



Presidential Authority to Impose Requirements on Federal Contractors

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June 14, 2011

Congressional Research Service

7-5700

www.crs.gov

R41866

Summary

Executive orders requiring agencies to impose certain conditions on federal contractors as terms of their contracts have raised questions about presidential authority to issue such orders. Recently, the Obama Administration circulated, but did not issue, a draft executive order directing “every contracting department and agency” to require contractors to “disclose certain political contributions and expenditures.” The draft order cites the President’s constitutional authority, as well as his authority pursuant to the Federal Property and Administrative Services Act of 1949 (FPASA), which authorizes the President to prescribe any policies or directives that he considers necessary to promote “economy” or “efficiency” in federal procurement. The draft executive order refers to FPASA’s goals in that it directs actions “to ensure the integrity of the federal contracting system in order to produce the most economical and efficient results for the American people.” The draft order has been characterized by some as an “abuse of executive branch authority” because it resembles the Democracy is Strengthened by Casting Light on Spending in Elections (DISCLOSE) Act that the 111th Congress considered, but did not pass. If issued, the draft order may face legal challenge.

The outcome of legal challenges to particular executive orders pertaining to federal contractors generally depends upon the authority under which the order was issued and whether the order is consistent with or conflicts with other statutes. Courts will generally uphold orders issued under the authority of FPASA so long as the requisite nexus exists between the challenged executive branch actions and FPASA’s goals of economy and efficiency in procurement. Such a nexus may be present when there is an “attenuated link” between the requirements and economy and efficiency, or when the President offers a “reasonable and rational” explanation for how the executive order at issue relates to economy and efficiency in procurement. However, particular applications of presidential authority under the FPASA have been found to be beyond what Congress contemplated when it granted the President authority to prescribe policies and directives that promote economy and efficiency in federal procurement.

Some courts and commentators also have suggested that Presidents have inherent constitutional authority over procurement. A President’s reliance on his constitutional authority, as opposed to the congressional grant of authority under the FPASA, is more likely to raise separation of powers questions.

In the event that Congress seeks to enlarge or cabin presidential exercises of authority over federal contractors, Congress could amend FPASA to clarify congressional intent to grant the President broader authority over procurement, or limit presidential authority to more narrow “housekeeping” aspects of procurement. Congress also could pass legislation directed at particular requirements of contracting executive orders. For example, in the 112th Congress, legislation has been introduced in response to the draft executive order (e.g., H.R. 1906; H.R. 1540, § 847; H.R. 2017, § 713).

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Introduction

Executive orders requiring agencies to impose certain conditions on federal contractors as terms of their contracts have raised questions about presidential authority to issue such orders.¹ Recently, the Obama Administration has circulated a draft executive order directing “every contracting department and agency” to require contractors to “disclose certain political contributions and expenditures.”² The draft order cites the President’s constitutional authority, as well as his authority pursuant to the Federal Property and Administrative Services Act (FPASA).³ The draft directive has been characterized by some commentators as an “abuse of executive branch authority”⁴ because it resembles disclosure requirements in legislation that the 111th Congress considered, but did not pass.⁵

The executive branch’s authority to place requirements on federal contractors via executive orders recently has been litigated, such as with executive orders (1) encouraging the use of project labor agreements (PLAs);⁶ (2) requiring that certain contracts include provisions obligating contractors to post notices informing employees of their rights not to be required “to join a union or to pay mandatory dues for costs unrelated to representational activities”;⁷ and (3) directing departments

¹ For purposes of this discussion, the term “federal contractor” does not necessarily mean a corporation. It includes any natural or juridical person that supplies goods or services for the government’s use and is paid using appropriated funds. Corporations, unions, and individuals may all qualify as contractors under this definition, depending upon their dealings with the federal government. However, the term “federal contractor” does not include persons that receive federal grants or cooperative agreements, or any contractor or subcontractor hired by a federal grantee or cooperative agreement recipient. See, e.g., 48 C.F.R. § 2.101 (definition of “acquisition”).

² Executive Order, Disclosure of Political Spending by Government Contractors, Draft, Apr. 13, 2011, [http://op.bna.com/der.nsf/id/rtar-8g4pmx/\\$File/Draft_EO_Govt_Contr_Disclosure.pdf](http://op.bna.com/der.nsf/id/rtar-8g4pmx/$File/Draft_EO_Govt_Contr_Disclosure.pdf).

³ P.L. 81-152, 63 Stat. 377 (June 30, 1949) (codified in scattered sections of Titles 40 and 41 of the United States Code). It is important to note that while the provisions of FPASA codified in Title 41 of the United States Code generally only apply to the procurements of civilian agencies, those codified in Title 40 (including the provision authorizing the President to prescribe policies and directives) apply government-wide.

⁴ See, e.g., Obama May Order Contractors to Reveal Donations, Apr. 20, 2011, http://news.yahoo.com/s/afp/20110420/pl_afp/usvotepoliticsmoney (quoting Senate Minority Leader Mitch McConnell).

⁵ Democracy is Strengthened by Casting Light on Spending in Elections (DISCLOSE) Act, H.R. 5175, S. 3295, S. 3628, 111th Cong. (2010). See generally CRS Report R41264, *The DISCLOSE Act: Overview and Analysis*, by R. Sam Garrett, L. Paige Whitaker, and Erika K. Lunder.

⁶ Project labor agreements (PLAs) are “multi-employer, multi-union pre-hire agreement[s] designed to systemize labor relations at a construction site.” Bldg. & Constr. Trades Dep’t, *AFL-CIO v. Allbaugh*, 295 F.3d 28, 30 (D.C. Cir. 2002). For example, President Obama issued an executive order “encourag[ing] executive agencies to consider requiring the use of [PLAs] in connection with large-scale construction projects.” Executive Order 13502, 74 Fed. Reg. 6985 (Feb. 11, 2009); see also 48 C.F.R. §§ 22.501-22.505. A Department of Labor solicitation requiring a PLA, issued under the authority of Executive Order 13502, was challenged as violating the Small Business and Competition in Contracting Acts, among other things. See ABC Member Files Protest against U.S. Department of Labor Project Labor Agreement, Oct. 6, 2009, <http://vlex.com/vid/abc-member-files-protest-u-labor-67827389>. This challenge was ultimately dismissed after the agency withdrew the solicitation. Executive Order 13502 also revoked Executive Order 13202, issued by President George W. Bush, which provided that the government would “neither require nor prohibit the use of” PLAs on federally funded contracts. See 66 Fed. Reg. 11225 (Feb. 22, 2001). Bush’s order was challenged as beyond his authority and as preempted by the National Labor Relations Act (NLRA). See *Allbaugh*, 295 F.3d at 29.

⁷ See *UAW-Labor Employment & Training Corp. v. Chao*, 325 F.3d 360, 362 (D.C. Cir. 2003); Executive Order 13201, 66 Fed. Reg. 11221 (Feb. 22, 2001).

and agencies to require their contractors to use E-Verify to check the work authorization of their employees.⁸

The issuance of executive orders requiring agencies to impose certain conditions on federal contractors and subcontractors has practical as well as legal significance given the scope of federal procurement activities. Spending on federal contracts totaled \$541.1 billion, or approximately four percent of U.S. gross domestic product, in FY2010,⁹ and approximately 22% of U.S. workers are employed by entities subject to requirements placed on certain federal and federally funded contractors and subcontractors pursuant to executive orders.¹⁰ Thus, some commentators have expressed concern that, if presidential authority to issue directives imposing requirements on federal contractors is construed broadly, the executive branch effectively could regulate significant segments of the U.S. economy.¹¹

This report provides background on the authorities under which Presidents have historically issued executive orders pertaining to federal contractors and the legal issues potentially raised by the exercise of these authorities. It also surveys key cases challenging executive orders pertaining to federal contractors, which typically were issued under the authority granted to the President under the FPASA. The report concludes by addressing potential limitations on and congressional responses to presidential exercises of authority regarding federal contractors.

Background

Broadly speaking, executive orders are directives issued by the President.¹² Such directives may have the force and effect of law if they are based on express or implied constitutional or statutory authority.¹³ Executive orders are “generally directed to, and govern actions by, Government officials and agencies” and are sometimes characterized as “affect[ing] private individuals only indirectly.”¹⁴ However, they can effectively reach private conduct, such as when an executive order requires agencies to incorporate particular terms in their contracts, or prohibits them from entering contracts with persons who do not comply with certain conditions.

⁸ See *Chamber of Commerce v. Napolitano*, 648 F. Supp. 2d 726 (S.D.Md. 2009); Executive Order 13465, 73 Fed. Reg. 33285 (June 11, 2008).

⁹ USASpending.gov, Prime Award Spending Data, Federal Spending FY2010, http://usaspending.gov/explore?fiscal_year=2010&tab=By+Agency&fromfiscal=yes&carryfilters=on&Submit=Go; Statistical Abstract of the United States, 2011, Table 666 (“Gross Domestic Product in Current and Chained (2005) Dollars: 1970 to 2009”), <http://www.census.gov/compendia/statab>.

¹⁰ E-mail from Michelle Rose, Department of Labor, to Jared Nagel, Congressional Research Service, May 31, 2011 (copy on file with the authors).

¹¹ See, e.g., J. Frederick Clarke, *AFL-CIO v. Kahn Exaggerates Presidential Power under the Procurement Act*, 68 CAL. L. REV. 1044, 1044 (1980) (characterizing the court’s decision in *Kahn* as giving the President “majestic powers to regulate the economy under the guise of formulating procurement policy”); Michael H. LeRoy, *Presidential Regulation of Private Employment: Constitutionality of Executive Order 12,954 Debarment of Contractors Who Hire Permanent Striker Replacements*, 37 B.C. L. REV. 229, 232 (1996) (“The stakes are high because virtually all presidents since Franklin Roosevelt have used their general power over procurement to place conditions on private actors who do business with the United States government.”). The order at issue in *Kahn*, for example, applied to all wages and prices of federal contractors, not just those applicable to their government contracts.

¹² Staff of House Comm. on Government Operations, 85th Cong., 1st Sess., *Executive Orders and Proclamations: A Study of a Use of Presidential Powers* (Comm. Print 1957).

