

The American Presidency and the Power of the Purchaser

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As the CEO of the administrative state, the president has the procurement power to dictate the terms and conditions on which the federal government will do business with the private sector. By way of delegated statutory authority, executive order, and agency procurement and acquisition rules, the president can call the shots. Anyone wishing to do business with the federal government must meet the president's contract terms and conditions. Presidents use this "power of the purchaser" to exercise political control over procurement rulemaking and to influence public policy in areas unrelated to the federal government's "efficient" purchase of goods and services. Procurement—and the power of the purchaser—must be viewed as a powerful weapon of coercion and redistribution in the president's political and policy-making arsenal.

Federal procurement is a powerful weapon by which American presidents attempt to expand their power and shape public policy in areas in which Congress has not acted or will not act. In the same way that presidents exercise political control over the bureaucracy and agency regulatory rulemaking, they exert direct control and influence over procurement rulemaking and thereby attempt to shape the behavior of private sector companies. For more than half a century, presidents have exercised this political control over federal procurement and influence on public policy without violating the separation of powers, affirming the unilateral presidential power of the purchaser-in-chief to set terms and conditions beyond a traditional proprietary contractual relationship.

Historically, procurement- and acquisition-related executive orders have been based upon the president's broad powers under article II of the Constitution or the powers delegated to the president under the little-known 1949 Federal Property and Administrative Services Act (FPASA). In the latter, Congress delegated statutory authority to the American president to act as the "principal and uniform" purchaser in contracting with

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any private sector entity that does business with the federal government. The FPASA authorizes the president to adopt policies and directives that provide for an “economic and efficient” procurement system. Presidents thereby gain a range of strategic advantages over Congress, largely as a result of the legislature’s collective-action problems, the relative ease with which the president can block attempts to reverse procurement and acquisition orders, and a range of federal judicial decisions affirming congressional delegation of this statutory authority.

Through this power of the purchaser over time, presidents attempt to influence public policy and private sector behavior in contested areas such as antidiscrimination and equal employment opportunity; unemployment and inflation; labor-management relations; environmental protection; gun control; international child labor standards; immigration enforcement; economic opportunities for minority- and women-owned businesses, service-disabled veterans, and accountability and transparency in political contributions from federal contractors.

To make policy in many of these areas, presidents need not always secure the consent of Congress. Instead, presidents simply amend federal purchasing rules and dare others to oppose the change. In this, the market *and* political power of the purchaser can be more important—for presidential power, for the administrative presidency, for policy making—than political scientists have recognized.

The Administrative Presidency and Political Control of the Bureaucracy

The administrative presidency remains the nexus of policy making in the modern era. Any discussion of the administrative presidency focuses on the emergence of national administrative agencies and the formulation of public policy through them. Presidents have sought to exert political control and influence over the administrative state through a variety of means such as expanding the White House staff and centralizing political control over federal regulatory policy. Modern presidents have exerted political control and influence over all federal rulemaking at the start of their administrations by imposing moratoriums on new regulations and postponing the effective dates of existing rules (Copeland 2008).

The theme of political control—how politicians control bureaucrats and how bureaucrats control subordinates—permeates the administrative presidency literature. While disagreement remains about who controls the bureaucracy, a scholarly consensus holds that agencies translate the broad mandates of political actors into concrete policy. Scholars focus on how presidents get political control of the institutions that create and implement policy as a means of exercising “residual decision rights.” Since statutes inevitably leave discretion to the executive, often by design, the president has many opportunities to exercise this residual authority (Mayer 2001, 24). Indeed, presidents have attempted to centralize (and to augment) their political control over the bureaucracy by drawing on every power, formal and informal, at their disposal (Lewis and Moe 2009; Moe 1989).

Presidents and their staffs consider executive orders an indispensable policy and political tool (Mayer 2001). Executive orders and presidential policy directives to the

bureaucracy are instruments of political control and influence. Formally, an executive order is a directive that draws on the president's unique legal authority to require or authorize some action within the administrative state (Mayer 1999). The ability to issue and to enforce an executive order is based on statutory authority, an act of Congress, or the Constitution.¹ Executive orders are not defined in the Constitution, and there are no specific provisions in the Constitution authorizing the president to issue them.² These orders are used to direct agencies and officials in their execution of congressionally established policies. In many instances, they have been used to guide federal administrative agencies in directions contrary to congressional intent.

