesses forming a joint-venture corporation, Small Business Act § 7(a)(6), 72 Stat. 388 (1958), 15 U.S.C. § 636(a)(6) (1958).

The chief thrust of the Sherman¹³⁸ and Clayton acts¹³⁹ is to assure freedom of trade and commerce among the states by prohibiting unreasonably restrictive business practices. Such aims are best served by the widest possible dispersion of industrial power. Though the advocates of so-called "fair competition," as opposed to "workable competition," might under certain conditions allow oligopolistic concentration, the ultimate goal, admittedly unobtainable, is pure competition—the existence of an unfettered market with such a multitude of buyers and sellers that no one can unduly influence the market price.¹⁴⁰ However, the entrance of the government as a buyer severely limits the opted-for dispersion of buyers, especially in the purchase of goods and services suitable solely for governmental or very specialized consumption. Since the antitrust limitations on monopoly, and mergers, do not apply to the federal government,¹⁴¹ prevention of monopolistic trends resulting from federal procurement programs must be approached from the seller's side only.

It has been restated only recently that "antitrust is our strongest and most consistent governmental means of maintaining market competition."¹⁴² To that end antitrust enforcement has concentrated on antimerger provisions. Commencing with its 1950 amendments to section seven of the Clayton Act,¹⁴³ Congress has attempted to inhibit the tendency for large corporations to merge as a means to "cope with monopolistic tendencies in their incipiency."¹⁴⁴ The Supreme Court has exhibited a similar concern focusing, at least in the *Brown Shoe*¹⁴⁵ decision, on maintenance of the small competitors' market position.¹⁴⁶ A supposed requisite to a freely competitive market and an index of its existence in any given sector or industry is ease of entry by new firms. Government procurement practices would appear to forestall easy entry, particularly where negotiation is the rule. While some assert that in a few fields of military procurement, specifically air weapons systems, newly formed companies have enjoyed a measure of success, this can be traced primarily to the high rate of technological change obviating the advantages of experience and existent production facilities usually held by established firms, and secondarily to the fact that most of the new entrants are "joint-ventures" or subsidiaries of large, diversified, and wealthy corporations.¹⁴⁷

¹³⁸ 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-3 (1958).

¹³⁹ 38 Stat. 730 (1914), as amended, 15 U.S.C. §§ 12-27 (1958), as amended, 15 U.S.C. §§ 13, 21 (Supp. III, 1962).

¹⁴⁰ "The essence of full monopoly power resides in being the sole source of a product, so that the buyer must meet the seller's terms or go without. . . . The same considerations apply where the problem is a buyer's monopoly." ATT'Y GEN. REPORT 318.

¹⁴¹ See note 45 *supra*.

¹⁴² Grether, *Consistency in Public Economic Policy with Respect to Private Unregulated Industries*, 53 AM. ECON. REV. PAPERS AND PROCEEDINGS 26, 32 (1963) (Papers and Proceedings of the 75th Annual Meeting of the American Economic Association, Pittsburgh, Pa., Dec. 27-29, 1962).

¹⁴³ 64 Stat. 1125 (1950), 15 U.S.C. §§ 18, 21 (1958), as amended, 15 U.S.C. § 21 (Supp. III, 1962).

¹⁴⁴ S. REP. NO. 1775, 81st Cong., 2d Sess. 4 (1950).

¹⁴⁵ *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962). See 31 GEO. WASH. L. REV. 504 (1963).

¹⁴⁶ See remarks of Jesse W. Markham, in 53 AM. ECON. REV. PAPERS AND PROCEEDINGS 57 (1963).

¹⁴⁷ PECK & SCHERER, *THE WEAPONS ACQUISITION PROCESS: AN ECONOMIC ANALYSIS* 195, 198-203 (1962).

Small business preferences and formal advertising are partly a response to the need for additional measures to buttress the antitrust provisions. That these preventive measures have not forestalled concentration¹⁴⁸ has been noted previously. Also noted were the inhibitions to maximum efficiency caused by the small business and labor surplus set-asides, which appear to operate contrary to the assumption, underlying the Robinson-Patman Act's admonition against price discrimination, that the objective of maintaining an economy with as many competing units as is efficiently possible is best served by forbidding favoritism to those who contribute no efficiency. Blame also can be placed partly upon: the piecemeal transfer of some portions of the economy from the unregulated to the regulated public utility sectors, partially accomplished through government contracting as in the atomic energy field; government subsidies total and partial which, as demonstrated by the farm commodity price support programs, may increase the economic disparity between large and small producers; state and municipal restrictive licensing procedures intended to limit competition. The variegated factors of weapons procurement, research and development, negotiation, necessity for technical expertise and reliability plus the immeasurable but significant effects of "pork-barreling" and regional favoritism have all combined to produce concentration directly through the government procurement mechanism. This concentration is antithetical to the expressed objectives of the antitrust laws.