¹³ *Id.*

¹⁴ *Id.*

Presidents from Franklin D. Roosevelt through Barack Obama have issued orders that seek to leverage the government's procurement spending to promote socio-economic policies that some commentators would characterize as extraneous to contractors' provision of goods or services to the government.¹⁵ The issuance of such orders has been controversial, partly because of disputes regarding the desirability of the underlying socio-economic policies to be promoted through the procurement process and partly because some commentators characterize such presidential actions as trespassing upon congressional prerogatives.¹⁶

Presidential power to issue executive orders must derive from the Constitution or from an act of Congress.¹⁷ Contractor-related executive orders historically have been issued based upon the President's powers under Article II of the Constitution or the powers delegated to the President by FPASA. The earliest orders using the procurement process to further socio-economic policies of the President appear to have been issued during World War II, and were based upon the President's constitutional authority as commander-in-chief.¹⁸ Later, during the 1960s, several orders were issued under the authority of prior executive orders or other provisions of federal law.¹⁹ More recently, orders have been issued based on presidential authority under FPASA.²⁰

FPASA states that its purpose is to "provide the Federal Government with an *economical* and *efficient* system for ... [p]rocurring and supplying property and nonpersonal services"²¹ and authorizes the President to prescribe any "policies and directives" consistent with the act that he "considers necessary to carry out" the act's goals of efficiency and economy.²² Courts and commentators have disagreed as to whether Congress intended to delegate to the President broad authority over procurement or authority only over narrow "housekeeping" aspects of procurement, and FPASA's legislative history is arguably inconclusive.²³ While a few courts have

¹⁵ See, e.g., 14 Weekly Compilation of Presidential Documents 1839, 1843 (1979) (President Carter noting a desire to "use our buying power more effectively to make price restraint and competition a reality" when issuing Executive Order 12092); see also *Rossetti Constr. Co. v. Brennan*, 508 F.2d 1036, 1045 n.18 (7th Cir. 1975) ("It is well established that the procurement process, once exclusively concerned with price and quality of goods and services, has been increasingly utilized to achieve social and economic objectives only indirectly related to conventional procurement considerations."). However, while some commentators suggest that procurement decisions once focused exclusively upon price and quality, Congress, in particular, has long sought to leverage procurement spending to promote particular socio-economic goals. See, e.g., James F. Nagle, *A HISTORY OF GOVERNMENT CONTRACTING* 57-58 (2d ed., 1999) (describing how the Continental Congress used contracts for the mail to promote the development of passenger transportation between the states).

¹⁶ See, e.g., LeRoy, *supra* note 111, at 266 (noting that every employment discrimination law followed, rather than preceded, executive orders, and that these orders were generally issued at times when Congress would not have enacted legislation on these issues).

¹⁷ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952).

¹⁸ See, e.g., Executive Order 8802, 3 C.F.R. 957 (1938-43 Compilation) (1941) (citing no specific statutory authority); Executive Order 9346, 3 C.F.R. 1280 (1938-43 Compilation) (1943) (apparently premised on the President's War Powers); see also *Contractors Ass'n v. Secretary of Labor*, 442 F.2d 159, 169-70 (1971) (noting the lack of a reference to a statutory authority in two Eisenhower executive orders, but finding that "they would seem to be authorized by the broad grant of procurement authority with respect to" FPASA).

¹⁹ See, e.g., *United States v. New Orleans Public Serv., Inc.*, 553 F.2d 459, 465-68 (5th Cir. 1977), *vacated on other grounds*, 436 U.S. 942 (1978) (noting that Executive Order 11246 was based, in part, on Executive Order 10925, as well as Title VII of the Civil Rights Act).

²⁰ See, e.g. *AFL-CIO v. Kahn*, 618 F.2d 784, 790 n.29 (D.C. Cir. 1979) (en banc) (noting that for the first three years of its operation, Executive Order 11141 "was apparently based on only the FPASA").

²¹ 40 U.S.C. § 101(a) (emphasis added).

²² 40 U.S.C. § 121(a).

²³ Compare *Kahn*, 618 F.2d at 789 (construing the legislative history of FPASA as evidencing an intention to give the (continued...)

found that the President has “inherent authority” over procurement,²⁴ questions have arisen about whether such authority survived the enactment of FPASA.²⁵ Some commentators have suggested that the authority delegated to the President under FPASA is so broad that Presidents do not need to assert inherent authority over procurement.²⁶

Challenges to Executive Orders on Federal Contracting

Parties challenging procurement-related executive orders and actions taken pursuant to such orders may raise different legal issues depending upon whether the President issues the executive order pursuant to the statutory authority granted to him by FPASA or under his constitutional authority. When the President relies upon the authority delegated by FPASA, courts may treat challenges alleging that presidential actions exceed statutory authority under FPASA as questions of statutory interpretation.²⁷ Such courts have focused upon the text and legislative history of FPASA, as well as prior uses of presidential authority under FPASA, in determining whether Congress contemplated the President taking the challenged actions when it delegated authority to prescribe policies and procedures “necessary” to promote “economy” and “efficiency” in federal procurement.²⁸

In a few cases, parties have unsuccessfully challenged a contractor-related executive order by asserting that FPASA itself, or a particular action taken under it, runs afoul of the nondelegation doctrine, which concerns the delegation of legislative power to the executive branch.²⁹ The

(...continued)

President “direct and broad-ranging authority” in order to “achieve a flexible management system capable of making sophisticated judgments in pursuit of economy and efficiency” *with id.* at 800 (McKinnon, J., dissenting) (viewing FPASA as intended to give the President “comparatively narrow authority to manage the procurement of federal government property, supplies, and services”). See Peter E. Quint, *The Separation of Powers under Carter*, 62 TEX. L. REV. 785, 792 (1984) (“[FPASA] easily could be read as authorizing the President to do little more than issue relatively modest housekeeping regulations relating to procurement practice.”).

²⁴ See, e.g., Savannah Printing Specialties Local 604 v. Union Camp Corp., 350 F. Supp. 632, 635 (S.D. Ga. 1972); Southern Ill. Builders Ass’n v. Ogilvie, 327 F. Supp. 1154, 1160-61 (S.D. Ill. 1971), *aff’d*, 471 F.2d 680 (7th Cir. 1972); Joyce v. McCrane, 320 F. Supp. 1284, 1290 (D.N.J. 1970). Some commentators have asserted that these cases misread early Supreme Court decisions, such as *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940), which several of the cases here cite when discussing the “voluntary” nature of government contracting (i.e., that contractors are not required to do business with the federal government). Such commentators note that while *Perkins* speaks of the government’s “unrestricted power . . . to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases,” it does not specifically mention *presidential* power. See, e.g., Clarke, *supra* note 11, at 1050. But see *United States v. Tingey*, 30 U.S. (5 Pet.) 115 (1831) (suggesting independent presidential power to contract).

²⁵ See, e.g., *Kahn*, 618 F.2d at 791-92 n.40 (“[A]doption of the comprehensive scheme of legislation embodied in the [FPASA] has negated the historical antecedents that engendered the doctrine of an inherent presidential proprietorship power.”). In fact, some commentators have read *Kahn* as removing the need to assert the President’s inherent authority over procurement. See, e.g., Quint, *supra* note 23, at 794.

²⁶ See, e.g., Clarke, *supra* note 11, at 1050.

²⁷ See, e.g., *Kahn*, 618 F.2d at 787 (explicitly declining to analyze the issue under the *Youngstown* framework because the President issuing the order had “relied entirely upon authority said to be delegated by statute, and makes no appeal to constitutional powers of the Executive that have not been confirmed by legislation”).

²⁸ See, e.g., *Chrysler Corp. v. Brown*, 441 U.S. 281, 308 (1979) (“This is not to say that any grant of legislative authority to a federal agency by Congress must be specific before regulations promulgated pursuant to it can be binding on courts in a manner akin to statutes. What is important is that the reviewing court reasonably be able to conclude that the grant of authority contemplates the regulations issued.”).

²⁹ Such challenges have not been successful. See, e.g., *Kahn*, 618 F.2d at 793 n.51 (finding no violation of the (continued...))

premise of the nondelegation doctrine is that Article I of the Constitution vests legislative power in Congress to make the laws that are necessary and proper,³⁰ and “the legislative power of Congress cannot be delegated” to other branches of government.³¹ A congressional delegation of legislative authority will be sustained, according to the Supreme Court, whenever Congress provides an “intelligible principle” that executive branch officials must follow and against which their actions may be evaluated.³² Today, the nondelegation doctrine constitutes only a “shadowy limitation on congressional power,” as the Court has not struck down a congressional delegation since 1935.³³

Parties challenging contractor-related executive orders and/or courts reviewing such challenges have sometimes also articulated constitutional arguments based on the three-part scheme for analyzing the validity of presidential actions set forth in Justice Jackson’s concurring opinion in *Youngstown Sheet & Tube Company v. Sawyer*.³⁴ This analysis has appeared when presidential action has been taken pursuant to the President’s express statutory authority under FPASA,³⁵ when presidential action has been viewed as conflicting with an existing statute,³⁶ and when presidential action has been based on the President’s constitutional authority.³⁷ In *Youngstown*, the Supreme Court struck down President Truman’s executive order directing the seizure of the steel mills during the Korean War.³⁸ It did so, in part, because the majority deemed the order to be an unconstitutional violation of the separation of powers doctrine given that it was, in essence, a legislative act, and no constitutional provision or statute authorized such presidential action.³⁹ To the contrary, Congress had expressly rejected seizure as a means to settle labor disputes during consideration of the Taft-Hartley Act.⁴⁰

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delegation doctrine because the goals of economy and efficiency in federal procurement provided sufficient standards to judge whether the President’s actions were within the legislative delegation); *Napolitano*, 648 F. Supp. 2d at 739 (plaintiffs conceding they were not raising a violation of the nondelegation doctrine); *Liberty Mutual Insurance Co. v. Friedman*, 639 F.2d 164, 166 (4th Cir. 1981).

³⁰ “All legislative Powers [granted by the Constitution] shall be vested in a Congress of the United States.” U.S. CONST. art. I, § 1.

³¹ *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85 (1932); *see also* *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537-38 (1934).

³² *J.W. Hampton & Co.*, 276 U.S. 394, 409 (1928); *see also* *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 530 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935).

