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Improving Economy and Efficiency in Federal Contracting Presidential Use of the Federal Property and Administrative Services to Direct Procurement Policy

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Abstract

This paper focuses on how presidents have issued Executive Orders relying on the Federal Property and Administrative Services Act of 1949 (FPASA) over the past thirty years to shape the Federal acquisition system. Pursuant to FPASA, the President has the authority to issue policies and directives that promote economy and efficiency in the procurement functions of the government. Research found a sharp increase in the use of FPASA to issue Executive Orders, and an increase in the scope of Executive Orders relying on the FPASA authority. It also found that while Federal courts have traditionally given broad latitude to the President's FPASA authority, that deference is limited. Likewise, it found that Congress is rarely moved to intervene in support of or contravention of the FPASA authority. Yet the policies enacted using this FPASA authority have created uncertainty and burdens in Federal contracting, effecting the workforce and the industrial base. The author provides recommendations for legislative and administrative changes to promote the use of FPASA to strengthen the industrial base rather than to create confusion and increase compliance costs.

Research Question

This paper will analyze the use of FPASA authorities in Executive Orders across administrations from both an historical and substantive perspective to examine the effect of these policies on the health of the procurement system. While it will neither denounce or endorse any particular order, it will examine the legal parameters applicable to FPASA orders as derived from judicial challenges to these orders. Next, it will survey the modern use of FPASA under Presidents William Clinton, George W. Bush, Barack Obama, Donald Trump, and Joseph Biden to explore the frequency and the subjects of FPASA orders, and the interplay between orders issued during these administrations, and how Congress has responded to FPASA orders. Finally, it will explore the effects on the industrial base and acquisition workforce.

FPASA Authority

The Supreme Court has long held that "the Government enjoys the unrestricted power … to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases" (Perkins v. Lukens Steel Co., 1940, 127). This finding has led to the conclusion that "[t]hose wishing to do business with the Government must meet the Government's terms; others need not"(AFL-CIO v. Kahn, 1979, 794). When those terms are set by a statute, the operative question is if the statute itself is constitutional. However, when those terms are set by Executive Order, the analysis becomes more difficult. While numerous other statutes provide the President with authority to promulgate regulations and guidance on Federal contracting, none provide as broad an authority at the Federal Property and Administrative Services Act of 1949 (FPASA).

FPASA, as codified throughout title 40 and title 41 of the U.S. Code, expresses Congress's intent to "provide for the Government an economical and efficient system for (a) the procurement and supply of personal property and nonpersonal services, . . .; (b) the utilization of

available property; (c) the disposal of surplus property; and (d) records management" (40. U.S.C. § 471). In Section 205(a), the Act 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 this Act" which "shall govern the . . . executive agencies in carrying out their respective functions hereunder." This gives the President enormous authority to enact policies to deliver that "economical and efficient system."

Judicial Review of FPASA Authority

Traditionally, this authority has been interpreted very broadly. In the 1960s and 1970s, the case law reflected great confidence in the authority of the President, allowing for some of the first Federal nondiscrimination provisions in Federal contracts (Farmer v. Philadelphia Electric Company, 1964, 7).[1] Indeed, in the 1979 case of AFL-CIO v. Kahn, the majority opinion for the Court of Appeals for the DC Circuit noted that almost all uses of FPASA in Executive Orders up until that time had been to insert anti-discrimination provisions into Federal contracts (AFL-CIO v. Kahn, 1979, 790–791). While the following is not an exhaustive review of the FPASA case law, it provides a brief overview of the decisions most frequently cited in current FPASA cases.

AFL-CIO v. Kahn (Kahn)

In Kahn, the court provides a substantive discussion of what FPASA means in terms of presidential authority. After revisiting FPASA's origins in the reports of the Commission on Organization of the Executive Branch of the Government, the Kahn court concludes that Congress, "by emphasizing the leadership role of the President in setting Government-wide procurement policy on matters common to all agencies," intended for "the President play a direct and active part in supervising the Government's management functions" to the extent they promote economy and efficiency in the procurement system (AFL-CIO v. Kahn, 1979, 790–791). Kahn then expounds 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" and are intended to further the goals of FPASA that awards be made to the offeror whose bid "will be most advantageous to the Government" (AFL-CIO v. Kahn, 1979, 789, 792). While recognizing that the "the terms and legislative record of the FPASA are not unambiguous" and that FPASA includes an "imprecise definition of presidential authority," the Kahn court showed great deference to the Administration's reasoning and upheld the underlying EO on price controls ruling by finding that the EO would, "likely have the **direct and immediate effect** of holding down the Government's procurement costs." (AFL-CIO v. Kahn, 1979, 793, emphasis added).