Political scientists recognize executive orders as an important policy tool, however constrained by legal and political considerations its use may be (Deering and Maltzman 1999; Krause and D. Cohen 1997; Mayer 1999, 2001; Moe and Howell 1999a). Presidents have used executive orders to reorganize executive branch agencies, to alter administrative and regulatory processes, to shape legislative interpretation and implementation, and to make public policy.³ In a study of the history of executive branch practice, Calabresi and Yoo (2008) conclude that since the days of George Washington, presidents have consistently asserted their power to execute law.⁴

To have the full force of law, executive orders must be "derived from the statutory or constitutional authority cited by the president in issuing the decree" (Cooper 2002, 21). However, courts have allowed the president to claim implied statutory authority when Congress has not opposed the president on the public record. In staying out of separation-of-powers issues, the courts have left it up to Congress to protect its own interests against the expansion of executive power. More broadly, executive orders have continued to grow in importance, and overly deferential court decisions have laid the foundation for further expansion. Congress has had a difficult time enacting laws that amend or overturn orders issued by presidents, though efforts to either codify in law or fund an executive order enjoy higher success rates. While judges and justices have appeared willing to strike down executive orders, the majority of such orders are never challenged, and for those that are, presidents win more than 80% of the cases that go to trial (Howell 2005).

Presidents thus have a unique position in which they seek to gain political control and influence over policy making (Moe and Wilson 1994). In the same way that presidents exercise political control over the bureaucracy and influence agency regulatory rulemaking, they also exert direct control and influence over federal procurement and acquisition rulemaking and attempt to shape private sector behavior. Presidents can use

1. There are three recognized sources of presidential power: an express grant of power, an implied grant of power, and the power that is inherent in the office of the executive under the Constitution. See *Youngstown Sheet & Tube Co. v. Sawyer* 1952, 635-37.

2. For more on the evolution of executive order and presidential proclamations, see Contrubis (1999).

3. A number of political science articles on executive orders have been published in mainstream political science journals (Cooper 2001, 2002; Deering and Maltzman 1999; Howell and Lewis 2002; Krause and D. Cohen 1997; Krause and J. Cohen 2000; Mayer 1999; Mayer and Price 2002; Moe and Howell 1999a, 1999b).

4. This historical survey of the unitary executive focuses on the president's power of removal, the president's power to direct subordinate executive officials, and the president's power to nullify or veto subordinate executive officials' exercise of discretionary executive power.

their power of the purchaser to extract behavioral adjustments from private sector actors and/or to supply benefits to key political constituencies. Republicans and Democrats, for example, have used labor-management procurement-related orders to advance key electoral supporters'—organized labor and business—political (and economic) interests.

The Market Power of the Purchaser

Federal contracting (and subcontracting) with the private sector is a political as well as an economic exchange. The federal government can provide public goods and services by either making them or buying them. Procurement is the purchasing of goods and services by contract, purchase card, grant, intragovernmental transaction, or other means of sourcing. The federal government has used procurement to draw on a range of private sector expertise and thereby perform functions more effectively and efficiently. Governments contract for products and services that its employees use (such as office supplies, computers, and fighter aircraft) and for services it provides to others (such as collecting on delinquent student loans, running customer-service hotlines, and delivering job training) (Kelman n.d.).

Early in the twentieth century, the federal government was a relatively small and unimportant purchaser of good and services. However, by fiscal year (FY) 1982, federal procurement spending reached \$158.9 billion and a high of 4.89% of gross domestic product (GDP). Total federal procurement spending has continued to grow, reaching \$168.1 billion in FY 1983, \$218.8 billion in FY 2000, \$523.8 billion by FY 2009 (3.71% of GDP) (see Figure 1). The U.S. federal government has thus become the world's largest purchaser of goods and services (Lew 2011; Manuel et al. 2012). Approximately