³³ *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1326 (D.C. Cir. 1996). *See* *Whitman v. American Trucking Ass’n*, 531 U.S. at 472-76 (reviewing the Supreme Court’s nondelegation decisions since 1935 and concluding “In short, we have ‘almost never felt qualified to second guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.’ *Mistretta v. United States*, 488 U.S. 361, 416 (1999) (Scalia, J., dissenting); *see id.* at 373 (majority opinion).”). In *Whitman*, the author of the opinion, Justice Scalia, who was the lone dissenter in a prior nondelegation doctrine case, *Mistretta v. United States*, modified his position on the doctrine.

³⁴ For example, the district court in *Kahn* found that President Carter’s issuance of Executive Order 12092 exceeded his authority under *Youngstown*. *AFL-CIO v. Kahn*, 472 F. Supp. 88, 102 (D.D.C. 1979). However, on appeal, both the majority and the dissent rejected this conclusion. *Kahn*, 618 F.2d at 787, 797.

³⁵ *Contractors Ass’n of Eastern Pennsylvania v. Sec’y of Labor*, 442 F.2d 159, 170 (3d Cir. 1971).

³⁶ *United States v. East Texas Motor Freight System, Inc.*, 564 F.2d 179, 185 (5th Cir. 1977); *Kahn*, 472 F. Supp. at 100. *But see Kahn*, 618 F.2d at 786 n.10, 787.

³⁷ *Allbaugh*, 295 F.3d at 32-33 (D.C. Cir. 2002).

³⁸ 343 U.S. 579 (1952).

³⁹ *Id.* at 586-89.

⁴⁰ *Id.*

The concurring opinion of Justice Jackson in *Youngstown*, which has come to be regarded as more influential than the majority opinion, set forth three types of circumstances in which presidential authority may be asserted and established a scheme for analyzing the validity of presidential actions in relation to constitutional and congressional authority.⁴¹ First, if the President has acted according to an express or implied grant of congressional authority, presidential “authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate,” and such action is “supported by the strongest of presumptions and the widest latitude of judicial interpretation.”⁴² Second, in situations where Congress has neither granted nor denied authority to the President, the President acts in reliance only “upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.”⁴³ Third, in instances where presidential action is “incompatible with the express or implied will of Congress,” the power of the President is at its minimum, and any such action may be supported pursuant only to the President’s “own constitutional powers minus any constitutional powers of Congress over the matter.”⁴⁴ In such circumstances, presidential actions must rest upon an exclusive power, and the courts can uphold the measure “only by disabling the Congress from acting upon the subject.”⁴⁵

Because Congress had passed three statutes on seizure of private property in particular circumstances and had considered, but not granted, the President general seizure authority for use in emergencies, Justice Jackson’s taxonomy supported the majority’s holding that the President lacked the authority to seize the steel mills in *Youngstown*.⁴⁶

Some commentators have proposed that this taxonomy ought to serve to invalidate at least certain contractor-related executive orders.⁴⁷ Such arguments are most common when the executive order requires agencies to impose requirements similar to those previously considered, but not passed by Congress.⁴⁸ However, separation of powers arguments generally have been unavailing so long as the executive order is also based on authority delegated to the President under the FPASA.⁴⁹ When acting under the FPASA, the President arguably is acting according to an express grant of congressional authority, and, under *Youngstown*’s first category, such actions are “supported by the strongest of presumptions and the widest latitude of judicial interpretation.”⁵⁰

⁴¹ *Id.* at 635-38.

⁴² *Id.* at 635, 637.

⁴³ *Id.* at 637.

⁴⁴ *Id.*

⁴⁵ *Id.* at 637-38.

⁴⁶ *Id.* at 602-03, 637.

⁴⁷ *See, e.g.,* Clarke, *supra* note 11, at 1055 (arguing that it would fundamentally violate the separation of powers principle from *Youngstown* if FPASA can be used to impose general economic controls contrary to Congress’s intent).

⁴⁸ *See, e.g., id.* (asserting that issuance of Executive Order 12954 ought to have been barred under *Youngstown*, given that Congress had considered, but failed to pass, legislation prohibiting the employment of permanent replacements for striking workers). *But see Reich*, 74 F.3d at 1325 (finding Executive Order 12954 invalid because it conflicted with the NLRA). Some commentators have asserted that such procurement-related executive orders do not address the same issues considered by Congress if the proposed legislation would have amended other provisions of law, not procurement laws. *See, e.g.,* Justice Department Memo on Executive Order 12,954, *reprinted* in 48 DAILY LAB. REP., at D-28 (Mar. 13, 1995) (asserting that Executive Order 12954 differed from the legislation considered by Congress because Congress would have amended the NLRA to prohibit employers from hiring permanent replacements).

⁴⁹ *See, e.g., Kahn*, 618 F.2d at 787, 797.

⁵⁰ 343 U.S. at 635, 637; *see Contractors Ass’n*, 442 F.2d at 170.

Developments in the Case Law

Cases alleging that particular executive orders are beyond the President's authority may be broadly divided into two types based upon the arguments raised in these cases and the courts' treatment thereof: (1) cases challenging one of several executive orders directing executive branch agencies to require certain federal and federally funded contractors to adhere to anti-discrimination or affirmative action requirements,⁵¹ and (2) cases challenging other contractor-related executive orders. Some executive orders regarding contractors' anti-discrimination and affirmative action obligations were issued prior to the enactment of FPASA,⁵² and, in part because they rely upon constitutional authority,⁵³ they can raise somewhat different legal issues than cases challenging orders issued under the authority of the FPASA.

The following discussion of key cases regarding contractor-related executive orders is arranged chronologically, so as to highlight developments in the case law over time. In a few instances, cases addressing similar issues have been grouped together, rather than treated individually.

Farmer v. Philadelphia Electric Co. (1964); Farkas v. Texas Instruments, Inc. (1967)

Although Presidents began issuing executive orders in 1941 requiring agencies to impose on federal contractors contract terms promoting particular socio-economic policies,⁵⁴ their authority to do so apparently was not subject to legal challenge for several decades.⁵⁵ The first case to address whether a particular executive order was within the President's authority seems to have been *Farmer v. Philadelphia Electric Co.*, a 1964 decision by the U.S. Court of Appeals for the Third Circuit (Third Circuit) holding that employees could not bring an action in district court to recover damages for alleged discrimination on the basis of color and race in violation of Executive Order 10925 prior to exhausting their administrative remedies.⁵⁶ Executive Order 10925 had directed agencies to include in their contracts provisions obligating the contractor not to discriminate against "any employee or applicant for employment because of race, creed, color, or national origin."⁵⁷ The plaintiff in *Farmer* asserted he was a third party beneficiary entitled to enforce these provisions against a contractor who allegedly terminated his employment because of race.⁵⁸ In finding that Executive Order 10925 did not authorize a private cause of action prior

⁵¹ While federal contractors are the most common target of procurement-related executive orders, some early orders targeted federally funded contractors and/or unions. *See, e.g.*, Exec. Order No. 8803, 6 Fed. Reg. 3109 (June 27, 1941).

⁵² President Franklin Roosevelt's Executive Order 8803, for example, was issued several years prior to FPASA's enactment.

⁵³ *See, e.g.*, Executive Order 9346, 3 C.F.R. 1280 (1938-43 Compilation) (1943).

⁵⁴ *See* 6 Fed. Reg. at 3109.

⁵⁵ *Cf.* Cheralynn M. Gregoire, *AFL-CIO v. Allbaugh: The D.C. Circuit Limits the President's Authority to Influence Labor Relations*, 19 GA. ST. U.L. REV. 1167, 1177 (2003).

⁵⁶ 329 F.2d 3, 10 (3d Cir. 1964).

⁵⁷ *See* 26 Fed. Reg. 1977 (Mar. 8, 1961).

⁵⁸ 329 F.3d at 4. Third party beneficiaries are persons who are entitled to enforce contracts to which they are not parties. Third party beneficiary status is an "exceptional privilege," which courts generally will not grant unless the plaintiff can demonstrate that the contract "not only reflects the express or implied intention to benefit the party, but [also] reflects an intention to benefit the party directly." *German Alliance Ins. Co. v. Home Water Supply Co.*, 226 U.S. 220, 230 (1912); *Glass v. United States*, 258 F.3d 1349, 1354 (Fed. Cir. 2001).

to the exhaustion of administrative remedies, the court indicated its view that Executive Order 10925 had “the force of law.”⁵⁹

While *Farmer* sometimes has been construed as holding that Executive Order 10925 is within the President’s authority,⁶⁰ other courts and commentators have noted that the defendant did not challenge the validity of the order, and the Third Circuit’s statement was made in *dicta*.⁶¹ Similarly, in *Farkas v. Texas Instruments, Inc.*, a 1967 decision by the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit), the defendants did not challenge the validity of the executive order.⁶² The *Farkas* court also held that Executive Order 10925 does not authorize a private right of action and that the refusal of relief by an administrative body was final, leading to the dismissal of the claims for “breach of contractual nondiscrimination provisions” for “failure to state a cause of action.”⁶³ In *Farkas*, as in *Farmer*, the court arguably assumed, rather than held, that the issuance of Executive Order 10925 was within the President’s authority.⁶⁴

The *Farkas* court did not mention *Youngstown*, while the *Farmer* court mentioned it only in passing, citing *Youngstown* to support its statement that the “[d]efendant does not contend that the requiring of non-discrimination provisions in government contracts is beyond the power of Congress.”⁶⁵

Contractors Association of Eastern Pennsylvania v. Secretary of Labor (1971); United States v. East Texas Motor Freight Systems, Inc. (1977); United States v. Trucking Management Inc. (1981)

While the defendants in *Farmer* and *Farkas* did not question the validity of the executive order requiring agencies to impose anti-discrimination requirements on federal contractors, the plaintiffs in *Contractors Association of Eastern Pennsylvania v. Secretary of Labor* directly challenged the validity of certain orders issued under the authority of Executive Order 11246, superseded Executive Order 10925.⁶⁶ It imposed similar anti-discrimination requirements on federal contractors and federally funded construction contractors, as well as required them to “take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin.”⁶⁷ Under

⁵⁹ 329 F.2d at 8. Although the court found that the executive order and regulations had the force of law, in a footnote, the court referenced a counterargument—advocated by individuals other than the parties—that the issuance of the executive order was “an (invalid) attempt to legislate when Congress has refused to do so” because “Congress has expressly refused to continue the [Fair Employment Practices Commission] and has declined to enact anti-discriminatory legislation.” *Id.* at 8 n.9.

⁶⁰ *Cf. Contractors Ass’n*, 442 F.2d at 167 (discussing assertions that *Farmers* and *Farkas* involved holdings, as opposed to *dicta*).

