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FEATURE COMMENT: How Presidential Power Over Procurement Can Be A Vehicle For Social Change

U.S. presidents have long used their power over federal procurement to enact a wide range of social policy. Executive orders issued under the Biden Administration have pushed the boundaries of the president's power over Government contracting to enact social change from establishing mandatory minimum wages for contract workers to requiring each contract worker to be vaccinated against COVID-19. Recent challenges to these orders shine some light on the line between acceptable executive action relating to procurement and implementation of social policies that go well beyond what will improve the "economy and efficiency" of the procurement system.

The Statutory and Case Law Roots—The Federal Property and Administrative Services Act of 1949, 40 USCA § 101 et seq. (Procurement Act) is the statutory origin of the president's purchasing power to enact social policies via executive orders. The first section of the Procurement Act states the intent of Congress to provide for the Government an economic and efficient system for (a) the procurement and supply of personal property and nonpersonal services and performance of related functions; (b) the utilization of available property; (c) the disposal of surplus property; and (d) records management. Id. Interestingly, the Armed Services Procurement Act of 1947, which underlies much of Department of Defense acquisition, does not contain "economic and efficient system" language similar to the Procurement Act. Consequently, the executive orders cite only the Procurement Act although the orders cover both civilian and defense contracts.

The federal courts have interpreted the extent of the president's Procurement Act authority through a test, i.e., is there "a sufficiently close nexus between [economy and efficiency] and the procurement program established." *AFL-CIO v. Kahn*, 618 F.2d 784 (D.C. Cir. 1979). Historically, the courts have viewed the executive branch as possessing "broad powers" to supervise procurement and, accordingly, have applied "lenient standards" to the close nexus inquiry. See *Kahn* and *UAW-Labor Employment & Training Corp. v. Chao,* 325 F.3d 360 (D.C. 2003); 45 GC ¶ 201.

Historic Executive Orders That Have Leveraged the Procurement Act to Enact Policy—Indeed, both Republican and Democratic presidents have issued policy through executive orders based on their procurement power granted under the Procurement Act. One of the earliest significant examples of this exercise of power involved Lyndon B. Johnson's efforts to curb racial discrimination in the midst of the Civil Rights movement through Equal Employment Opportunity. Johnson, EO 11246, 30 Fed. Reg. 12319 (Sept. 24, 1965). Among various provisions, this executive order prohibited discrimination in employment for both Government contractors and their subcontractors. The executive order did not clearly rely on any specific grant of statutory authority; however, one court challenge to the order cites the Procurement Act as a source of authority. *Liberty Mut. Ins. Co. v. Friedman*, 639 F.2d 164, 168 (4th Cir. 1981).

The roots of this executive order began in 1953, when President Eisenhower issued EO 10479 establishing the Government Contract Committee,

whose function was to "make recommendations to the contracting agencies for improving and making more effective the nondiscrimination provisions of government contracts." See EO 10479, Establishing the Government Contract Committee. The order empowered the Committee to receive complaints related to discrimination in Government contracts and to review reports from contracting agencies of the actions taken to remedy such discrimination. See id. Then, in 1961, President Kennedy replaced the order with EO 10925, establishing the President's Committee on Equal Employment. This executive order directed the committee to immediately "scrutinize and study employment practices of the Government of the United States, and to consider and recommend additional affirmative steps which should be taken by executive departments and agencies to realize more fully the national policy of nondiscrimination within the executive branch of the Government." See EO 10925, Establishing the President's Committee on Equal Employment Opportunity. For an in depth history of executive orders related to improving equality in employment, see *Contractors Ass'n v. Sec'y of Labor,* 442 F.2d 159, 168 (3d Cir. 1971).

Two key cases, *Contractors Association* and *Liberty Mutual,* explicitly considered the relationship between the Procurement Act and the use of the executive order to combat discrimination in procurement. In *Contractors Association,* 442 F.2d 159, the Third Circuit upheld the application of EO 11246 to federally assisted construction contracts. The court found that excluding minority workers from the labor pool increases the cost of labor on federal contracts, which in turn, reduces the economy and efficiency of federal procurement. The case involved evidence from administrative findings and public hearings that demonstrated discriminatory practices artificially restricted the labor pool.

