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DEPARTMENT OF LAW OPINION NO. 71-8 (R-36)

REQUESTED BY: WILLIAM N. PRICE  
State Highway Engineer

QUESTION: Does President Nixon's Proclamation No. 4031, suspending the provisions of the Davis-Bacon Act relating to the payment of wage rates on federally assisted projects, preclude this state from incorporating into its federal aid projects the prevailing wage requirement contained in state law (Title 34, Chapter 3, Article 2, A.R.S. §§ 34-321 through 34-326)?

ANSWER: Yes; qualified.

Section 6 of the Davis-Bacon Act (40 U.S.C. . . , § 276a) provides:

"In the event of a national emergency the President is authorized to suspend the provisions of this Act."

The heart of the Davis-Bacon Act problem, as viewed by the President, is contained in the following language:

". . . every contract in excess of \$2,000, to which the United States or the District of Columbia is a party, for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works of the United States or the District of Columbia within the geographical limits of the States of the Union, or the District of Columbia, and which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which

Opinion No. 71-8  
(R-36)  
March 12, 1971  
Page Two

shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State in which the work is to be performed, or in the District of Columbia if the work is to be performed there.  
. . . ."

The President capsulized the problem with this provision in the following statement issued from The White House at the time the Proclamation was signed:

"This decision suspends a special provision of law which has applied uniquely to the construction industry since 1931. It puts the construction industry on the same footing with other industries that now sell products to the Government. For under the Davis-Bacon Act, wage rates on Federal projects have been artificially set by this law rather than by customary market forces. Frequently, they have been set to match the highest wages paid on private projects. This means that many of the most inflationary local wage settlements in the construction industry have automatically been sanctioned and spread through Government contracts."

The operative words placed in the Proclamation by the President make it abundantly clear that he intended his suspension to apply to all legislative enactments which are dependent upon such wage determinations:

"NOW, THEREFORE, I, RICHARD NIXON, President of the United States of America, do by this proclamation suspend, as to all contracts

entered into on or subsequent to the date of this proclamation and until otherwise provided the provisions of the Davis-Bacon Act of March 3, 1931, as amended, and the provisions of all other acts providing for the payment of wages, which provisions are dependent upon determinations by the Secretary of Labor under the Davis-Bacon Act." (Emphasis added.)

The question now present is whether the President's Proclamation precludes this state from applying its own statutes providing for the payment of wages to various classes of laborers and mechanics on the basis of state established "wage determinations". A.R.S. § 34-322 provides that:

"A. Every contract in excess of one thousand dollars to which the state or political subdivision thereof is a party, which requires or involves employment of laborers or mechanics in the construction, alteration or repair of public buildings or other improvements of the state or a political subdivision thereof, shall contain:

"1. A provision that the rate of wages for all laborers and mechanics employed by the contractor or any subcontractor on the project shall be not less than the prevailing rate of wages for work of a similar nature in the county, city, town, village or other political subdivision of the state in which the project is located."

A.R.S. §§ 34-324 and 34-325 establish the criteria for all state established wage determinations and require their specifications in all public works contracts for which bids are advertised:

"34-324. Criteria for determination of prevailing per diem wages by industrial commission

"A. For the purpose of determining the general prevailing rate of per diem wages, the industrial commission of Arizona shall ascertain and keep on record the rates or scale of per diem wages required to be paid to each craft or type of workman belonging to or affiliated with the American Federation of Labor, the Arizona State Federation of Labor, or any other state or national labor organization similarly constituted, prevailing in the locality in which the public work is to be performed. If such method of arriving at the general prevailing rate of per diem wages cannot reasonably and fairly be applied in any political subdivision of the state for the reason that no such organization is maintained in the political subdivision, the industrial commission shall determine the prevailing rate to be the rate required to be paid to each craft or type of workman of the same or most similar class, working in the same or most similar employment in the nearest and most similar neighboring locality, and affiliated with any such labor organization.

"B. Nothing in this article shall be construed to prohibit payment to any laborer, workman or mechanic employed on public work, more than the general prevailing rate of wages, nor shall this article be construed to permit overtime working in violation of law."

"§ 34-325. Specification of minimum wages in call for bids and in contract; mandatory payment of specified wages

"A. The officer or state agency awarding a contract for public work on behalf of the state or a political subdivision thereof, or otherwise undertaking any public works, shall ascertain the general prevailing rate of per diem wages from the industrial commission for each craft or type of workman needed to perform the contract, and shall specify such wages in the call for bids for the contract, and in the contract itself.

"B. It shall be mandatory on the contractor to whom the contract is awarded and upon any subcontractor under him, to pay not less than the specified rate of wages to laborers, workmen and mechanics employed by the contractor or by any subcontractor in the performance of the contract."

For purposes of clearer understanding, the problem presented will be divided into three categories: (I) Federal aid public works contracts which are directly and specifically governed by the wage determinations of the Davis-Bacon Act; (II) Public works contracts which receive some form of federal assistance which is not directly tied to the wage determinations provided for in the federal Davis-Bacon Act; and, (III) Public works contracts which are wholly funded by the state or any of its political subdivisions.