⁶¹ *Liberty Mutual*, 639 F.2d at 169; *see also* Clarke, *supra* note 11, at 1059.

⁶² 375 F.2d 629, 632 n.1 (5th Cir. 1967).

⁶³ 375 F.2d at 633.

⁶⁴ *Id.* at 632 n.1 (“We would be hesitant to say that the antidiscrimination provisions of Executive Order No. 10925 are so unrelated to the establishment of ‘an economical and efficient system for . . . the procurement supply’ of property and services . . . that the order should be treated as issued without statutory authority. Indeed, appellees make no such challenge to its validity.”).

⁶⁵ 329 F.2d at 8.

⁶⁶ 442 F.2d 159, 162 (3d Cir. 1971), *aff’g*, 311 F. Supp. 1002 (E.D. Pa.).

⁶⁷ 30 Fed. Reg. 12319 (Sept. 28, 1965).

the authority of Executive Order 11246, officials of the Department of Labor issued two orders commonly known as the Philadelphia Plan.⁶⁸ The Philadelphia Plan required bidders for federal and federally funded construction contracts in the Philadelphia area valued in excess of \$500,000 to submit “acceptable affirmative action program[s],” including “specific goals” for “minority manpower utilization” in six construction trades prior to contract award.⁶⁹ Several contractor groups challenged the plan, asserting, among other things, that it was without a constitutional or statutory basis.⁷⁰

The Third Circuit upheld the validity of the Philadelphia Plan.⁷¹ Citing *Youngstown*, the court found that “[i]n the area of Government procurement[,] Executive authority to impose non-discrimination contract provisions falls in Justice Jackson’s first category: action pursuant to the express or implied authorization of Congress.”⁷² It reached this conclusion after reviewing the various anti-discrimination and affirmative action executive orders issued by Presidents from Franklin Roosevelt to Lyndon Johnson and noting that Congress continued to authorize appropriations for programs subject to these executive orders.⁷³ According to the court, given these continuing appropriations and absent specific statutory restrictions, Congress “must be deemed to have granted to the President a general authority to act for the protection of federal interests.”⁷⁴ The court further found that the President had exercised this general congressionally granted authority in issuing Executive Order 11246. It specifically viewed the President as issuing the order to address “one area in which discrimination in employment was most likely to affect the cost and the progress of projects in which the federal government had both financial and completion interests,” rather than to impose the President’s “notions of desirable social legislation on the states wholesale.”⁷⁵ Thus, the court stated that the inclusion of the plan “as a pre-condition for federal assistance was within the implied authority of the President and his designees,” unless it was “prohibited by some other congressional enactment.”⁷⁶ The court added that the President has “implied contracting authority,” under which the various anti-discrimination and affirmative action requirements imposed on federal contractors were valid.⁷⁷ However, it also suggested that these orders were within the President’s authority under the FPASA,⁷⁸ and later courts have

⁶⁸ 442 F.2d at 162.

⁶⁹ *Id.* at 163-64.

⁷⁰ *Id.* at 165. The Association also argued that the Philadelphia Plan “imposes on the successful bidder on a project of the Commonwealth of Pennsylvania record keeping and hiring practices which violate Pennsylvania law.” *Id.* at 166. The court found that the Philadelphia Plan would control if “adopted pursuant to a valid exercise of presidential power.” *Id.*

⁷¹ *Id.* at 167-68. It is important to note that the court in *Contractors Association* only addressed orders pertaining to federally funded contracts issued under the authority of Executive Order 11246. It did not address procurement contracts or subcontracts.

⁷² *Id.* at 170. The court also suggested, in the alternative, that if the issuance of Executive Order 11246 did not fall within the first of Justice Jackson’s categories from *Youngstown*, it would fall within the second, since “no congressional enactments prohibit what has been done.” *Id.* at 171.

⁷³ *Id.* at 168-71.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 171.

⁷⁷ *Id.* at 174.

⁷⁸ *Id.* at 170.

generally emphasized this aspect of the Third Circuit’s decision, as opposed to its statements about the President’s implied contracting authority.⁷⁹

The Third Circuit rejected challenges to the executive order under the National Labor Relations Act (NLRA), which the court said does not “place any limitation upon the contracting power of the government,”⁸⁰ and to the Department of Labor’s interpretation of the affirmative action provision of the executive order.⁸¹

The Third Circuit also rebuffed plaintiffs’ allegation that the Philadelphia Plan was invalid because Executive Order 11246 “requires action by employers which violates” Title VII of the Civil Rights Act.⁸² In particular, the plaintiffs asserted that the plan violated Title VII by establishing “specific goals for the utilization of available minority manpower in six trades,” while Title VII states that employers cannot be required to grant preferential treatment on account of workforce imbalances.⁸³ The plaintiffs further asserted that the Philadelphia Plan interfered with a bona fide seniority system, contrary to Title VII, by imposing quotas on whom may be hired.⁸⁴ The court rejected both arguments. It found the first argument unavailing because Title VII stated only that “preferential treatment” (e.g., specific goals) based on workforce imbalances could not be required under Title VII.⁸⁵ According to the court, Title VII did not prohibit agencies from requiring preferential treatment under other authority, such as Executive Order 11246’s required contract provision.⁸⁶ The court relied upon similar logic as to the alleged interference with the bona fide seniority system, stating that Title VII only prohibited interference with the seniority system under Title VII and did not prevent interference through the executive order or the Philadelphia Plan.⁸⁷

This later holding regarding the bona fide seniority system was, however, effectively overturned by the Supreme Court in *International Brotherhood of Teamsters v. United States*,⁸⁸ which rejected the government’s assertion that a seniority system “adopted and maintained without discriminatory intent” and exempted from Title VII, violated Title VII because it perpetuated discrimination.⁸⁹ Based upon *Teamsters*, the Fifth Circuit held in *United States v. East Texas*

⁷⁹ See, e.g., *Kahn*, 618 F.2d at 792 (quoting *Contractors Association*, 442 F.2d at 170).

⁸⁰ 442 F.2d at 174.

⁸¹ *Id.* at 175.

⁸² 442 F.2d at 172.

⁸³ *Id.* Title VII states that “[n]othing contained in this subchapter shall be interpreted to require any employer ... [or] labor organization to grant preferential treatment to any individual or to any group because of the race ... of such individual or groups on account of an imbalance which may exist with respect to the total number or percentage of persons of any race ... employed ... in comparison with the total number or percentage of persons of such race ... in the available work force in any community ... or other area.” *Id.* (quoting § 703(j) of the Civil Rights Act).

⁸⁴ *Id.* at 172.

⁸⁵ *Id.* at 172-73.

⁸⁶ *Id.* at 172.

⁸⁷ *Id.* at 172-73.

⁸⁸ 431 U.S. 324 (1977). It should be noted that the *Teamsters* Court did not address the validity of Executive Order 11246.

⁸⁹ See also *United States v. Trucking Mgmt. Inc.*, 662 F.2d 36, 37, 43 n.56 (D.C. Cir. 1981) (noting (1) that *Contractors Association* was “decided before *Teamsters* when no court or legislator had focused on any distinction between Title VII and the Executive Order;”(2) that *Contractors Association* was “based on the affirmative action obligations of the Executive Order which have only prospective application,” as opposed the retroactive seniority relief sought in *Trucking Management*, and (3) that, as “the court in *Contractors [Association]* evaluated the seniority system discussed (continued...)

Motor Freight Systems, Inc. that a bona fide seniority system cannot be prohibited by Executive Order 11246, which “imposes obligations on government contractors and subcontractors designed to eliminate employment discrimination of the same sort to which Title VII is directed,” because Congress explicitly exempted the seniority system from Title VII.⁹⁰ In so holding, the court noted that the President could not make unlawful in an executive order a bona fide seniority system that “Congress has declared ... shall be lawful.”⁹¹ The Fifth Circuit cited *Youngstown* in support of this statement, suggesting that the order may not have the force of law to the extent that the order conflicted with the statute (i.e., Title VII) regarding the seniority system.⁹² However, the court commented that the executive order “is authorized by the broad grant of procurement authority.”⁹³

In *United States v. Trucking Management, Inc.*, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) also considered whether a bona fide seniority system that was lawful under Title VII could be unlawful under Executive Order 11246.⁹⁴ The court found the Fifth Circuit’s reasoning in *East Texas* to be persuasive, and dismissed the government’s arguments regarding the statutory language and legislative history of Title VII.⁹⁵ The D.C. Circuit echoed the Fifth Circuit’s statement noting that the government had failed to argue, prior to the Supreme Court’s decision in *Teamsters*, that Congress intended the executive order to extend beyond the limits of Title VII with regard to discrimination potentially perpetuated by seniority systems.⁹⁶ The court did not cite to *Youngstown*, although it noted that the government did not argue whether the President has inherent authority to issue the executive order “to override the expressed or implied will of Congress.”⁹⁷

Chrysler Corporation v. Brown (1979)

Like *Contractors Association*, *Chrysler Corporation v. Brown* involved a challenge to actions taken under the authority of Executive Order 11246, as amended.⁹⁸ The litigation in *Chrysler* arose because of regulations that the Department of Labor promulgated under the authority of Executive Order 11246 and a Department of Labor disclosure regulation.⁹⁹ These regulations provided for the public disclosure of information filed with or maintained by the Office of Federal Contract Compliance Programs (OFCCP) and other agencies about contractors’ compliance with their contractual anti-discrimination and affirmative action requirements.¹⁰⁰ The

(...continued)

there under pre-*Teamsters* standards, there was no finding as here that the seniority systems at issue were protected by § 703(h)” of Title VII).

⁹⁰ *United States v. East Texas Motor Freight Sys., Inc.*, 564 F.2d 179, 185 (5th Cir. 1977).

⁹¹ *Id.*; see also *Trucking Mgmt.*, 662 F.2d 36 (holding that Executive Order 11246 could not make unlawful the negotiation or maintenance of a seniority system that was lawful under Title VII).

⁹² *East Texas Motor Freight*, 564 F.2d at 185.

⁹³ *Id.* at 184.

⁹⁴ 662 F.2d at 38.

⁹⁵ *Id.* at 38, 42.

⁹⁶ *Id.* at 43-44.

⁹⁷ *Id.* at 42.

⁹⁸ 441 U.S. 281 (1979).