In conclusion, then, the federal contracting program, whatever may have been the intention of Congress, runs counter to the spirit, and perhaps the letter, of the antitrust laws. It may well be that, as Adolf Berle and David Lilienthal, among others, have been saying, "big business is here to stay" and, further, that "big business is good for the nation"; nevertheless, we must think clearly on this question of the nature and type of economy that is desired. Such thinking does not seem to be evident today in the halls of government, save perhaps where governmental policies reflect a bias in favor of big business on the part of key decision-makers—for the most impeccable reasons, of course, national security.

B. "Free Trade"

Since at least as far back as the 1934 Trade Agreements Act¹⁴⁹ and the negotiation of "reciprocal trade" agreements, the professed goal of United States officials has been "free multilateral trade." This policy constantly receives obeisance from economic theoreticians, tariff negotiators, and congressional and administrative leaders:¹⁵⁰

¹⁴⁸ It should be caveated that a minority contend: "Over-all concentration [in the non-agricultural sector] does not seem to have changed much since the pattern of high concentration . . . at the turn of the century." Rosenbluth, *The Trend in Concentration and Its Implications For Small Business*, 24 LAW & CONTEMP. PROB. 192, 204-05 (1959).

¹⁴⁹ 48 Stat. 943 (1934).

¹⁵⁰ See generally Miller, *Foreign Trade and the "Security State": A Study in Conflicting National Policies*, 7 J. PUB. L. 37 (1958).

The basic purpose of our foreign trade is to exchange goods produced efficiently in the United States for goods which we can produce relatively less efficiently or not at all. International trade lowers costs and raises standards of living both at home and abroad.¹⁶¹

More recently the late President Kennedy stated in a 1962 message to Congress.¹⁶²

Once given a fair and equal opportunity to compete in oversea markets, and once subject to healthy competition from oversea manufacturers for our own markets, American management and labor will have additional reason to maintain competitive costs and prices, modernize their plants, and increase their productivity. The discipline of the world marketplace is an excellent measure of efficiency and a force to stability.

However, these statements are mainly hortatory. The United States throughout its history has adhered in some degree to a protectionist policy; one need only invoke the ghost of Alexander Hamilton to illustrate the point. Accordingly, there is a "basic ambivalence between professed aim and actual operational facts"¹⁶³ in American foreign economic policy. With respect to federal contracting, again the Buy American Act may be cited, this time to underscore the point that some inconsistency exists between contracting policy and the purported aims of external policy. Just as that act runs counter to the policy of procuring at the lowest possible cost, so it conflicts with the desire to have closer trading relations with other nations.

It may be that protectionism is not economically unsound for the total domestic economy, but what is clear is that when combined with government contracting it contributes to higher procurement costs and undermines free trade. As a partial offset the United States has initiated an extensive offshore procurement program to purchase foreign military supplies for the overseas use of American military forces and allied or friendly nations under the provisions of the 1954 Mutual Security Act.¹⁶⁴ Nevertheless, the total effect of Buy American, required preferences for United States shipping even at higher costs, the national security provision of the Trade Acts et al. is to subvert national free trade efforts. When the federal government itself is forced to prefer less efficient domestic producers, manufacturers, or shippers, it becomes difficult to persuade threatened domestic industries that they should submit to increased and equal foreign competition. This is an area where the government should lead by example.

C. Other Federal Policies

One other example will serve to indicate a further dimension to external inconsistency: Federal contracts have been used at times to circumvent certain statutes. Noteworthy here is the manner in which the "contracting-out" system enables scientists and others to be employed by private concerns at salary rates higher than

¹⁶¹ COUNCIL OF ECONOMIC ADVISERS, ANNUAL REPORT 92-93 (1963).

¹⁶² President John F. Kennedy, Message to Congress on Reciprocal Trade Agreements Program, Jan. 25, 1962, 108 CONG. REC. 904, 952-53 (1962).

¹⁶³ Miller, *supra* note 150, at 39.

¹⁶⁴ 68 Stat. 832 (1954), as amended, 22 U.S.C. §§ 1750-1951. See Exec. Order No. 10575, 19 Fed. Reg. 7249 (1954). See generally Pasley, *Offshore Procurement*, 18 MILITARY L. REV. 55 (1962).

those permitted by the federal pay scales. Thus one who, if he was in the federal bureaucracy, would be paid at a certain rate and would be entitled to the perquisites of his office, when employed by a "private" concern whose only *raison d'être* is to perform government contracts, receives higher pay and greater fringe benefits. Furthermore, manpower ceilings imposed by Congress are neatly evaded. The contracting-out program, however it may be justified on the grounds of necessity, is to that extent blatantly inconsistent with the letter and spirit of federal statutes.

