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*Mitchell v. Freeman*, et al.: Judicial Enforcement of Affirmative Action set Asides - Overcoming the Economic Remnants of Slavery

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**MITCHELL v. FREEMAN, ET. AL.:**  
**JUDICIAL ENFORCEMENT OF AFFIRMATIVE**  
**ACTION SET ASIDES—OVERCOMING THE**  
**ECONOMIC REMNANTS OF SLAVERY**

I. INTRODUCTION

On July 21, 1980 Congressman Parren J. Mitchell filed a lawsuit<sup>1</sup> against the administrator and assistant administrator for Acquisition Policy of the General Services Administration (GSA) that promises to be an important sequel to the recent United States Supreme Court decision in *Fullilove v. Klutznick*.<sup>2</sup> In *Fullilove*, the Court by a 6-3 vote held that it is constitutionally permissible for Congress to set-aside a portion of federal expenditures for minority-owned businesses<sup>3</sup> and, thereby, provide the political means through which federal contracting dollars can be used to remedy the historic exclusion of minorities from the economic mainstream. Congressman Mitchell's suit begins where *Fullilove* ended. It asks the court whether, after obtaining the political means to direct federal contracting opportunities to minority-owned businesses, legal redress is available against unsympathetic government officials who fail to implement statutorily-mandated affirmative action set-asides.

This lawsuit is significant because its outcome will dramatically affect the economic well-being of the minority community, and bear heavily upon the future significance of *Fullilove*. If the court declines jurisdiction over Congressman Mitchell's action or accepts jurisdiction but denies the remedies he seeks, billions of dollars in potential contracting opportunities may be lost to the minority business community; and the *Fullilove* decision, which has so much potential to bring minorities into the economic mainstream, will be vitiated of any practical importance.

To date, the defendants have not answered Congressman Mitchell's complaint. Nevertheless, because of its potential significance, this Note will analyze the legal issues the complaint raises and address the defendants' probable responses to them. Part II will outline the facts alleged by Congressman Mitchell, and offer additional information which supports his allegations. Part III is a legal analysis of the lawsuit, and will discuss whether a private cause of action exists, or is necessary to enforce affirmative action set-asides. It also will determine whether the action should be barred by the doctrine of sovereign immunity. Finally, part IV will examine the historic and continuing exclusion of minorities from the economic mainstream and

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1. CA 80-1801 Congressman Mitchell is a Democrat representing Maryland's Seventh Congressional District.

2. 584 F.2d 600 (2d Cir. 1978).

3. In *Fullilove*, the Second Circuit and the Supreme Court affirmed the district court's finding that the Minority Business Enterprise provision of the Public Works Employment Act of 1977, which requires that at least ten percent of any public works grant be set aside for minority business, does not violate the fifth and fourteenth amendments to the Constitution. The court ruled that this provision was constitutional because Congress had intended it to remedy past discrimination against minorities in the construction industry. 584 F.2d at 603.

emphasize the importance of affirmative action set-asides in overcoming a history of racial oppression.

## II. THE CASE

Congressman Mitchell filed his lawsuit in the United States District Court for the District of Columbia against R.G. Freeman, III and Gerald McBride, the administrator and assistant administrator, respectively, for Acquisition Policy of the GSA. The suit is against Mr. Freeman and Mr. McBride in their official administrative capacities. As administrators, the defendants "are legally required to promulgate procurement regulations for civilian agencies of the federal government, to monitor the contracting processes of such agencies and, where necessary, to impose sanctions upon those agencies."<sup>4</sup> The complaint in this case alleges that the defendants have failed to execute these responsibilities with respect to Public Law 95-507 (hereinafter the Act), an amendment to the Small Business Investment Act of 1958.<sup>5</sup>

On October 24, 1978 the Act went into effect in order to give "small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals . . . the maximum practicable opportunity to participate in the performance of contracts let by any federal agency."<sup>6</sup> In furtherance of that policy, the Act requires that all contracts let by any federal agency, "with certain exceptions, contain a clause reaffirming the above stated federal policy and a "subcontracting clause wherein the contractor agrees "to carry out this policy in awarding subcontracts to the fullest extent possible. . . ."<sup>7</sup> The Act also requires that potential offerors for federal contracts be notified in each solicitation that submission and negotiation of a subcontracting plan consistent with the federal policy are an essential and material part of all contracts."<sup>8</sup>

The Act's subcontracting provisions became effective April 20, 1979, when the Office of Federal Procurement Policy (OFPP) published in the Federal Register final rules and regulations directing the GSA to conform federal procurement regulations to the OFPP guidelines. On May 22, 1979, the GSA informed all other civilian agencies of the regulations, and on July 2, 1979, it published temporary regulations in the Federal Register.

