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REPORT
104–163

NULLIFYING AN EXECUTIVE ORDER THAT PROHIBITS FEDERAL CONTRACTS WITH COMPANIES THAT HIRE PERMANENT REPLACEMENTS FOR STRIKING EMPLOYEES

JUNE 27, 1995.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. GOODLING, from the Committee on Economic and Educational Opportunities, submitted the following

REPORT

together with

MINORITY AND ADDITIONAL VIEWS

[To accompany H.R. 1176]

[Including cost estimate of the Congressional Budget Office]

The Committee on Economic and Educational Opportunities, to whom was referred the bill (H.R. 1176) to nullify an executive order that prohibits Federal contracts with companies that hire permanent replacements for striking employees, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE

The purpose of H.R. 1176 is to nullify any executive order that prohibits Federal contracts with companies that hire permanent replacements for striking employees.

COMMITTEE ACTION

H.R. 1176 was introduced by Representative William F. Goodling on March 8, 1995, the day that Executive Order 12954 was issued. The original cosponsors of the legislation included a bipartisan group of 29 Members, and the bill is now cosponsored by almost 70 Members.

The Committee on Economic and Educational Opportunities held a hearing on H.R. 1176 and Executive Order 12954 on April 5, 1995. The hearing focused on both the policy implications of a ban

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on striker replacement workers and on the legality, from a constitutional perspective, of the Executive Order. Testimony was received from Stephen Bokat, General Counsel, U.S. Chamber of Commerce; Paul Huard, Senior Vice President for Policy and Communications, National Association of Manufacturers; Clifford J. Erhlich, Senior Vice President of Human Resources, Marriott International, and Vice Chairman, Labor Policy Association; Richard K. Willard, Partner, Steptoe & Johnson; Reed Larson, President, National Right to Work Committee; and Roger Gates, President, Local 713, United Rubber Workers.

Although the April 5th hearing was the only one this Congress specifically devoted to the issues raised by H.R. 1176 and the Executive Order, the Committee, in the past, has held numerous hearings on the implications of a ban on striker replacements for our system of labor-management relations. During the last several Congresses, hearings were held on legislation to broadly prohibit all employers covered by the National Labor Relations Act (NLRA) and the Railway Labor Act (RLA) from hiring permanent replacement workers in a wide range of labor disputes—H.R. 3936 in the 101st Congress and H.R. 5 in the 102nd and 103rd Congresses. Although these hearings obviously did not touch upon the legal authority of the President to act in this area, they were a forum for discussion of the effect of a ban on hiring striker replacement workers on the collective bargaining system created by the NLRA.

On June 14, 1995, the Committee on Economic and Educational Opportunities approved H.R. 1176 by a vote of 22–16, and, by a voice vote, ordered the bill favorably reported.

STATEMENT

INTRODUCTION

H.R. 1176 would nullify Executive Order 12954, which was issued March 8, 1995, to prohibit Federal contracts with companies that hire permanent replacement workers for striking employees. This Order's ban on permanent replacement workers, even if limited to government contractors [1], has serious negative implications for the integrity of our system of collective bargaining. The foundation of that system is a balancing of the interests and risks of labor and management that allows the bargaining process to prod both parties toward a collective agreement on the terms and conditions of employment.

The peaceful use of economic weapons, including the right to strike and the right to continue business operations during a strike by hiring permanent replacement workers, are part and parcel of our collective bargaining system. The system becomes completely unbalanced when the economic weapon available to one party is taken away, while the other party retains the ability to fully use

[1] Although limited to contractors with the Federal government, the sweep of the Executive Order is still quite broad. Clifford Erlich, Senior Vice President for Human Resources of Marriott International and Vice-Chairman of the Board of Directors of the Labor Policy Association, testified before the Committee on Economic and Educational Opportunities on April 5, 1995, that the federal government is now purchasing approximately 22 percent of the nation's Gross Domestic Product (GDP).

its economic weapon to force concessions.[2] The Committee is convinced that a ban on the use of replacement workers will lead to more strikes in the Federal contractor arena, and the ripple effects of those strikes will result in lost jobs and lost business opportunities throughout industry.

The Committee also has serious concerns regarding the legality of an Executive Order prohibiting Federal contractors from using permanent replacement workers when that right is guaranteed to employers in every other industry.[3] The Congress has expressed its will with respect to the legality of permanent replacement workers during an economic strike and the proposed order runs completely counter to that will. The National Labor Relations Act (NLRA) is a comprehensive statutory and remedial scheme governing collective bargaining relations and the unilateral executive action taken by the President completely undermines that scheme. The responsibility for setting employment policy rests in the Congress, not in the White House, and the Committee objects to the President's attempt to circumvent the legislative process with an Executive action of questionable legality.

In sum, Executive Order 12954 constitutes both bad policy and bad law, and the Committee strongly supports H.R. 1176 nullifying the order.

EXECUTIVE ORDER 12954

Executive Order 12954 prohibits contracting agencies from contracting with employers that permanently replace lawfully striking employees. This prohibition would apply to all contracts over $100,000. The Executive Order authorizes the Secretary of Labor to investigate an organizational unit of a Federal contractor and to hold public or private hearings to determine if the unit has permanently replaced lawfully striking employees. The Order, which was effective immediately upon being issued on March 8, 1995, applies only to striker replacements hired *after* the effective date with respect to *contract termination*, but applies to striker replacements hired *before* the effective date with respect to *contract debarment*. The period of debarment of a contractor may not extend beyond the date of the resolution of the labor dispute precipitating the hiring of permanent replacement workers.

The President attempts to justify Executive Order 12954, pursuant to his authority under the Federal Property and Administrative Services Act (FPASA), on the grounds that "efficient economic performance and productivity are directly related to the existence of cooperative working relationships between employers and employees." The President presumes that stable employee relations in a company will lead to more efficient performance and that the threat of permanent replacement is a threat to the stability of the

[2] As to the policy arguments generally in favor of retaining current law allowing employers to hire permanent replacement workers during an economic strike, see the Minority Views to Committee Report 103-116, H.R. 5, the Cesar Chavez Workplace Fairness Act.

[3] The Minority Members of the Committee made much of the fact that President Bush had issued executive orders dealing with the ability of government contractors to execute pre-hire agreements and the obligation of contractors to notify employees of their rights under the *Beck* decision to object to the payment of union dues for activities unrelated to collective bargaining. The legal authority of the President to issue these orders was never seriously examined and thus they provide no basis for justifying Executive Order 12954.

collective bargaining relationship. The Committee seriously questions the conclusions on which the President rests his authority to take this unilateral executive action.

EXECUTIVE ORDER 12954 IS OF QUESTIONABLE LEGALITY

The starting point for any analysis of the authority of the President to issue an executive order is the Supreme Court's decision in *Youngstown Sheet & Tube Co.* v. *Sawyer*.[4] In that decision, the Court instructed that "[t]he President's power, if any, to issue [an] order must stem either from an act of Congress or from the Constitution itself."[5] Justice Jackson's oft-cited concurrence in the so-called "steel seizure" decision delineated three situations where Presidential authority to issue an executive order might be exercised, each with different implications with respect to the legality of the resulting order:[6]

> (1) Executive order is issued pursuant to express or implied authorization from Congress—Presidential authority is at its maximum.
>
> (2) Executive order is issued in the absence of either a granting or a denial of authorization from Congress—Presidential authority is less clear and must derive from the independent power of the President. There is also likely concurrent authority in the Congress to act.
>
> (3) Executive order is incompatible with the expressed or implied will of Congress—Presidential authority is most restricted and to be sustained, courts must disable Congress from acting on the subject.

The President cites the FPASA as authorizing the Executive Order on striker replacements and relies on a Justice Department Memorandum analyzing this authority.[7] The Administration argues that the Act promotes an economic and efficient procurement system and a ban on strike replacement workers would lead to cooperative working relationships, thus reducing labor strife and holding down labor costs on Federal contracts. The courts have held that the FPASA gives the President "broad ranging authority" to issue orders designed to promote "economy" and "efficiency" in government procurement.[8] The critical element in assessing the legality of the President's action, in this context, is whether there is a "sufficiently close nexus" between the order banning striker replacements by federal contractors and the goals of economy and efficiency.[9]

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[4] 343 U.S. 579 (1952).
[5] Id. at 585.
[6] Id. at 635-38.
[7] Memorandum to Janet Reno, Attorney General, from Walter Dellinger, Assistant Attorney General, Re: Executive Order 12954, March 9, 1995, reprinted at 141 Cong. Rec. S 3781–01, 3782 (March 10, 1995).
[8] See *American Federation of Labor and Congress of Industrial Organizations* v. *Kahn*, 618 F.2d 784 (D.C. Cir.) (en banc), cert. denied, 443 U.S. 915 (1979).
[9] Id. at 792.

There is no nexus between the executive order banning federal contractors from hiring permanent replacement workers and the goals of economy and efficiency in federal procurement.

The Committee does not believe that a nexus exists between the order banning striker replacements by federal contractors and the goals of economy and efficiency, and the findings cited by the President do little to establish the requisite connection. Far from contributing to the goals of economy and efficiency, Executive Order 12954 will *increase* the costs of federal procurement.[10] A ban on the hiring of permanent replacement workers by federal contractors is likely to cause excessive delays in the performance of federal contracts in the many situations where the use of temporary replacement workers is not feasible, thus increasing costs. And, as a recent Congressional Research Service analysis of the Executive Order attests, it could be argued that the order "ignores the possibility that a ban on striker replacements could lead to higher wage settlements, ultimately increasing the cost to the government."[11] The CRS report goes on to conclude that "a reviewing court might find it difficult to discern any reasonable nexus between the goals of economy and efficiency of the federal acquisition process, and the goals of the Executive Order."

The Justice Department's reliance on the *Kahn* case as the justification for Executive Order 12954 is misplaced. Indeed, although the *Kahn* doctrine certainly establishes the operative principles for analyzing the scope of the President's authority under the FPASA, the court there indicated that they would look *unfavorably* on an executive order dealing with labor-management relations similar to that issued on March 8, 1995. The court said:

> *Amicus* argues that a decision upholding Executive Order 12092 [dealing with wage and price standards] would give the President power, for example, to establish by Executive Order the sort of program proposed in the National Labor Law Reform Act of 1977, which was not enacted, that "willful" violators of the National Labor Relations Act should be suspended from seeking Government contracts for three years. [Citation omitted.] *The approach we take today might raise serious questions about the validity of such an Order,* but we need not reach that issue here.[12]

The President asserts that an important aspect of stable collective bargaining relationships, that lead to efficient economic performance, is the balance between allowing businesses to operate

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[10] It is interesting to note a point about the impact of the Executive Order's ban on the hiring of permanent replacement workers on the goals of efficiency and economy that was raised by John A. Penello, a former Member of the National Labor Relations Board, in a letter to Representative William Clay dated April 6, 1995. Mr. Penello states that when the AFL–CIO submitted a draft labor law reform bill to the White House for review in 1977, it included a provision outlawing permanent replacement workers during strikes for first or second collective bargaining agreements. Citing Townley, *Labor Law Reform in U.S. Industrial Relations,* 93 (1986), he asserts that President Carter's White House rejected the proposal both as politically infeasible, and, agreeing with objections raised by the Commerce Department, as leading to "increased industrial conflict" and "inflationary wage increases."

[11] CRS American Law Division Memorandum, "Executive Order 12954: Prohibiting the Use of Striker Replacements Under Federal Contracts," by Vince Treacy, April 3, 1995.

[12] *Kahn* at 793 n.50 (emphasis added).

during a strike and preserving worker rights.[13] The President goes on to contend that this balance is disrupted when permanent replacement employees are hired. This contention by the President demonstrates his misunderstanding both of the practical realities faced by many businesses during a strike and the statutory scheme governing collective bargaining created in the NLRA.

The hiring of permanent replacement workers to maintain business operations in the face of an economic strike is part and parcel of the give and take of collective bargaining and is a "legitimate and substantial" practice entirely consistent with the NLRA.[14] Furthermore, as a practical matter, in order to continue operating during a strike, which the President admits is part of the balance, hiring permanent replacement workers may be a necessity. It is impossible for many employers to keep an operation running for any sustained period of time utilizing supervisory personnel or temporary replacements. Geographic isolation, specialized skill requirements, or the threat of union violence all may drive employers to the necessity of offering permanent employment to those who cross the picket lines. Economy and efficiency in federal procurement will certainly *not* be served if factories are forced to stand idle by a ban on permanent replacement workers which makes it impossible for companies performing federal contracts to maintain operations.