Chamber of Commerce of the United States v. Reich (Reich)

In the 1996 Reich case, the same court cautioned that the Kahn decision did not "write a blank check for the President to fill in at his will" but required that the authority "must be exercised consistently with the structure and purposes of the statute that delegates that power" (Chamber of Commerce of the United States v. Reich, 1996, 1,331). This case challenged to President Clinton's E.O. 12,954, which required 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." The Reich court ultimately concluded that the Order was "regulatory in nature and is pre-empted by the [National Labor Relations Act (NLRA)] which guarantees the right to hire permanent replacements" (Chamber of Commerce of the United States v. Reich, 1996, 1,336).

[1] For example, President Kennedy's Executive Order (EO) 10925 of 1961, Establishing the President's Committee on Equal Employment, was found by later courts to rely on FPASA (Farkas v. Texas Instrument, Inc., 1967, n.1)

In dicta, the Reich court revisited the economy and efficiency requirements from Kahn, stressing "stressed the importance of the nexus between [an EO] and likely savings to the government" (Chamber of Commerce of the United States v. Reich, 1996, 1,331). While the court declined to find whether the economic justification provided in the Order was insufficient, it acknowledged that the appellant's argument that "use of permanent replacements is a good deal more efficient than temporary replacements" was also persuasive (Chamber of Commerce of the United States v. Reich, 1996, 1,336). Therefore, the Reich court found that "it [is] untenable to conclude that there are no judicially enforceable limitations on presidential actions, besides actions that run afoul of the Constitution or which contravene direct statutory prohibitions, so long as the President claims that he is acting pursuant to [FPASA]," thereby signaling a willingness to consider whether future orders exceeded the authority of FPASA even if they did not contradict a specific statute (Chamber of Commerce of the United States v. Reich, 1996, 1,331).

Building and Construction Trades Department v. Allbaugh (Allbaugh)

Six years later, the Court of Appeals for the DC Circuit attempted to explain the Reich ruling when considering a challenge was to President George W. Bush's Order 13,202, which directed that recipients of Federal funds could not allow or disallow a contractor's use of a Project Labor Agreement. In distinguishing Reich, the Court stated that the Reich Order had "the effect of forcing corporations wishing to do business with the Federal government not to hire permanent replacements even if the strikers are not the employees who provide the goods or services to the government" (Building and Construction Trades Department v. Allbaugh, 2002, 36). Thus in Allbaugh, the court upheld the Order because it applied only "to work on projects funded by the government" and "does not address the use of PLAs on projects unrelated to those in which the Government has a proprietary interest" (Building and Construction Trades Department v. Allbaugh, 2002, 36).

UAW-Labor Employment & Training Corp. v. Chao (Chao)

In the Reich decision, the court expounded that Executive Order 12,800, which required government contractors to post notices informing their employees that they could not be required to join or remain a member of a union, was legal" (Chamber of Commerce of the United States v. Reich, 1996, fn 10). As the order was repealed by President Clinton with Order 12,836, it was only when President George W. Bush issued a materially similar order, Executive Order No. 13,201, that any challenge to the FPASA policy was heard. Ultimately, the Chao court upheld Executive Order No. 13,201, finding that the Kahn economy and efficiency test was met because, "[w] hen workers are better informed of their rights, including their rights under the Federal labor laws, their productivity is enhanced" and that the "availability of such a workforce from which the United States may draw facilitates the efficient and economical completion of its procurement contracts" (Exec. Order No. 13,201, 2001). The court conceded that the "link may seem attenuated (especially since unions already have a duty to inform employees of these rights), and indeed one can with a straight face advance an argument claiming opposite effects or no effects at all" (UAW-Labor Employee & Training Corp. v. Chao, 2003, 366–367). Yet, citing Kahn's "lenient standards" the court found that there was a sufficient nexus (UAW-Labor Employee & Training Corp. v. Chao, 2003, 367).

Challenges to Executive Order No. 14,042, Ensuring Adequate COVID Safety Protocols for Federal Contractors (Contractor Mandate)

The most recent series of cases diving into the FPASA justifications involve Executive Order No. 14,042, the Contractor Mandate, which used FPASA to require that Federal contractors provide adequate COVID-19 safeguards to workers performing on or in connection a Federal contract in order to "decrease worker absence, reduce labor costs, and improve the

efficiency of contractors and subcontractors at sites where they are performing work for the Federal Government." To accomplish this goal, the Order required a task force provide guidance outlining the necessary safeguards, and that the OMB Director review those safeguards to determine if they would promote economy and efficiency in Federal contracting. Ultimately, the Contractor Mandate required the FAR Council to amend the FAR to comply with this guidance.

The COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors (Contract Guidance) required that contractors "working on or in connection with a covered contract or working at a covered contractor workplace" including contractors who were working entirely from home, be fully vaccinated within four months (Contractor Guidance, sections 3–5, 11). The OMB Director concurred with the Contractor Guidance and determined that the FPASA standard was met (Determination 1; Office of Management and Budget, 2021a). The FAR Council then issued the suggested contract clauses agencies were encouraged to adopt via deviation (FAR Council Guidance). At that time, 21 states sought injunctive relief in five separate case which were heard in Arizona, Georgia, Missouri, Kentucky, and Florida. Unlike the prior cases discussed, challenges to the Contractor Mandate all address injunctive relief at the district court level rather than the appellate level. While each court granted an injunction, each applied the existing caselaw differently.

During this litigation, the OMB Director issued a revised determination that included an extensive FPASA justification (Determination 2; Office of Management and Budget, 2021b). It cited to six external studies, providing data on the costs incurred by the Federal Government and contractors due to COVID, data explaining that vaccination reduces net new costs to the government and the contractor community, and information on how masking and distancing reduce contractor and agency costs before concluding that the Guidance would increase economy and efficiency (Office of Management and Budget, 2021b, 63,423).

To grant injunctive relief, each court decided that the plaintiffs had proven a substantial likelihood of ultimate success on the merits (Georgia v. Biden, 2021, 25).[2] They unanimously found that the nexus required by Kahn was lacking, and the practical implication of upholding the Contractor Mandate would mean that almost any action could be justified by FPASA and "would grant the President a breathtaking amount of authority" (Arizona, 55). The Missouri court positing that under the authority claimed in the Order, "the President would be able to mandate virtually any public health measure that would result in a healthier contractor workforce." (Missouri v. Biden, 2021, 14). The Arizona and Kentucky courts speculated as to other absurd ways the Administration could use FPASA to reduce absenteeism and the spread of COVID, such as a ban on sugary drinks or a ban on hiring obese workers (Arizona, 56; Kentucky, 22). The Georgia court similarly found that the reasonably related nexus needed to be sufficiently narrower, otherwise it would give "the President the right to impose virtually any kind of requirement on businesses that wish to contract with the Government (and, thereby, on those businesses' employees) so long as he determines it could lead to a healthier and thus more efficient workforce" (Georgia v. Biden, 2021, 31). Finally, in Florida the Court notes that Determination 2 "fails . . . to identify any instance in which absenteeism attributable to COVID-19 among contractor employees resulted in delayed procurement or increased costs also attributable to COVID-19" so that the nexus test is not met (Florida v. Nelson, 2021, 37).

[2] Additionally, the court had to find that the injunction was necessary to prevent irreparable harms, that the harm outweighs an injury to the Federal government, and that the injunction would not "be adverse to the public interest" (Georgia v. Biden, 25). Given the topic of this paper only the question of success on the merits will be addressed here, so as to focus on the five theories considered by the courts.

The Arizona, Georgia, and Kentucky cases also found that the actions of the Contractor Mandate were of such "vast economic and political significance" that it required an explicit authorization from Congress (Arizona 57; Georgia v. Biden, 28). The Kentucky court stated that because FPASA is limited to promoting "economy and efficiency Federal contracting," that "even for a good cause, including a cause that is intended to slow the spread of Covid-19, Defendants cannot go beyond the authority authorized by Congress" (Kentucky, 22–23).

The courts in Arizona, Georgia, Kentucky, and Florida all criticize the use of FPASA to act in an area of public health traditionally reserved for the states. The Arizona Court finds that the Contractor Mandate is a public health mandate outside the contemplation of a statute intended to authorize "policies and directives related to procurement" (Arizona, 59). Likewise, the Kentucky court states that a "a vaccine mandate would be more appropriate in the context of an emergency standard promulgated by [the Occupational Safety and Health Administration (OSHA)]" given that OSHA "was created to ensure safe and healthful working conditions for workers by setting and enforcing standards and by providing training, outreach, education and assistance" (Kentucky, 27). However, given that the Fifth Circuit had recently struck down an OSHA-promulgated a vaccine mandate, the Kentucky court rejects the idea that a vaccine mandate could be outside the scope of a public health law but within that of a procurement law. The Georgia court agreed, stating that the Contractor Mandate "goes far beyond addressing administrative and management issues in order to promote efficiency and economy in procurement and contracting, and instead, in application, works as a regulation of public health, which is not clearly authorized under the [FPASA]" (Georgia, 29–30).