After receiving notice of the requirements of the Act from the GSA on May 22, every civilian agency, including the Departments of Agriculture, Labor, Health and Human Services, Housing and Urban Development, and Transportation, continued to issue solicitations and award contracts without the requisite subcontracting provisions. Even the GSA, the agency that controls the federal procurement regulations and that issued the May 22 telegram instructing other agencies to comply with the Act had advertised 437 solicitations and awarded 246 contracts for \$306,351,761 without the requisite subcontracting provisions as of December 4, 1979.

On December 4, 1979, a lack of compliance with the Act by the GSA

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4. Complaint for Congressman Parren J. Mitchell *supra* note 1 at 2.

5. Public Law No. 95-507, 92 STAT 1757 (1978).

6. *Id.* at 1767.

7. *Id.*

8. *Id.* at 1768.

and other civilian agencies prompted a hearing by the House Subcommittee on General Oversight and Minority Enterprise.<sup>9</sup> During the hearing, Defendant McBride addressed the subcommittee and confessed that "the accomplishments of the GSA to date in implementing the Act have been limited and disappointing."<sup>10</sup> He, however, assured Congressman John J. LaFalce, Chairman of the Committee, that he and Defendant Administrator Freeman were "firmly committed to seeing that the small and disadvantaged segment of the free enterprise system gets a fair chance at doing business with the Federal Government whether through subcontracting or direct contracting."<sup>11</sup> Yet, notwithstanding defendant McBride's promise, the GSA subsequently awarded contracts totalling more than \$350,000,000 without the requisite provisions,<sup>12</sup> resulting in a loss of millions of dollars in potential subcontracting opportunities to small and minority-owned businesses.

Congressman Mitchell seeks declaratory relief ordering the withdrawal and reissuance of all solicitations within the ambit of the Act which do not contain the requisite subcontracting provisions, and declaring void or voidable all contracts awarded without the requisite subcontracting plans. He also seeks damages for the loss of billions of dollars in potential subcontracting opportunities, and whatever further relief the court may deem just and proper.<sup>13</sup>

### III. LEGAL ANALYSIS

Although Congressman Mitchell's suit is novel, it is analogous to the actions which have been brought to enjoin impoundment of funds duly authorized and appropriated by Congress.<sup>14</sup> In these cases, the court found that when refusal to spend appropriated funds operates to defeat a congressional legislative purpose, the impoundment is statutorily and constitutionally impermissible.<sup>15</sup> The invalidity of a general executive impoundment power is based upon two principles, 1) the doctrine of separation of powers<sup>16</sup> and 2) the President's limited veto power.<sup>17</sup> Article I of the Constitution delegates fiscal authority to Congress, and executive impoundment encroaches upon that authority. Moreover, executive impoundment exceeds the President's veto power because it permits him to veto effectively part of a bill by selectively spending appropriated funds in violation of Article I, section 7 of the Constitution. In short, the President does not have the authority to refuse to spend money appropriated by Congress if his refusal operates to circumscribe Congress' wishes.

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9. *Implementation of Subcontracting Provisions of Public Law 95-507 (Part I)*, Hearing before the Subcommittee on General Oversight and Minority Enterprise of the Committee of Small Business, House of Representatives Ninety-Sixth Congress first session December 4, 1979. [Hereinafter cited as *Hearing*].

10. *Id.* at 226.

11. *Id.*

12. Complaint for Parren J. Mitchell *supra* note 1.

13. *Id.*

14. Comment, *Presidential Impoundment of Funds: The Judicial Response*, 40 UNIV. OF CHICAGO L. REV. 328 n.6 (1973). [Hereinafter cited as *Presidential Impoundment of Funds*].

15. *See Id.*

16. Boggs, *Executive Impoundment of Congressionally Appropriated Funds*, 24 UNIV. OF FLORIDA L. REV. 221, 221-23 (1972).

17. *Presidential Impoundment of Funds, supra*, note 15, at 330.

It is not at all far-fetched to say that the defendants' failure to enforce the Act in the instant case is tantamount to impounding billions of federal contracting dollars which were legislatively appropriated to benefit small, disadvantaged businesses. The executive, through the GSA, has restricted Congress' spending power and has effected an item veto of the Act in violation of that statute and the Constitution.

Two common defenses against actions to force the executive to release impounded funds have been 1) that the plaintiffs lack standing or a cause of action, and 2) that the action is barred by the doctrine of sovereign immunity. These defenses will likely be raised against Congressman Mitchell's complaint and, therefore, are discussed below.