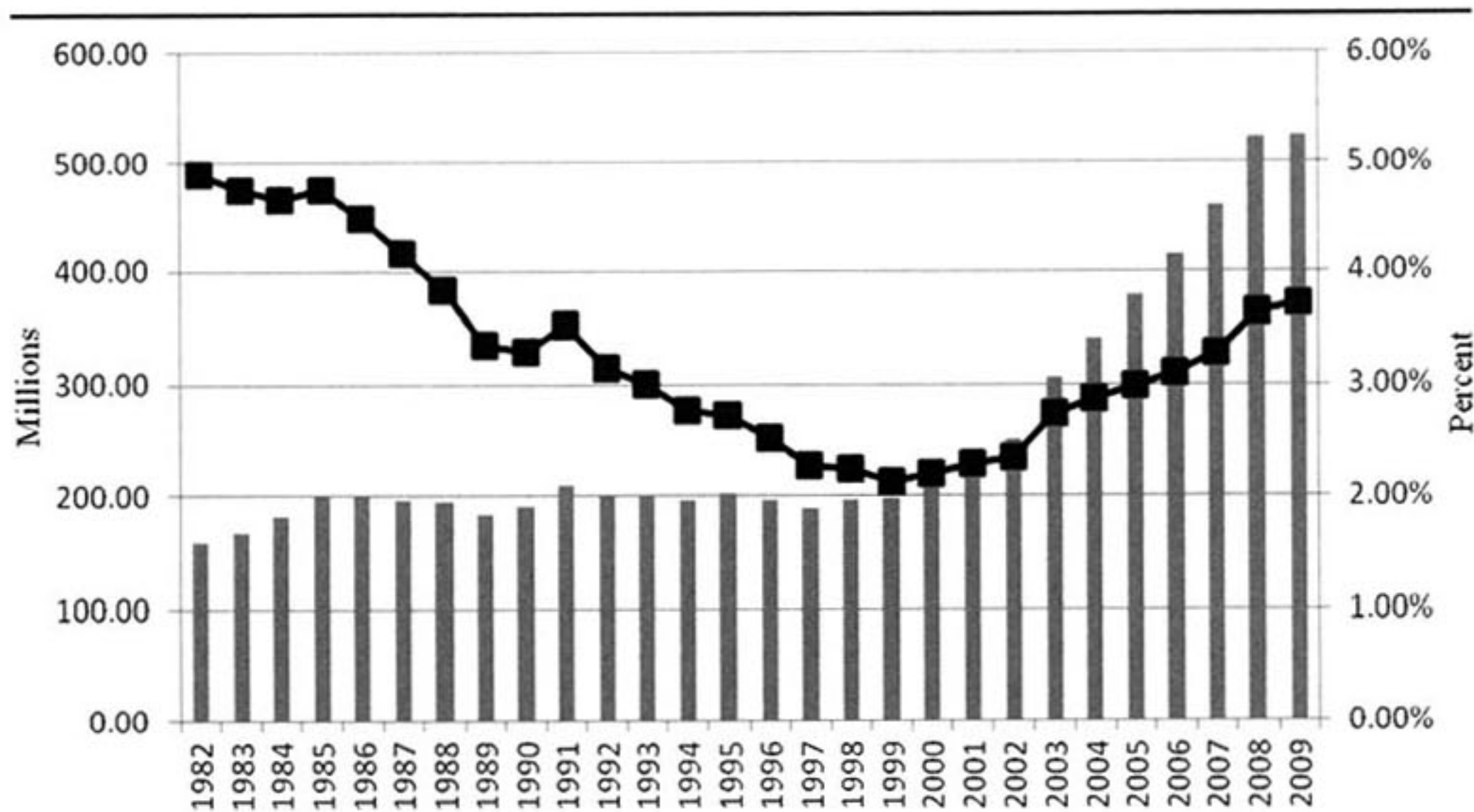


FIGURE 1. Federal Procurement Spending in Dollars and Percent of GDP, FY 1982-2009.

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 (Burrows and Manuel 2011). Thus, some analysts have argued that if presidential power to impose requirements on federal contractors (and subcontractors) is construed broadly, the president could effectively regulate significant sectors of the U.S. economy. As a result, the American presidency has substantial market and political power as a purchaser.

The private sector companies that contract with the government are not small players. For example, the ten companies that received the most federal procurement dollars in FY 2010 included defense contractors such as Lockheed Martin, Boeing, Northrop Grumman, General Dynamics, and Raytheon. In fact, the top 50 contractors (in terms of federal contract dollars) accounted for half of all procurement spending in FY 2010 (see Table 1). Moreover, as a result of “flow down” requirements common to contracts between the government and a prime contractor, a subcontractor is bound by provisions identical to those of the principal contractor (Porter 1996).

Unlike negotiating instructions from a private individual to his or her agent, federal government direction as a principal to its agents involves statutes or regulations with the force of law (Porter 1996). These procurement and acquisition orders can effectively reach private conduct, when an executive action requires all federal agencies to

TABLE 1
Top 25 Federal Contractors, FY 2010

<i>Company</i>	<i>Total Actions</i>	<i>Total Dollars</i>	<i>%Total Actions</i>	<i>%Total Dollars</i>
LOCKHEED MARTIN CORPORATION	21,700	\$35,828,421,340.83	0.3890%	6.7848%
THE BOEING COMPANY	14,039	\$19,486,294,255.83	0.2517%	3.6901%
NORTHROP GRUMMAN CORPORATION	19,587	\$16,797,921,451.22	0.3511%	3.1810%
GENERAL DYNAMICS CORPORATION	17,934	\$15,249,055,811.75	0.3215%	2.8877%
RAYTHEON COMPANY	11,228	\$15,245,234,506.52	0.2013%	2.8870%
UNITED TECHNOLOGIES CORPORATION	13,499	\$7,721,459,648.98	0.2420%	1.4622%
L-3 COMMUNICATIONS HOLDINGS INC.	15,171	\$7,445,106,575.43	0.2720%	1.4099%
OSHKOSH CORPORATION	4,660	\$7,243,489,906.25	0.0835%	1.3717%
SAIC INC.	28,807	\$6,796,280,361.66	0.5164%	1.2870%
BAE SYSTEMS PLC	13,624	\$6,561,185,112.84	0.2442%	1.2425%
CERBERUS CAPITAL MANAGEMENT L.P.	3,188	\$4,768,901,697.89	0.0572%	0.9031%
MCKESSON CORPORATION	22,247	\$4,601,060,051.58	0.3988%	0.8713%
COMPUTER SCIENCES CORPORATION	5,920	\$4,372,553,085.04	0.1061%	0.8280%
URS CORPORATION	5,570	\$3,947,003,912.81	0.0999%	0.7474%
BECHTEL GROUP INC.	285	\$3,939,025,644.12	0.0051%	0.7459%
BOOZ ALLEN HAMILTON HOLDING CORPORATION	9,137	\$3,748,607,534.52	0.1638%	0.7099%
KBR INC.	617	\$3,625,557,555.82	0.0111%	0.6866%
HARRIS CORPORATION	7,092	\$3,301,564,466.11	0.1271%	0.6252%
HUMANA INC.	545	\$3,248,780,847.62	0.0098%	0.6152%
HEALTH NET INC.	424	\$3,224,143,073.24	0.0076%	0.6106%
GENERAL ELECTRIC COMPANY	9,311	\$3,134,833,212.85	0.1669%	0.5936%
ITT CORPORATION	3,803	\$2,814,320,312.00	0.0682%	0.5329%
BELL BOEING JOINT PROJECT OFFICE	1,306	\$2,752,694,557.21	0.0234%	0.5213%