The interplay between FPASA and Congress's delegation authority was addressed by the Arizona and Kentucky courts. While Congress may statutorily delegate some policy making authority to the Executive branch, it must ensure that in doing so it "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform"(Arizona, 60). Thus, the Arizona court suggests that any reading of FPASA broad enough to "permit the executive to issue the Contractor Mandate" would itself suggest that FPASA itself is unconstitutional (Arizona, 64). The Kentucky court agrees, noting that while it is rare to find a statute to violate Congress's delegation authority, the court "believes that today's holding is consistent with prior nondelegation doctrine precedent" (Kentucky, 29).

The Arizona and Kentucky courts found that the Contractor Mandate violated FPASA by "intrud[ing] into an area traditionally and principally reserved to the states" without an express grant of such authority from Congress (Arizona, 64). The Kentucky court reiterated that "a person receiv[ing] a vaccine or undergo testing falls squarely within the States' police power" (Kentucky, 30). The Arizona court explained that simply because police power grants vaccination authority to the states does not mean that the Federal government could not exercise concurrent power, but that such an exercise would require "clear and manifest purpose of Congress" (Arizona, 68).

Thus, in the Contractor Mandate series of cases, all of the Courts found that the Executive Order exceeded the President's FPASA authority. While the unifying theory of the decisions relies on Kahn, each court had a decidedly different approach to what authorities the President holds under FPASA, which will later be discussed in terms of recommendations.

Presidential Use of FPASA: 1993 to the Present

Given that many statutes provide more explicit and specific authority for presidential action related to procurement, historically FPASA justifications for Executive Orders have been used sparingly.

President Clinton

While President Clinton issued 364 Executive Orders addressing covering everything from child labor, electric vehicles, and IT procurement reform, the FPASA authority was used sparingly: only five Orders cite to FPASA itself or its codification. By topic category, they are:

- Labor Unions and Collective Bargaining.

Executive Order No. 12,836, Revocation of Certain Executive Orders Concerning Federal Contracting, revoked Executive Orders 12,800 and 12,818. Executive Order No. 12,800 required Federal contractors to inform workers of the right to not join unions or pay certain dues. Executive Order No. 12,818 prohibited requiring a Project Labor Agreement on Federal construction contracts.

Executive Order N. 12,954, Ensuring the Economical and Efficient Administration and Completion of Federal Government Contracts, barred Federal contractors from hiring permanent replacements for striking workers. However, as previously discussed, the Reich case held that the Order was preempted by the National Labor Relations Act.

- Nondisplacement of Incumbent Contractor Labor.

Executive Order No. 12,933, Nondisplacement of Qualified Workers Under Certain Contracts, established a requirement for contractors to retain the incumbent workforce of a predecessor services contract.

- Undocumented Workers.

Executive Order No. 12,989, Economy and Efficiency in Government Procurement Through Compliance with Certain Immigration and Naturalization Act Provisions, created a reporting system intended to prevent and detect the use of undocumented workers on Federal contracts.

- Economic Development.

Executive Order No. 13,005, directed the FAR Council to provide incentives on unrestricted contracts for businesses located in underutilized areas.

While the Courts invalidated Executive Order No. 12,933, and later Administrations would revisit Orders 12,836 and 12,933, the other orders remain applicable today. President George W. Bush expanded upon Executive Order No. 12,989 with the E-Verify program. Congress took modified portions of Order 13,005 to create what is now the Historically Underutilized Business Zone (HUBZone) contracting program in section six of the Small Business Reauthorization Act of 1997.

President Bush

President George W. Bush issued 70 fewer Executive Orders that President Clinton. Three of his first orders used FPASA to reverse policies set by the Clinton Administration, and ultimately President Bush relied upon FPASA authority for six orders covering four topics. The only new subject matter addressed was real property management.

- Labor Unions and Collective Bargaining:

Executive Order No. 13,201, Notification of Employee Rights Concerning Payment of Union Dues or Fees, revoked Executive Order No. 12,836, thereby once again requiring contractors to notify employees of the right not to join a union and to opt out of certain dues. This marked the third reversal of course in nine years.

Executive Order No. 13,202, Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally Funded Construction Projects, reinstated the requirement of government neutrality on Project Labor Agreements that had been revoked by the Clinton Administration.

Executive Order No. 13,208, Amendment to Executive Order No. 13,202, Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally Funded Construction Projects, again modified the government's stance on Project Labor Agreements, allowing Federal agencies the ability to allow for the use of these agreements on specific projects. This marked the fourth change to the policies and direction provided workforce and industrial base in nine years.

- Nondisplacement of Incumbent Contractor Labor.

Executive Order No. 13,204, Revocation of Executive Order on Nondisplacement of Qualified Workers Under Certain Contracts, repealed Executive Order No. 12,933. This allowed contractors the discretion to decide whether or not to extend offers to an incumbent contractor's workforce.

- Real Property Management.