In another challenge, *Liberty Mutual*, 639 F.2d 164, the Fourth Circuit held that EO 12319's application of non-discrimination requirements to at least some Government subcontractors fell outside the scope of any legislative grant of authority. The Fourth Circuit rejected Liberty Mutual's argument that it was not a subcontractor within the meaning of the regulations because it was merely providing workmen's compensation insurance to the contractor. However, the court concluded that providing workmen's compensation insurance bore no direct relationship to procurement. Consequently, the Procurement Act did not provide authority for the specific application of the non-discrimination executive order. The court emphasized that no reasonable relationship between the executive order and the Procurement Act's purpose existed because the plaintiff had no direct connection to federal procurement. The executive order's enforcement against an insurer did "not lie 'reasonably within the contemplation of ' " the Procurement Act. In addition, in contrast to *Contractors Association*, there was no evidence on the record demonstrating increased costs to the Government. Accordingly, *Liberty Mutual* represents a limiting of the "economy and efficiency" standard.

Notably, recent cases have expressed skepticism regarding *Liberty Mutual*'s holding. For example, in *Bradford v. U.S. Dep't of Labor*, 582 F. Supp. 3d 819 (D. Colo. 2022), a Colorado district court noted that "*Liberty Mutual*'s persuasiveness [is] minimal given … the Sixth Circuit's recent statement that anti-discrimination orders have a 'close nexus' to the management of labor." *Bradford*, at 836, n.6.

Jimmy Carter issued Prohibition Against Inflationary Procurement Practices, EO 12092, 43 Fed. Reg. 51375 on Nov. 3, 1978, which directed the Council on Wage and Price Stability to establish voluntary wage and price standards for non-inflationary behavior for the entire economy. The order required federal contractors to comply with the wage and price standards "in order to ensure economy and efficiency in government procurement." The AFL-CIO challenged this EO in *Kahn*, 618 F.2d 784.

Kahn is a seminal case for the Procurement Act in the federal courts, which is cited by subsequent court opinions. In that case, the District of Columbia Circuit held that the Procurement Act authorized the executive order because there was "a sufficiently close nexus between [economy and efficiency] and the procurement compliance program established" by the wage and price standards. In particular, the court explained, "if the voluntary restraint program is effective in slowing inflation ... the Government will face lower costs in the future .... Such a strategy of seeking the greatest advantage to the government ... is entirely consistent" with the Procurement Act. The court "emphasize[d] the importance ... of the nexus between the wage and price standards and likely savings to the Gov-

ernment." Thus, the D.C. Circuit established the "close nexus" limiting principle.

Accordingly, Carter's EO 12092 and its associated case law illustrate how broadly the courts have interpreted the "economy and efficiency" language of the Procurement Act. The loose close nexus standard from *Kahn* has remained good law for over four decades. Future presidents followed *Kahn*'s principles in enacting even more expansive policy in this manner.

In 1996, Bill Clinton issued Economy and Efficiency in Government Procurement Through Compliance with Certain Immigration and Naturalization Act Provisions, Clinton, EO 12989, 61 Fed. Reg. 6091 (Feb. 13, 1996), which banned the Federal Government from contracting with parties that employ "unauthorized alien workers." It drew statutory support from the Procurement Act positing that detainment and deportation of unauthorized alien workers leads to a "less stable and less dependable work force" for contractors who employ them, ultimately impacting the "economic[] and efficient administration and completion of Federal Government contracts."

EO 13465's electronic verification of employment eligibility was unsuccessfully challenged in *Chamber of Com. of U.S. v. Napolitano*, 648 F. Supp. 2d 726 (D. Md. 2009); 51 GC ¶ 306. In that case, the Chamber of Commerce argued, inter alia, that the EO did not have a sufficient nexus to the Procurement Act's goals of improving economy and efficiency in contracting. The district court ultimately sided with the Government's argument that companies with rigorous employment eligibility confirmation policies are less likely to face immigration enforcement actions. Because immigration enforcement actions can delay fulfillment of a contract, the court held that the Government had reasonably and rationally established a nexus between the EO and the Procurement Act's goals.

Contemporary EOs That Have Tested the "Close Nexus" to "Economy and Efficiency" Standard—On Sept. 22, 2020, President Donald Trump issued Combatting Race and Sex Stereotyping, EO 13950, 85 Fed. Reg. 60683 (Sept. 22, 2020), requiring that federal contractors and other federal departments, agencies, etc. change their discrimination trainings, as the Trump Administration viewed many of the discrimination trainings as actually "perpetuat[ing] racial stereotypes and division" and potentially subjecting employees to a "subtle coercive pressure to ensure conformity of viewpoint." Therefore, "Federal contractors [were not] permitted to inculcate such views in their employees." From a political standpoint, this EO was part of a larger effort to push back against "critical race theory," the 1619 Project, and certain other anti-discrimination efforts the administration viewed as "blame-focused." Critically, the Trump executive order cited the Procurement Act for its source of authority, stating multiple purposes of both promoting economy and efficiency in federal contracting and of "promoting unity in the workforce … and … combat[ting] offensive and anti-American race and sex stereotyping and scapegoating."