incorporate particular terms in their contracts or prohibits them from entering contracts with companies that do not comply with certain terms and conditions. Such presidential directives prevail over the contract text itself and over what would be the rights of the contractors were the contract between two private parties.

A challenge for private sector actors in contracting with the federal government is the problem of “intergenerational opportunism” (Ponser 2001). In ordinary circumstances, the parties to a private contract have the same identity at the time of entry into the contract and the time of performance. However, the federal government does not always have the same identity at the time of entry and the time of performance. This problem arises because the government represents the interests of a constantly changing population (voters who prevail in periodic elections) rather than having a single, time-constant interest. Thus, federal procurement is complex and must be responsive to multiple principles. Each president uses the power of the purchaser for instrumental and strategic advantage at particular points in time.

An additional issue arises from the fact that one of the parties to the contract is the state or a state institution (Spiller 2008). “Governments can opportunistically change the rules of the game via the standard use of governmental powers to extract the quasi-rents of its contract partner” (Spiller 2008, 6). In sum, a tension exists between the role of the federal government as a party to a contract and the role of the federal government as democratically elected officials—that is, the conflict between the federal government’s contractual and political obligations (Hadfield 1999). When the president, as CEO and purchaser-in-chief, contracts, he acts in a public capacity. When conflicts arise, they are often matters of public law governing the relationship between the federal government and individuals rather than private law governing a transaction between two parties. Private obligations do not hobble the federal government’s fulfillment of its democratic functions. With the concept of sovereign immunity, the sovereign (state) is not subject to the jurisdiction of the courts, including for the purpose of enforcing contracts against it, unless it explicitly consents to be sued. Government-provided remedies can be restricted only to administrative remedies (Hadfield 1999).

Even though U.S. courts have declared that when the state “enters into contract relations, its rights and duties are governed generally by the law applicable to contracts between private” parties (*Lynch v. United States* 1934), the federal government retains its sovereign powers, including the power to override contractual obligations. As the Supreme Court has ruled, like private individuals and firms, the “Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases” (*Perkins v. Lukens* 1940, 127). Thus, the government is under no restraint as to many of the terms and conditions of its contracts and may impose those conditions it deems necessary. The federal government’s contracts remain subject to subsequent legislative (or executive) action by the sovereign (*Merrion v. Jicarilla Apache Tribe* 1982, 148). The “sovereign power, even when unexercised, is an enduring presence that governs all contracts” (*Bowen v. PAOSSE* 1986, 52).

However, the federal government cannot walk away scot-free from existing contracts whenever political motivations or opportunities encourage it to do so, an action

that shifts the costs onto the contracting parties. By honoring its contracts, the federal government reinforces its democratic legitimacy as a government subject to the rule of law. Indeed, the ability of the government (the sovereign) to bind itself in contract has been an important step in the evolution of the modern democratic and administrative state. However, when confronting electoral or political problems, American presidents attempt to use their power of the purchaser to exert political control over procurement and to influence policy in areas beyond the efficient purchase of goods and services. Indeed, changes in the rules of the game can be accomplished in subtle or unsubtle ways. Thus, politics is fundamental to understanding public procurement.

Origins and Evolution of Federal Procurement and Acquisition Policy

During the Great Depression and New Deal, Congress *and* the president, going it together, set several legislative precedents to use the broad federal government power of the purchaser to achieve political and policy objectives. Major federal procurement policy with goals beyond “economy and efficiency” include the 1931 Davis-Bacon Act, requiring public works projects to pay prevailing wages;⁵ the 1933 Buy American Act, giving preference to domestic suppliers unless the domestic price was unreasonable, in an effort to foster and protect American industry and workers; and the 1936 Walsh-Healy Public Contracts Act, authorizing regulation of contract employees’ wages, hours, and working conditions.