Executive Order 12954 is inconsistent with the National Labor Relations Act's comprehensive statutory and remedial scheme governing labor-management relations

The President's reliance on the FPASA also ignores the fact that executive authority in this area may be circumscribed by the National Labor Relations Act (NLRA). The NLRA has been interpreted to have broad preemptive effect, and the Executive Order—which vests in the Department of Labor the authority to investigate Federal contractors to determine if strike replacements have been used—unreasonably interferes with the National Labor Relations Board's (NLRB) broad remedial authority over labor-management relations. The Labor-Management Relations Act (LMRA)[15] gives the NLRB exclusive jurisdiction over the NLRA and thus suggests that no other government actor has the authority to regulate private sector collective bargaining relationships. The CRS analysis, on this point, indicates that "there seems to be no statutory authority for the reallocation of jurisdiction from the NLRB to the Department of Labor."[16]

Further, by denying federal contractors the right to hire permanent replacement workers during an economic strike, Executive Order 12954 disrupts the foundation of the National Labor Relations Act's system of collective bargaining. Indeed, the order runs counter to the very purpose of our collective bargaining system, which is to facilitate the resolution of disputes between employees and employers within the general confines of a competitive market

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[13] *See*, Preamble to Executive Order 12954.

[14] See *Trans World Airlines, Inc.* v. *Independent Federation of Flight Attendants*, 489 U.S. 426, 433 (1989).

[15] 29 U.S.C. section 153 *et seq.*

[16] CRS Memorandum at p. 9.

place. Fundamental to that system, and its overall effectiveness, is a delicate balance that both protects the interests of labor and management and, at the same time, exposes both to certain risks.

The law safeguards both workers' right to strike and the right of employers to continue business operations during a strike. If an employer is found to have committed unfair labor practices in the course of a strike undertaken to secure economic concessions, all economic strikers are entitled to full reinstatement and back pay. If, however, the strike is fully based on economic disagreements between labor and management, management may continue to operate with workers to whom it may offer permanent employment. Put simply, both sides have something to lose if they fail to reach agreement. Labor is threatened with the prospect of permanent replacement if it goes on strike; and, business is faced with the decline in productivity and profits which invariably accompany a strike, whether or not permanent replacements are employed.

This balance of protections and risks is designed to encourage *settlement* of labor disputes. For almost 60 years this balance has served labor and management very well, and has never been seriously questioned by the Congress—or by the Supreme Court, which first articulated the permanent replacement doctrine in its *Mackay* decision in 1938.[17] The Committee fails to see how Executive Order 12954 can be justified in the face of the clear effect it would have upsetting the delicate balance which is and, always has been, one of the underpinnings of our collective bargaining system.

Executive Order 12954's ban on permanent replacement workers is an exercise of regulatory authority, preempted by the NLRA, which cannot be justified as a legitimate condition of doing business with the Federal Government

While the federal government certainly has a right, as a purchaser of goods and services, to place terms and conditions on those with whom it chooses to deal[18], Executive Order 12954 is clearly regulatory in nature. Thus, the order loses its protection as a government action in the sphere of participation in the market and the preemptive effect of the NLRA applies in full force. As the Supreme Court concluded in the *Machinists* case, this preemption doctrine applies to conduct the "Congress intended to be 'unrestricted by

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[17] In *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, the Supreme Court concluded that, although section 13 of the NLRA prohibits employer interference with the right to strike:

> ". . . [It] does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of the strikers, upon the election of the latter to resume their employment, in order to create places for them. The assurance by [the employer] to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice nor was it such to reinstate only so many of the strikers as there were vacant places to be filled." 304 U.S. 333, 345–46 (1938).

The Court thus concluded that hiring "permanent" replacements during "economic" strikes was *not* an unfair labor practice prohibited by the NLRA. As the NLRA was amended subsequent to the *Mackay* decision, the permanent replacement doctrine was essentially incorporated into other provisions of the Act dealing with the rights of economic strikers. Section 9(c)(3) of the NLRA which was added by 1947 Taft-Hartley changes to the Act and amended by 1959 Landrum-Griffin changes implicitly recognizes the right of employers to hire permanent replacement workers in an economic strike. That provision deals with the voting rights of "employees on strike who are not entitled to reinstatement" and has always been interpreted to refer to replaced economic strikers. *See* Hardin *The Developing Labor Law* (3d Ed. 1992), p.1109.

[18] See *Building & Construction Trades Council* v. *Associated Builders & Contractors, Inc.,* 113 S.Ct. 1190 (1993). [the so-called *Boston Harbor* case]

any governmental power to regulate' because it was among the 'permissible economic weapons in reserve'" under the NLRA.[19] The right of employers to hire permanent replacement workers is clearly a permissible economic weapon under the NLRA upon which government regulation of any kind, including Executive Order 12954, is foreclosed.

The Supreme Court's rationale in *Wisconsin Department of Industry* v. *Gould*[20], overturning a state law which debarred contractors found guilty of three unfair labor practices under the NLRA, has application to Executive Order 12954 as well. The Court rejected the state's arguments, similar to those raised by the Department of Justice in the context of the Executive Order, that the law was not regulatory in nature, but was the state functioning as a private purchaser of services. The Supreme Court refused to elevate form over substance and stated that "[t]o uphold the Wisconsin penalty simply because it operates through state purchasing decisions . . . would make little sense. It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern."[21] Thus, the Court found that the purpose of the law was to deter NLRA violations, and was tantamount to regulation, thereby invoking the preemption doctrine.[22]

The Executive Order is more closely comparable to the Wisconsin law rejected in *Gould* than to the union-only prehire agreement, required by Massachusetts in the bid specification for the Boston Harbor Cleanup project, that was upheld by the Supreme Court. In the latter case, the Court found that the state was free as a participant in the marketplace to condition its "purchasing upon the very sort of labor agreement that Congress explicitly authorized" under the NLRA.[23] The Executive Order, like the provision at issue in *Gould*, is a blanket requirement demanding all government contractors, not just those on a single project, to waive their right under the NLRA to hire replacement workers. The broad sweep of the order, potentially impacting almost one fifth of the gross domestic product (GDP) of the United States, makes it more akin to regulatory, than proprietary, action by the President.

Furthermore, in rationalizing the need for Executive Order 12954, the President asserts that the balance, so important to stable collective bargaining relationships, between allowing businesses to operate during a strike and preserving worker rights is disrupted when permanent replacements are hired. The broad attempt by the President to prohibit striker replacements in the guise of stabilizing collective bargaining relationships exposes the order as the President "perform[ing] a role that is characteristically a governmental rather than a private role,"[24] and thus as an action that is regulatory in nature.

Clearly, the collective bargaining relationship is of utmost concern to the statutory framework of the NLRA, and, implicit in that

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[19] *Lodge 76, International Association of Machinists & Aerospace Workers* v. *Wisconsin Employment Relations Commission,* 427 U.S. 132, 141 (1976).

[20] 475 U.S. 282 (1986).

[21] *Gould* at 289 (internal quotation marks omitted.)

[22] In *Gould,* the preemption doctrine at issue was actually that established in *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236 (1959), which protects the primary jurisdiction of the NLRB to determine what conduct is prohibited or protected by the NLRA.

[23] *Boston Harbor,* 113 S.Ct. at 1199.

[24] See *Boston Harbor,* 113 S.Ct. at 1197.

framework, is a judgment that the use of the economic weapon of permanent replacement workers is part of collective bargaining process. The Executive Order interferes with the statutory judgment implicit in the NLRA and cannot be justified.

Executive Order 12954's ban on permanent replacement workers is bad policy

Although the Committee believes strongly that the President overstepped his authority in issuing Executive Order 12954, the Committee believes equally strongly, regardless of the legality of the Order, that it constitutes bad policy in the area of labor-management relations that will undermine our system of collective bargaining.

Executive Order 12954 ignores economic realities

Far from improving the efficiency of Federal contracting, a ban on striker replacements would inevitably lead to more strikes. If management were prevented from hiring permanent replacement workers, much of the risk would be removed from the decision to strike, thereby labor's impulse to strike would be less restrained. In situations where operations cannot be maintained without hiring permanent replacements, an employer would face the lose-lose proposition of agreeing to what are perhaps unreasonable demands of the union or suffering serious business losses. Related businesses and their employees would also suffer, as the domino effect of stalled industries and services leads to lost productivity and layoffs.

Executive Order 12954 upsets the balance of interests and risks

The current system of collective bargaining works because both labor and management come to the table with considerable leverage. The right to strike and the right to hire permanent replacement workers are counterbalancing weapons that drive both sides to settle their disputes at the bargaining table. By tying one arm behind management's back, the Order places so heavy a thumb on the scale in favor of labor that the balance of interests and risks that serves as the foundation for this nation's collective bargaining system will be seriously compromised.

Executive Order 12954 reverses 55 years of labor-management law which recognizes the right of employers to maintain operations during an economic strike by hiring permanent replacement workers

The right of employers to hire permanent replacement workers was first recognized in 1938 when the Supreme Court concluded in the *Mackay* decision that, although section 13 of the NLRA prohibits employer interference with the right to strike, it "does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of the strikers, upon the election of the latter to resume their employment, in order to create places for

them."[25] The Court thus concluded that hiring "permanent" replacements during economic strikes was not an unfair labor practice prohibited by the NLRA. This distinction between *economic* strikers and *unfair labor practice* strikers, in terms of their reemployment rights, has survived 55 years of lawmaking by the Congress, the Supreme Court, and the NLRB. Unfair labor practice strikers are entitled to immediate reinstatement at the conclusion of a strike, with backpay, while economic strikers are entitled to reinstatement only as vacancies occur.

The origins and development of the Mackay Radio Doctrine demonstrate that the right of employers to hire permanent replacement workers is a well-accepted facet of labor law

Proponents of a ban on permanent replacement workers have argued that the Supreme Court announced the right of employers to hire permanent replacement workers during an economic strike in a discussion that was peripheral to the holding of the *Mackay* decision. They contend that this right became enshrined in precedent without a thorough examination of the issue of permanent replacement either in the decision or when the NLRA was passed. However, this contention ignores legislative developments prior to passage of the NLRA, amendments to the NLRA subsequent to the *Mackay* decision, and the evolution of the *Mackay* doctrine through 50 years of Supreme Court decisionmaking. Employers were understood to retain the right to hire permanent replacement workers prior to the passage of the NLRA, and in numerous cases since the 1938 decision, the Supreme Court has reaffirmed the *Mackay* doctrine.[26] Further, subsequent case law and legislative developments related to the rights of both replacement workers and economic strikers have started from the premise of the per se legality of permanent replacement.[27]

The many legal protections in the NLRA that are extended to strikers ensures that permanent replacement is not the same as firing a striker

Allowing permanent replacement workers is not the same as allowing an employer to fire an employee for engaging in a lawful strike. There are numerous protections in the current law that are extended to economic strikers that protect the lawful exercise of the right to strike. Among these statutory protections are the fact that economic strikers remain statutory employees eligible for recall until they obtain regular and substantially equivalent employment[28] and they remain eligible to vote in union elections for 12 months.[29] Employers are prohibited from engaging in "surface bargaining" to instigate a strike so that nonunion replacement workers can be hired.[30] Likewise, employers may not grant additional benefits to either temporary or permanent replacement workers,[31]

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[25] 304 U.S. at 345.
[26] See, *e.g.*, *Trans World Airlines, Inc.* v. *Independent Federation of Flight Attendants,* 489 U.S. 426 (1989).
[27] See, *generally,* Hardin, *The Developing Labor Law* (3d Ed. 1992), pp. 1104–10.
[28] See *Laidlaw Corp.,* 171 NLRB 1366 (1968), *enfd.* 414 F.2d 99 (7th Cir. 1969), *cert. denied,* 397 U.S. 920 (1970).
[29] See section 9(c)(3) of the NLRA.
[30] Employers have an obligation under section 8(a)(5) of the NLRA to bargain in good faith.
[31] See *NLRB* v. *Erie Resistor Corp.,* 373 U.S. 221 (1962).

and they may not presume that replacement workers do not support the union for purposes of their duty to bargain.[32]

There is no evidence of an increase in the incidence of striker replacement activity during the 1980's and 1990's

Proponents of a ban on permanent replacement workers have argued that, after 55 years of coexisting with the possibility of permanent replacement, the practice has increased so dramatically in the last 15 years that it has become management's first and most common response to any labor dispute. The notion that employers cavalierly decide to replace entire units of employees contradicts the nearly universal efforts of employers to ensure workforce stability. Indeed, an experienced, well-trained workforce is one of an employer's most valuable assets. Moreover, not only is the hiring of permanent replacements costly, in terms of recruitment, training, and productivity loss, but it also is often associated with strike violence, public relations problems, and costly litigation. As a result, most employers involved in labor disputes will hire permanent replacements when faced with the most dire of circumstances and, then, only as a last resort. There is simply no empirical evidence demonstrating a marked increase in striker replacement activity.