Executive Order No. 13,327, Federal Real Property Asset Management, promoted better management of Federal buildings and lands. It established the Federal Real Property Council.

- Undocumented Workers.

Executive Order No. 13,465, Amending Executive Order No. 12,989, required that contractors use the E-Verify system to demonstrate that employees were legally able to work under immigration laws.

While later Administrations would revisit the FPASA orders on labor unions, collective bargaining, and the displacement of incumbent contractor workforces, the E-Verify and real property orders are still in effect today.

President Obama

Despite Saturday Night Live's parody suggesting that President Obama was overly reliant on Executive Orders, he issued fewer orders than either of his predecessors. However, the Federal contractor community complained that a disproportionate share of these were directed at them. In 2015, in a letter to the President, they complained that due to 13 executive orders affecting government contractors, the "rapid growth in compliance requirements is becoming untenable" (Wheeler, 2015). While not all of these orders were based on FPASA, the Obama presidency saw a significant increase in reliance on FPASA authority, with 12 enacted FPASA orders and one draft order that drew Congressional scrutiny.

- Labor Unions and Collective Bargaining.

Executive Order No. 13,494, Economy in Government Contracting, made Federal contractor costs relating to collective bargaining and the management of union relationships unallowable, and was amended by Executive Order No. 13,517.

Executive Order No. 13,496, Notification of Employee Rights Under Federal Labor Laws, revoked Executive Order No. 13,201 on union dues and additionally required affirmative worker education on labor rights.

Executive Order No. 13,502, Use of Project Labor Agreements for Federal Construction Projects, reinstated the preference for Project Labor Agreements. This marked the fifth revision to the policy in 10 years.

Executive Order No. 13,517, Amendments to Executive Orders 13,183 and 13,494, amended Executive Order No. 13,394 to clarify that contractor costs relating to labor relationship management were indeed allowable, but that cost related to influencing the workforce's decision to organize were not. It also addressed unrelated issues in Executive Order No. 13,183.

- Nondisplacement of Incumbent Contractor Labor.

Executive Order No. 13,495, Nondisplacement of Qualified Workers Under Service Contracts, was yet another volley in the debate about the treatment of incumbent service contractors, reverting to the requirement to retain these workers.

- Text Messaging.

Executive Order No. 13,513, Federal Leadership on Reducing Text Messaging While Driving, directed that agencies use contract clause to ban text messaging while driving.

- Human Trafficking.

Executive Order No. 13,627, Strengthening Protections Against Trafficking in Persons in Federal Contracts, marked a new use of FPASA with an order aimed at reducing human trafficking. While previous administrations had issued executive orders on this topic they had relied on other authorities. Specifically, the Order required the inclusion of new contract clauses and audit rights related to human trafficking, stating that these would promote economy and efficiency in contracting by "increas[ing] stability, productivity, and certainty in Federal contracting by avoiding the disruption and disarray caused by the use of trafficked labor and resulting investigative and enforcement actions."

- Equal Rights.

Executive Order No. 13,672, Further Amendments to Executive Order No. 11,478, Equal Employment Opportunity in the Federal Government, and Executive Order No. 11,246, Equal Employment Opportunity, reflected one of the most traditional uses of the FPASA authority, the expansion of equal rights protections. This bans contractors from discriminating based on gender identity or sexual orientation.

- Contractor Compensation.

Executive Order No. 13,658, Establishing a Minimum Wage for Contractors, also saw a new use of FPASA authorities. Finding that "[r]aising the pay of low-wage workers increases their morale and the productivity and quality of their work, lowers turnover and its accompanying costs, and reduces supervisory costs" would "lead to improved economy and efficiency in Government procurement," the Order established minimum rates of pay for contractor employees.

Executive Order No. 13,706, Establishing Paid Sick Leave for Federal Contractors, required that Federal contractors provide paid sick leave as part of the compensation offered.

- Contractor Responsibility.

Executive Order No. 13,673, Fair Pay and Safe Workplaces, was the most controversial of the FPASA orders signed by President Obama. Intended to increase efficiency and "cost savings in the work performed by parties who contract with the Federal Government," the order asserts that "[c]ontractors that consistently adhere to labor laws are more likely to have workplace practices that enhance productivity and increase the likelihood of timely, predictable, and satisfactory delivery of goods and services to the Federal Government" (Section 1). Because of the significance of this rule, a longer discussion is merited.

The Fair Pay and Safe Workplaces order provided FPASA-based Presidential direction in three areas. First, the Order addressed potential pre-and post-award violations of 14 labor laws and their state counterparts, requiring that prospective contractors self-report any "administrative merits determination, arbitral award or decision, or civil judgment" issued in the past three years as well as any violations by its proposed subcontractors (Sec. 2). Executive Order No. 13,738, amended this order to provide for direct subcontractor reporting to the government.