#### A. *Private Cause of Action Under Public Law 95-507*

The threshold question posed by Congressman Mitchell's suit is whether it states a claim upon which relief can be granted. The Act articulates Congress' desire to increase the economic opportunities available to small and small minority business concerns by affording them greater opportunities to participate in the performance of contracts let by all federal agencies. It also requires the inclusion of a policy statement and subcontracting clause consistent with that desire in all solicitations and contracts advertised and awarded by civilian agencies. The Act, however, does not provide an express private cause of action to small and minority-owned businesses against those who would violate it. However, the case law suggests strongly that a private cause of action for damage relief may be implied from the Act. Although the case law also supports the implication of a private cause of action for declaratory and injunctive relief, this relief, arguably, can be obtained without an implied private cause of action. The availability both of damage and equitable relief is discussed below.

##### 1. *Damage Relief*

The United States Supreme Court established the doctrine of an implied private cause of action in 1916 in *Texas and Pacific Railway Co. v. Rigsby*,<sup>18</sup> when it held that "[a] disregard of the command of [a] statute is a wrongful act, and where it results in damages to one of the class for whose especial benefit the statute was enacted, the right to recover the *damages* from the party in default is implied. . ."<sup>19</sup> This virtually unrestrained implication of private causes of action later was restricted and now is available only when the court determines that Congress intended to create a private cause of action to enforce a federal statute.<sup>20</sup>

The test to determine when Congress intended to create a private cause of action was articulated in *Cort v. Ash*.<sup>21</sup> In *Ash*, the Supreme Court considered whether a corporate stockholder had an implied private cause of action against corporate directors under the Federal Election Campaign

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18. 241 U.S. 33 (1916).

19. *Id.* at 39 (emphasis added).

20. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979).

21. 422 U.S. 66 (1975).

Act,<sup>22</sup> a federal statute prohibiting corporations from making "a contribution or expenditure in connection with any election at which Presidential and Vice-Presidential electors . . . are to be voted for."<sup>23</sup> The plaintiff sought an injunction and damages against the corporation's directors. The Court of Appeals for the Third Circuit held that the plaintiff had an implied private cause of action against the directors and granted both an injunction barring future contributions by the directors and damages. The Supreme Court reversed and held that there was no implied private cause of action for injunctive relief nor for damages.

The Court disposed of the claim for injunctive relief by holding that the Federal Election Campaign Act Amendment of 1974,<sup>24</sup> enacted after the Court of Appeals decision, constituted an intervening and controlling law which relegated the plaintiff's claim for injunctive relief to the Federal Election Commission.<sup>25</sup> The Amendments gave the Commission exclusive primary jurisdiction for processing alleged violations of the Election Campaign Act and rendered private actions for injunctive relief unnecessary and inappropriate.

The Supreme Court then addressed the plaintiff's claim for damages and articulated four factors relevant to determining whether a private cause of action is implicit in a federal statute. First, is the plaintiff:

one of the class for whose *especial* benefit the statute was enacted, that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purpose of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one historically relegated to state law, in an area basically the concern of the State, so that it would be inappropriate to infer a cause of action based solely on federal law?<sup>26</sup>

Congressman Mitchell seeks damages from the defendants in their official capacity for permitting the solicitation and issuance of contracts by federal agencies without the requisite policy statements and subcontracting provisions. Damages are sought in the amount sufficient to compensate small and minority-owned business for lost contracting opportunities attributable to the defendants' failure to act.

Applying the *Ash* test to the instant case, the first inquiry is whether Congressman Mitchell is "one of the class for whose especial benefit the statute was enacted."<sup>27</sup> Because Congressman Mitchell is bringing action in his official capacity as a member of Congress representing the Seventh Congressional District of Maryland in the United States House of Representatives, however, the appropriate inquiry is whether Congressman Mitchell's constituents are members of the class for whose especial benefit the statute was enacted. Clearly they are. The Seventh Congressional District of Maryland is comprised of persons who are predominantly members of socially

22. Federal Election Campaign Act of 1971, Pub. L. 92-225, (1970) (ed. and Supp. III), 86 STAT. 3.

23. *Id.*

24. Federal Election Campaign Act of 1974, Pub. L. 93-443, 88 STAT. 1263 (Amendments) (*amending* the Federal Election Campaign Act of 1971, 86 STAT. 3).

25. 442 U.S. at 75-76.

26. *Id.* at 78 (notes omitted).

27. 442 U.S. at 78.

and economically disadvantaged groups<sup>28</sup> and, as such, are within the ambit of the statute.