Comparisons to the labor-management laws of other nations are irrelevant to the issue of whether a ban on striker replacements makes policy sense for the United States

Much has been made by proponents of the striker replacement ban of the contention that the United States is the only industrialized nation in the world to allow the permanent replacement of striking workers. Even assuming arguendo that this contention is accurate, such a comparison ignores not only the comprehensive body of statutory and regulatory labor relations law in each country, but also the economic, social, and cultural context of which any legal system is a part. Employers could also pick and choose among the labor relations laws of other nations to find provisions that might be more amenable to the interests of American businesses than the system of balanced interests they must work within in this country. A decision by any other country to include a ban on the hiring of permanent replacement workers within the fabric of their labor laws says very little about whether that policy makes sense for the United States. The fact remains that within the context of the U.S. system of labor relations law, the collective bargaining process simply will not work with the inequality of power that will result from a ban on permanent replacement workers.

CONCLUSION

H.R. 1176 is necessary to nullify executive order 12954 because it is of questionable legality and because it interferes with the balance between labor and management underpinning the collective bargaining process protected by the NLRA

Executive Order 12954 attempts to make illegal the use of economic weapons by federal contractors that are specifically authorized by the NLRA, and thus, cannot be allowed to stand. There is

[32] See *NLRB* v. *Curtin Matheson Scientific, Inc.*, 110 S.Ct. 1542 (1990).

no nexus between the Executive Order banning federal contractors from hiring permanent replacement workers and the goals of economy and efficiency in federal procurement. The order is inconsistent with the National Labor Relations Act's comprehensive statutory and remedial scheme governing labor-management relations. Finally, Executive Order 12954's ban on permanent replacement workers is an exercise of regulatory authority, preempted by the NLRA, which cannot be justified as a legitimate condition of doing business with the federal government.

The President's action runs counter to Congress' clearly expressed legislative intent to permit employers to maintain business operations during a strike by hiring permanent replacement workers. The will of Congress is consistent with almost 60 years of interpretation of the National Labor Relations Act (NLRA) that recognizes the necessary counterbalancing effect of the right to strike and the right to hire permanent replacement workers. Indeed, this balance of powers is at the heart of our system of collective bargaining. If Executive Order 12954 is allowed to stand, the Committee is convinced that the system would break down, resulting in more strikes, with the consequent loss of business opportunities and, ultimately, jobs.

The conclusion of the CRS analysis of Executive Order 12954 is that it "may not survive even the most restrained judicial scrutiny."[33] The analysis noted the irony of the situation created by the Order, in that a company could lose its Federal contracts because it had *legally* hired permanent replacement workers, while a company guilty of *illegal* unfair labor practices could not be disabled from participating in the Federal procurement process by the NLRB. The Committee feels strongly that the order is completely inappropriate and unwarranted and wholeheartedly supports the purpose of H.R. 1176 to make it null and void.

SUMMARY

H.R. 1176 would nullify any executive order that prohibits Federal contracts with companies that hire permanent replacements for striking employees.

SECTION-BY-SECTION ANALYSIS

SECTION ONE

Section one provides that any executive order, or other rule or order, that prohibits Federal contracts with, or requires the debarment of, or imposes other sanction on, a contractor on the basis that such contractor or organizational unit thereof has permanently replaced lawfully striking workers shall have no force or effect.

OVERSIGHT FINDINGS OF THE COMMITTEE

In compliance with clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives and clause 2(b)(1) of rule X of the Rules

[33] See CRS Memorandum at p. 7.

of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the body of this report.

INFLATIONARY IMPACT STATEMENT

In compliance with clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee estimates that the enactment into law of H.R. 1176 will have no significant inflationary impact on prices and costs in the operation of the national economy. It is the judgment of the Committee that the inflationary impact of this legislation as a component of the federal budget is negligible.

GOVERNMENT REFORM AND OVERSIGHT

With respect to the requirement of clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives, the Committee has received no report of oversight findings and recommendations from the Committee on Government Reform and Oversight on the subject of H.R. 1176.

COMMITTEE ESTIMATE

Clause 7 of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs which would be incurred in carrying out H.R. 1176. However, clause 7(d) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974.

APPLICATION OF LAW TO LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch. This bill would nullify any executive order that prohibits Federal contracts with contractors on the basis that such contractor has permanently replaced lawfully striking workers and as such has no application to the legislative branch.

UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget & Impoundment Control Act requires a statement of whether the provisions of the reported bill include unfunded mandates. This bill would nullify any executive order that prohibits Federal contracts with contractors on the basis that such contractor has permanently replaced lawfully striking workers and as such does not contain any unfunded mandates.

BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirement of clause 2(l)(3)(B) of rule XI of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause 2(l)(3)(C) of rule XI of the House of Representatives and section 403 of the Congressional Budget Act of 1974, the Committee

has received the following cost estimate for H.R. 1176 from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, June 19, 1995.

Hon. WILLIAM F. GOODLING,
Chairman, Committee on Economic and Educational Opportunities, House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 1176, as ordered reported by the Committee on Economic and Educational Opportunities on June 14, 1995, and has estimated that the bill would have no significant effects on the federal budget, and no impact on the budgets of state and local governments.

The bill would nullify an executive order that prohibits federal contracts with, requires debarment of, or imposes other sanctions on a contractor on the basis that the contractor has hired permanent replacements for striking employees. On March 8, 1995, President Clinton signed an executive order that prohibited the executive branch from contracting with employers that permanently replace lawfully striking employees. No action has been taken under this executive order, but the regulations implementing the order will become effective June 26, 1995. CBO has no basis for predicting the extent to which the executive order or its absence would affect labor disputes, and whether there would be any resulting effect on costs to the federal government. We anticipate that such effects, if any, would not be significant.

Enactment of H.R. 1176 would not affect direct spending; therefore, pay-as-you-go procedures would not apply to this bill.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

JAMES T. BLUM
(For June E. O'Neill, Director).

ROLLCALL VOTES

MOTION TO ADOPT THE BILL H.R. 1176

The bill H.R. 1176 was adopted without amendments on June 14, 1995 by a vote of 22 ayes to 16 noes.

The rollcall vote is as follows:

AYES	NOES
Chairman Goodling	Mr. Clay
Mr. Petri	Mr. Martinez
Mr. Gunderson	Mr. Owens
Mr. Fawell	Mr. Sawyer
Mr. Ballenger	Mr. Payne
Mr. Barrett	Mrs. Mink
Mr. Cunningham	Mr. Andrews
Mr. Hoekstra	Mr. Reed
Mr. McKeon	Mr. Roemer
Mr. Castle	Mr. Engel
Mr. Johnson	Mr. Becerra
Mr. Talent	Mr. Scott
Mr. Greenwood	Mr. Green
Mr. Hutchinson	Ms. Woolsey
Mr. Knollenberg	Mr. Romero-Barceló
Mr. Riggs	Mr. Reynolds
Mr. Graham	
Mr. Weldon	
Mr. Funderburk	
Mr. Souder	
Mr. McIntosh	
Mr. Norwood	

CHANGES IN EXISTING LAW

There are no changes to existing law made by this bill.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, DC, June 20, 1995.

Hon. BILL GOODLING,
Chairman, Committee on Economic and Educational Opportunities, Rayburn House Office Building, Washington, DC.

DEAR CHAIRMAN GOODLING: I regret that I was unable to be present on June 14th when our full committee voted to favorably report H.R. 1176, legislation which nullified President Clinton's Executive Order 11954. Unfortunately, as Chairwoman of the Banking Subcommittee on Financial Institutions and Consumer Credit, I was presiding over a second mark-up.

Had I been present, I would have voted "yes" to favorably report H.R. 1176.

Thank you for including this explanation in the committee report.

Sincerely,

MARGE ROUKEMA,
Member of Congress.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, DC, June 20, 1995.

Hon. WILLIAM GOODLING,
Chairman, Committee on Economic and Educational Opportunities, Rayburn House Office Building, Washington, DC.

DEAR CONGRESSMAN GOODLING: I unfortunately was not present during final consideration of H.R. 1176 before the Committee on Economic and Educational Opportunities. I was engaged in a mark-up of a measure before the Resources Committee. Had I been present during the vote to bring up H.R. 1176 and to report it out of Committee, I would have voted "no."

Thank you for your consideration.

Sincerely,

GEORGE MILLER,
Member of Congress, 7th District.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, DC, June 15, 1995.

Hon. WILLIAM L. GOODLING,
Chairman, Committee on Economic and Educational Opportunities, House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: I regret that I was unable to be present yesterday when the Full Committee voted to favorably report H.R. 1176, legislation to Nullify the President's Striker Replacement Executive Order.

I would like the official transcript to reflect that had I been present, I would have voted "Yea." However, it was necessary for me to be present on the House floor to speak in support of an amendment at the time the vote was taken.

Thank you for including this explanation in the record.

Sincerely,

JAN MEYERS,
Member of Congress.

COMMITTEE ON ECONOMIC
AND EDUCATIONAL OPPORTUNITIES,
U.S. HOUSE OF REPRESENTATIVES,
Washington, DC, June 21, 1995.

Hon. WILLIAM L. GOODLING,
Chairman, Committee on Economic and Educational Opportunities, House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: I regret that I was unable to be present Wednesday, June 14, when the Full Committee voted to favorably report H.R. 1176, legislation to Nullify the President's Striker Replacement Executive Order.

I would like the official transcript to reflect that had I been present, I would have voted "No." However, it was necessary for me

to be present at another Committee proceeding at the time the vote was taken.

Thank you for including this explanation in the record.

Sincerely,

PAT WILLIAMS,
Member of Congress.

MINORITY VIEWS

INTRODUCTION

In its zeal to enact legislation to embarrass the President, the majority has failed to present either a convincing case that the legislation represents good policy or that the legislation would serve any constructive purpose. H.R. 1176 raises two fundamental issues: (1) Is a policy that prohibits government contractors from permanently replacing striking workers in the Nation's interest? And, (2) does Executive Order No. 12954 exceed the scope of the President's procurement authority?

With regard to whether it is in the national interest to prohibit government contractors from permanently replacing striking workers, the answer is "absolutely yes." Restricting the use of permanent replacements by government contractors is clearly in the interest of taxpayers.

Not even the major league baseball owners were willing to pretend that the replacement players they hired were capable of playing baseball with the same skill and professionalism of major leaguers. The same is true in any other endeavor. Unilaterally turning one's back on skilled experienced employees in order to permanently replace them with unskilled, inexperienced replacements cannot help but have detrimental consequences for the products or services of government contractors and for the taxpayers who purchase those goods or services. Government contractors often provide essential services for our Nation's welfare. We should not, for instance, be willing to jeopardize the safety of our troops by sending them into battle using aircraft, weapons, and other equipment built by permanent replacement workers.

On the issue of whether the President has acted within his authority, the majority has failed to make its case that he has not so acted. Moreover, it is impossible not to notice a glaring inconsistency in the majority's position. In October 1992, President Bush issued Executive Order No. 12818 prohibiting federal contractors from entering into pre-hire agreements.[1] In effect, Mr. Bush denied construction workers on federal construction projects the only practical means they have of protecting their ability to engage in collective bargaining.