⁹⁹ *Id.* at 286, 303. Also issued by President Johnson, Executive Order 11375 extended Executive Order 11246 to prohibit discrimination on the basis of sex. See 3 C.F.R. 684 (1966-1970 Comp.).

¹⁰⁰ 441 U.S. at 287.

regulations stated that, despite being exempt from mandatory disclosure under the Freedom of Information Act (FOIA):

records obtained or generated pursuant to Executive Order 11246 (as amended) ... shall be made available for inspection and copying ... if it is determined that the requested inspection or copying furthers the public interest and does not impede any of the functions of the [OFCCP] or the Compliance Agencies.¹⁰¹

Chrysler objected to the proposed release of the annual affirmative action program and complaint investigation report for an assembly plant.¹⁰² Chrysler asserted, among other things, that disclosure was not “authorized by law” within the meaning of the Trade Secrets Act because the OFCCP regulations that purported to authorize such disclosure did not have the force and effect of law.¹⁰³

The Supreme Court considered whether the OFCCP regulations provided the “[authorization] by law” required under the Trade Secrets Act.¹⁰⁴ The Court stated that agency regulations, as an “exercise of quasi-legislative authority,” must be based on a congressional grant of authority.¹⁰⁵ As mentioned above, the Department of Labor regulations were issued under the authority of Executive Order 11246, which authorized the Secretary of Labor to adopt regulations to achieve its purposes, and an existing disclosure regulation.¹⁰⁶ The Court determined that the regulations lacked the required nexus to congressionally delegated authority, as the legislative grants of authority relied on for the disclosure regulations were not contemplated in “any of the arguable statutory grants of authority” for Executive Order 11246.¹⁰⁷ The Court further noted that “[t]he relationship between any grant of legislative authority and the disclosure regulations becomes more remote when one examines” the section of the order under which the challenged regulations were promulgated, which authorizes regulations “necessary and appropriate” to end discrimination in government contracting.¹⁰⁸ The Court then held that “the thread between these regulations and any grant of authority by the Congress is so strained that it would do violence to established principles of separation of powers” to find that the regulations had the force and effect of law.¹⁰⁹

In finding the challenged regulations invalid, the Court articulated what has become the prevailing test of the validity of presidential actions under the FPASA, requiring that there be a

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 294-95.

¹⁰⁴ *Id.* at 301.

¹⁰⁵ *Id.* at 302.

¹⁰⁶ *Id.* at 304.

¹⁰⁷ *Id.* at 304, 306, 307. Again, as in *Teamsters*, the Court did not address the validity of Executive Order 11246. *Id.* at 305 (“For purposes of this case, it is not necessary to decide whether Executive Order 11246 as amended is authorized by the [FPASA], Titles VI and VII of the Civil Rights Act of 1964, the Equal Employment Opportunity Act of 1972, or some more general notion that the Executive can impose reasonable contractual requirements in the exercise of its procurement authority.”). It is within this statement that the Court makes its only citation to *Youngstown*, although it does separately discuss separation of powers issues. *See id.* at 306 n. 37, 308; *see also* 441 U.S. 201, 320-21 (1979) (Marshall, J., concurring) (“Nor do we consider whether such an Executive Order must be founded on a legislative enactment.”).

¹⁰⁸ *Id.* at 304, 307.

¹⁰⁹ *Id.* at 308.

“nexus” between the challenged executive branch action and congressionally delegated authority to promote economy and efficiency in federal procurement.¹¹⁰ However, the Court emphasized:

This is not to say that any grant of legislative authority to a federal agency by Congress must be specific before regulations promulgated pursuant to it can be binding on courts in a manner akin to statutes. What is important is that the reviewing court reasonably be able to conclude that the grant of authority contemplates the regulations issued.¹¹¹

AFL-CIO v. Kahn (1979)

Several months after the Supreme Court’s decision in *Chrysler*, the D.C. Circuit issued its decision in *AFL-CIO v. Kahn*, apparently the first in a series of cases challenging procurement-related executive orders that did not involve the anti-discrimination and affirmative action requirements. In *Kahn*, several labor unions challenged the validity of Executive Order 12092, which directed agencies to incorporate in their contracts clauses requiring compliance with certain wage and price standards that were otherwise voluntary.¹¹² The unions alleged that the executive order was beyond the President’s power under FPASA and contravened other provisions of federal law.¹¹³ The district court agreed, finding, among other things, that “[s]uch an indirect and uncertain means of achieving economy in government was certainly not contemplated nor would it appear that Congress would have desired such a result when it enacted” FPASA.¹¹⁴ To the contrary, the court noted that the order could result in the government paying higher prices, as it would be “forced to pass over the low bidder to do business with an adherent to the wage guidelines.”¹¹⁵ The district court also found that the order was barred by the Council on Wage and Price Stability Act (COWPSA), which expressly stated that it did not “authorize[] the ... imposition ... of any mandatory economic controls with respect to prices, rents, wages, salaries, corporate dividends, or any similar transfers.”¹¹⁶ Further, it concluded that “constitutional separation of powers issues cannot be ignored,” and that the order fell within Justice Jackson’s third category and was incompatible with the expressed intent of Congress.¹¹⁷

A majority of the *en banc* court of appeals reversed, finding that that the “terms of the FPASA, its legislative history, and Executive practice since its enactment” all indicated that Executive Order 12092 was within the President’s power under FPASA.¹¹⁸ In particular, the court noted that the goals of FPASA—“economy” and “efficiency”—“are not narrow terms,” and can encompass

¹¹⁰ *See id.* at 305.

¹¹¹ *Id.* at 308.

¹¹² 618 F.2d 784, 786 (D.C. Cir. 1979).

¹¹³ *Id.* at 786-87, 796.

¹¹⁴ 472 F. Supp. 88, 95 (D.D.C. 1979). To the contrary, the court found that the language and legislative history of FPASA “affirmatively indicate” that Congress intended that the executive branch *not* use the procurement system as a means of price regulation or control. *Id.* at 94-95.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 100. The court explicitly rejected the government’s assertion that the wage and price controls required under federal contracts are not “mandatory,” but rather “voluntary,” because one chooses to contract with the government. In reaching this conclusion, the court focused on the fact that the “program imposes a real penalty” (i.e., debarment) upon contractors that fail to comply with the wage and price controls, and “[i]f an offending company is actually debarred, the penalty is a loss of sales and income, and for its workers a possible loss of jobs.” *Id.* at 102.

¹¹⁷ *Id.* at 100.

¹¹⁸ 618 F.2d at 792.

factors “like price, quality, suitability, and availability of goods or services.”¹¹⁹ As such, the court would not treat the executive order as lacking statutory authority, but rather held that the President’s order was within his statutory authority under FPASA.¹²⁰ It also construed the legislative history of FPASA as evidencing congressional intent to give the President “particularly direct and broad-ranging authority over those larger administrative and management issues that involve the Government as a whole.”¹²¹ Further, the court noted that prior Presidents had exercised their procurement power under the act to “impose[] additional considerations on the procurement process.”¹²² Given all this, the court found that there was a “sufficiently close nexus” between the executive order and economy and efficiency in procurement, even if the order resulted in temporary increases in prices on certain contracts.¹²³ The court further found that the procurement compliance program authorized by the executive order was not barred under COWPSA because COWPSA stated only that it did not “authorize” the imposition of mandatory wage and price controls; it did not prohibit the imposition of such controls under FPASA.¹²⁴ The court also suggested that the requirements of the procurement program were not “mandatory” because only “[t]hose wishing to do business with the Government must meet the Government’s terms; others need not.”¹²⁵

The majority emphasized that its decision did not “write a blank check for the President to fill in at his will” and that the President must use his procurement authority in a manner “consistent[] with the structure and purpose” of the FPASA.¹²⁶ The court suggested in a footnote that its approach “might raise serious questions” about a hypothetical executive order suspending willful violators of the NLRA from government contracts for three years.¹²⁷ Two concurring opinions also emphasized the “narrowness” of the majority’s decision and the “close nexus” between the executive order and the purposes of FPASA.¹²⁸ The dissent strongly disagreed, emphasizing both

¹¹⁹ *Id.* at 789 (referencing § 303(b) of FPASA).

¹²⁰ *Id.* at 791, 793.

¹²¹ *Id.*; *see also id.* at n.24 (taking issue with the conclusions about the legislative history of FPASA given in testimony by the Comptroller General that the district court relied heavily upon).

¹²² *Id.* at 790. In particular, the court noted that executive branch interpretations of statutes that have operated over time without legislative reversal are to be given deference by the courts, and that Congress could have been said to have impliedly ratified the executive branch’s interpretation of COWPSA and FPASA by failure to amend them after the issuance of multiple executive orders. *Id.* at 790, 796 n.65.

¹²³ *Id.* at 792. In rejecting the district court’s concern that implementation of the order could result in the government paying higher prices when it awards contracts using sealed bidding, the appeals court noted the possibility of short-term savings when the government uses negotiated procurement, as well as longer-term savings as inflation declined. *Id.* at 792-93. However, later courts have construed *Kahn* to say that presidential actions are permissible under FPASA even if they lead to higher prices or inefficiency. *See, e.g.,* Chamber of Commerce v. Reich, 74 F.3d 1322, 1337 (D.C. Cir. 1996); Chamber of Commerce v. Reich, 897 F. Supp. 570, 581 (D.D.C. 1995).

¹²⁴ 618 F.2d at 794-95.

¹²⁵ *Id.* at 794 (citing *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940), for the proposition 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”). The court also found that there was no impingement upon free bargaining, contrary to the NLRA and Railway Labor Act, because the executive order represented only “an important external factor in the economic environment surrounding collective bargaining [and] does not subvert the integrity of that process.” *Id.* at 795.

¹²⁶ *Id.* at 793.

¹²⁷ *Id.* at 793 n.50. The majority did not explain why its approach would raise serious questions about such an order. *See also Reich*, 74 F.3d at 1335 n.7.