The instant case is distinguishable from *Ash* on this point. In *Ash*, the Court examined the legislative history to ascertain whether the Federal Election Campaign Act was enacted to protect the stockholders and determined that it was not.<sup>29</sup> The protection of the individual stockholder was only a subsidiary purpose of the legislation, the court said, and the defendants, therefore, did not qualify as members of the group for those especial benefit the legislation was enacted.<sup>30</sup> Preventing the influence of large sums of money on election results was held to be the primary purpose of the Federal Election Campaign Act. In this case, however, the Act was created for the especial benefit of those represented by Congressman Mitchell. It explicitly states that its primary and only purpose is to increase the opportunities for small and small business concerns owned and controlled by socially and economically disadvantaged individuals to participate in federal contracting.<sup>31</sup> The Act could not reasonably be construed to be for the especial benefit of anyone other than the groups which Congressman Mitchell represents.

The second inquiry relevant to determining whether a private cause of action for damages is implicit in a federal statute is whether there is any indication of legislative intent to create or to deny such an action.<sup>32</sup> Intent may be expressed either explicitly or implicitly, or may be lacking altogether, provided the plaintiff is a member of a class that has been granted certain rights by federal law.<sup>33</sup> In *Ash*, the Court found "no indication whatever in the legislative history" of an intent to grant a private cause of action and, consequently, disallowed the action.<sup>34</sup> This deficiency, however, would not have barred a private cause of action if plaintiffs had demonstrated that the Federal Election Campaign Act granted them certain rights. The Court declared that where the vesting of a right is doubtful, the absence of a legislative intention to grant a private cause of action will bar such an action; but where the statute confers certain rights upon the plaintiff, the absence of such an intention is not controlling.<sup>35</sup> In the instant case, although the Act does not explicitly or implicitly provide a private cause of action, it clearly does grant to the owners and potential owners of small business concerns the right to share in federal contracting opportunities. Therefore, it is unnecessary to show an intention to create a private cause of action so long as there is no explicit intention to deny such an action, which there is not. The third inquiry of the *Ash* test is whether providing the remedy sought will advance the purpose of the legislation.<sup>36</sup> In the *Ash* case, the Court determined that the remedy sought would not aid in effectuating the statute's congressional purpose because the statute focused on preventing

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28. Complaint for Congressman Parren J. Mitchell, *supra* note 12, at 1.

29. 422 U.S. at 80-82.

30. *Id.*

31. Pub. L. No. 95-507 STAT 1757 (1978).

32. 422 U.S. at 78.

33. *Id.*

34. *Id.* at 82.

35. *Id.* at 82-83.

36. *Id.* at 78.

the corrupting influence of money on federal elections, and the recovery of derivative damages could not redress any negative influence such contributions may have had on past elections.<sup>37</sup> This rationale does not apply to Congressman Mitchell's complaint. The purpose of the Act is to increase the economic viability of small businesses by providing them a larger share of federal contracting dollars. This purpose would clearly be effectuated by awarding damages among those small businesses which have illegally been denied their share of federal contracting opportunities. A damage award would compensate the affected small business for lost subcontracting opportunities and place them in the position they would have occupied had the defendants executed their ministerial responsibilities.

The final inquiry of the four part *Ash* test asks whether the cause of action is one historically and more appropriately left to the States. In *Ash*, the Court responded affirmatively to this inquiry, finding that because corporations are created under state law, state law should govern the shareholders' relationship with the corporation, and a federal remedy would be inappropriate.<sup>38</sup> No such state interest exists with respect to this Act, however. Public Law 95-507 is a federal statute which does not implicate any state law or contrary state interest and can be enforced only through a federal remedy.

Although the plaintiffs in *Ash* failed to satisfy any part of the four part test articulated there, Congressman Mitchell's suit is distinguishable and passes muster under each part of the test. A private cause of action for damages, therefore, may be implied from the Act.

## 2. *Equitable Relief*

Congressman Mitchell's claim for equitable relief to rescind or to reissue those solicitations not containing the requisite policy statements and to declare void or voidable those contracts not containing the requisite subcontracting provisions is not controlled by the test articulated in *Cort v. Ash*. *Ash* spoke to the plaintiffs' claim for damages; the claim for equitable relief was disposed of by recognizing the Federal Election Campaign Act Amendments of 1974 as providing a civil enforcement mechanism for future violations of the Act. However, there is some case law suggesting that a private cause of action for equitable relief may be implied from a statute under the facts alleged in the instant case, and other case law suggesting that this relief may be obtained absent an implied private cause of action.