The challenges to Trump's executive order did not concern the president's Procurement Act authority, likely because the plaintiffs had richer arguments that targeted the substance of the order. See, e.g., *Santa Cruz Lesbian & Gay Cmty. Ctr. v. Trump,* 508 F. Supp. 3d 521 (N.D. Cal. 2020)*; Nat'l Urban League et al. v. Trump*, 2020 WL 6391278 (D.D.C. Oct. 29, 2020). Had *Santa Cruz* and *National Urban League* reached the "close nexus" question, it would have been interesting to see whether the court would have found the nexus too attenuated between an economic and efficient procurement system and restricting thoughts that Government contractor employees could hear on important social issues. That question became moot when the Biden Administration revoked the executive order in a Jan. 20, 2021 Executive Order On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government.

In another recent, controversial example of the trend in challenges to executive orders, President Biden ordered that the minimum wage for federal contractors be raised to $15 an hour through issuing Increasing the Minimum Wage for Federal Contractors, EO 14026, 86 Fed. Reg. 22835 (Apr. 27, 2021). The order directly relies on the Procurement Act and explained that the order will "promote economy and efficiency in procurement by contracting with sources that adequately compensate their workers." The executive order explains that "[r]aising the minimum wage enhances worker productivity and generates high-quality work by boosting workers' health, morale, and effort; reducing absenteeism and turnover; and lowering supervisory training costs."

Unlike previous Obama and Trump executive orders concerning federal minimum wage issues, Biden's minimum wage order has been challenged in the federal courts. In one challenge, the states

of Texas, Louisiana, and Mississippi asserted that there was no "close nexus" between the purpose of the Procurement Act and the minimum wage requirement. *Texas, et al. v. Biden*, *et al.*, No. 6:22-cv-4 (S.D. Tex. 2022). Plaintiffs' complaint contended there was no "direct evidence whatsoever" of how the minimum wage increase would impact the economy and efficiency of the procurement system.

A second challenge arose in *Bradford*, 582 F. Supp. 3d 819. In *Bradford*, the plaintiffs, outdoor recreation companies holding permits to do business on federal land, challenged the Biden executive order as ultra vires on the grounds that the Procurement Act could not apply to nonprocurement contractors such as themselves, i.e. contractors that do not provide goods or services to the federal Government, and have, according to the plaintiffs, "nothing at all to do with procurement." The district court was unpersuaded that the president's authority under the Procurement Act is limited to procurement contractors, finding that parties who hold federal recreational permits provide nonpersonal services which fall within a broad range of contracts subject to the Procurement Act.

The plaintiffs, however, asserted that the executive order exceeded Biden's procurement power because it was "not necessary for economical and efficient procurement policy." The court rejected this argument because the Act (1) requires only that "the President considers the policy or directive to be necessary"; and (2) only requires that a directive have a "sufficiently close nexus to the values of providing the government an economical and efficient [procurement] system." (quoting *UAW-Labor Employment & Training Corp.*, 325 F.3d 360). "Courts will find a nexus even where the connection seems attenuated," and the court found that the executive order met the lenient economy and efficiency nexus. The Colorado district court denied plaintiffs' motion for a preliminary injunction, and the case is currently on appeal to the Tenth Circuit.

Finally, Ensuring Adequate COVID Safety Protocols for Federal Contractors, EO 14042, 89 Fed. Reg. 50986 (Sept. 9, 2021), issued during the height of the global COVID-19 pandemic, is an executive order that obligated federal contractors to provide "adequate COVID-19 safeguards" to their workers to decrease worker absence, reduce labor costs, and improve workplace efficiency. It requires the Safer Federal Workplace Task Force to define and communicate these COVID safeguards and other safety protocols to contractors. Subsequently, the Task Force issued guidance mandating that contractors become fully vaccinated against COVID-19. This executive order cites the Procurement Act, specifically noting that the Biden Administration promulgated this executive order explicitly "to promote economy and efficiency in procurement."