That Executive Order and President Clinton's Executive Order (No. 12954) were based on a similar claim of executive authority. However, the majority does not contend that President Bush exceeded his authority, and H.R. 1176 would not prevent a future President from reissuing the Bush Executive Order. We are left to

[1] In fact, their is a substantial body of precedents for Executive Orders relating to federal procurement policy. They are discussed in more detail later in these minority views. Significantly, H.R. 1176 would not prohibit any of the other Executive Orders. H.R. 1176 only applies where the President has taken action to protect workers and taxpayers from permanent replacement workers.

conclude then that the majority's theory of Presidential authority would seem to be that as long as the President takes an action against the interest of workers, he is acting within his authority; however, if the President acts to help workers, he has exceeded his authority. While such a posture may be consistent with the majority's political philosophy, it has no basis in law and is simply unfair.

In addition, it is ironic that some in the majority contend that the President somehow violated the principle of separation of powers by issuing Executive Order No. 12954. If the majority is so concerned with the separation of powers, why is it not content to let the courts determine the lawfulness of the President's action? The judicial branch is best equipped to determine the limits of executive power.

The use of permanent replacement workers is bad policy

The use of permanent replacement workers undermines cooperative and stable labor-management relations. Once management makes the decision to replace striking workers permanently, the union's paramount focus is to return its members to work. All other issues, including issues vital to productivity, become relatively insignificant.

Strikes involving the use of permanent replacement workers are more prolonged and contentious than other strikes. The trust essential to a cooperative collective bargaining relationship is shattered even when the mere threat of permanent replacements hovers overhead.

The decades of the 1980's and 1990's are littered with the destruction caused by the use of permanent replacement workers. Greyhound, International Paper, Continental Airlines, and Eastern Airlines offer prime examples of subsequent financial calamity. The best workplaces are those that foster constant experimentation, development, flexibility, and better products. Because workers are integral to the central process of collective innovation, they need flexible skills and responsibilities that will enable them to contribute more fully. This model cannot survive in an atmosphere polluted by permanent replacement workers. H.R. 1176 not only fails to recognize this reality, but promotes a policy of awarding federal contracts to companies that engage in this destructive behavior.

The majority's report, like so much of the majority's actions this Congress, utterly ignores the effects of H.R. 1176 on workers. The painful reality is that the pro-permanent-replacement policy embodied in the report promotes practices that destroy the lives of workers and their families. At a hearing on April 5, 1995, the Committee heard testimony from Roger Gates, President of Local 713 of the United Rubber Workers of America and an employee of Bridgestone/Firestone. That company permanently replaced its striking workers without notice in January 1994. Gates reminded us that:

> Aside from the legal questions of what goods the federal government should buy, there are some human questions. In the last year, I have learned nearly as much about those as about making tires. Every day I confront and try to deal with what is happening to the families of several

> thousand Bridgestone/Firestone workers in Decatur, in Oklahoma City, in Noblesville, Indiana, and in Des Moines, Iowa. I am here to make sure that when you in Washington debate government policy in this area, you clearly have in mind the real people whose lives you are affecting.[2]

In keeping with Mr. Gates salient observation, the minority notes the following comments from other "real people."

> By far, the most tragic case was that of flight attendant Frank Fotjik. Frank had flown for TWA for 21 years when the strike took place; he was married with two children, 8 and 9 years old. Frank's inability to regain his rightful employment and the fact that he could no longer provide for his wife and children weighed heavily on him, causing deep depression. Frank would have regained his job back at the end of the strike had the crossovers been removed. Three weeks after the strike ended, when Frank realized that he had no post-strike job, he committed suicide. His widow told IFFA that Frank had no prior history of depression. Frank's death is a tremendous loss to his family, friends, and TWA.[3]
>
> There were divorces, there were problems, physical, mental. It's devastating. You're pitting brother against brother in many cases . . . I saw one brother on one side of the coin and the other as a striker and they literally would fight each other because one was working for the company and one was not . . . The company pitted one against another and some of this is never going to go away. All of the top management that makes these decisions, they don't live here in this town.[4]
>
> I was with Ravens 18 years. I worked my way up through the ranks, my family had a good quality of life. I was earning $13.16 an hour when Ravens locked us out and hired scabs. It takes two to negotiate—we were ready to do some honest talking, but Ravens wasn't interested. We knew what they were doing wasn't right, but it seemed that everywhere we turned for help, all we got was a slap in the face. To make matters even worse, the few other companies in this area apparently have "blacklisted" us; as far as I know, none of the workers who were forced to strike by Ravens has found work in this area. Now, I work when I can . . . usually part-time, temporary jobs, whatever comes along. My wife works full-time as a bank teller. She earns $9,000 a year. Our daughter Susan is a senior in high school, and she is filling out applications for college, but we don't know how we are going to pay the tui-

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[2] "Hearing on E.O. 12954 and H.R. 1176 before the House Economic and Educational Opportunities Committee", 104th Cong., 1st Sess. at 33 (Apr. 5, 1995).

[3] "Prohibiting Permanent Replacement of Striking Workers, Hearing before the Subcommittee on Aviation of the Committee on Public Works and Transportation", 102d Cong., 1st Sess. at 113 (Apr. 10, 1991) (Testimony of Vicki Frankovich, President, Independent Federation of Flight Attendants).

[4] "Hearings on H.R. 5, The Striker Replacement Bill, Hearings before the Subcommittee on Labor-Management Relations of the Committee on Education and Labor," 102d Cong., 1st Sess. at 162 (Mar. 6, 1991). (Tom Pratt.)

> tion. My family went from being comfortable, typical middle-class working Americans, to worrying about keeping the wolves away from the door.[5]

Executive Order 12954 promotes productive Federal procurement

The Clinton Administration argues that the Federal Property and Administrative Services Act of 1949 (FPASA), 40 U.S.C. § 471 *et seq.*, was enacted to "provide for the Government an economical and efficient system for . . . procurement and supply."[6] The goals of economy and efficiency "appear in the statute and dominate the sparse record of the congressional deliberations" concerning the FPASA.[7] Section 486(a) of the FPASA provides that the President "may prescribe such policies and directives, not inconsistent with the provisions of this Act, as he shall deem necessary to effectuate the provisions of said Act." The Administration argues that Congress intended the FPASA to "emphasiz[e] the leadership role of the President in setting Government-wide procurement policy on matters common to all agencies," by giving the President "particularly direct and broad-ranging authority over those larger administrative and management issues that involve the Government as a whole."[8]

The Administration concedes, however, that the authority delegated to the President is not unlimited. Because the purpose of the FPASA is to promote economy and efficiency in federal procurement of goods and services, the U.S. Court of Appeals for the District of Columbia has held that presidential orders under section 486(a) "must accord with values of 'economy' and 'efficiency.'"[9] The Administration asserts that "[e]conomy and efficiency are not narrow terms; they encompass those factors like price, quality, suitability, and availability of goods or services that are involved in all acquisition decisions."[10] Nonetheless, the Administration recognizes that some nexus between the executive order and the statutory goals of economy and efficiency is required. Although courts have not yet specified what is a "sufficiently close nexus,"[11] it is the Administration's view that the President need only have a rational basis for finding that the executive order serves economy and efficiency in government procurement.

The Administration accumulated evidence from recent congressional debates, hearings, and reports, as well as from scholarly studies on the use of permanent replacements for lawful strikers to support the President's findings that strikes involving perma-

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[5] Prohibiting Discrimination Against Economic Strikers, Hearing before the Subcommittee on Labor of the Committee on Labor and Human Resources," 102d Cong., 1st Sess. at 224 (Mar. 12, 1991). (Richard Board.)

[6] 40 U.S.C. § 471.

[7] *AFL–CIO* v. *Kahn,* 618 F.2d 784, 788 (D.C.Cir.) (en banc), *cert. denied,* 443 U.S. 915 (1979).

[8] Id. at 788, 789.

[9] Id. at 792.

[10] Id. at 789.

[11] Id. at 792.

nent replacements tend to be longer[12] and more disruptive[13] than other strikes. These strikes result in lower productivity[14] and less cooperative labor-management relations.[15]

The evidence and common sense also support the executive order's finding that an employer who hires permanent replacement workers "loses the accumulated knowledge, experience, skill, and expertise of its incumbent employees."[16] The evidence also indicates not only that employers using permanent replacement workers are not able to operate their facilities at a greater capacity than employers using other means to operate during a strike (*e.g.*, temporary replacements), but also that the use of temporary replacements, rather than permanent replacements, may allow a firm to operate at a greater capacity.[17] Consistent with the findings in the executive order, studies show that cooperative workplaces are likely to be more productive than those that experience a great conflict.[18]

Executive Order No. 12954 advances cooperative and stable labor-management relations, which is a central feature of efficient, economical and productive procurement. The use (or threatened use) of permanent replacement workers destroys opportunities for cooperative and stable labor-management relations. Since the economical and efficient administration and completion of federal government contracts requires a stable and productive labor-management environment, the federal government has a strong interest in prohibiting the use of permanent replacements.

Executive Order 12954 is carefully tailored to promote efficient and economical procurement

Executive Order No. 12954 only applies to those who seek to profit from the taxpayers. The vast majority of employers who are not government contractors are wholly unaffected by the President's order. The order is only applicable to the small number of irresponsible government contractors who seek to permanently re-

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[12] S. Rep. No. 110, 103d Cong., 1st Sess. 12 (1993); H.R. Rep. No. 116 at 20; "Hearings on H.R. 5, The Striker Replacement Bill: Hearings before the Subcomm. on Labor-Management Relations of the House Comm. on Educ. & Labor," 102d Cong., 1st Sess. 490–91, 495–96 (1991); John F. Schnell and Cynthia L. Gramm, "The Empirical Relations Between Employers' Striker Replacement Strategies and Strike Duration," 47 Indus. & Lab. Rel. Rev. 189, 190, 199, 201, 203 (1994); Craig A. Olson, "The Use of Strike Replacements in Labor Disputes: Evidence From the 1880's to the 1980's," at 13–21 (Univ. of Wisconsin-Madison, March 1991) (unpublished paper); Cynthia Gramm, "Empirical Evidence on Political Arguments Relating to Replacement Worker Legislation," 42 Lab. L.J. 491, 493–94 (1991); *see also* Cynthia L. Gramm and John F. Schnell, "An Analysis of The Economic Costs of Executive Order 12954: Barring Federal Contractors From Hiring Permanent Striker Replacements" Kenneth L. Deavers, Employment Policy Foundation, 1995 at 6–14 (June 1995).

[13] S. Rep. No. 110 at 7, 21–24; H.R. Rep. No. 116 at 16, 28–29.

[14] S. Rep. No. 110 at 7; H.R. Rep. No. 116 at 16.

[15] S. Rep. No. 110 at 4, 24–25; H.R. Rep. No. 116 at 27, 30–31.

[16] See, e.g., Julius Getman & Ray Marshall, "Industrial Relations in Transition; The Paper Industry Example," 102 Yale L.J. 1803, 1840–43, 1881 (June 1993).

[17] Cynthia Gramm, "Employers' Decision to Operate During Strikes: Consequences and Policy Implications" (1990), reprinted in Hearings on H.R. 5, The Striker Replacement Bill: Hearings Before the Subcomm. on Labor-Management Relations of the House Comm. on Educ. & Labor," 102d Cong., 1st Sess. 491–92, 497–98 (1991); Cynthia L. Gramm and John F. Schnell, "Some Empirical Effects of Using Permanent Striker Replacements," 12 Contemp. Econ. Pol'y 122, 124–29, 132 (1994).

[18] See Julius Getman & Ray Marshall, "Industrial Relations in Transition: The Paper Industry Example," 102 Yale L.J. 1803, 1836–44, 1880–81 (June 1993); Belman, "Unions, the Quality of Labor Relations, and Firm Performance," reprinted in "Unions and Economic Competitiveness" 41, 70–71 (Mishel and Voos, eds., 1992); see generally Richard B. Freeman and James L. Medoff, "What Do Unions Do?" (1984) (presence of unions increases efficiency and productivity).

place lawfully striking workers. The order does not restrict the right of contractors to replace striking workers. Moreover, if the strike is unlawful, if the conduct of the strikers is unlawful, or if the workers lose the strike and do not agree to return to work under the employer's terms and conditions, contractors may still, in effect, permanently replace strikers. Executive Order No. 12954 merely provides that, if a contractor chooses to discriminate against lawfully striking workers in favor of replacement workers, the federal government will not reward that behavior by doing business with that contractor.