Historically, Congress and the president, acting together, also have promoted opportunities for small businesses to contract with the federal government. For example, the 1953 Small Business Act mandated that small businesses receive a “fair proportion” of federal contracts and sales of surplus property (P.L. 83-163; P.L. 85-536). This requirement has been extended to include socially and economically disadvantaged small businesses. The 1978 Small Business Act affirmed that “it is the policy of the federal government to provide maximum practicable opportunities in its acquisitions to small businesses, small disadvantaged businesses, and women-owned businesses” (P.L. 95-507).⁶

Historically, small businesses received a share of federal procurement dollars not commensurate with their relative importance in the U.S. economy (Clark, Moutray, and Saade 2006). Thus, Congress and the president have updated procurement laws to assist small businesses, including those owned by minorities and women. Current socio-economic target groups for procurement and acquisition include small businesses, small

5. Roosevelt suspended the Davis-Bacon Act in 1934 for three weeks for administrative reasons. Nixon suspended Davis-Bacon for 28 days in 1971 in an attempt to hold down inflation. The most protracted suspension came in 1992, when George H. W. Bush suspended Davis-Bacon to assist in the recovery from Hurricane Andrew; Clinton put Davis-Bacon back into effect in March 1993. In 2005, George W. Bush suspended Davis-Bacon for two months to assist in the recovery from Hurricane Katrina.

6. <http://www.sheppard.af.mil/shared/media/document/AFD-120427-037.pdf> (accessed February 15, 2013).

disadvantaged businesses (including minorities), women-owned small businesses, small businesses located in Historically Underutilized Business Zones, and small businesses owned by service-disabled veterans.⁷

The stakes are high, because virtually all American presidents since Franklin Roosevelt have used their general power over procurement to place conditions on private actors who do business with the federal government. The president's power to exert direct political control and influence over procurement is statutory in its origin. Modern-day federal contracting is based on two laws, the 1947 Armed Services Procurement Act (which governed the acquisition by defense agencies of all property, construction, and services) and the 1949 Federal Property and Administrative Services Act—FPASA (which governed acquisitions by civilian agencies).

Under FPASA, Congress delegated statutory authority to the president to act as the “principal and uniform purchaser” in contracting with any company that does business with the government. Congress set forth its goal of an “economical and efficient system” for procurement and supply and directed the president to “procure supplies in a manner advantageous to the government in terms of economy, efficiency, or service.”⁸ However, Congress also declared that “price was not the sole consideration; instead, the contract most advantageous to the government, price and *other factors* considered, should be the guide for purchasing decisions.” Thus, presidents have sought to “employ a strategy of seeking the greatest advantage to the government, short- and long-term,” while also maintaining the public's trust and fulfilling policy objectives (U.S. General Services Administration n.d.).

To oversee federal procurement, Congress and President Truman created the General Services Administration (GSA) in 1949, with an administrator appointed by the president and confirmed by the Senate, to manage procurement (and the utilization and disposal) of government property (Reeves 1996). The GSA's original mission was to dispose of war surplus goods, manage and store government records, handle emergency preparedness, and stockpile strategic supplies for wartime. As the volume of federal purchasing increased, Congress created the Commission on Government Procurement (1969) to recommend ways to “promote the economy, efficiency, and effectiveness” of procurement (Reeves 1996, 16). The commission recommended the establishment of a strong, central office to provide leadership in procurement for all agencies within the Executive Office of the President (EOP).

Over time, Congress has affirmed the centralization of procurement policy making in the executive: the 1974 Federal Procurement Policy Act created the Office of Federal

7. Congress has established a number of goals to help small businesses compete for federal contracts. In addition to the goal of awarding at least 23% of all federal prime contracting dollars to small businesses, Congress has established government-wide contracting goals for participation by various groups of small businesses.

8. In 1949, the government faced “the disorderly administration of mammoth federal supply of operations that were uncoordinated, duplicative, and without rational procedures.” Congress sought to deal with these problems by streamlining the government's contracting operations in accordance with the flexible, centralized procurement practices employed by the private sector. The FPASA was in response to a 1949 Hoover Commission report that said that the government's method of doing business must be modernized. See Reeves (1996, 11).

Procurement Policy (OFPP) as part of the Office of Management and Budget (OMB) and recommended that the OFPP be placed within the EOP to “give it prestige and leverage in dealing effectively with all agencies” (P.L. 93-400).⁹ The OFPP sets procurement policies for all administrative agencies and coordinates the president’s position on procurement-related legislation.¹⁰

Congress insulated OFPP from direct presidential control after President Richard Nixon’s budget impoundments and the OMB’s attempts to exert political control over administrative agencies. The Senate voted to protect the administrator’s independence, establishing a procurement office within the EOP but independent of the OMB, including separate authorizations for OFPP; a requirement that the administrator report directly to Congress; and a provision vesting the OFPP’s authority in the administrator rather than in the OMB director (P.L. 93-400). Congress also required the OFPP to give advance notice before making policy changes.