Several plaintiffs challenged EO 14042 alleging that the order exceeds statutory power given by the Procurement Act. The Sixth Circuit upheld a district court ruling that the mandate is not authorized under the Procurement Act.

In another case, *Brnovich v. Biden*, 562 F. Supp. 3d 123 (D. Ariz. 2022), the district court enjoined enforcement of EO 14042, finding that the Procurement Act does not authorize a president to implement sweeping public health policies. In the suit, plaintiffs challenged both EO 14042 and EO 13991 (Biden executive order Protecting the Federal Workforce and Requiring Mask-Wearing, which ordered that those on-site at federal buildings, including contractors, keep social distances and wear masks to prevent the spread of COVID, but without citing the Procurement Act as authority) alleging, inter alia, that the public health policies were too broad a reading of the statute. The court found that EO 14042 was not consistent with the Procurement Act because the EO focused on public health policies, rather than explicitly dealing with procurement and contracting. The court cited *Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, Occupational Safety & Health Admin.*, 142 S. Ct. 661 (2022), which held that COVID was not an occupational hazard, and thus, the link between COVID policies and procurement was not enough to satisfy *Kahn*'s nexus test.

In *Louisiana v. Biden*, 575 F. Supp. 3d 680 (W.D. La. 2021), the district court granted a preliminary injunction against the vaccine mandate for Louisiana/Mississippi/Indiana state entities contracting with the Federal Government under parens patriae standing. The district court found that inconsistencies with the timelines in EO 14042 and the Task Force suggestions (e.g., that the EO specifically covers future contracts but that the Task Force guidelines account for past and future contracts) show that the implementation of the executive order fell outside of the scope of presidential power.

Next, in *Florida v. Nelson*, 576 F. Supp. 3d 1017 (M.D. Fla. 2021), a Florida district court found that Biden does not have the authority to implement a vaccine mandate under the Procurement Act in part because it was a conclusory rationalization that non-vaccination will impede economy and efficiency. The Florida district court also concluded that the executive order is expansive to the point of including a significant part of the population without granting exceptions and requires the injection of a vaccine, which is an "invasive process," among other presidential oversteps.

In yet another challenge, *Missouri v. Biden*, 576 F. Supp. 3d 622 (E.D. Mo. 2021), a district court concluded that the State of Missouri and other plaintiffs do not have parens patriae standing to challenge the operation of a federal vaccine mandate, but that that they have alleged sufficient injuries to make a sovereign interest claim, noting that the federal mandate preempts state law, and that Missouri and other states have ongoing federal contracts. The district court found, however, that the mandate is likely not consistent with the Procurement Act because it fails the nexus test. The court ultimately granted an injunction against the mandate.

In *Georgia v. Biden*, 574 F. Supp. 3d 1337 (S.D. Ga. 2021); 63 GC ¶ 368, the district court held that EO 14042 exceeds the presidential power afforded by the Procurement Act and issued a nationwide injunction against the order. The court noted that the executive order's requirements go beyond the administration and management of procurement and contracting in its practical application (i.e., requiring a significant number of individuals to become vaccinated or face a serious risk of losing their job), it operates as a public health regulation, it has vast economic and political significance, and the order does not have a nexus to the purposes of the Procurement Act.

Finally, in a recent Eleventh Circuit case, *Georgia v. President of the U.S.*, 2022 WL 3703822 (11th Cir. Aug. 26, 2022); 64 GC ¶ 276, the majority concluded that Biden's executive order likely exceeded the scope of the president's authority, concluding that *Kahn*'s "close nexus" standard "need not be … a blueprint for near-limitless executive procurement authority." Id. at *10. The majority rejected the D.C. Circuit's expansive interpretation of presidential authority under the Procurement Act, rejecting a "purpose-based approach" as "detached from the Act's remaining text and structure." Id. The dissent disagreed with the majority's rejection of what it characterized as a "longstanding consensus" of presidential authority and described the president's role in this situation as "proprietor"—not as a regulator. Thus, in the role of business owner, the president logically can "specify reasonable qualifications for performing the government work." Id. at *19. The core of the majority and dissent's disagreement in this case, and indeed the dispute in many of the vaccine mandate cases, likely reflects differing world views of how dramatic or significant the imposition of a vaccine mandate really is.