I. Federal aid projects governed by Davis-Bacon Act.

The Constitution of the United States, together with laws made in pursuance thereof, is, by the express declaration of Article 6, § 2, made the supreme law of the land. Panhandle Oil Co. v. Miss., 277 U.S. 218 (1928); Hawke v. Smith, 253 U.S. 221 (1920); Buchanan v. Warley, 245 U.S. 60 (1917). This does not, of course, preclude the exercise of state power in all situations dealt with by the federal Constitution or a duly enacted federal statute. On the contrary, the Supreme Court at an early date laid down a broad

formula which from that time has been the general principle governing the possibility of state exercise of power. The court held that the states may exercise concurrent or independent power with the federal government in all cases except where:

1. The power is lodged exclusively in the federal Constitution.

2. The power is given to the United States and prohibited to the states.

3. From the nature and subject of the power, it must necessarily be exercised by the national government. 6 Am. Jur. 442, citing Gilman v. Philadelphia, 3 Wall. (U.S.) 713, summarizing language in which Mr. Justice Story originally formulated this group of principles in Houston v. Moore, 5 Wheat. (U.S.) 1.

As a general proposition, the courts have refused to presume that a federal statute is intended to supersede the exercise of power by a state, unless there is a clear manifestation of intention to do so. Schwartz v. State of Texas, 344 U.S. 199 (1952). Nevertheless, federal legislation "must not be read in a spirit of mutilating narrowness." "Hospitable scope" must be given to congressional purposes "even when meticulous words are lacking." United States v. Hutcheson, 312 U.S. 219 (1940). The rationale in Hutcheson is particularly significant, since it dealt with state efforts to frustrate federal policy through action in an area not expressly dealt with by the federal law.

In Hill v. Florida, 325 U.S. 538, 550 (1944), the court expanded on the principle enunciated in Hutcheson. In the Hill case a state was denied the exercise of power to fix the qualifications of labor union representatives upon a showing that one of the basic purposes of the National Labor Relations Act would be frustrated if the state action were permitted. Cf. Nash v. Florida Industrial Commission, 389 U.S. 235 (1967); Florida Lime and Avocado Growers v. Paul,

Opinion No. 71-8  
(R-36)  
March 12, 1971  
Page Seven

373 U.S. 132, rehearing denied 374 U.S. 858 (1963); Fitzgerald v. Catherwood, 388 F.2d 400 (C.A. N.Y.), cert. denied 391 U.S. 934 (1968). See also Maryland v. Wirtz, 392 U.S. 183 (1968).

The application of the supremacy clause and the doctrine of federal preemption by the Supreme Court is increasingly a matter of statutory construction--a determination of whether state regulations can be reconciled with the language and policy of federal enactments. Once the Congress has acted in a certain area, however, the concern of the court is not an inquiry into the "precise nature and degree of federal-state conflict involved, and more particularly what exact mischief such a conflict would cause. . .", but rather "the potential conflict of two law-enforcing authorities, with the disharmonies inherent in two systems, one federal, the other state, of inconsistent standards of substantive law and differing remedial schemes." Mr. Justice Frankfurter in the opinion in San Diego Building Trades Council, et al. v. Garmon, et al., 359 U.S. 236, 242 (1959).

In trying to avoid such conflict, the court has been mindful of the problem that: "A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law." Mr. Justice Jackson in the opinion in Garner v. Teamsters, Chauffeurs and Helpers Local Union No. 776 (A.F.L.), et al., 346 U.S. 485, 491 (1953). The court has supported this principle even where the federal government has declined jurisdiction over an area it regulates. Guss v. Utah Labor Relations Board, 353 U.S. 1 (1957). (The "no man's land" problem created here was dealt with in the Labor-Management Reporting and Disclosure Act of 1959 (P.L. 86-257), 29 U.S.C. 164(c)(2).) In so holding, the court pointed out that specific statutory provisions for the national authority to enter into agreements with states to cede its authority was the exclusive means by which states may be enabled to act concerning the matters Congress had entrusted to the National Labor Relations Board. The court

pointed out that the specific provision was enacted in response to its decision under the former Wagner Act that federal policy prevailed over state provisions with regard to declining jurisdiction over unions of foremen in the absence of any delegation of jurisdiction by the federal board. Bethlehem Steel Co. v. New York Labor Board, 330 U.S. 767 (1946).

The thrust of these cases was most recently followed in International Longshoremen's Association, Local 1416, AFL-CIO v. Ariadne Shipping Co., Ltd., et al., 397 U.S. 195 (1970). There the court (Mr. Justice Brennan) found the state enjoined picketing "arguably subject" to regulation under the federal act and thus the National Labor Relations Board's jurisdiction was exclusive and preempted that of the federal courts. Mr. Justice White in a concurring opinion stated (at page 202) that, so long as employers are denied effective determination by the National Labor Relations Board as to whether "arguably protected" picketing is actually protected, he would hold that only "labor activity determined to be actually, rather than arguably, protected under federal law should be immune from state judicial control."