After allowing the contractor to explain any mitigating actions it has taken, the contracting officer is required to consult with a Labor Compliance Advisor (LCA) to determine whether the corrective measures are adequate or whether "appropriate remedial measures, compliance assistance [or] steps to resolve issues to avoid further violations" are necessary to allow for a responsibility determination (Section 2). Successful awardees would repeat these disclosures six months, at which time the contracting officer and LCA may require additional remedial measures, cancel the contract, and/or refer the contractor for suspension and debarment proceedings (Section 2). To ensure uniform application of these rules, the FAR Council is required to issued regulations and the Department of Labor is to provide guidance (Section 4).

In addition to the provisions governing a contractor's labor record, the order has two other provisions. For each pay period, it requires contractors provide their employees with a document stating "the individual's hours worked, overtime hours, pay, and any additions made to or deductions made from pay" (Section 5). Finally, the order requires contractors who normally have binding arbitration agreements with their employees to allow the employee to opt out of arbitration if the alleged violation is sexual harassment, a tort, or a violation of the Civil Rights Act of 1964 (Section 6).

The Order was immediately controversial. A contemporaneous article cites the director of Public Justice, a public interest law group, as saying that this is "one of the most important positive steps for civil rights in the last 20 years" (Bazelon, 2014). Others expressed concerns that "businesses will be penalized for pending claims against them before those claims have been adjudicated . . [or] that unions, knowing violations could put awards at risk, could threaten complaints as a pressure tactic" (Trottman, 2016). When the implementing regulations were issued in Federal Acquisition Circular 2005–90, contractor groups immediately filed suit as Associated Builders & Contrs. (ABC) of Southeast Tex. v. Rung. An injunctive order was granted on all but the paycheck transparency provisions, in part on the argument that FPASA could not regulate beyond the scope of the underlying laws (Associated Builders & Contractors of Southeast Texas v. Rung, 2016, 18–27). In early 2017, both the House and the Senate passed disapproval resolutions, which prohibited the rule from taking effect pursuant to the Congressional Review Act.

Twelve orders relying on FPASA authority were issued during the Obama presidency—more than the prior two presidencies combined. These covered seven different subjects, many of which had not previously cited to FPASA.

However, in addition to the aforementioned 12 FPASA orders issued by President Obama, a draft FPASA order was leaked in April 2011 (H. Rpt. 112–47). Titled "Disclosure of Political Spending by Government Contractors," it would have required that Federal contractors disclose all contributions of directors, officers, subsidiaries and affiliates to candidates and to third party organizations. The Draft Order tasked the FAR Council with the collection and appropriate use of the data. The justification stated that this disclosure was necessary, lest companies decline to participate in Federal contracting out of a belief that the system was rigged to favor political contributors. Congress intervened, inserting a provision in the National Defense Authorization Act for Fiscal Year 2012 that blocked any attempt by contracting agencies to require the disclosure of campaign contributions.

President Trump

In only four years, President Trump issued 220 Executive Orders, a much faster pace than his predecessors. His FPASA orders broke with tradition in many ways: President Trump did not revoke the majority of the Obama FPASA orders, and he issued FPASA orders on novel topics.[3]

- Contractor Compensation.

Executive Order No. 13,838, Exemption from Executive Order No. 13,658 for Recreational Services on Federal Lands, modified the contractor minimum wage to exempt employees of concessionaires on public land found.

- Contractor Responsibility.

Executive Order No. 13,782, Revocation of Federal Contracting Executive Orders, repealed the Fair Pay and Safe Workplaces Order concurrent with the Congressional Review Act vote, and directed a repeal of the FAR rule.

- Nondisplacement of Incumbent Contractor Labor.

Executive Order No. 13,897, Improving Federal Contractor Operations by Revoking Executive Order 13,495, again repealed requirements to extend offers to an incumbent workforce.

- Offshoring.

Executive Order No. 13,940, Aligning Federal Contracting and Hiring Practices with the Interests of American Workers, presents a novel use of the FPASA authority. It directs that the "head of each agency that enters into contracts shall assess any negative impact of contractors' and subcontractors' temporary foreign labor hiring practices or offshoring practices on the economy and efficiency of Federal procurement and on the national security" and then propose the appropriate responsive actions (Section 2).

- *Economic Development/Real Property*.

Executive Order No. 13,946, Targeting Opportunity Zones and Other Distressed Communities for Federal Site Locations, directs agencies to prioritize opportunity zones when seeking potential office.

- Equal Rights.