Executive Order No. 12954 closely ties termination or debarment of contractors who permanently replace striking workers to the pursuit of economy and efficiency. Significantly, the order provides that the Secretary of Labor will do a case-by-case analysis before issuing any debarment or termination order. In addition, any decision by the Secretary to issue a debarment or termination order is subject to review by the contracting agency. Finally, any final agency action remains subject to judicial review. As stated by the U.S. District Court for the District of Columbia:

> As both the proposed regulations and the Executive Order itself make clear, the Order does not create an automatic bar to the hiring of permanent replacement workers, but rather, provides for an administratively layered system of case-by-case review in order to determine whether termination and/or debarment would be appropriate in the case of individual contracts and contractors.[19]

Clearly, Executive Order No. 12954 does not establish a universal or general rule. Rather, it provides a careful review process to ensure the particular facts and circumstances of each case and the interests of efficient and economical procurement are assessed before any action is taken.

A substantial body of precedents exists for executive orders on procurement policy

Federal contractors are often required to follow a more progressive course than other employers. Since enactment of the FPASA, Presidents have exercised the authority delegated to them by Congress, among other things, to ban discrimination and require affirmative action by federal contractors, to exclude certain state prisoners from federal contract work, to require federal contractors to adhere to wage and price controls, and to require federal workers to pay parking fees.[20]

The Buy American Act,[21] passed by Congress in 1933, requires that the federal government buy primarily goods and services that are produced or manufactured in the United States. The rationale for that Act is that American taxpayers' dollars should be used to

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[19] *Chamber of Commerce et al v. Reich,* Civ. No. 95–0503, Memorandum-Opinion at 16 (D.D.C. May 9, 1995) (Kessler, J.).

[20] *See Kahn* at 790–93; *American Fed'n of Gov't Employees v. Carmen,* 669 F.2d 815 (D.C. Cir. 1981); *Contractors Ass'n v. Secretary of Labor,* 442 F.2d 159 (3d Cir.), *cert. denied,* 404 U.S. 854 (1971); *Farkas v. Texas Instrument Inc.,* 375 F.2d 629, 632 n.1 (5th Cir.), *cert. denied,* 389 U.S. 977 (1967).

[21] 41 U.S.C. § 10a et seq.

put Americans to work. Several executive orders have been issued by a variety of Presidents to enforce that requirement.

Before 1964, racial discrimination in employment did not violate federal law. Nonetheless, in 1941, President Roosevelt issued an executive order requiring defense contractors to refrain from racial discrimination. In 1951, President Truman extended that requirement to all federal contractors, even through Congress had declined to enact an anti-discrimination statute proposed by the President. In 1964, President Johnson issued Executive Order No. 11246 to require federal contractors to guarantee equal opportunity based on race, gender, and national origin. President Johnson issued that executive order a full year before Congress enacted the Civil Rights Act of 1965, and the executive order still requires a higher standard for federal contractors than the Civil Rights Act requires for other employers. President Johnson also issued an executive order in 1964 prohibiting federal contractors from discriminating on the basis of age, even though Congress would not act to prohibit age discrimination for at least another decade.

Most recently, President George Bush issued two executive orders pursuant to his authority under the FPASA that related directly to labor-management relations policy:[22]

(1) "Pre-Hire Agreements": Executive Order No. 12818 issued in late October 1992 prohibited federal contractors from entering into "pre-hire agreements," also known as "project agreements" with a union for work on federal construction contracts.[23] Project agreements are collective bargaining agreements common to the construction industry that establish labor standards for construction work prior to the hiring of workers. Section 8(f) of the National Labor Relations Act ("NLRA"),[24] specifically and expressly *permits* construction employers and construction unions to enter into project agreements. In *Building and Construction Trade Council of Boston and the Massachusetts Water Resources Authority* v. *Associated Builders & Contractors of Massachusetts/Rhode Island,* 113 S. Ct. 1190 (1993) ("*Boston Harbor*") the United States Supreme Court held unanimously that a State could enter into project agreements without violating federal labor laws.

In sum, Executive Order No. 12818 sought to prohibit a practice which Congress had expressly permitted. In contract, the National Labor Relations Act is silent on the question of whether federal contractors may use permanent replacement workers. Congress has never spoken on the issue. The House of Representatives twice passed the Workplace Fairness Act which would have prohibited *all* employers, not just federal contractors, from using permanent replacements.[25] A majority of United States Senators was ready to

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[22] The majority correctly notes that neither of President Bush's executive orders underwent serious legal challenge. Both orders were eventually repealed by President Clinton. Nonetheless, these precedents undermine the majority's claim to the principle of defending the integrity of the National Labor Relations Act and the collective bargaining process. No member of the majority either introduced legislation to overturn either of President Bush's executive orders or publicly advocated for hearings to consider the consequences of these executive orders for collective bargaining and the NLRA. In fact, as noted later in this text, leaders of the Republican party praised President Bush's actions.

[23] 57 Fed. Reg. 48713 (Oct. 28, 1992).

[24] 29 U.S.C. § 158(f).

[25] See H.R. 5, 102d Cong., 1st Sess. (1991); S. 55, 102d Cong., 2d Sess. (1992); H.R. 5, 103d Cong., 1st Sess. (1993).

pass the Workplace Fairness Act, but their intent was frustrated by filibusters on two separate occasions.

(2) *Beck Decision*: Executive Order No. 12800, issued in April 1992, required federal contractors to post notices declaring that their employees could not be required to join or maintain membership in a union.[26] This executive order purported to implement the Supreme Court's decision in *Communications Workers of America* v. *Beck*, 487 U.S. 735 (1988).

President Bush proceeded with this executive order, even though a very closely related legislative proposal was pending before Congress. In 1991, a coalition of House Republicans, including the current Speaker Newt Gingrich, the current Republican leader Richard Armey, the current Republican whip Tom Delay, and Representatives Archer, Ballenger, and Livingston co-sponsored the Workers Political Rights Act of 1991.[27] The proposed legislation would have required that employees be notified in writing that they could not be required to join a union. The bill was never passed by the Congress. But on April 13, 1992, President Bush issued Executive Order No. 12800 anyway.

On the very day President Bush issued that Executive Order, presidential Press Secretary Marlin Fitzwater explained that the Bush Administration had hoped that Congress would pass legislation that addressed Bush's policy or that the NLRB would issue a decision preventing unions from using fees collected from dissenting employees for political purposes. "That has not occurred," said Fitzwater. "[W]e thought it most important to go forward with this piece of it, which is all we could do."[28] The current Republican whip, Rep. Tom DeLay, expressed an even more blunt view: "This is an effort by the President to do something through executive order that he cannot get Congress to do."[29]

The majority's arguments regarding strike duration, strike incidence, and the costs of the executive order are entirely without merit

The evidence contradicts several unsupported assertions in the majority report. First, while the majority claims (without citation to any scholarly or empirical support or testimony before the Committee) that "there is no evidence of an increase in the incidence of striker replacement activity during the 1980's and the 1990's," scholars have found that the incidence of strikes in which employers permanently replace striking workers has generally increased during the period since the Supreme Court's decision in *National Labor Relations Board* v. *Mackay Radio & Telegraph Company*, 304 U.S. 333 (1938). That increase has been sustained at a historically high level during the past two decades.[30]

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[26] 57 Fed. Reg. 12985 (Apr. 14, 1992).
[27] H.R. 2915, 102d Cong., 1st Sess. (1991).
[28] 72 Daily Labor Report A–10, April 14, 1992.
[29] 72 Daily Labor Report A–10, April 14, 1992.
[30] See, e.g., Michael Leroy, "Regulating Employer Use of Permanent Replacement Strikes: Empirical Analysis of NLRA and RLA Strikes, 1935–1991," (forthcoming in Berkeley Journal of Employment & Labor Law, 1995); Cynthia Gramm, "Employers' Decision to Operate During Strikes: Consequences and Policy Implications" (1990), reprinted in Hearings on H.R. 5, The Striker Replacement Bill: Hearings Before the Subcomm. on Labor-Management Relations of the House Comm. on Educ. & Labor, 102d Cong., 1st Sess. (1991); see also Cynthia L. Gramm and

Continued

Second, while the majority asserts that the executive order will increase the incidence of strikes, data drawn from experience with Canadian provincial law that would affect all employers (not simply federal contractors with contracts exceeding $100,000) indicate that prohibiting employers from using permanent replacement workers does not significantly increase the incidence or duration of strikes.[31]

A third unsupported assertion relates to the cost of the executive order to the economy, as a whole, and to the government, in particular. The majority offers no empirical evidence to support its view that the executive order will increase the government's costs. A letter from Congressional Budget Office Director June E. O'Neill (included in this Committee Report) directly rebuts the majority's view:

> CBO has no basis for predicting the extent to which the executive order or its absence would affect labor disputes, and whether there would be any resulting effect on costs to the federal government. We anticipate that such effects, if any, would not be significant.[32]

A study by the Employment Policy Foundation purported to show that Executive Order No. 12954 would cost the economy as a whole between $520 million and $2 billion. A careful analysis of that study concluded the following with respect to the EPF study

> [F]inal estimates of the aggregate annual economic cost of the Executive Order are *not credible* because they are derived from contaminated data and because they are based on several assumptions that are demonstrably false when considered in light of both economic theory and empirical evidence.[33]

Not surprisingly, the majority does not cite the EPF study in the Committee Report. In fact, the majority cites no authority for their naked assertion regarding the Executive Order's costs. If anything, the Executive Order is likely to save money by protecting the government from low-quality goods and services provided by unskilled, less productive permanent replacement workers.

The administration has advanced substantial arguments in support of the legality of Executive Order No. 12954

The Justice Department's Office of Legal Counsel reviewed Executive Order No. 12954 before it was issued and released a thorough memorandum finding that the President plainly acted within his

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John F. Schnell, "An Analysis of The Economic Costs of Executive Order 12954: Barring Federal Contractors From Hiring Permanent Striker Replacement" Kenneth L. Deavers, Employment Policy Foundation, 1995 at 16–21 (June 1995).

[31] John W. Budd, "*Canadian Strike Replacement Legislation and Collective Bargaining: Lessons for the United States*," at 9–12 (Univ. of Minnesota, Dec. 1994) (unpublished paper forthcoming in Industrial Relations; see also Cynthia L. Gramm and John F. Schnell, "*An Analysis of The Economic Costs of Executive Order 12954: Barring Federal Contractors From Hiring Permanent Striker Replacements*" Kenneth L. Deavers, Employment Policy Foundation, 1995 at 14–16 (June 1995).

[32] Letter from Director June E. O'Neill, Congressional Budget Office, to Chairman William F. Goodling, June 9, 1995.

[33] Cynthia L. Gramm and John F. Schnell, "*An Analysis of The Economic Costs of Executive Order 12954: Barring Federal Contractors From Hiring Permanent Striker Replacements*" *Kenneth L. Deavers, Employment Policy Foundation, 1995 at ii (June 1995) (Executive Summary).*

executive authority when he issued the Executive Order. This memorandum (attached as Appendix A to these minority views) concisely sets forth the Administration's legal arguments in support of the executive order.

The United States Supreme Court has construed the NLRA to preempt government regulation of certain conduct that the Congress intended to remain free from any regulation or to commit to the exclusive jurisdiction of the National Labor Relations Board ("NLRB"). The Administration argues, however, that the NLRA does not preempt action by the government when it is acting, as here, as a purchaser of goods or services, rather than as a regulator or policymaker.[34]

Section 7 of the NLRA guarantees certain rights to employees, including the right to organize, to bargain collectively, and to engage in other concerted activities, including strikes.[35] Section 8 prohibits employer conduct that interferes with the exercise of section 7 rights.[36] The Supreme Court has recognized that employers who hire permanent replacements during an economic strike do not violate section 8 of the NLRA.[37] However, the Supreme Court has never created a statutory right for employers to hire permanent replacements.[38]

The Supreme Court has developed two preemption doctrines under the NLRA. Under the first doctrine, known as "*Garmon* preemption", the NLRA preempt State or local regulation of conduct that is arguably subject to section 7 or 8 of the NLRA.[39] *Garmon* preemption "protects the primary jurisdiction of the NLRA to determine in the first instance what kind of conduct is either prohibited or protected by the NLRA."[40]

The second preemption doctrine, "*Machinists* preemption," applies to conduct that "Congress intended to be 'unrestricted by any governmental power to regulate' because it was among the permissible 'economic weapons in reserve'" under the Act.[41] The *Machinists* rule "creates a free zone from which all regulation, 'whether federal or State,' is excluded."[42]

The Administration argues that these NLRA preemption doctrines "apply only to . . . *regulation*" by the government within a "zone protected and reserved for market freedom" or for NLRB jurisdiction.[43] Where the government acts as a proprietor in the market, and does not engage in regulation or policymaking, the Admin-

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[34] *Boston Harbor,* 113 S. Ct. 1190 (1993). The Administration has pointed out that the Supreme Court has not applied the NLRA preemption doctrine to action by a federal agency, other than the NLRB. See *Kahn,* 618 F.2d at 796. Even assuming that Congress meant to preempt any federal, as well as state or local, regulation of conduct that it intended to be left to the free play of economic forces, proprietary action such as that embodied in Executive Order No. 12954 is not preempted.