¹²⁸ 618 F.2d at 796-97 (Bazelon, J., concurring, and Tamm, J. concurring).

that FPASA “contains no warrant for using the procurement process as a tool for controlling the Nation’s economy,”¹²⁹ and that the majority’s reading of FPASA would:

permit[] the President to effect any social or economic goal he chooses, however related or unrelated to the true purposes of the 1949 Act, as long as he can conceive of some residual consequences of the order that might in the long run help the Nation’s economy and thereby serve the ‘not narrow’ and undefined concepts of ‘economy’ and ‘efficiency’ in federal government procurement.¹³⁰

The dissent also stated that, were the majority’s interpretation of FPASA correct, FPASA would constitute an unconstitutional delegation of legislative authority to the executive branch because “the close nexus test ... cannot supply an adequate standard.”¹³¹

The majority and the dissent agreed that the order raised no issues under *Youngstown*.¹³² The majority, in particular, stated that challenges to executive actions under FPASA entail primarily questions of statutory interpretation, not broader questions of separation of powers under *Youngstown*.¹³³ The majority said that the main question was “whether the FPASA indeed grants to the President the powers he has asserted,” and answered that question in the affirmative.¹³⁴

Liberty Mutual Insurance Co. v. Friedman (1981)

Two years after *Kahn*, the U.S. Court of Appeals for the Fourth Circuit (Fourth Circuit) found that a Department of Labor (DOL) determination that insurance underwriters are subject to the recordkeeping and affirmative action requirements of Executive Order 11246 was invalid under the “reasonably close nexus” tests of *Chrysler* and *Kahn*.¹³⁵ The plaintiffs in *Liberty Mutual Insurance Co. v. Friedman* underwrote workers’ compensation policies for many companies with government contracts, but did not underwrite any insurance policies for federal agencies, or sign any contracts or subcontracts containing the anti-discrimination or affirmative action clauses required under Executive Order 11246.¹³⁶ When DOL informed the plaintiffs that they were “subcontractors” for purposes of Executive Order 11246 because their services were “necessary” to the performance of federal contracts, they filed suit.¹³⁷

The plaintiffs alleged that they were outside the definition of “subcontractor” provided in the regulations implementing Executive Order 11246, or, alternatively, (1) that the regulations were

¹²⁹ *Id.* at 800.

¹³⁰ *Id.* at 805-06.

¹³¹ *Id.* at 811.

¹³² *Id.* at 787, 797.

¹³³ *Id.* at 787, 793. The majority also faulted the district court for concluding that the present case was similar to the case in *Youngstown*. *Id.* at 786 n.10.

¹³⁴ *Id.* at 787.

¹³⁵ 639 F.2d at 168-71. The question of whether a particular entity that provides goods or services to a federal contractor constitutes a “subcontractor” for purposes of federal law is a recurring one, which has recently arisen in the context of oversight of hospitals by the OFCCP. *See, e.g., OFCCP Expanding Jurisdiction over Hospitals, Health Care Systems*, 94 FED. CONT. REP. 132 (Aug. 3, 2010).

¹³⁶ 639 F.2d at 166.

¹³⁷ *Id.* The court reached this conclusion, in part, because state laws require employers, including government contractors, to provide workers’ compensation insurance. *Id.*

outside the scope of the executive order or the legislative authority granted by Congress, or (2) that the executive order constituted an invalid delegation of legislative authority.¹³⁸ The district court rejected all these arguments, noting that the situation here corresponded to that in the first of Justice Jackson’s categories (i.e., action pursuant to an express or implied grant of congressional authority). It also distinguished this situation from *Chrysler* because “[t]he regulations here ... are not tangentially related to the express purpose of combating employment discrimination through government procurement but rather are directly aimed at implementing civil rights programs by requiring government contractors to submit specific affirmative action plans.”¹³⁹ The court further found that the plaintiffs had a choice as to whether to deal with the government, and they would not have to comply with the “requirements” if they did not deal with the government.¹⁴⁰

A majority of the Fourth Circuit reversed.¹⁴¹ While agreeing with the district court that the plaintiffs fell within the definition of “subcontractor” under the regulations, the court found that the application of the executive order to the insurance company was outside the scope of any legislative authority granted to the President.¹⁴² In so finding, the court relied heavily on *Chrysler*, which held that a disclosure rule issued pursuant to Executive Order 11246 was not within the congressional grants of authority.¹⁴³ The court looked at the possible sources of congressional grants of authority “to require Liberty to comply with” Executive Order 11246 and found that none of them “reasonably contemplates that Liberty, as a provider of workers’ compensation insurance to government contractors, may be required to comply with EO 11,246.”¹⁴⁴ The court observed that FPASA did not “provide[] the necessary [congressional] authorization for application of the [Executive] Order to Liberty.”¹⁴⁵ The court distinguished the instant case from *Contractors Association*, in which that court found FPASA to be the congressional authority for Executive Order 11246 and the Philadelphia Plan issued under that order which was being challenged. Unlike the courts in *Contractors Association* and *Kahn*, the court in *Liberty Mutual* held that the application of the executive order to Liberty failed the reasonably close nexus test “between the efficiency and economy criteria of the” FPASA and the requirements imposed on contractors under the executive order.¹⁴⁶ The court held that “[t]he connection between the cost of workers’ compensation policies ... and any increase in the cost of federal contracts that could be

¹³⁸ *Id.*

¹³⁹ 485 F. Supp. 695, 715 (D. Md. 1979). In its willingness to find the challenged actions valid if they promote policies consistent with any federal law, not just economy and efficiency in procurement, the opinion here resembles that in *New Orleans Public Service* and related cases. See, e.g., *New Orleans Public Serv.*, 553 F.2d at 466-67 (5th Cir. 1977), *vacated on other grounds*, 436 U.S. 942 (1978).

¹⁴⁰ 485 F. Supp. at 715 (citing *Perkins v. Lukens Steel Co.*).

¹⁴¹ 639 F.2d at 168-71.

¹⁴² *Id.* at 167-68. *But see id.* at 173 (Butzner, J., dissenting) (finding that Executive Order 11246 and the implementing regulations were not inconsistent with FPASA, and the President deemed them necessary).

¹⁴³ *Id.* at 168.

¹⁴⁴ *Id.* at 168-69. The court examined FPASA, Titles VI and VII of the Civil Rights Act of 1964, and congressional “ratification” or “negative authorization” as sources of congressional authority. *Id.* at 169-72. The court held that “the rejection in 1973 of several amendments intended to circumscribe the role of the Executive Order program” could not be considered to be an affirmative grant of congressional authority to the President to apply the order to Liberty Mutual. *Id.* at 172.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 170. The *Contractors Association* court did not use the term “nexus” to describe the relationship between the executive order and FPASA, but the *Liberty Mutual* court saw *Contractors Association* as requiring that “any application of the Order [] be reasonably related to the [FPASA’s] purpose of ensuring efficiency and economy in government procurement ... in order to lie within the statutory grant.” *Id.*

attributed to discrimination by these insurers is simply too attenuated to allow a reviewing court to find the requisite connection between procurement costs and social objectives.”¹⁴⁷

In differentiating the instant case from *Contractors Association*, the *Liberty Mutual* court noted that there had been administrative findings of serious underrepresentation of minority employees in the six trades included in the Philadelphia Plan.¹⁴⁸ Here,

[b]y contrast, no such findings were made Liberty is not itself a federal contractor and there is, therefore, no direct connection to federal procurement. ... There are no findings that suggest what percentage of the total price of federal contracts may be attributed to the cost of this insurance. Further, there is no suggestion that insurers have practiced the deliberate exclusion of minority employees found to have occurred in *Contractors Association*.¹⁴⁹

The court did not explicitly state why the existence of such findings was necessary for the application of Executive Order 11246 to the insurance company to be valid. However, subsequent courts generally have declined to follow *Liberty Mutual* in requiring that procurement-related executive orders be based on presidential findings, although its holding that parties not within the contemplation of a congressional grant of authority in the FPASA cannot be subjected to requirements promulgated under the authority of the FPASA apparently remains valid.¹⁵⁰

The court mentioned *Youngstown* in a footnote, and cited the case as preventing consideration of the argument that the authority for the executive order could be based upon the President’s inherent constitutional powers, as there was a lack of congressionally authorized legislative authority in both *Youngstown* and the instant case.¹⁵¹

Chamber of Commerce of the United States v. Reich (1996)

After *Liberty Mutual*, the next significant challenge to a procurement-related executive order came in 1996, when the U.S. Court of Appeals for the District of Columbia Circuit found that Executive Order 12954 was invalid because it conflicted with the NLRA and was “regulatory in nature.”¹⁵² Executive Order 12954 directed the Secretary of Labor to promulgate regulations providing for the debarment of contractors who hired permanent replacements for striking workers,¹⁵³ and was issued after Congress debated, but failed to pass, amendments to the NLRA that would have prohibited employers from hiring permanent replacements.¹⁵⁴ The Chamber and several business groups challenged the order on the grounds that it was barred by the NLRA, which “preserves to employers the right to permanently replace economic strikers as an offset to the employees’ right to strike.”¹⁵⁵ They also alleged that the order was beyond the President’s

¹⁴⁷ *Id.* at 171.

¹⁴⁸ *Id.* at 170.

¹⁴⁹ *Id.* at 171.

¹⁵⁰ *See id.* at 172.

¹⁵¹ *Id.* at 172 n.13.

¹⁵² 74 F.3d 1322, 1339 (D.C. Cir. 1996).

¹⁵³ 60 Fed. Reg. 13023 (Mar. 10, 1995).

¹⁵⁴ 74 F. 3d at 1325; *see, e.g.*, H.R. 5, 103d Cong.; S. 55, 103d Cong.; Ronald Turner, *Banning the Permanent Replacement of Strikers by Executive Order: The Conflict between Executive Order 12945 and the NLRA*, 12 J.L. & POL’Y 1 (1996).