*J.I. Case Co. v. Borak*<sup>39</sup> supports the argument that Congressman Mitchell has an implied private cause of action against the defendants for equitable relief. *Borak* pre-dates *Ash*, but it was not overruled by it.<sup>40</sup> In *Borak*, corporate stockholders brought a civil action in federal district court alleging that the defendant corporation's directors consummated a merger through the use of a proxy statement containing false and misleading infor-

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37. *Id.* at 84.

38. *Id.*

39. 377 U.S. 426 (1964).

40. Perhaps *Ash* was intended to narrow somewhat *Borak*'s broad invitation to infer a scheme of private enforcement whenever a federal right had been created by Congress. This, however, has not been borne out by subsequent Supreme Court decisions. *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979); *Cannon v. University of Chicago*, 442 U.S. 677 (1979).

mation in violation of section 14(a) of the Securities Exchange Act of 1934.<sup>41</sup> The plaintiffs asserted that the merger deprived them of their preemptive rights as shareholders in *Borak*. On this claim, the district court determined that the plaintiffs had a private cause of action against the corporate directors because they were the especial beneficiaries of the legislature. Put simply, the Securities Exchange Act of 1934 was enacted to protect shareholders from this type of wrong. The district court was affirmed by the Seventh Circuit and the Supreme Court.<sup>42</sup> On the issue of appropriate relief, however, the district court held only declaratory relief permissible. The Seventh Circuit reversed and held that the district court should grant whatever relief is necessary to effectuate the federal purpose of the Act. The Supreme Court granted certiorari to consider the question of relief and articulated the general principle that where a private cause of action is found for the violation of a federal statute, the federal court is free to fashion whatever remedy is necessary and appropriate to effectuate the statute's congressional purpose. Relief is not limited to prospective remedies.<sup>43</sup>

Because Congressman Mitchell's constituents are the especial beneficiaries of Public Law 95-507, he has an implied private cause of action under *Borak*. *Borak* also suggests that he is entitled to whatever relief is necessary to effectuate fully the congressional purpose of the Act. Public Law 95-507, after all, was enacted to insure that small and minority-owned businesses receive the maximum practicable chance to participate in federal contracting opportunities, and that purpose can be effectuated only if the relief Congressman Mitchell prays for is granted since the defendants' wholesale disregard of the Act's requirements has resulted in a loss of millions of dollars in subcontractive opportunities to the minority business community. These opportunities can be regained only through a grant both of prospective injunctive relief against the defendants' failure to act, and remedial declaratory relief ordering the withdrawal and reissuance of all solicitations not containing the requisite policy statement and declaring void all contracts awarded without the requisite subcontracting clause.

If the court grants only injunctive relief, it will protect the minority business community from a future disregard of the Act, but it will not return to the minority business community the millions of dollars in potential subcontracting opportunities which may have been lost. Alternatively, a grant of declaratory relief, alone, will correct the deficiencies in the outstanding solicitations and contracts, but will do nothing to prevent future violations of the Act. It is, therefore, imperative that both injunctive and declaratory relief be granted to Congressman Mitchell.

Even if the court finds that a private cause of action for equitable relief cannot be implied from the Act, injunctive relief would still be available under Sections 10, 10(a), and 10(e) of the Administrative Procedure Act,<sup>44</sup> which give the court jurisdiction to determine whether the administrator of a federal agency failed to meet statutory or procedural requirements,<sup>45</sup> and

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41. Securities Exchange Act of 1934, 48 STAT. 881 (1934).

42. 377 U.S. at 431.

43. *Id.* at 433-35.

44. 5 U.S.C. §§ 701, 702 and 706.

45. *Id.*

through a writ of mandamus.<sup>46</sup> Congressman Mitchell seeks only to require the defendants to perform their ministerial duty of complying with the Act, and, therefore, is entitled to such relief.<sup>47</sup> *Legal Aid Society of Alameda County v. Brennan*<sup>48</sup> is illustrative of this point. In that case, black citizens brought action against federal officials alleging that they had failed to discharge their duty under Executive Order No. 11246<sup>49</sup> to insure that food processing contractors maintained adequate affirmative action programs. The plaintiffs sought injunctive relief. The district court enjoined federal officials from approving federal contractors' affirmative action programs which did not comply with the Executive Order, and the Ninth Circuit affirmed, holding that "[j]udicial review is available to insure that compliance officials perform their non-discretionary duty to refrain from approving plans that do not contain the elements mandated by the regulations."<sup>50</sup>

The plaintiffs in *Brennan* asked the court to review the government's enforcement efforts against the standards established by the Executive Order and the regulations.<sup>51</sup> The court held that "[r]eview of this sort is an ordinary element of administrative enforcement schemes, absent clear indications to the contrary."<sup>52</sup> It emphasized the importance of such review by stating that "without it, no remedy would be available against compliance agencies which ignore the specific requirements of the Executive Order and regulations."<sup>53</sup>

