Opinion No. 71-38

March 4, 1971

BY: OPINION OF DAVID L. NORVELL, ATTORNEY General

TO: Mr. Richard T. Whitley Acting Chief Counsel New Mexico State Highway Department Post Office Box 1149 Santa Fe, New Mexico 87501

QUESTIONS

QUESTION

Does the temporary suspension of the Davis-Bacon Act by the President of the United States return public works wage-determination authority to the State Labor Commissioner?

CONCLUSION

No.

OPINION

*{*55}* **ANALYSIS**

In Opinion of the Attorney General No. 70-61, dated September 8, 1970, this Office considered the application of the Davis Bacon Act, 40 U.S.C. 276 **et seq.,** to the determination of minimum wage rates to be paid workers employed on federally-funded highway projects in this State. In brief, it was the conclusion of that Opinion that the operation of the Federal-Aid Highway Act, 23 U.S.C. 101 **et seq.,** and the Davis-Bacon Act, **supra,** vested wage determining authority in the hands of the Secretary of Labor of the United States. That conclusion is reiterated here. Based upon well-settled doctrines of constitutional law, it was held that the United States Government had preempted the field of wage-determination under the Davis-Bacon Act, and that the State Labor Commissioner was without authority to determine wages on federally-funded projects.

During the week of February 22, 1971, the President of the United States, acting pursuant to 40 U.S.C. 276 (a)(5), ordered the suspension of the wage-determining provisions of the Davis-Bacon Act. The question therefore arises: does the suspension of the Davis-Bacon Act re-vest wage-determining authority in the State Labor Commissioner? We believe that it does not.

It will be recalled that this Office's previous Opinion turned in large measure on the doctrine of federal preemption. This doctrine, in its most fundamental form, teaches that Congress may, by the assumption of regulatory power over a given subject, deny to the states the power to regulate the same subject. When Congress has the constitutional

right to assume jurisdiction, and when it is plain that Congress intends to deal fully with the subject, then the states' authority over the same matter is excluded, and any state attempts to intervene are of no effect. **Free v. Bland,** 369 U.S. 663, 82 S. Ct. 1089, 8 L. Ed. 2d 180 (1962).

This doctrine applies directly to the present question, though its application requires that some further comment. When the subjects to be regulated are in their nature national, or when the proper regulation of the subject requires a uniform system or plan, a strong presumption obtains in favor of exclusive Congressional authority, and the failure of Congress to assume total jurisdiction is understood as an expression of its intent that the states should not attempt to interpose their own plans of regulation. **Cooley v. Philadelphia,** 12 How. (U.S.) 299, 13 L. Ed. 996 (1851); **Maryland v. Wirtz,** 392 U.S. 183, 88 S. Ct. 2017, 20 L. Ed. 2d 1020 (1968).

This doctrine is generally known as the "Doctrine of the Silence of Congress." It may be best described as a theory which allows Congress to declare that specific federal regulation will not apply to a given subject, but to bar at the same time the exercise of state authority in the area. By so doing, Congress may in effect determine that states cannot act, and that Congress may act but chooses not to do so.

The present situation is a clear example of pre-emption by the doctrine of the silence of Congress. The Davis-Bacon *{*56}* Act, **supra,** represents a comprehensive and uniform plan for determining wage rates to be paid workers on federally-funded projects. As long as the machinery of wage-determination is in operation, the states may not act in the area. By giving the President the authority to suspend the wage-determining machinery in times of national emergency, Congress is to be understood as having determined that if the President so acts, he can do so without allowing the states to reenter the field.

It is thus apparent that the President's suspension of the Davis-Bacon Act, **supra,** does not enlarge the authority of the State Labor Commissioner. That official presently enjoys no more and no less authority than he did before the President's order; in projects formerly governed by the Davis-Bacon Act, **supra,** the State Labor Commissioner was without authority and he is still without authority. In projects where the Davis-Bacon Act did not apply previously, the State Labor Commissioner still enjoys the authority to determine wage rates. Finally, it should be observed that the reasoning and results of this Opinion apply with equal force to any construction project which was formerly governed by the Davis-Bacon Act, and is not limited to highway construction projects.

By: Richard J. Smith

Assistant Attorney General