Possible Causes for the Rise in Challenges to Presidential Authority Over Procurement—*Political Polarization*: The most likely explanation for why litigants challenged the Trump and Biden executive orders so frequently and vehemently is the existing political polarization of American society. Presidents likely view the Procurement Act as a source of authority to bypass the typical legislative process, particularly when Congress will not, or cannot, act due to political gridlock in one or both chambers. Indeed, executive orders that are grounded in legislative authority from Congress are as binding as any other law "except where … contradicted by other duly passed federal law [so a] President can issue an executive order to bypass Congress' bureaucracy and advance policy objectives without having to go through the legislative process." *The Power of the President: Role of Executive Orders in American Government*, Law Shelf, (last accessed July 15, 2022), *lawshelf.com/shortvideoscontentview/the-power-of-the-president-the-roles-of-executive-orders-in-american-government*.

American democracy incorporates more checks on the executive than other modern democratic systems. Moreover, the inertia that is inherent in American democracy is enhanced when confronting political polarization in Congress. Indeed, "[i]n recent years, Congress's gridlock and increased polarization have pushed presidents to turn to executive actions more and more as substitutes for legislation. This trend will likely continue as our nation's Commander-in-Chief looks for alternative paths to set and enforce policy." See, e.g., id.

That said, in a world in which partisans scrutinize every action of the opposing side, even previously "normal" political tactics become fodder for litigation. Numerous scholars have analyzed the deadlock that predominates American politics. See

Frances E. Lee, *How Party Polarization Affects Governance*, Annual Review of Political Science 2015 18:1, 261–282.

Substantive Policy: Another possibility is that litigants are more likely to challenge orders relying upon the president's procurement authority that rest at the intersection of the Government's power to protect citizens and individual rights. For example, health policy related orders are likely harder to justify on an "economy and efficiency" basis than orders such as those regulating the labor conditions of federal contractors. Health orders, like President Biden's vaccine mandate, may receive greater pushback from the public because these orders strike at the core of where Government power and individual rights intersect—which also happens to be where the ideological left and right are most in tension.

That said, there have been executive orders related to immigration, another hotly debated political issue, that have survived partisan scrutiny. Additionally, scholarship has recognized the legality of using gubernatorial executive orders to enact significant health policies and respond to serious public health emergencies. See Maxim Gakh, Jon S. Vernick, & Lainie Rutkow, *Using Gubernatorial Executive Orders to Advance Public Health*, 2013 Mar–Apr; 128(2): 127–130 ("The gubernatorial executive order (GEO) is an increasingly visible legal tool within the public health arsenal that may blur some of the traditional lines created through the separation-of-powers framework.").

Nothing Has Changed: A third possibility is that these challenges do not actually reflect an inflection point in presidential power over procurement. Rather, opposing the Biden orders represents a slight shift in an existing practice of challenging presidents who push the limits of "economy and efficiency" past what is deemed reasonable. They reflect a continuation of a practice that has existed since the roots of LBJ's anti-discrimination order, and potentially even earlier.

Will the Supreme Court's Interpretation of the Major Questions Doctrine Impact the President's Procurement Act Authority?: The major questions doctrine (an "identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted," see *W. Virginia v. Envtl. Prot. Agency,* 142 S. Ct. 2587, 2609 (2022)), may limit future presidents' ability to use their Procurement Act authority to enact policy-generating executive orders. In *W. Virginia v. Envtl. Prot. Agency,* the Supreme Court invoked the major questions doctrine in holding that Congress did not grant the EPA authority to cap carbon dioxide emissions from power plants under the Clean Air Act. One could anticipate challenges to future executive orders arguing that the major questions doctrine prohibits a president from invoking the Procurement Act's "economy and efficiency" language for authority to enact a politically charged social policy. That said, the major questions doctrine concerns agency action, not presidential action. The distinction between agency and presidential action merits attention. Furthermore, most procurement executive orders would not rise to the level of a major question. Still, the majority's decision in *W. Virginia v. Envtl. Prot. Agency* could foreshadow future challenges to the "close nexus" standard if litigants perceive the Supreme Court as willing to leverage the major questions doctrine to limit the power of the executive branch.

Ultimately, there may not be a single cause for this trend. In all likelihood, the president's authority is being challenged more often, and perhaps more successfully, because of a confluence of factors: from the interaction between the structure of American democracy—which favors political inertia—with partisan polarization, to the substantive policy at issue. It is also probable that unique world events, from the rise of populism to a global pandemic, have undermined confidence in the executive branch in the public and the courts. What is more clear is that the Procurement Act is not going away. Thus, Government contractors should remain prepared to adapt and respond to future executive orders that simultaneously require them to take various actions to promote "economy and efficiency" in their contracts—and enact social policy.

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