Prior to 1984, two sets of federal procurement or acquisition regulations existed. Military purchasing was governed by the Armed Services Procurement Regulations (ASPR), renamed the Defense Acquisition Regulations (DAR) in 1978. Civilian purchasing was governed by the Federal Procurement Regulations (FPR). The Competition in Contracting Act (1984) established rules for choosing suppliers based on the policy of “full and open competition.” Procurements were to be widely advertised, open to all, and evaluated strictly on criteria announced in advance.

Under the 1984 reform, a single set of Federal Acquisition Regulations (FAR) was established to codify uniform policies for acquisition of supplies and services and to govern the procurement of property and services by all agencies (Heifetz 1998). The FAR Council, which was established in 1990, manages and oversees the FAR, which are prepared through the coordinated action of the Defense Acquisition Regulations Council (DAR Council) and the Civilian Agency Acquisition Council.¹¹ The FAR apply to all agencies in the executive branch. The legislative and judicial branches are not required to comply with the FAR but tend to follow them in “spirit and content.”

Recent decades have seen the adoption of a range of federal procurement reforms designed to align public purchasing with best practices that govern contracting in the private commercial market.¹² For example, in March 2009, President Barack Obama directed all federal agencies to save \$40 billion annually by FY 2011 and apply fiscally responsible acquisition practices that better protect taxpayers from waste and cost overruns (U.S. Office of Management and Budget 2011). However, the president remains free to base purchasing on considerations that might not enter into the proprietary decisions of a private sector firm. While the OFPP is charged with improving acquisition and

9. The administrator would be an associate director of OMB appointed by the president and confirmed by the Senate.

10. Congress offered temporary authorization for the office in 1979 and renewed it in 1983 before making the office permanent in the 1988 OFPP Act Amendments (P.L. 100-679).

11. The FAR system was established for the codification and publication of uniform policies and procedures for acquisition by all executive agencies.

12. The Federal Acquisition Streamlining Act mandates that federal agencies implement past performance, using criteria other than price, such as delivery rate and quality of goods and services, in evaluating competitively negotiated proposals (see Heifetz 1998).

playing its part in improving government performance, presidents continue to exert direct political control over purchasing and attempt to influence private sector behavior.

In addition to efficiency-related concerns such as cost, quality, and timely delivery, presidents also attempt to secure other political and policy-related goals. Take a most recent example: from his earliest days in office, President Obama called for an overhaul of federal procurement rules, citing the contracting scandals of the prior decade involving cost overruns and no-bid contracts. However, most federal contracts are awarded based on a “best value” approach in which the federal government considers price *along* with a number of noncost factors. Thus, Obama explored a “high-road contracting” procurement-related executive order whereby the federal government would encourage all federal agencies to do business with companies that “invest” in their workers.

This “high-road” executive order would require all agencies to evaluate contract bidders on the quality of their labor and workplace practices. Indeed, the political response was swift: “this is a social policy goal,” warned Glenn Spencer, executive director of the Workforce Freedom Initiative at the U.S. Chamber of Commerce. “The objective is to impact wages nationwide using the backdoor of contracting” (Brodsky 2010). Indeed, the purchaser-in-chief and politics remain alive and well in 2013. The following cases illuminate how, regardless of partisan affiliation, American presidents have used the unilateral power of the purchaser to shape the agenda, to influence policy, and to shift the prevailing status quo.

War and Procurement Power: Equal Employment Opportunity

Even prior to the delegation of congressional statutory authority under the 1949 FPASA, Presidents Franklin Roosevelt (FDR) and Harry Truman used the power of the purchaser to impose antidiscrimination executive orders in all defense and civilian contracts. These orders, addressing discrimination in private sector employment, grew out of the labor market conditions created by America’s entry into World War II. FDR used the “authority vested in the presidency by the Constitution and statutes” to require all private sector industries engaged in defense production “to refrain from discriminating on the basis of race, creed, color or national origin” and to engage in fair employment practices (E.O. 8802, 1941; E.O. 8823, 1941; E.O. 9001, 1942; E.O. 9346, 1943).¹³ The orders, derived from the president’s broad war powers, were not challenged by either Congress or the courts (Millenson 1999). Throughout World War II, these orders were framed less as a civil rights issue and more as part of an “overall war effort and need to maximize the pool of workers available for defense production” (E.O. 8802, 1941).