*Brennan* suggests, therefore, that Congressman Mitchell has a right to injunctive relief because his action, in part, seeks only to require the administrator and assistant administrator to perform their ministerial duty to comply with the Act by including the requisite policy statement and subcontracting provisions in solicitations and contracts let by civilian federal agencies. The requirements of the Act are explicit, and the defendants are afforded no discretion. As administrators for Acquisitive Policy, enforcing the Act is among their ministerial duties, and their enforcement efforts may be reviewed without implying a private cause of action from the statute.

### B. *Sovereign Immunity as a Possible Defense*

The second possible defense by the defendants to Congressman Mitchell's suit for declaratory and injunctive relief and damages is that the suit is barred by the doctrine of sovereign immunity. Government immunity from suits has been supported in the United States upon two theories.<sup>54</sup> The first, borrowed from England, is the notion that the king or the government can do no wrong.<sup>55</sup> The second, developed in the United States, holds that the authority making the laws cannot be subject to them.<sup>56</sup> Although there is no

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46. 28 U.S.C. § 1361.

47. See, e.g., *American Friends Service Committee v. Webster*, 485 F. Supp. 222 (1980); *Legal Aid Society of Alameda County v. Brennan*, 608 F.2d 1319 (1979).

48. 608 F.2d 1319 (1979).

49. Executive Order No. 11246, §§ 201 et seq. 202, 42 U.S.C.A. § 2000e note.

50. 608 F.2d 1319, 1331 (1979).

51. *Id.* at 1332.

52. *Id.*

53. *Id.*

54. Barchard, *Governmental Immunity in Tort*, 36 YALE L.J. 1, 17 (1926).

55. *Id.*

56. *Id.*

constitutional provision barring suits against the sovereign, such a bar is said to be implicit in the Constitution.<sup>57</sup>

It is well settled, however, that relief is not sought against the sovereign when a plaintiff asked the court to order a government official to perform his ministerial duties, or that which he statutorily is obliged to do.<sup>58</sup> This type of suit is distinguishable from actions seeking to compel an official to exercise his discretion.<sup>59</sup> Suits may be brought against government officials who purport to act as individuals and not as officials,<sup>60</sup> or where officials act beyond their statutory authorization.<sup>61</sup> The courts unanimously have held that such suits are against the government official and not against the sovereign.<sup>62</sup> However, if an official acts within the limits of his statutory authority, it is an action of the sovereign and cannot be enjoined or directed without the sovereign's permission.<sup>63</sup> Consequently, the court is obliged to entertain jurisdiction against a government official to determine whether he has acted outside his statutory authority,<sup>64</sup> provided the plaintiff alleges the applicable statutory limitations.<sup>65</sup>

This ministerial/discretionary distinction is illustrated by a comparison between the instant case and *Peoples Brewing Co. v. Kleppe*.<sup>66</sup> In *Kleppe*, a brewing company and Black businessmen brought an action against the administrator of the Small Business Administration and the Secretary of Defense seeking injunctive relief, mandamus, and damages for an alleged racially discriminatory contracting policy. The court held that the suit was barred by the doctrine of sovereign immunity because acquiring contracts with other federal agencies to be performed by small businesses was committed by the Small Business Act to agency discretion.<sup>67</sup> The administrator was not statutorily required to solicit any contracts for minority businesses nor for any other small businesses.

*Kleppe* is distinguishable from the instant case. Here the defendants acted outside their statutory authority by failing to include the requisite public policy statements and subcontracting provisions in all contracts advertised and awarded after October 24, 1978, when the Act went into effect. Under the Act, the inclusion of the policy statements and the subcontracting provisions within all solicitations and contracts is mandated; there is no agency discretion. Hence, the distinction between ministerial and discretionary responsibilities which led the court in *Kleppe* to hold that the plain-

57. See *Monaco v. Mississippi*, 292 U.S. 313, 321 (1934); *c.f. Arizona v. California*, 298 U.S. 568 (1936) (this bar also applies to suits by one state against another).

58. *United States v. Capital Assistance Corp.*, 460 F.2d 256 (9th Cir. 1972); *Ferry v. Udall*, 336 F.2d 706, 711 (9th Cir. 1964); *c.f. Romeo v. U.S.*, 462 F.2d 1036, 1038 (5th Cir. 1972) (the statute in question granted a limited waiver of immunity).

59. *Id.*

60. *Belknap v. Schild*, 161 U.S. 10, 18 (1896).