Executive Order No. 13,950, Combating Race and Sex Stereotyping, is the most controversial of the Trump FPASA orders. It finds that since the Federal government has, "long

[3] Analyzing President Trump's orders proves challenging because the authority is frequently vague. In many of his orders, President Trump cites only to his constitutional authority and unspecified laws of the United States.

prohibited Federal contractors from engaging in race or sex discrimination," that it should also prohibit those companies from allowing employees to participate in training that "promotes race or sex stereotyping or scapegoating" since it "undermines efficiency in Federal contracting" (Section 2).[4] Therefore, the order directs agencies to include a clause banning such training in contracts.

While enforcement of the order was enjoined by the courts in the Santa Cruz case, the court did not examine whether FPASA was appropriately used here, instead finding that the prohibited conduct was so vague as to make the order unenforceable. Therefore, this novel use of FPASA has not been judicially vetted as to scope.

President Trump issued more FPASA orders in one term than either President Clinton or President Bush had in two terms. The six FPASA orders issued by President Trump covering six unique topics were promptly rejected by President Biden.

President Biden

At the time of writing, President Biden had been in office for just over 14 months, during which time he issued 85 Executive Orders.

- Civil Rights.

Executive Order No. 13,985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, revoked the Trump Executive Order No. 13,950 on Sex Stereotyping.

Nondisplacement of Incumbent Contractor Labor.

Executive Order No. 14,055, Nondisplacement of Qualified Workers Under Service Contracts, reasserts the FPASA rationale for retaining incumbent workforces, thus providing the fifth order on this topic in five administrations.

- Contractor Compensation.

Executive Order No. 14,026, Increasing the Minimum Wage for Federal Contractors, reinstated the prior application of the contractor minimum wage to concession workers and it raised the contractor minimum wage.

Executive Order No. 14,069, Advancing Economy, Efficiency, and Effectiveness in Federal Contracting by Promoting Pay Equity and Transparency, requires that contractors provide employees with detailed pay statements and limits or prohibits contractor inquiries into a candidate's compensation history.

- Labor Unions and Collective Bargaining.

Executive Order No. 14,063, Use of Project Labor Agreements for Federal Construction Projects, reasserts the preference Project Labor Agreements, even though President Trump had not repealed the Project Labor Agreement Order issued by President Obama

- Vaccine Mandates.

[4] The order defines race or sex stereotyping as "ascribing character traits, values, moral and ethical codes, privileges, status, or beliefs to a race or sex, or to an individual because of his or her race or sex" and defines "race or sex scapegoating" as "assigning fault, blame, or bias to a race or sex, or to members of a race or sex because of their race or sex. It similarly encompasses any claim that, consciously or unconsciously, and by virtue of his or her race or sex, members of any race are inherently racist or are inherently inclined to oppress others, or that members of a sex are inherently sexist or inclined to oppress others."

Executive Order No. 14,042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, is perhaps the most controversial Biden FPASA order to date, addressing the vaccination of contractor employees. Because of the scrutiny it has brought to the Act itself, it is discussed in more depth in a prior section. At this time, several judicial injunctions have stopped enforcement of the Order.

With six orders deriving authority from FPASA in 14 months, President Biden has already equaled the volume President Trump's entire presidency. This volume has also surpassed that of two-term Presidents Clinton and Bush.

Effect on the Industrial Base and Acquisition Workforce

It is widely acknowledged that the industrial base is struggling, with the number of unique vendors for the Department of Defense falling from 80,000 firms in 2010 to just over 50,000 in 2019, despite a 286% increase the number of transactions during that period (Bresler & Bresler, 2020, p. 3). Even more precipitous was the decline of new entrants, falling from more than 15,000 entities per year to nearly 4,000 entities (Bresler & Bresler, 2020, p. 4).

While no studies can demonstrate that FPASA orders are directly or solely responsible for this decline, when the National Defense Industrial Association asked business what conditions limit a company's willingness engage in additional Federal contracting, more than 70% cited uncertain business conditions and nearly 63% cited administrative burdens (National Defense Industrial Association [NDIA], 2022, p. 7). Given that a substantial portion of FPASA orders are revoked and reinstated with each change in administration, and that new subjects are increasingly regulated using FPASA authorities, these orders are a factor contributing to and exacerbating the underlying problem.

Similarly, the pressures on the acquisition workforce are well documented, with a 2015 GAO report attributing the Department of Defense's shortfall in growing its contracting personnel to "high attrition rates and difficulty in hiring qualified personnel" (GAO, 2015, p. 15). The 2016–2021 DoD Acquisition Workforce Strategic Plan found that more than 25,000 civilian employees in the contracting career field would be eligible to retire in 2019 (DoD Acquisition, 2015, p. 76). Delayed appropriation cycles are placing increased pressure on contracting officers to fulfill requirements in a compressed timeframe. So while no analysis exists on the effect of FPASA orders on the acquisition workforce, it does raise the question of whether economy and efficiency are best met by the series of fire drills resulting from the rush conform contracts to each new order.