[35] 29 U.S.C. § 157; *NLRA* v. *Fleetwood Trailer Co.,* 389 U.S. 375 (1967).

[36] 29 U.S.C. § 158.

[37] *NLRB* v. *Mackay,* 304 U.S. 333, 345–46 (1938).

[38] In fact, there is good reason to doubt whether the NLRA creates any rights for employers, as opposed to mere permitted conduct.

[39] *San Diego Bldg. Trades Council* v. *Garmon,* 359 U.S. 236, 245 (1959).

[40] *Metropolitan Life Ins. Co.* v. *Massachusetts,* 471 U.S. 724, 748 (1985).

[41] *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers* v. *Wisconsin Employment Relations Comm'n,* 427 U.S. 132, 141 (1976) ("Machinists") (citation omitted).

[42] *Golden State Transit Corp.* v. *City of Los Angeles,* 493 U.S. 103, 111 (1989) (quoting *Machinists,* 427 U.S. at 153) (citations and footnote omitted).

[43] *Boston Harbor,* 113 S. Ct. at 1196 (emphasis in original).

istration asserts that its conduct simply is not subject to either *Garmon* or *Machinists* preemption.[44]

The Administration relies on the Supreme Court's reasoning in *Boston Harbor* that a public entity "purchasing contracting services" generally may make the same decisions as private purchaser in the market.[45] Thus, the Court held that a State could insist that all successful bidders on a particular State project abide by a project agreement negotiated between the manager of the project and a council of trade unions. The Court emphasized that the State was not engaged in policymaking, but was simply trying to ensure that the project would be completed with economy and efficiency.[46] The State's proprietary conduct as a purchaser of construction services exemplified the workings of the market and was subject to neither *Garmon* nor *Machinists* preemption.[47]

The Administration also relies on the Supreme Court's recent statement that "the status of the Government as . . . market participant must be sharply distinguished from the status of the Government as regulator."[48] Contrary to the majority's assertions, the Administration argues that the Executive Order does not regulate an area of conduct that Congress intended to be left to the free play of economic forces. In the Administration's view, the order simply is an exercise of federal government's authority as a purchaser of goods and services and, therefore, does not conflict with the NLRA.

As in *Boston Harbor,* Executive Order No. 12954 applies only to contracts in which the federal government acts as a purchaser of goods and services.[49] The Administration argues that the order implements the government's right as a purchaser to refrain from doing business with employers whose use of permanent replacements likely will impede their ability to fulfill their contractual obligations.[50] The Administration asserts that, like private purchasers, "the Government enjoys the unrestricted power to . . . determine those with whom it will deal, and to fix the terms and conditions upon which will make needed purchases."[51]

Moreover, the Administration argues that Executive Order No. 12954 is intended to serve economic, rather than regulatory or policy goals.[52] Thus, in the Administration's view, the order is easily distinguishable from the Wisconsin statute in *Wisconsin Dep't of Indus., Labor & Human Relations* v. *Gould Inc.,* 475 U.S. 282 (1986), which automatically debarred businesses that had committed three unfair labor practices under the NLRA in five years. In that case, the Administration concludes that the Court could not credibly ascribe any purpose other than regulation to the statute, "given the rigid and undiscriminating manner" in which debarment

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[44] Id. at 1196–97; see *Babler Bros., Inc.* v. *Roberts,* 995 F.2d 911, 916 (9th Cir. 1993); *Associated Builders & Contractors, Inc.,* v. *City of Seward,* 966 F.2d 492, 495–96, 498 (9th Cir. 1992), *cert. denied,* 113 S. Ct. 1577 (1993).

[45] *Boston Harbor,* 113 S. Ct. at 1198.

[46] Id. at 1193.

[47] Id. at 1199.

[48] *Director, OWCP* v. *Newport News Shipbuilding & Dry Dock Co.,* 63 U.S.L.W. 4213, 4215 (U.S. March 21, 1995).

[49] *Boston Harbor,* 113 S. Ct. at 1198.

[50] See id. at 1198–99.

[51] *Perkins* v. *Lukens Steel Co.,* 310 U.S. 113, 127 (1940) (footnote omitted).

[52] *Boston Harbor,* 113 S. Ct. at 1198; *Phoenix Eng'g Inc.* v. *MK-Ferguson of Oak Ridge Co.,* 966 F.2d 1513, 1524 (6th Cir. 1992); *Seward,* 966 F.2d at 496.

occurred.[53] Indeed, the State conceded that the statute's purpose was "to deter labor law violations" regardless of their nature and, as the Court emphasized in *Boston Harbor*, it served only to deter conduct that bore no relation to an employer's performance on government contracts.[54] Thus, Wisconsin was not functioning as a private purchaser of services, but had enacted a law that was "tantamount to regulation."[55]

The Administration argues that, unlike the statute in *Gould*, the proprietary purpose of Executive Order No. 12954 is evident on its face. The order is intended "to ensure that economical and efficient administration and completion of Federal Government contracts."[56] Doing business with contractors engaged in prolonged labor disputes impedes those goals.[57]

The extensive research and congressional history cited above provides the Administration's support for its conclusions that hiring permanent replacement workers results in longer strikes, antagonizes labor-management relations, and deprives employers of the knowledge, experience, skill, and expertise of the incumbent employees, adversely affecting productivity. Thus, sound business judgment counsels against entering into contracts with employers that permanently replaced lawfully striking workers.

Finally, the Administration argues that the flexible scheme embodied in Executive Order No. 12954 underscores its lawful proprietary purpose. The Executive Order does not provide for automatic contract termination or debarment of those contractors that hire permanent replacements. Rather, according to the Administration, the Secretary of Labor or the contracting agency heads have discretion in determining when to take such action. By permitting individual agencies to continue to contract with entities that hire permanent replacements, the Executive Order demonstrates a flexibility wholly incompatible with a regulatory rationale.

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[53] *Gould*, 475 U.S. at 287.
[54] *Boston Harbor*, 113 S. Ct. at 1197.
[55] *Gould*, 475 U.S. at 289; see *Boston Harbor*, 113 S. Ct. at 1197.
[56] 60 Fed. Reg. 13023.
[57] Id.

APPENDIX A

DEPARTMENT OF JUSTICE,
OFFICE OF LEGAL COUNSEL,
Washington, DC, March 9, 1995.

Memorandum for Janet Reno, Attorney General
From: Walter Dellinger, Assistant Attorney General
Re: Executive Order No. 12954, entitled "Ensuring the Economical and Efficient Administration and Completion of Federal Government Contracts"

On March 6, 1995, we issued a memorandum approving as to form and legality a proposed executive order entitled, "Ensuring the Economical and Efficient Administration of Federal Government Contracts." On March 8, 1995 the President signed the proposed directive, making it Executive Order No. 12954. This memorandum records the basis for our prior conclusion that the Federal Property and Administrative Services Act vests the President with authority to issue Executive Order No. 12954 in light of his finding that it will promote economy and efficiency in government procurement.

PART I

Executive Order No. 12954 establishes a mechanism designed to ensure economy and efficiency in government procurement involving contractors that permanently replace lawfully striking workers. After a preamble that makes and discusses various findings and ultimately concludes that Executive Order No. 12954 will promote economy and efficiency in government procurement, the order declares that "[i]t is the policy of the Executive branch in procuring goods and services that, to ensure the economical and efficient administration and completion of Federal Government contracts, contracting agencies shall not contract with employers that permanently replace lawfully striking employees." Exec. Order No. 12954, § 1. The order makes the Secretary of Labor ("Secretary") responsible for its enforcement. *Id.* § 6. Specifically, the Secretary is authorized to investigate and holding hearings to determine whether "an organizational unit of a federal contractor" has permanently replaced lawfully striking employees either on the Secretary's own initiative or upon receiving "complaints by employees" that allege such permanent replacement. *Id.* § 2.

If the Secretary determines that a contractor has permanently replaced lawfully striking employees, the Secretary is directed to exercise either or both of two options. First, the Secretary may make a finding that all contracts between the government and that contractor should be terminated for convenience. *Id.* § 3. The Secretary's decision whether to issue such a finding is to be exercised

to advance the government's economy and efficiency interests as set forth in section 1. Id § 1 ("all discretion under this Executive order shall be exercised consistent with this policy."). The Secretary is then to transmit the finding to the heads of all departments and agencies that have contracts with the contractor.[1] Each such agency head is to terminate any contracts that the Secretary has designated for termination, unless the agency head formally and in writing objects to the Secretary's finding. Id. § 3. An agency head's discretion to object is also limited to promoting the purpose of economy and efficiency as set forth in the policy articulated in section 1.

The Secretary's second option is debarment. If the Secretary determines that a contractor has permanently replaced lawfully striking employees, the Secretary is to place the contractor on the debarment list until the labor dispute has been resolved, unless the Secretary determines that debarment would impede economy and efficiency in procurement. The effect of this action is that no agency head may enter into a contract with a contractor on the debarment list unless the agency head finds compelling reasons for doing so. Id. § 4.

Exective Order No. 12954, taken as a whole, sets forth a mechanism that closely ties its operative procedures—termination and debarment—to the pursuit of economy and efficiency. The President has made a finding that, as a general matter, economy and efficiency in procurement are advanced by contracting with employers that do not permanently replace lawfully striking employees. Additionally, the President has provided for a case-by-case determination that his finding is justified on the peculiar facts and circumstances of each specific case before any action to effectuate the President's finding is undertaken.

PART II

The Supreme Court has instructed that "[t]he President's power, if any, to issue [an] order must stem either from an act of Congress or from the Constitution itself." *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, 585 (1952). The President's authority to issue Executive Order No. 12954 is statutory; specifically, the Federal Property and Administrative Services Act of 1949 ("FPASA"). That statute was enacted "to provide for the Government an economical and efficient system for ... procurement and supply." 40 U.S.C. § 471. The FPASA expressly grants the President authority to effectuate this purpose,

> The President may prescribe such policies and directives, not inconsistent with the provisions of this Act, as he shall deem necessary to effectuate the provisions of said Act, which policies and directives shall govern the Administrator [of General Services] and executive agencies in carrying out their respective functions hereunder.

Id § 486(a). An executive order issued pursuant to this authorization is valid if (a) "the President acted 'to effectuate the provisions' of the FPASA," and (b) the President's "action was 'not inconsistent

[1] We will refer to this class of officials generally as agency head(s).

with' any specific provision of the Act." *American Fed'n of Gov't Employees* v. *Carmen*, 669 F.2d 815, 820 (D.C. Cir 1981) (quoting 40 U.S.C. § 486(a)). We are not aware of any specific provision of the FPASA that is inconsistent with Executive Order No. 12954. Therefore, we turn to the question whether the President acted to effectuate the purposes of the FPASA.

Every court to consider the question has concluded that § 486(a) grants the President a broad scope of authority. In the leading case on the subject, the United States Court of Appeals for the District of Columbia Circuit, sitting en banc, addressed the question of the scope of the President's authority under the FPASA, and § 486(a) in particular. See AFL–CIO v. Kahn, 618 F.2d 784 (D.C. Cir.) (en banc), cert. denied, 443 U.S. 915 (1979). A plausible argument that the FPASA granted the President only narrowly limited authority was advanced and rejected. See id. at 799–800 (MacKinnon, J., dissenting). After an extensive review of the legislative history of that provision, the court held that the FPASA, through § 486(a), was intended to give the President "broad-ranging authority" to issue orders designed to promote "economy" and "efficiency" in government procurement. Id. at 787–89. The court emphasized that "(e)conomy' and 'efficiency' are not narrow terms; they encompass those factors like price, quality, suitability, and availability of goods or services that are involved in all acquisition decisions." Id. at 789 see also Peter E. Quint, *The Separation of Powers under Carter*, 62 Tex. L. Rev. 785, 792–93 (1984) (although § 486(a) "easily could be read as authorizing the President to do little more than issue relatively modest housekeeping regulations relating to procurement practice. . . . The *Kahn* court found congressional authorization of sweeping presidential power. . . ."); Peter Raven-Hansen, "Making Agencies Follow Orders: Judicial Review of Agency Violations of Executive Order 12,291, 1983 Duke L.J. 285, 333 n.266; Jody S. Fink, "Notes on Presidential Foreign Policy Powers (Part II)," 11 Hofstra L. Rev. 773, 790–91 n.132 (1983) (characterizing *Kahn* as reading § 486(a) to grant President "virtually unlimited" authority).