61. *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682 (1949); *Philadelphia Company v. Stimson*, 223 U.S. 605 (1912).

62. See notes 20-21 *supra*.

63. 337 U.S. 682 (1949).

64. *Payne v. Central Pacific Ry Co.*, 255 U.S. 228 (1921); *Philadelphia Co. v. Stimson*, 223 U.S. 605 (1912).

65. 337 U.S. 682 (1949).

66. 360 F. Supp. 729 (1973). For stronger authority supporting this case, see note 58 *supra* and accompanying text.

67. *Id.* at 730.

tiffs' action was barred by the doctrine of sovereign immunity should not bar Congressman Mitchell's action.

Congressman Mitchell has alleged a statutory violation by the administrator and assistant administrator, and the specific relief sought is against the defendants and not against the sovereign. The relief which the court is requested to grant requires nothing of the sovereign that it is not already obliged to do under the Act. The suit is against the named defendants, personally. Their actions are contrary to their authority and, therefore, may be made the object of specific relief.<sup>68</sup>

#### IV. ECONOMIC INEQUALITY AS A RELIC OF SLAVERY

Although Congressman Mitchell probably will win his suit, the question he presents to the court is more fundamental than the judicial reviewability of administrative action. His suit questions the viability of the Thirteenth Amendment to the Constitution, which permits the Congress to act directly to ameliorate economic inequality attributable to this country's history of slavery.<sup>69</sup> The defendants have circumvented that power by refusing to comply with the Act, and unless the court grants Congressman Mitchell the relief he seeks, it will, in effect, ignore the mandate of the thirteenth amendment, and deny minority citizens a means to overcome the economic remnants of slavery.

"The severe shortage of potential minority entrepreneurs with general business skills is a result of . . . historic exclusion from the mainstream economy."<sup>70</sup> This exclusion finds its roots in the institution of slavery, which necessitated the total subjugation of the slave race. "Black business ventures prior to the Civil War were confined largely to small-scale, personal service enterprises operating within the framework of well-established and rigidly enforced patterns of prescribed behavior."<sup>71</sup> Each American colony was empowered to circumscribe the economic activities of slaves and most did so.<sup>72</sup> For example, Alabama required that,

No slave can own property, and any property purchased or held by a slave, not claimed by the master or owner, must be sold by order of any justice of the peace, one half the proceeds of the sale, after the payment of cost and necessary expenses to be paid to the informer and the residue to the county treasury.<sup>73</sup>

A New York City regulation more directly restricted black economic activity by prohibiting slaves from selling large quantities of "boiled corn, peaches, pears, apples, and other kinds of fruit;"<sup>74</sup> and other state laws required slaves to acquire the consent of their masters before engaging in commerce.<sup>75</sup>

68. 337 U.S. 382, 389 (1949).

69. *Fullilove v. Keps*, 584 F.2d 600 (2d Cir. 1978).

70. *Id.* (quoting Office of Minority Business Enterprise, U.S. DEPT. OF COMMERCE, MINORITY BUSINESS OPPORTUNITY HANDBOOK, August 1976).

71. Coles, *The Unique Problems of the Black Businessman*, 26 VANDERBILT L. REV. 509, 510 (1973) (notes omitted). [Hereinafter cited as *Problems of the Black Businessman*].

72. See B. BURRELL & J. SEDER, *GETTING IT TOGETHER: BLACK BUSINESS IN AMERICA*, [hereinafter cited as *GETTING IT TOGETHER*].

73. Act of 1852, Code of Alabama, Sec. 1018 (1852).

74. *GETTING IT TOGETHER*, *supra* note 72, at 8.

75. For example, a South Carolina law provided: "If any shopkeeper, trader, or other person,

The plight of black business improved very little following the Emancipation Proclamation.<sup>76</sup> "During 1865 and 1866 [southern lawmakers] enacted the Black Codes as a system of social control that would be a substitute for slavery, fix [Blacks] in a subordinate place in the social order and provide a manageable and inexpensive labor force."<sup>77</sup> The right to contract, a prerequisite to successful participation in business, was continually burdened. There were laws which voided any contract where one or more of the parties to the contract was black, unless the contract was in writing and witnessed by a white person who could read and write.<sup>78</sup> Moreover, vagrancy and apprenticeship laws operated to restrict the black economic base,<sup>79</sup> and restrictive covenants, which were legally enforceable agreements between landowners not to sell or rent to blacks, further limited access to the mainstream economy.<sup>80</sup>