President Truman, building on FDR’s precedent, issued executive orders on fair employment practice, requiring nondiscrimination in all industries engaged in “work contributing to the production of military supplies or to the effective transition to a

13. All executive orders (E.O.s) issued since 1945 are available at <http://www.archives.gov/federal-register/codification/numeric-executive-orders.html> (accessed February 15, 2013). The text of executive orders appears in the daily *Federal Register* as each executive order is signed by the president and received by the Office of the Federal Register.

peacetime economy" (E.O. 9664, 1951; E.O. 10210, 1951; E.O. 10308, 1951). Truman also created the Committee on Government Contract Compliance to eliminate discrimination in any federal government activities. President Dwight Eisenhower affirmed the antidiscrimination order and established an additional obligation to promote "equal employment opportunity" on all federal contracts (E.O. 10479, 1953; E.O. 10557, 1953).¹⁴

President John F. Kennedy had attacked Eisenhower's luke-warm support for civil rights during the 1960 presidential election: Procurement-related orders became the core of Kennedy's civil rights agenda as a consequence of limited political support from southern Democrats in Congress (Mayer 2001, 197). Kennedy declared "an urgent need for expansion and strengthening of efforts to promote full equality of employment opportunity" and issued an order to "promote the economy, security, and national defense of the U.S. through the most efficient and effective utilization of all available manpower" (E.O. 10925, 1961). In sum, any private sector company doing business with the federal government was required to go beyond nondiscrimination and "affirmatively act" to ensure that employment opportunities were open to all minorities (Fleishman and Aufes 1976).

Kennedy extended the procurement-related antidiscrimination order to federally assisted construction contractors (E.O. 11114, 1963) and replaced the existing Committee on Government Employment Policy and the Government Contract Committee with a Presidential Committee on Equal Employment Opportunity (PCEEO).¹⁵ President Lyndon Johnson's executive order retained the prohibition but "delegated specific authority . . . to the Labor Department to issue rules for and to enforce the civil rights policy on contractors" (Cooper 2002, 57; E.O. 11246, 1965).¹⁶ According to one analysis of its impact, the order affected "some 225,000 contractors throughout the U.S. . . . building \$30 billion worth of federally assisted construction projects, and directly or indirectly employing 20 million workers" (Graham 1992, 155).

Since the Great Depression, federal policy had shaped a two-tiered housing market that segregated metropolitan regions and their material resources by race (Freund 2004, 3). Thus, Kennedy extended the antidiscrimination order to all federally assisted housing—specifically, the sale, lease, or use of future housing constructed by the federal government or guaranteed under the Federal Housing Administration (FHA) or Veterans' Administration (VA) programs—and created the President's Committee on Equal Opportunity in Housing (E.O. 11063, 1962). Under this order, nondiscrimination was

14. E.O. 10479, which revoked E.O. 10308, established the Government Contract Committee and directed it to make recommendations to all agencies to improve the nondiscrimination provisions in federal contracts.

15. The PCEEO received broad authority to investigate employment practices and to punish contractors that failed to comply with regulations. Johnson transferred authority for enforcement of equal opportunity policy from the commission to the secretary of labor and a new Office of Federal Contract Compliance (OFCC), which the president empowered to require compliance reports on hiring practices before firms could bid on contracts (see MacLaury 2008).

16. The OFCCP administers and enforces E.O. 11246 (as amended) and prohibits federal contractors and federally assisted construction contractors and subcontractors who do more than \$10,000 in government business per year from discriminating in employment decisions on the basis of race, color, religion, sex, or national origin (see MacLaury 2008).

required in new federally supported housing contracts (excluding commercial banks, federal guaranteed lending activity, and existing loans and projects). Agencies could enforce compliance by canceling or terminating contracts or by refusing to approve lending institutions as beneficiaries under federal programs. The order required the FHA, the Public Housing Administration, the Urban Renewal Administration, and the Federal National Mortgage Association to commit themselves not only to “altering patterns of discrimination that the agencies had long sustained” but also to channeling resources to populations long denied the benefits of federal assistance (Freund 2004, 2).

Yet the scope of these procurement-related executive orders had limits shaped by politics. For example, Kennedy prohibited racial discrimination in new, federally supported construction, but the order did not cover existing units. The order also did not apply to housing financed by private savings and loan associations, even those overseen and ultimately underwritten by the reserve and insurance functions of the Federal Home Loan Bank Board. The FHA decided to exclude from coverage all one- and two-family homes whose mortgages were insured by its agency. The fast-growing conventional market for home mortgages, while overseen and indirectly subsidized by regulatory agencies, including the bank board, also was exempt (Freund 2004, 37).

For decades, Congress did not endorse any of these antidiscrimination or equal opportunity orders. In fact, southern Democrats opposed any federal intervention to uphold civil rights and did not directly appropriate any funds to carry out the executive order’s implementation. In 1951, for example, Congress refused to continue the Fair Employment Practice Committee or to provide financial support for the Committee on Government Contracts. However, electoral changes and pressures in the mid- to late 1960s led Congress to affirm these antidiscrimination orders as part of 1964 Civil Rights Act, making direct reference to the earlier orders (Millenson 1999), and again in 1972 amendments to the Civil Rights Act as approved by Nixon.¹⁷

The power of the purchaser enabled American presidents to act on civil rights before Congress was willing or able to do so. Indeed, Congress embraced other procurement-related orders in areas where it initially had refused to act. For example, in the 1968 Fair Housing Act, Congress imposed rules beyond the original order (E.O. 11063, 1962), barring discrimination in home sales, rentals, and mortgages. Under 1988 amendments to Fair Housing Act, Congress, controlled by Democrats, required the Department of Housing and Urban Development (HUD) to report annually and to make all information required under E.O. 11246 (1965) available to the public (Millenson 1999).