The court then concluded that a presidential directive issued pursuant to § 486(a) is authorized as long as there is a "sufficiently close nexus" between the order and the criteria of economy and efficiency. *Kahn*, 618 F.2d at 792. Although the opinion does not include a definitive statement of what constitutes such a nexus, the best reading is that a sufficiently close nexus exists when the President's order is "reasonably related" to the ends of economy and efficiency. See id. at 793 n.49; Harold H. Bruff "Judicial Review and the President's Statutory Powers," 68 Va. L. Rev. 1, 51 (1982) ("in *AFL–CIO* v. *Kahn*, the court stated an appropriate standard for reviewing the basis of a presidential action—that it be 'reasonably related' to statutory policies") (footnote omitted).

As one commentator has asserted, under *Kahn*, the President need not demonstrate that an order "would infallibly promote efficiency, merely that it [is] plausible to suppose this." Alan Hyde, "Beyond Collective Bargaining: The Politicization of Labor Relations under Government Contract," 1982 Wis. L. Rev. 1, 26. In our view a more exacting standard would invade the "broad-ranging" authority that the court held the statute was intended to confer upon the President See *Kahn*, 618 F.2d at 787–89. In addition, a

stricter standard would undermine the great deference that is due presidential factual and policy determinations that Congress has vested in the President. See e.g., Henry P. Monaghan, Stare Decisis and Constitutional Adjudication," 88 Colum. L. Rev. 723, 738 (1988).[2]

We have no doubt, for example, that § 486(a) grants the President authority to issue a directive that prohibits executive agencies from entering into contracts with contractors who use a particular machine that the President has deemed less reliable than others that are available. Contractors that use the less reliable machines are less likely to deliver quality good or to produce their goods in a timely manner. We see no distinction between this hypothetical order in which the President prohibits procurement from contractors that use machines that he deems unreliable and the one the President has actually issued, which would bar procurement with contractors that use labor relations techniques that the President deems to be generally unreliable, especially when the Secretary of Labor and the contracting agency head each confirm the validity of that generalization in each specific case.

The preamble of Executive Order No. 12954 sets forth the President's findings that the state of labor-management relations affects the cost, quality, and timely availability of goods and services. The order also announces his finding that the government's procurement interests in cost, quality, and timely availability are best secured by contracting with those entities that have "stable relationships with their employees" and that "[a]n important aspect of a stable collective bargaining relationship is the balance between allowing businesses to operate during a strike and preserving worker rights." The President has concluded that "[t]his balance is disrupted when permanent replacement employees are hired." In establishing the policy ordinarily[3] to contract with contractors that do not hire permanent replacement workers, the President has found that he will advance the government's procurement interests in cost, quality, and timely availability of goods and services by contracting with those contractors that satisfy what he has found to be an important condition for stable labor-management relations.

The order's preamble then proceeds to set forth a reasonable relation between the government's procurement interests in economy and efficiency and the order itself. Specifically, the order asserts the President's finding that

> strikes involving permanent replacement workers are longer in duration than other strikes. In addition, the use of permanent replacements can change a limited dispute into a broader, more contentious struggle, thereby exacerbating the problems that initially led to the strike. By per-

[2] We do not mean to indicate a belief that Executive Order No. 12954 could not withstand a stricter level of scrutiny. We simply regard the employment of such a standard to be contrary to the holding of *Kahn*, as well as the view of the purposes of the FPASA and its legislative history upon which that decision expressly rests.

[3] Again, the order does not categorically bar procurement from contractors that have permanently replaced lawfully striking workers. The sanctions that the order would authorize would not go into effect if either the Secretary, with respect to either the termination or the debarment option, or the contracting agency head, with respect to the termination option, finds that the option would impede economy and efficiency in procurement.

> manently replacing its workers, an employer loses the accumulated knowledge, experience, skill, and expertise of its incumbent employees. These circumstances then adversely affect the businesses and entities, such as the Federal Government, which rely on that employer to provide high quality and reliable goods or services.

We believe that these findings state the necessary reasonable relation between the procedures instituted by the order and achievement of the goal of economy and efficiency.

It may well be that the order will advance other permissible goals in addition to economy and efficiency. Even if the order were intended to achieve goals other than economy and efficiency, however, the order would still be authorized under the FPASA as long as one of the President's goals is the promotion of economy and efficiency in government procurement. "We cannot agree that an exercise of section 486(a) authority becomes illegitimate if, in design and operation, the President's prescription, in addition to promoting economy and efficiency, serves other, not impermissible, ends as well. "Carmen," 669 F.2d at 821; see *Rainbow Navy, Inc.* v. *Dep't of the Navy*, 783 F.2d 1072 (D.C. Cir. 1986); Kimberley A. Egerton, Note, "Presidential Power over Federal Contracts under the Federal Property and Administrative Services Act; The Close Nexus Test of" *AFL–CIO* v. *Kahn*, 1980 Duke L.J. 205, 218–20.

Since the adoption of the FPASA, Presidents have consistently regarded orders such as the one currently under review as being within their authority under that Act. As the court explained in *Kahn*, Presidents have relied on the FPASA as authority to issue a wide range of orders. 618 F.2d at 789–92 (noting the history of such orders since 1941, especially to institute "buy American" requirements and to prohibit discrimination in employment by government contractors). Not surprisingly this executive practice has continued since *Kahn*. For instance, President Bush issued Executive Order No. 12800, which required all government contractors to post notices declaring that their employees could not "be required to join a union or maintain membership in a union in order to retain their jobs." 57 Fed. Reg. 12985 (April 13, 1992). The order was supported solely by the statement that it was issued "in order to . . . promote harmonious relations in the workplace for purposes of ensuring the economical and efficient administration and completion of Government contracts." Id.[4] This long history of executive practice provides additional support for the President's exercise of authority in this case. See *Kahn*, 618 F.2d at 790.[5] This is especially so where, as here, the President sets forth the close nexus between the order and the statutory goals of economy and efficiency.

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[4] This order is also significant insofar as it demonstrates that Executive Order No. 12954 is not the first in which a president has found that more stable workplace relations promote economy and efficiency in government procurement.

[5] Of course, the President's view of his own authority under a statute is not controlling, but when that view has been acted upon over a substantial period of time without eliciting congressional reversal, it is 'entitled to great respect.' . . . [t]he 'construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong.' " *Kahn*, 618 F.2d at 790 (quoting *Board of Governors of the Federal Reserve Sys.* v. *First Lincolnwood Corp.*, 439 U.S. 234 (1978), and *Miller* v. *Youakim*, 440 U.S. 125, 144 n. 25 (1979)).

It may be that in individual cases, a contractor that maintains a policy of refusing to permanently replaced lawfully striking workers may nevertheless have an unstable labor-management relationship while a particular contractor that has permanently replaced lawfully striking workers may have a more stable relationship. As to such situation, however, the Secretary and the contracting agency heads retain the discretion to continue to procure goods and services from contractors that have permanently replaced lawfully striking workers if that procurement will advance the federal government's economy and efficiency interests as articulated in section 1 of Executive Order No. 12954.[6] We recognize that, even with these safeguards, it could happen that a specific decision to terminate a contract for convenience or to debar a contractor pursuant to the order might not promote economy or efficiency. The courts have held that it remains well within the President's authority to determine that such occurrences are more than offset by the economy and efficiency gains associated with compliance with an order generally. See *Kahn*, F. 2d at 793.[7]

Similarly, it would be unavailing to contend that Executive Order No. 12954 will secure no immediate or near-term advancement of the federal government's economy and efficiency procurement interests. Section 486(a) authorizes the President to employ "a strategy of seeking the greatest advantage to the Government, both short- and long-term," and this is "entirely consistent with the congressional policies behind the FPASA." Id. (emphasis added); cf, *Contractors Ass'n* v. *Secretary of Labor*, 442 F.2d 159, 170 (3d Cir.) (deciding on basis of President's constitutional rather than statutory authority), cert. denied, 404 U.S. 854 (1971).

The FPASA grants the President a direct and active supervisory role in the administration of that Act and endows him with broad discretion over how best "to achieve a flexible management system capable of making sophisticated judgments in pursuit of economy and efficiency." *Kahn*, 618 F.2d at 788–89. As explained above, the President has set forth a sufficiently close nexus between the program to be established by the proposed order and the goals of economy and efficiency in government procurement.[8]

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[6] The authority of an agency head is diminished somewhat, though not eliminated entirely, with respect to procuring from a contractor that the Secretary has debarred. An agency head may procure from a debarred contractor only for compelling reasons. See Exec. Order No. 12954, § 4. Nevertheless, the Secretary has authority to refuse to place a contractor on the debarment list in the first instance if the Secretary believes that debarment would not advance economy and efficiency.

[7] "[W]e find no basis for rejecting the President's conclusion that any higher costs incurred in those transactions will be more than offset by the advantages gained in negotiated contracts and in those cases where the lowest bidder is in compliance with the voluntary standards and his bid is lower than it would have been in the absence of standards." *Kahn*, 618 F.2d at 793.

[8] Moreover, we note that under the Supreme Court's decision in *Dalton* v. *Specter*, 114 S. Ct. 1719 (1994). It is unlikely that the President's judgment may be subjected to judicial review. It is clear that § 486(a) gives the President the power to issue orders designed to promote economy and efficiency in government procurement. See 40 U.S.C. § 486(a); *Carmen*, 669 F.2d at 821: *Kahn*, 618 F.2d at 788–89, 792–93. The Supreme Court has recently "distinguished between claims of constitutional violations and claims that an official has acted in excess of his statutory authority. "*Dalton* 114 S. Ct. at 1726. The Court held that

> where a claim "concerns not a want of [presidential] power, but a more excess or abuse of discretion in exerting a power given, it is clear that it involves considerations which are beyond the reach of judicial power. This must be since, as this court has often pointed out, the judicial may not invade the legislative or executive departments so as to correct alleged mistakes or wrongs arising from asserted abuse of discretion."

Id. at 1727 (quoting *Dakota Central Telephone Co.* v. *South Dakota ex rel. Payne.* 250 U.S. 163. 184 (1919)); see also *Smith* v. *Reagan*, 844 F.2d 195, 198 (4th Cir.), cert. denied. 488 U.S.

Finally, we do not understand the action of Congress in relation to legislation on the subject of replacement of lawfully striking workers to bear on the President's authority to issue Executive Order 12954. The question is whether the FPASA authorizes the President to issue the order. As set forth above, we believe that it does. Recent Congresses have considered but failed to act on the issue of whether to adopt a national, economy-wide proscription of the practice applying to all employers under the National Labor Relations Act ("NLRA").[9] This action may not be given the effect of amending or repealing the President's statutory authority, for the enactment of such legislation requires passage by both houses of Congress and presentment to the President. See *Metropolitian Washington Airports Authority* v. *Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991), *INS* v. *Chadha,* 462 U.S. 919 (1983). To contend that Congress's inaction on legislation to prohibit all employers from hiring replacement workers deprived the President of authority he had possessed is to contend for the validity of the legislative veto.

In *Youngstown Sheet & Tube*, it was considered relevant that Congress had considered and rejected granting the President the specific authority he had exercised. 343 U.S. at 586. There, however, the President did not claim to be acting pursuant to any statutory power, but rather to inherent constitutional power. In such a case, the scope of the President's power depends upon congressional action in the field, including an express decision to deny the President any statutory authority. Id. *Youngstown Sheet & Tube* is inapposite here because the President does not rely upon inherent constitutional authority, but rather upon express statutory authority—§ 486(a) of the FPASA. See *Kahn,* 618 F. 2d at 787 & n.13.