In fact, black business enterprise did not increase substantially until 1895 when blacks began moving into the cities in large numbers, and the black community began to rely more heavily upon black business.<sup>81</sup> The years between 1890 and 1900 saw a thirty percent increase in black business enterprise.<sup>82</sup> Still, in absolute terms, the number of black-owned businesses remained very small.<sup>83</sup> Black business enterprises increased rapidly, however, throughout the 1920's and then more slowly into the 1960's,<sup>84</sup> but their effect on the economy was and is negligible. "According to a 1969 study conducted by the Bureau of Census, [b]lack-owned businesses had total receipts of 4,500,000,000 dollars—roughly ten percent of the total gross sales to [b]lacks."<sup>85</sup>

The problem of underrepresentation in business ownership is not limited to blacks; it affects all minorities. In 1972 approximately seventeen percent of all Americans were minority group members. Yet minorities owned only about four percent of America's businesses and accounted for less than one percent of the nation's business receipts.<sup>86</sup> There are many obstacles minority business owners must overcome to establish and maintain a successful business. First, they share the low probability of success inherent in

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shall . . . buy or purchase from any slave . . . any other article whatsoever, or shall otherwise deal, trade or traffic with any slave not having a permit so to deal, trade or traffic, or to sell any such article, from or under the hand of his master or owner, or such other person as may have the care and management of such slave, such shopkeeper, trader, or other person, shall, for every such offense, forfeit a sum not exceeding one thousand dollars and imprisonment not exceeding a term of twelve months nor less than one month." Act of 1817, Statutes at Large of South Carolina, Vol. 7, at 454 (1840).

76. GETTING IT TOGETHER, *supra* note 72, at 10-11.

77. A. MEIER AND E. RUDWICK, FROM PLANTATION TO GHETTO: AN INTERPRETIVE HISTORY OF AMERICAN NEGROES 138 (1966).

78. E. MCPHERSON, THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION, 23 (1880).

79. *Id.*

80. Restrictive covenants were not struck down by the Court as illegal until 1947. *Shelley v. Kraemer*, 334 U.S. 1 (1947).

81. *Problems of the Black Businessman*, *supra* note 71 at 511.

82. *Id.*

83. *Id.*

84. *Id.* at 512-13.

85. *Id.* at 514 (notes omitted).

86. Weimann, *A Piece of the Action for the Disadvantaged*, 31 FEDERAL BAR JOURNAL 336 (1972).

any small business, and they have the added problem of discrimination. Discrimination against small minority-owned business takes many forms. For example, "buyers may refuse to purchase goods or services from minority suppliers and manufacturers solely because the business is minority-owned."<sup>87</sup> More frequently, however, "[c]ompanies may solicit bids from [minority-owned] businesses, but accompany the invitation with unattainably high quality or quantity requirements."<sup>88</sup> Whatever the form of discrimination, it restricts the market for goods and services produced and sold by minority-owned businesses.

If minority businesses are to succeed in the face of past and present discrimination, and if the economic relics of slavery are to be lifted from the shoulders of minorities, it is necessary to guarantee that minority-owned businesses receive their fair share of the \$100 billion in federal contracts awarded annually. Public Law 95-507 is a step in that direction and must be enforced.

## V. CONCLUSION

This Note has examined the two probable legal challenges to Congressman Mitchell's suit to require the administrator and assistant administrator for Acquisition Policy of the GSA to include in all future contracts let by any federal agency the provisions to withdraw or reissue those solicitations not containing the requisite policy statement, and to declare void all contracts issued without the requisite subcontracting provisions of Public Law 95-507. The case law suggests that neither of these legal challenges, alone or in concert, is sufficient to bar the action or to deny the relief sought. The Note also suggests the importance of enforcing the Act by demonstrating that without appropriate enforcement mechanisms, the hope that affirmative action set-asides will help to bring minority entrepreneurs into the economic mainstream will be mere illusion.

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87. GETTING IT TOGETHER, *supra* note 72, at 996.

88. *Id.*

### Editors Note:

On February 16, 1981, Congressman Mitchell voluntarily withdrew his complaint with prejudice when the General Services Administration agreed to comply with Public Law 95-507 and offered statistical data suggesting an effort to correct defective contracts and to implement systems to prevent subsequent defeat. *Mitchell v. Freeman et al.*, CA80-1801 (February 16, 1981). However, the issues raised in the suit are still viable. Although Congressman Mitchell's lawsuit can no longer serve to test the availability of legal redress against federal officials who are reluctant to enforce the set-asides, minority businesses still must have a means which will guarantee that congressionally authorized affirmative action set-asides reach their intended beneficiaries. Consequently, until such a test case is litigated successfully, the possibility of similar abuses still exists.