Perhaps the broadest occupation of a field under a federal statute where states have exercised legislative authority could be implied from the holding in Pennsylvania v. Nelson, 350 U.S. 497 (1956), where, drawing upon its holdings with regard to occupation of the field in the commerce cases, the court held that federal legislation regulating communist activity had superseded the sedition statutes of the states. It held that the states cannot punish sedition directed against the United States Government, but declared that they remained free to punish offenses involving a local breach of the peace. In Uphaus v. Wyman, 360 U.S. 72 (1959), the court, however, offers the dictum that Nelson did not deprive the states of the right to punish sedition directed against themselves, dictum which might support a finding that states may apply their wage provisions on construction not involving federal assistance. However, where Congress has expressed a

policy with regard to application of funds under a federal grant program, inconsistent state regulation is invalid. King v. Smith, et al., 392 U.S. 309 (1968). .

Closely in point is Paul v. United States, 371 U.S. 245 (1963), in which the court held that a state regulatory scheme fixing the minimum wholesale price on milk--including milk purchased by a military installation solely for military consumption--was preempted by the federal procurement statute and regulations thereunder. The established federal procurement policy, the court found, demanded competition in the purchase of milk by military installations for military consumption. The California policy effectively eliminated such competition, and thus defeated the command to federal officers to procure supplies at the lowest cost.

In concluding that the supremacy clause of the federal Constitution barred California from enforcing its regulations, the court also noted that, under the federal statute when a purchase contract is negotiated because it is impracticable to obtain competition, the state agency, not the federal procurement officer and the seller, would determine the price provisions of the contract if state policy prevailed, a clear "collision between the federal policy of negotiated prices and state policy of regulated prices." The Paul case is particularly significant in terms of the issues involved here, since--like the general federal procurement statutes--the Davis-Bacon Act and related statutes involve a proprietary function of the federal government.

The weight of authority thus supports the conclusion that the President's Proclamation preempted the states from applying their wage determinations to federal aid public works contracts which were directly subject to federal wage determinations established pursuant to the Davis-Bacon Act prior to that date. That there is a conflict between the purpose of the President's action in invoking his authority under Section 6 of the Davis-Bacon Act to suspend the Act and the application of state wage determinations to federally assisted work is plain. Such application would frustrate the

purpose of Section 6 in authorizing suspension of the Davis-Bacon Act. It would not only not permit "unhampered effectuation" of federal objectives, it could almost completely nullify the effectiveness of the President's action. Where there is such a conflict the requirements of Article VI of the Constitution control, so that state power must be denied.

II. Federally assisted public works contracts not requiring adherence to the Davis-Bacon Act wage determinations.

The United States Department of Justice, through its office of legal counsel, in an opinion dated March 1, 1971, has concurred in the conclusion we have reached in connection with federal aid projects specifically governed by the Davis-Bacon Act. That opinion did, however, caution:

" . . . If the conclusion is so limited [to federally assisted construction projects which require the payment of wages determined in accordance with the Davis-Bacon Act], we would concur in it. If, on the other hand, the conclusion encompasses all federally-assisted construction regardless of whether a Davis-Bacon extension statute applies, we cannot concur.

\* \* \*

" . . . Where the Congress has not seen fit to impose a wage floor, despite the involvement of federal funds, the States are free to impose their own wage floors. . . ."

To paraphrase what the Department of Justice opinion states: As far as the Davis-Bacon Act is concerned, there are two kinds of federally assisted construction projects--those which are dependent upon the prevailing wage determinations of the Secretary of Labor and those which are not. In

connection with all such projects, therefore, state laws relating to state established wage determinations would still apply. This result is reached, not because of any impotency of the federal supremacy doctrine, but rather because, in the enactment of Davis-Bacon, Congress did not elect to impose wage floors in such public works projects. Accordingly, the Presidential suspension would not preclude the enforcement of applicable state laws.

Rather than to catalog all the various federally assisted public works programs which are or are not subject to the wage determinations of the Davis-Bacon Act and hence the state statutes, the legal advisors of the state agencies as well as those of the appropriate political subdivisions should be consulted. In each such public works program research must be first conducted to establish into which category federally assisted projects fall.

III. Public works contracts wholly funded by the state or its political subdivisions.

The Davis-Bacon Act never attempted to establish wage determinations on projects funded wholly with the funds of the states or their political subdivisions. Nor did it preempt the entire field of wage determinations for the exclusive province of the federal government. It was in this vacuum that the various states enacted similar wage determination laws. The latter laws were primarily intended by the states to apply to public works contracts awarded by the states and their political subdivisions, which were not otherwise governed by the Davis-Bacon Act. Here again the President's Proclamation does not preclude the application of the state law, because the Davis-Bacon Act under which his Proclamation was issued did not extend his authority that far.

We therefore conclude that A.R.S. §§ 34-322, 34-324, 34-325 and 34-326 must be applied and enforced in connection with all public works contracts "in excess of one thousand

Opinion No. 771-8  
(R-36)  
March 12, 1971  
Page Twelve

dollars" awarded by the state and its political subdivisions where no federal funds are involved, since the President's Proclamation No. 4031 does not apply.

Respectfully submitted,

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