Moreover, we note that Congress's action was far from a repudiation of the specific authority exercised in Executive Order No. 12954. Even if a majority of either house of Congress had voted to reject the blanket proscriptions on hiring permanent replacements for lawfully striking workers, contained in H.R. 5 and S. 55, this would denote no more than a determination that such a broad, inflexible rule applied in every labor dispute subject to the NLRA would not advance the many interests that Congress may consider

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954 (1988); *Colon* v. *Carter,* 633 F 2d 964, 966 (1st Cir. 1980); cf. *Heckler* v. *Chaney,* 470 U.S. 821 (1985); *Chicago Southern Air Lines Inc.* v. *Waterman S.S. Corp.* 333 U.S. 103 (1948).

Judicial review is unavailable for claims that the President had erred in his judgment that the program established in the order is unlikely to promote economy and efficiency. The FPASA entrusts this determination to the President's discretion and, under *Dalton,* courts may not second-guess his conclusion. The Court made it clear that the President does not violate the Constitution simply by acting ultra vires. see *Dalton,* 114 S. Ct. at 1726–27. Judicial review is available only for contentions that the President's decision not only is outside the scope of the discretion Congress granted the President, but also the President's action violates some freestanding provision of the Constitution.

[9] In the 102d Congress, The House of Representatives passed a bill to amend the National Labor Relations Act to make it an unfair labor practice for an employer to hire a permanent replacement for a lawfully striking employee. See H.R. 5. 102d Cong., 1st Sess. (1991). The House passed this legislation on a vote of 247–182. Cong. Rec. H5589 (daily ed. July 17, 1991). The Senate considered legislation to the same effect. S. 55, 102d Cong., 2d Sess. (1992). The legislation was not brought to the floor for a vote because supporters of the measure were only able to muster 57 votes to invoke cloture. See Cong. Rec. S8237–38 (daily ed. June 16, 1992).

Likewise, legislation to categorize the hiring of permanent replacement workers as an unfair labor practice was considered in the 103d Congress. The House of Representatives approved the legislation on a vote of 239–190. See Cong. Rec. H3568 (daily ed. June 15, 1993). Again, the Senate did not bring the bill to a vote, because its supporters were unable to attract the supermajority required to invoke cloture. See Cong. Rec. S8524 (daily ed. July 12, 1994) (fifty-three senators voting to invoke cloture).

when assessing legislation. The order, by contrast, does not apply across the economy, but only in the area of government procurement. Nor does the order establish an inflexible application, rather it provides the Secretary of Labor an opportunity to review each case to determine whether debarring or terminating a contract with a particular contractor will promote economy and efficiency in government procurement and further permits any contracting agency head to override a decision to debar if he or she believes that there are compelling circumstances or to reject a recommendation to terminate a contract if, in his or her independent judgment, it will not promote economy and efficiency. In sum, the congressional action alluded to above simply does not implicate the narrow context of government procurement or speak to the efficacy of a flexible case-by-case regime such as the one set forth in the order.[10]

The *Kahn* option fully supports this view. There the President promulgated voluntary wage and price guidelines that were applicable to the entire economy. Contractors that failed to certify compliance with the guidelines were debarred from most government contracts. See Exec. Order No. 12092, 43 Fed. Reg. 51,375 (1978). The order was issued in 1978 against the following legislative backdrop: In 1971 Congress passed the Economic Stabilization Act, which authorized the President to enforce economy-wide wage and price controls. In 1974, a few months after the Economic Stabilization Act expired, the Council on Wage and Price Stability Act ("COWPSA") was enacted. COWPSA expressly provided that "[n]othing in this Act . . . authorizes the continuation, imposition, or reimposition of any mandatory economic controls with respect to prices rents, wages, salaries, corporate dividends, or any similar transfers." Pub. L. No. 93–387, § 3(b), 88 Stat. 750 (1974).

The court concluded that "the standards in Executive Order 12092, which cover only wages and prices, are not as extensive as the list in Section 3(b). Consequently, we do not think the procurement compliance program falls within the coverage of Section 3(b), but rather is a halfway measure outside the contemplation of Congress in that enactment." *Kahn*, 618 F.2d at 795. Similarly, Executive Order No. 12954 is a measure that operates in a manner (case-by-case determination) and a realm (government procurement exclusively) that was outside the contemplation of Congress in its consideration of a broad and inflexible prohibition on the permanent replacement of lawfully striking workers.

PART III

Congress, in the FPASA, established that the President is to play the role of managing and directing government procurement. Congress designed this role to include "broad-ranging authority" to issue orders intended to achieve an economical and efficient pro-

[10] We have found no indication in the legislative history that those opposing the proposed amendments to the NLRA even considered the specialized context of government procurement. See e.g., S. Rep. No. 110. 103d Cong., 1st Sess. at 35–49 (1993) (stating minority views); H.R. Rep. No. 116, 103d Cong. 2d Sess., pt. 1. at 42–62 (1993) (minority views); H.R. Rep. No. 116, 103d Cong., 2d Sess., pt. 2, at 16–17 (1993) (minority views); H.R. Rep. No. 116, 103d Cong., 2d Sess., pt. 3, at 11–15 (1993) (minority views). Moreover, we note that at least some of the opposition to the legislation was based in part on concerns regarding the breadth of the legislation, see H.R. Rep. No. 116, pt. 1, at 45 (minority views) (emphasizing absence of "a truly pressing societal need" (emphasis added)), as well as its inflexibility see id. at 62 (views of Rep. Roukema).

curement system. Executive Order No. 12954, "Ensuring the Economical and Efficient Administration and Completion of Federal Government Contracts," represents a valid exercise of this authority.

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ADDITIONAL VIEWS OF CONGRESSMAN DALE E. KILDEE

Mr. Chairman, I want to include in the official record the reason why I was not present during the vote to report H.R. 1176 out of the House Educational and Economic Opportunities Committee on June 14, 1995.

I was present for the mark-up of H.R. 1176. However, during the mark-up, I was informed that the House Committee on Resources, of which I am also a member, was conducting a vote on a bill being considered before that committee.

While I was absent to vote on the bill in the House Resources Committee, I missed the roll call vote on reporting H.R. 1176. If I were present, I would have voted NO on reporting H.R. 1176 out of the Committee.

DALE E. KILDEE.

ADDITIONAL VIEWS OF CONGRESSMAN DAVID FUNDERBURK

The Congress has been able to defeat much of President Clinton's anti-business agenda, including two attempts to force through legislation that would have prohibited employers from hiring permanent replacement workers for striking employees. However, the President recently decided to do an end-run around the will of the Congress and the American people by issuing an executive order that would effectively prohibit any company with federal contracts in excess of $100,000 from hiring permanent striker replacements.

The President's March 8 executive order, if allowed to stand, will fracture the delicate balance between workers and employers which has made the American workplace the job engine of the world. Since 1938, U.S. labor law has carefully balanced labor's right to withhold its services against management's right to keep its doors open.

Contrary to the claims of union leaders, management's right to replace striking workers has been seldom invoked. In fact, a recent study by the General Accounting Office showed that although management has often threatened to use its legal rights, the threats were carried out in only 17 percent of all strikes and affected less than four percent of all striking workers.

This executive order is a threat to the future of our free enterprise system. At stake is the right of every employer to keep his business operating during labor unrest. At stake is the future of millions of American workers who refuse to be coerced into joining labor unions. At stake is whether we will accelerate the flight of American companies to Mexico and the Far East because of out-of-kilter, coercive labor laws.

Will any worker be willing to risk life and limb to cross a picket line and go to work if the President is allowed to have his way? The President's action leaves workers with no practical alternative but to join a union at a time when Americans of all stripes are repeatedly rejecting the tactics of the union leaders.

The leaders of the AFL–CIO will fight H.R. 1176 because they want to make their strike weapon as powerful as possible. But Walter Williams, distinguished professor of economics at George Mason University, observed that:

> Unions' power comes from their ability, through laws or violence, to prevent businesses from hiring other workers. If they didn't have that ability, a strike would be just a massive resignation.
>
> The union struggle is not against employers, as popularly thought. Its against workers who are not union members. One way you see this is to ask: Who gets beat up during a strike? It's not owners or management; it's workers who've disagreed with the union and wish to work. The

> union labels these men and women trying to earn a livelihood "scabs." The National Right to Work Committee estimates that almost 6000 violent incidents have occurred during strikes since 1975, including the 1990–1993 Greyhound bus strike, where buses were shot at 52 times.

As Professor Williams clearly illustrates, organized labor's objective is not to destroy employers outright. The unions' top goal is to increase its membership rolls and to fill up the labor union coffers with forced union dues. The President wants to give the unions' the leverage to demand that all of a company's workers be forced to pay the bills the union leaders demand. What worker will be able to withstand threats, picket-line violence, and blacklisting to work at a job if he knows that the employer, with the blessing of President Clinton, must punish him or fire him as soon as the union says the strike is over? Why should big labor end strikes quickly and quietly? If the President has his way, union strikers can't lose their jobs and the union bosses can't lose the massive dues paid to their unions.

The Clinton Administration is in the White House partly because of the money and organization big labor is able to provide in every election. Fair enough. Big labor means big bucks. Union PACs gave $43.3 million to Democratic candidates in 1991–92. But, as Reed Larson of the National Right to Work Committee points out, ". . . that $41 million was only the tip of the iceberg." Unreported soft money contributions to the Democratic Party—in the form of phone banks, get out the vote drives, and door to door canvassing—amounted to ten times the value of the $41 million up front money.

Mr. Clinton is working overtime to make the AFL–CIO forget his support of NAFTA. During the campaign he said that he was on the side of working Americans who "work hard and play by the rules." Unfortunately, the President's order demonstrates once again that his rhetoric is far removed from the reality of his actions. Even though the President is from a right-to-work state he has surrounded himself with advisors who have nothing but contempt for the right of the American worker to offer his skills to any employer without fear of coercion or retribution. The attitude of Labor Secretary Robert Reich is illustrative. In 1985, while an instructor at Harvard, Mr. Reich had this to say about the workplace:

> In order to maintain themselves unions have got to have some ability to strap their members to the mast. The only way unions can exercise countervailing power vis-a-vis management is to hold their members' feet to the fire when times get tough. Otherwise the union is only as good as it is convenient for any given member at any given time.

Under these circumstances we should expect more strikes for longer periods of time. That is what happened in Canada once striker replacement legislation became law north of the border. According to the Journal of Labor Economics, the province of Quebec nearly went bankrupt because of the loss of revenue from businesses that were shut down because of increased strike activity. The Heritage Foundation reports that the striker replacement law in Italy has cost that country 1,440 work days per 1,000 workers

each year compared with fewer than 100 days lost in American due to strikes.

The President's actions will wreak havoc on my state and my district. North Carolina has the longest right-to-work tradition in the nation. Businesses—big and small—are rushing to North Carolina because employers know that their workplace will be free from intimidation and outside agitation. It is no accident that North Carolina has the lowest unemployment rate of the twenty largest states in America. I cannot stand by and watch as North Carolina's right-to-work tradition is swept away because the President wants to appease the labor leaders who put him into office.

The committee minority has attached supporters of this bill as being against the worker. Nothing could be farther from the truth. In any free country, workers must be free to organize themselves and strike. It is already illegal to fire strikers and hire replacements if a company engages in unfair or dangerous practices. But when workers do strike for higher pay or benefits they take a risk that their employers will not be able to find skilled people to replace them. That they are sometimes, though rarely, replaced keeps sanity and stability in the workplace.

There is nothing, repeat nothing, "fair" about the President's actions. This executive order discriminates against the small businessmen who struggle to provide ninety percent of our jobs, it discriminates against employees who choose to remain on the job and, it discriminates against workers who won't join a union. More importantly, the President's action is a direct challenge to the Constitutional prerogatives of the Congress. If President Clinton is allowed to have his way, striking union members will be given the exclusive rights to jobs they refuse to perform and that is not fair for any American, union member or otherwise.

The President's policy on striker replacement will lead to higher labor costs, higher prices, lower productivity and fewer jobs—and that is all this economy needs to send it reeling into another recession. This order is a threat to every right-to-work state in the country. I urge my colleagues to support H.R. 1176 and not allow the President to unilaterally upset the delicate balance between the rights of labor and management to resolve their own disputes.

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