¹⁵⁵ 74 F.3d at 1325, 1332.

authority under FPASA because there were no findings demonstrating that its requirements would lead to “savings in government procurement costs.”¹⁵⁶ The district court disagreed, finding that the order was not reviewable under *Dalton v. Specter*,¹⁵⁷ and even if it were reviewable, was within the President’s broad authority under FPASA.¹⁵⁸ In particular, it noted that the validity of policies implemented under the authority of FPASA need not be established by empirical proof.¹⁵⁹

The appeals court reversed as to both the reviewability and validity of the order. In one of the few decisions regarding procurement-related executive orders to focus extensively on this issue, the court discussed the ability of the courts, in cases where Congress has not precluded non-statutory judicial review, to review the legality of the President’s order and the actions of subordinate executive officials acting pursuant to a presidential directive.¹⁶⁰ The court stated that it was “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 the [FPASA] in pursuit of governmental savings.”¹⁶¹

Having determined that it had jurisdiction, the court then found that Executive Order 12954 was invalid because it conflicted with NLRA provisions guaranteeing the right to hire permanent replacements during strikes and that such a conflict with federal labor relations policy was unacceptable under a body of Supreme Court case law known as the NLRA preemption doctrine.¹⁶² The court concluded that the order was “regulatory” in nature because it sought to impose requirements upon contractors, rather than protect the government’s interests as a purchaser, although preemption of other federal actions by the NLRA was “still relevant” when the government acts as a purchaser instead of a regulator.¹⁶³ The court did not suggest that the order exceeded the President’s authority under FPASA and even reaffirmed interpretations of the President’s broad authority to issue executive orders in pursuit of FPASA goals of economy and efficiency in procurement with the appropriate nexus between standards and government savings, even those orders that “reach beyond any narrow concept of efficiency and economy in procurement.”¹⁶⁴ However, the court noted the potential effects of the order’s policy upon “thousands of American companies” and “millions of American workers,”¹⁶⁵ as well as the

¹⁵⁶ *Id.* at 1331. The plaintiffs also alleged that the lack of findings meant there had been an unconstitutional delegation of legislative power, but they did not claim that FPASA itself was an unconstitutional delegation. 74 F.3d at 1326 n.2.

¹⁵⁷ See 511 U.S. 462 (1994) (holding that an executive order shutting down the Philadelphia Naval Base cannot be subject to judicial review because the authorizing statute provided for non-constitutional remedies for statutory review).

¹⁵⁸ 897 F. Supp. 570, 580 (D.D.C. 1995); 74 F.3d at 1325. In particular, the district court noted that there was a “reasonable relationship” between the requirements of the executive order and economy and efficiency in federal procurement given the legislative history and case law.

¹⁵⁹ 897 F. Supp. at 580.

¹⁶⁰ 74 F.3d at 1328 (“That the ‘executive’s’ action here is essentially that of the President does not insulate the entire executive branch from judicial review. . . . Even if the Secretary were acting at the behest of the President this ‘does not leave the courts without power to review the legality [of the action], for courts have power to compel subordinate executive officials to disobey illegal Presidential commands.’”) (quoting *Soucie v. David*, 448 F.2d 1067, 1072 n.12) (D.C. Cir. 1971)); see also *Reich*, 74 F.3d at 1331 n.4.

¹⁶¹ 74 F.3d at 1332 (emphasis in original).

¹⁶² *Id.* at 1332, 1334. In its discussion of the NLRA preemption doctrine, the court referenced two executive orders issued by an earlier President and expressed doubts about their legality. *Id.* at 1337, 1337 n. 10.

¹⁶³ *Id.* at 1330-31, 1334, 1336-37, 1339.

¹⁶⁴ See *id.* at 1333, 1337.

¹⁶⁵ *Id.* at 1337.

implications of the broad authority that the President claimed under FPASA.¹⁶⁶ Finding that the order affected labor policy, the court noted that if the government is correct that there are few limits on presidential power under the FPASA, a future President could not only revoke the executive order, but also impose a new one requiring government contractors to permanently replace striking workers in the interests of economy and efficiency in federal procurement.¹⁶⁷ The court did not mention *Youngstown*.

Building and Construction Trades Department, AFL-CIO v. Allbaugh (2002); UAW-Labor Employment and Training Corp. v. Chao (2003)

Reich was followed by several decisions that highlighted the breadth of presidential power under FPASA along the lines suggested by the appellate court in *Reich*. For example, in *Building and Construction Trades Department, AFL-CIO v. Allbaugh*, the U.S. Court of Appeals for the District of Columbia Circuit found that the Executive Order 13202, which provided that the government would “neither require nor prohibit the use of” project labor agreements (PLAs) on federally funded contracts, was within the President’s constitutional authority to issue and not preempted by the NLRA.¹⁶⁸ Under the executive order, contractors and subcontractors were still free to enter into PLAs, and in practice would potentially do so depending on the effect of a PLA on costs.¹⁶⁹ The D.C. Circuit reversed the district court’s decision finding the order invalid and enjoining its enforcement, as well as criticized its *Youngstown* analysis.¹⁷⁰ Noting that *Youngstown* requires the President to have statutory or constitutional authority for an executive order, the D.C. Circuit found that the President possessed the necessary constitutional authority.¹⁷¹ The court determined that the order was “an exercise of [his] supervisory authority over the Executive Branch,” in that it addressed the administration of federally funded projects “to the extent permitted by law.”¹⁷² The court noted that the situation here was unlike that in *Youngstown* because the order to seize the steel mills in *Youngstown* was self-executing, and Executive Order 13202 directed executive branch employees “in their implementation of statutory authority.”¹⁷³

The D.C. Circuit also found that the executive order was not preempted by the NLRA because the order was a proprietary, as opposed to a regulatory, action, in that the government was “acting as a proprietor, ‘interacting with private participants in the marketplace.’”¹⁷⁴ The court distinguished this case from *Reich*, in which it had held that the NLRA preempted the executive order at issue because the order was regulatory. According to the court, the order in *Reich* was regulatory “not because it decreed a policy of general application ... but because it disqualified companies from contracting with the Government on the basis of conduct [not hiring permanent replacements for striking workers] unrelated to any work they were doing for the Government.”¹⁷⁵ In the instant

¹⁶⁶ *Id.* at 1338.

¹⁶⁷ *Id.* at 1337-38.

¹⁶⁸ 295 F.3d 28, 29-30, 36 (D.C. Cir. 2002).

¹⁶⁹ *Id.* at 30.

¹⁷⁰ *Id.* at 31-32.

¹⁷¹ *Id.* at 32.

¹⁷² *Id.* at 33 (citing CONST. art. II, § 1).

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 34 (quoting *Bldg. & Constr. Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 227 (1993)).

¹⁷⁵ *Id.* at 35.

case, in contrast, the D.C. Circuit found that the executive order was proprietary because it did “not address the use of PLAs on projects unrelated to those in which the Government has a proprietary interest.”¹⁷⁶

Similarly, in *UAW-Labor Employment and Training Corp. v. Chao*, the D.C. Circuit found that Executive Order 13201 was not preempted by the NLRA and that the President possessed authority to issue the order under FPASA because the order had an adequate nexus to FPASA’s goals of economy and efficiency in procurement.¹⁷⁷ The order required that all contracts valued in excess of \$100,000 include a provision obligating contractors to post notices informing employees of their rights not to be required “to join a union or to pay mandatory dues for costs unrelated to representational activities.”¹⁷⁸ The district court had found that the NLRA preempted the order, but did not reach the question regarding FPASA.¹⁷⁹ The D.C. Circuit reversed, finding that although the order was regulatory and not proprietary, because it “operates on government procurement across the board,” the NLRA preemption doctrine did not apply since the order did not cover a specific right that was “arguably protected by the NLRA” or conflict with the NLRA such that the NLRA preempted it.¹⁸⁰ The court’s decision largely focused on the NLRA and did not mention *Youngstown*. Turning to whether the order had a “sufficiently close nexus” to FPASA’s requirements regarding economy and efficiency in procurement, the court held that although “[t]he link may seem attenuated,” it was an adequate nexus, even if “one can with a straight face advance an argument claiming opposite effects or no effects at all.”¹⁸¹

Chamber of Commerce v. Napolitano (2009)

The most recent of these cases was *Chamber of Commerce v. Napolitano*, a 2009 decision by the U.S. District Court for the Southern District of Maryland upholding Executive Order 13465 and the regulations implementing it.¹⁸² This order directed agencies to require their contractors to use E-Verify to verify whether their hires are authorized to work in the United States.¹⁸³ The order also required that the Federal Acquisition Regulation be amended to provide the requisite contract clauses.¹⁸⁴ Several business groups challenged the order and the final rule, alleging that they were barred by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),

¹⁷⁶ *Id.* at 36; *see also id.* at 35 (“First, the Government unquestionably is the proprietor of its own funds, and when it acts to ensure the most effective use of those funds, it is acting in a proprietary capacity. Second, that the Government is a lender to or a benefactor of, rather than the owner of, a project is not inconsistent with its acting just as would a private entity; a private lender or benefactor also would be concerned that its financial backing be used efficiently.”)

¹⁷⁷ 325 F.3d 360, 362, 366-67 (D.C. Cir. 2003).

¹⁷⁸ *Id.* at 362. In *National Labor Relations Board v. General Motors Corp.* and *Communications Workers v. Beck*, respectively, the Supreme Court held that employees in unionized workplaces cannot be required to become or remain members of the union and, if the employer enters a union-security agreement requiring employees to pay uniform periodic dues or fees, may obtain reductions in dues paid for union activities that are unrelated to unions’ duties as bargaining agents. *See* 325 F.3d at 362. In *UAW*, the court stated that in *Reich*, it would have found the *Beck* executive order to be regulatory in nature, and that it agreed with its sentiment in *Reich*. *Id.* at 366.

¹⁷⁹ 325 F.3d at 362.

¹⁸⁰ *Id.* at 363, 365-66. The court also rejected the government’s argument that the “preemption analysis should be less intrusive because the order only imposes a contract condition, and firms can choose to do business elsewhere.” *Id.* at 363.

¹⁸¹ *Id.* at 366-67.

¹⁸² 648 F. Supp. 2d 726 (S.D. Md. 2009).

¹⁸³ *Id.* at 730-31; 73 Fed. Reg. 33285 (June 11, 2008).

¹⁸⁴ 648 F. Supp. 2d at 730.

beyond the President’s authority under FPASA, in excess of E-Verify’s statutory authority, and in excess of the executive branch’s constitutional authority because they were legislative in nature.¹⁸⁵ They also argued that the IIRIRA prohibited the Secretary of Homeland Security from “requiring any person or other entity to participate” in E-Verify.¹⁸⁶ The court disagreed.