Trends

By looking at the FPASA based orders over the past 30 years, a few trends emerge. Primarily, FPASA is being used substantially more often. Since 2009, presidents have used FPASA 25 times, compared to only 10 uses between 1993 and 2008. This indicates an increased reliance by presidents on this authority, thereby emphasizing how important it is that there be additional clarity on depth and breadth of the scope Congress intended to delegate to the President under FPASA.

An analysis of the topics addressed in FPASA orders finds that some topics are perennial favorites, reliably revoked and reinstated based on the Administration. For example, in five administrations, there have been five orders on the nondisplacement of contractor workers, four orders on Project Labor Agreement, and three on contractor minimum wages and notices regarding union dues. While this predictable, it is not efficient, since each chain initiates a new series of FAR cases, contract clauses, modifications, training, and compliance audits.

When the courts defer to the President in cases such as those on Project Labor Agreements, they clearly signal that they are not persuaded by the FPASA justification since a justification of an apposite policy will also meet with approval under the statute. They are simply requiring a colorable argument that economy and efficiency will be served, and then they defer to the President. However, when considering FPASA orders covering novel grounds, judicial deference to FPASA orders also appears to be waning. In the recent spate of cases on Fair Pay and Safe Workplaces and the in cases the vaccine mandate, injunctive relief has been repeatedly granted. In the Contractor Mandate cases, all five courts made it abundantly clear that no amount of detail in a FPASA justification was provided, they did not believe that FPASA was intended to apply so broadly. Both judicial support and approbation have led to the devaluation of the underlying goal of promoting economy and efficiency.

Recommendations and Conclusion

In recent years, Congress has focused more on FPASA orders, holding multiple hearings in front of the Committee on Oversight and Government Reform, Committee on Education and Workforce, and Committee on Small Business. However, despite hearings and handwringing about FPASA orders, in 30 years Congress has only successfully invoked the Congressional Review Act once, for the Fair Pay and Safe Workplaces Order. Likewise, only the proposed order on campaign contributions was legislatively blocked. This suggests that while Congress is concerned about the use of FPASA authorities, the topics covered by those authorities in recent years are either unobjectionable or so divisive that Congress cannot reach an agreement.

The current FPASA scheme allows presidents of each party to increasingly use FPASA authority for political gain without any reasonable belief that these policies will endure under their successor. Rather than promoting economy and efficiency in Federal contract, FPASA is now more likely to tax the resilience of the acquisition workforce and the industrial base without any reasonable expectation of lasting change or benefits. Therefore, I offer the following suggestions to allow more meaningful improvements through FPASA orders.

1. Congress should require that any Executive Order relying on FPASA do so explicitly.

Such an action would require a clearer nexus to contracting and prevent situations where Presidents implicitly use their FPASA authority.

2. Congress should require that any new FPASA Executive Order provide explicit and measurable goals for increased economy and efficiency, and then task an entity such as the Office of Federal Procurement Policy with publicly reporting the results on an annual basis.

This recommendation would also promote a well-rationalized nexus to FPASA. It would force clarity around the outcomes being sought by the President. If such a test were applied to the numerous orders on labor notifications, Project Labor Agreements, and the retention of incumbent employees, it would ameliorate the issue identified in the Reich and Chao cases: the arguments for and against many FPASA policies can be so vaguely articulated under the Kahn standard that they are meaningless. It also will force administrations to answer questions such as how requiring Project Labor Agreements promoted economy and efficiency during the Clinton, Obama, and Biden presidencies but hindered economy and efficiency during the two Bush presidencies and the Trump presidency.

3. Congress should explicitly state if FPASA Executive Orders may regulate activities that are not expressly contemplated in FPASA.

While early FPASA orders focused on integrating the Federal workforce and prohibiting discrimination by Federal contractors, the trends of the past 30 years indicate that presidents are now willing to issue FPASA orders on an increasingly broad set of topics, ranging from pay and leave issues and offshoring of workers to permissible types of training and vaccine mandates. While the courts may act as a check on implementation in some cases, the expense and time consumed by the acquisition workforce and the industrial base preparing to implement these orders cannot be underestimated. Likewise, the latest cases on the Contractor Mandate suggest that some courts are open to FPASA itself to be so overly broad that it risks being ruled unconstitutional under a nondelegation theory. Therefore, Congress should provide greater specificity around those areas delegated to the President under FPASA.

Jointly or independently, these legislative changes would provide clarity and predictability, two qualities that will indeed improve economy and efficiency in Federal contracting.

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