For unknown reasons, this has not caused undue concern in Congress, although hearings held in the late 1950s contain both testimony illuminating the practice and statements of displeasure by individual congressmen.¹⁵⁵ Possibly, this lack of interest may be attributed to a feeling that contracting-out is working tolerably well in that it permits the federal government to receive services not available to it in the federal bureaucracy. The net result, however, is an expansion of this bureaucracy to double its supposed size if the employees of "private" firms, profit and nonprofit, whose only customer is the federal government, are included. It is these millions who may be said to be the rank-and-file of the military-industrial complex discussed above. It is their paychecks which swell the economies of such states as California, Arizona, and Massachusetts. (And, incidentally, it is their votes which help to keep a given congressman in office.)

Another example may be the legality of the Power Development Reactor Program of the Atomic Energy Commission. The Atomic Energy Act of 1954 contained this provision:¹⁵⁶

Section 169.—No Subsidy. No funds of the Commission shall be used in the construction or operation of facilities licensed under section 103 or section 104 except under contract or other arrangement entered into pursuant to section 31.

In other words, section 169 prohibited use of AEC funds in the construction or operation of privately owned nuclear reactors, except as might be authorized under section thirty-one. Section thirty-one authorized the AEC to make contracts for the conduct of research and development in a number of specified areas, including "industrial uses, the generation of usable energy, and the demonstration of the practical value of utilization of production facilities for industrial or commercial purposes."

The main legal question was whether the Commission could enter into research and development contracts for section 104 licenses under which AEC funds would be used to assist in the construction of power reactors. The AEC said yes, but the Joint Committee on Atomic Energy disagreed. One astute observer stated that, despite section 169, "it is true, of course, that the Program . . . involves a subsidy in

¹⁵⁵ See, for example, House Comm. on Post Office and Civil Service, *Contracting Out Government Responsibility for Administrative, Management, and Other Services*, H.R. REP. No. 688, 86th Cong., 1st Sess. (1959); Miller, *supra* note 3, at 976-90; Dupre & Gustafson, *supra* note 25.

¹⁵⁶ 68 Stat. 952 (1954).

a very real sense, but it is a subsidy which reduces loss rather than one which provides even a hope of profit."¹⁵⁷ If that conclusion is accurate, then it furnishes another example of administrative circumvention of a statute by contract. However, the meaning of section 169 is disputed and thus it is not as clear a case of the circumvention of a statute by federal contracts as is our other illustration.

V

BY WAY OF CONCLUSION

Enough perhaps has been said to indicate some of the contours of the federal contract as a device of great flexibility which in its total impact has important consequences for the manner in which the values of the American people are shaped and shared. The government contract system, as Dr. Carl F. Stover has put it, is a "problem in public policy." It is "one of the truly significant governmental inventions of this century."¹⁵⁸ As the legal technique for welding together a new partnership between governmental and nongovernmental agencies in the performance of public functions, contract permits crucial social needs to be met and paid for out of the public treasury; at the same time, an attempt is made to preserve the privateness of American enterprise (and nonprofit organizations). The enormous social utility of contract cannot be overemphasized, even though the attempt to maintain the private character of the public contractor has not been very successful.

Even so, the system also raises serious problems of public policy, not the least of which is the extent to which it runs counter to other policies and programs as well as basic democratic values. The social usefulness of the federal contract should not bar continuing analyses in political and economic terms. Legal analysis alone, as important as it is and as great a need as there may be, will not suffice for the task.

The consistency question has become acute with the advent of the Positive State.¹⁵⁹ At one time perhaps, when government was relatively quiescent and had not yet undertaken the affirmative responsibilities that American government now has accepted, inconsistency in policy and program could not only be tolerated; it could even be welcomed as a form of that diversity which underlies and exemplifies the American commitment to freedom. But that time is now in the past. Big government is here, doubtless to stay, whatever one's personal preferences may be. If that is accepted, and it seems that there is an American consensus on the need for massive governmental interventions into socioeconomic affairs, then incongruity among policies no longer is tolerable. The need exists for means by which public policies can be made consistent.

¹⁵⁷ Green, *The Strange Case of Nuclear Power*, 17 FED. BAR J. 100, 112 (1957).

¹⁵⁸ Stover, *The Government Contract System as a Problem in Public Policy*, in 2 STANFORD RESEARCH INSTITUTE, *op. cit. supra* note 109, at 3.

¹⁵⁹ The concept of the Positive State is suggested in Miller, *The Public Interest Undefined*, 10 J. PUB. L. 184 (1961), and in Miller, *An Affirmative Thrust to Due Process of Law?*, 30 GEO. WASH. L. REV. 399 (1962). See Nutting, *Some Reflections on the Positive State*, 49 VA. L. REV. 729 (1963); Walden, *Antitrust in the Positive State*, 41 TEXAS L. REV. 741 (1963).