The court first found that the Secretary of Homeland Security did not “require” contractors to use E-Verify, in violation of the IIRIRA, because the Secretary was acting in a ministerial manner pursuant to the executive order in making the designation.¹⁸⁷ The court held that it was instead the executive order itself and the final rule that mandated that government contracts require contractors to use the E-Verify system designated by the Secretary.¹⁸⁸ The court emphasized that entering into contracts with the government “is a voluntary choice.”¹⁸⁹ In responding to later arguments that the executive order and the final rule violated IIRIRA because they “required” contractors to use E-Verify, the court reiterated the holding in *Kahn* that the “decision to be a government contractor is voluntary and ... no one has a right to be a government contractor.”¹⁹⁰ It specifically rejected the plaintiffs’ assertion that the “choice” to contract with the government is not really voluntary for persons who make their living as government contractors,¹⁹¹ an argument that has been raised by courts and commentators who note the financial consequences that loss of the government’s business could have for contractors.¹⁹² Thus, the court held that the executive order and the final rule directing agencies to require the use of E-Verify did not in fact “require any person or entity to use E-Verify,” because such persons could choose not to contract with the government.¹⁹³

In analyzing whether IIRIRA prohibited the executive order and the final rule, the court found that the relevant text of the IIRIRA applied to the Secretary of Homeland Security, not the President.¹⁹⁴ The court then noted that the President had acted under the statutory authority of FPASA, not IIRIRA, when directing agencies to require that contractors use E-Verify.¹⁹⁵ Finding that the executive order and the final rule were within the President’s authority under FPASA, the court also held that the order had demonstrated a “reasonably close nexus” to the goals of FPASA.¹⁹⁶ The court found that the President’s explanation regarding the requirement that contractors use E-Verify met this “nexus test” because he found that “[c]ontractors that adopt rigorous employment eligibility confirmation policies are much less likely to face immigration enforcement actions ... and they are therefore generally more efficient and dependable

¹⁸⁵ *Id.* at 732-33.

¹⁸⁶ *Id.* at 729, 732-33 (quoting IIRIRA § 402(a)). The plaintiffs also asserted that the order and regulations constituted rulemaking for which the President lacks constitutional authority, but they did not assert a violation of the nondelegation doctrine. *See id.* at 739.

¹⁸⁷ *Id.* at 733.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 735.

¹⁹² *See, e.g.,* *Pan Am. World Airways, Inc. v. Marshall*, 439 F. Supp. 487, 495 (S.D.N.Y. 1977) (“To be barred, permanently or temporarily, from competition for government contracts can be a matter of fiscal life and death to government contractors.”).

¹⁹³ 648 F. Supp. 2d at 736.

¹⁹⁴ *Id.* at 734.

¹⁹⁵ *Id.* at 735.

¹⁹⁶ *Id.* at 738.

procurement sources.”¹⁹⁷ In so doing, the court specifically noted that Presidents are not required to base their findings regarding the promotion of economy and efficiency in procurement on evidence in a record.¹⁹⁸ Rather, the court held that a “reasonably close nexus” exists so long as the “President’s explanation for how an Executive Order promotes efficiency and economy [is] reasonable and rational.”¹⁹⁹ Additionally, the court held that the executive order and final rule were constitutional under FPASA.²⁰⁰ The court did not cite *Youngstown*.

Conclusions

As the case law illustrates, Presidents have broad authority under FPASA to impose requirements upon federal contractors.²⁰¹ However, this authority is not unlimited, and particular applications of presidential authority under FPASA have been found to be beyond what Congress contemplated when it granted the President authority to prescribe policies and directives that promote economy and efficiency in federal procurement. For example, in *Chrysler*, regulations promulgated under the authority of Executive Order 11246 were deemed to lack the required nexus to congressionally delegated authority because the regulations were not contemplated in statutory grants of authority such as the FPASA that may have been relied upon for Executive Order 11246. A similar argument was made in *Liberty Mutual*, where attempts to subject insurance underwriters to Executive Order 11246 failed the “reasonably close nexus” test between the economy and efficiency in federal procurement and the recordkeeping and other requirements imposed on contractors by the order.

¹⁹⁷ *Id.* at 738-39.

¹⁹⁸ *Id.* at 738.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 739 (noting that the plaintiffs conceded that they were not raising a claim that FPASA was in violation of the nondelegation doctrine).

²⁰¹ *See, e.g.*, *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1333, (D.C. Cir. 1996); *AFL-CIO v. Kahn*, 618 F.2d 784 (D.C. Cir. 1979); *Contractors Ass’n v. Secretary of Labor*, 442 F.2d 159, 169-70 (1971). Here, in particular, it may be important to note that federal statutes governing competition in federal contracting have been amended since *Kahn* was decided. 472 F. Supp. at 94 (noting that FPASA “contemplates a competitive procurement system with full and free competition consistent with the nature of the property or services being procured. Any restriction against competition must be consistent with the authorities for limiting competition specifically enumerated in the act”). Currently, the Competition in Contracting Act (CICA) of 1984 generally requires that contracts be awarded via “full and open competition through the use of competitive procedures” unless they are awarded by a specific procedure expressly authorized by statute. 10 U.S.C. § 2304(a)(1)(A) (procurements of defense agencies); 41 U.S.C. § 253(a)(1)(A) (procurements of civilian agencies). In particular, under CICA, a “full and open competition” means that “all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement.” 41 U.S.C. § 403(6). State competitive bidding statutes have been found to be violated by the imposition of any requirement that could discourage at least some entities from submitting bids or offers. *See, e.g.*, *City of Cleveland v. Ohio*, 508 F.3d 829 (6th Cir. 2007), *aff’g* 2006 U.S. Dist. LEXIS 1083 (S.D. Ohio Jan. 13, 2006) (finding that a municipal ordinance requiring contractors who did not comply with certain “local hiring” provisions to post a surety bond equal to 20% of the contract price for future contracts ran afoul of a federal regulation prohibiting procedures or requirements that “may operate to restrict competition” because it “could discourage contractors who had once defaulted from submitting subsequent bids because they uniquely would be required to provide a twenty percent bond.”); *Associated Builders & Contractors, Inc. v. City of Rochester*, 492 N.E.2d 781 (N.Y. 1986) (local ordinance requiring bidders to have an apprentice training program as a precondition of contract award inconsistent with state competitive bidding statute). While there does not appear to be any precedent for construing CICA in this way, it seems possible that certain requirements imposed on contractors via executive order could be so onerous to be tantamount to impermissible restrictions upon competition.

Additionally, the requirements of particular executive orders have been found invalid when they conflict with other provisions of law. In *Reich*, the court found that debarment of contractors who hired permanent replacements for striking workers was preempted by the NLRA.²⁰² In *East Texas and Truckers Mgmt.*, the courts found that Executive Order 11246, which addressed the use of bona fide seniority systems by government contractors and subcontractors, conflicted with Title VII of the Civil Rights Act, which exempted bona fide seniority systems.

Executive orders on federal contracting promulgated under authorities other than the FPASA potentially could be found invalid under *Youngstown*, although it is unclear that Presidents would rely solely on the Constitution for such authority given the breadth of presidential authority under the FPASA. However, in *Building and Construction Trades Department, AFL-CIO*, an executive order on the use of PLAs in federal contracting was upheld based, in part, on the President's constitutional authority.

Further developments in the case law are possible, given that recent Presidents have continued the practice of their predecessors in terms of issuing executive orders on government contracting. These orders may require agencies to incorporate in their contracts provisions obligating contractors to take steps that some commentators would characterize as extraneous to contractors' provision of goods or services to the government. As mentioned earlier, the Obama Administration circulated a draft executive order on disclosure of campaign contributions and expenditures. If issued, such an order, or a revised version of the draft order, may face legal challenge.²⁰³

Legislation in this area is also possible, as Congress may amend or repeal an executive order, terminate the underlying authority upon which it is based, or use its appropriations authority to limit its effect.²⁰⁴ In the event that Congress sought to enlarge or cabin presidential exercises of authority over federal contractors, Congress could amend FPASA to clarify congressional intent to grant the President broader authority over procurement, or limit his authority to more narrow "housekeeping" aspects of procurement.²⁰⁵ Congress also could pass legislation directed at particular requirements of contracting executive orders.²⁰⁶ For example, in the 112th Congress, H.R. 1906, the Fairness in Federal Contracting Act of 2011, was introduced in response to the draft executive order. H.R. 1906 would amend FPASA to prohibit an executive agency from requiring an entity submitting an offer for a federal contract or participating in acquisition of property or services by the federal government to disclose certain political contributions, expenditures, and disbursements of funds as a condition of submitting the offer or participation. On May 25, 2011, the House passed an amendment, H.Amdt. 310, to the National Defense Authorization Act for FY2012, H.R. 1540, which contains the same language as H.R. 1906. The House has also passed an amendment to the Department of Homeland Security Appropriations Act, 2012 (H.R. 1077) that would prohibit the use of funds appropriated under the act "to

²⁰² However, in *Building and Construction Trades Department, AFL-CIO and UAW-Labor Employment and Training Corp.*, the NLRA has been held not to preempt requirements of other executive orders.

²⁰³ See Eric Lichtblau, *Lobbyist Fires Warning Shot Over Donation Disclosure Plan*, N.Y. TIMES, Apr. 27, 2011, at A19.

²⁰⁴ See CRS Report RS20846, *Executive Orders: Issuance and Revocation*, by Vanessa K. Burrows.

²⁰⁵ See, e.g., LeRoy, *supra* note 11, at 284 (noting that when orders derive from a "broad delegation of legislative power, Congress has the power to restrict that delegation or revoke an application of it").

²⁰⁶ But see Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539, 542 (2005) (noting that between 1945 and 1998, Congress overturned only 4 of the more than 3,500 executive orders issued).

implement any rule, regulation, or executive order regarding the disclosure of political contributions that takes effect on or after the date of enactment of this Act.”

Finally, it is worth noting that many courts have emphasized the voluntary nature of federal contracting.²⁰⁷ In sum, Congress appears to have granted the President wide latitude to issue executive orders on federal procurement. Courts seeking to uphold such orders may use the presidential findings in the executive order itself to determine that the requisite nexus exists between an order issued under the authority of the FPASA, or executive branch actions taken pursuant to that order, and the FPASA’s goals of economy and efficiency in procurement.

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²⁰⁷ *See, e.g.*, Perkins v. Lukens Steel Co., 310 U.S. 113, 127 (1940); Contractors Ass’n of Eastern Pennsylvania v. Sec’y of Labor, 442 F.2d 159, 174 (3d Cir. 1971); AFL-CIO v. Kahn, 618 F.2d 784, 794 (D.C. Cir. 1979); Chamber of Commerce v. Napolitano, 648 F. Supp. 2d 726, 733, 735-36 (S.D. Md. 2009); *see also* Liberty Mutual Insurance Co. v. Friedman, 485 F. Supp. 695, 716-17 (D. Md. 1979).