While some presidents act on prior precedent, no order is immune to shifts in partisan presidential politics and interest group pressures. With different ideological preferences on affirmative action policy, President Ronald Reagan aimed to modify the enforcement mechanism rather than to repeal the affirmative action order (E.O. 11246). Reagan did consider an order to clarify that the “government does not require, authorize or permit the use of goals, or any other form of race- or gender-specific preferential

17. Through the annual appropriations process, Congress subsequently approved substantial increases in funds for the OFCCP (Millenson 1999).

treatment by contractors.” Ultimately, he decided not to issue such an order, as Democrats in political control of Congress were likely to adopt a statute to reaffirm the original affirmative action order (E.O. 11246) (Millenson 1999). Republican control of the White House (1981-92) produced no significant change in the order requiring antidiscrimination in all contracts (Mayer 2001). Indeed, under those circumstances when a unilateral directive can be expected to spark some kind of congressional or judicial reprisal, presidents proceed with caution. If a president can forecast that an order will be overturned, presidents usually will not act at all.

Presidents relied on the power of the purchaser to extend antidiscrimination order to age, gender, and disability status. For example, in the 1970s, Nixon facilitated the employment of Vietnam War veterans by requiring all federal agency contractors and subcontractors to list labor market openings with employment service systems (E.O. 11598, 1971; E.O. 11701, 1973). President Jimmy Carter provided a formal mechanism for the coordination and enforcement of all equal employment opportunity procurement-related orders by creating the Equal Employment Opportunity Commission (E.O. 12067, 1978).

Procurement and the Political Challenge of Unemployment and Inflation

Presidents have relied on the power of the purchaser to address the political (and economic) problem of unemployment and inflation. President Eisenhower pledged to use defense spending to alleviate unemployment in 1952. The Office of Defense Mobilization issued the Defense Manpower Policy (DMP-4), which gave preferences to contracts with and purchases from companies in areas of labor surplus or high unemployment (Sky 1969). President Johnson, as part the War on Poverty, amended DMP-4 to offer incentives for companies to locate in “high-poverty” neighborhoods, establishing preferences for contractors who perform “substantial portions of their contracts in or near sections of concentrated unemployment or underemployment” (Sky 1969, 1271).¹⁸ President Jimmy Carter implemented a procurement set-aside in labor surplus areas (E.O. 12073, 1978). President Bill Clinton relied on the power of the purchaser, describing “empowerment contracting” as a tool of community economic development “to expand the pool of contractors in economically distressed communities” (E.O. 13005, 1996). Areas of general economic distress were defined as all urban and rural communities with poverty rates of at least 20%.

In the 1970s, Nixon and Carter used the power of the purchaser to combat inflation, a complex problem with high political costs (Quint 1984).¹⁹ With construction costs

18. The Department of Defense (DOD) implemented DMP-4 by setting aside up to 50% of procurement from general solicitation and offering it to firms operating in labor surplus areas.

19. In 1971, Nixon, acting under the 1970 Economic Stabilization Act (ESA), imposed the first mandatory peacetime wage and price controls in the construction industry. Three years later, Congress enacted the Council on Wage and Price Stability Act, providing for an advisory body to monitor wage and price activity and granting the president power to issue and monitor voluntary wage and price guidelines.

escalating at a greater rate than the rest of the economy, Nixon prohibited unions from negotiating wages and benefits without government intervention (E.O. 11588, 1971). The procurement order was expanded to impose general wage and price controls, freezing salaries for 90 days, and authorizing a presidential council to order employers to maintain wage records (E.O. 11627, 1971). Carter denied contracts to firms that refused to follow president-issued wage guidelines. Carter's order encouraged noninflationary pay and price behavior by the private sector and labor unions and prohibited contractors from raising prices and wages beyond prescribed "non-inflationary limits" (E.O. 12092, 1978). Carter also directed the Council on Wage and Price Stability to establish noninflationary wage and price standards for the entire economy.²⁰

Although Congress had authorized voluntary guidelines in the 1974 Council on Wage and Price Stability Act, no statutory authority was delegated to deny federal contracts as a means of enforcement.²¹ Debarment for noncompliance was not uncommon. However, Carter's prohibition against inflationary procurement practices was the first use of contract debarment to enforce noninflationary pay and price behavior (E.O. 12092, 1978).²² By 1981, President Reagan opposed wage and price controls to combat inflation and issued an order to "terminate the regulatory burdens of the wage and price program" (E.O. 12288, 1981).

Favoring Small Business: Minority, Women, and Veteran Owned

While Congress recognized over time that it could provide a framework for requiring federal administrative agencies to "maximize the use of small socially and economically disadvantaged businesses," presidential appointees, the director of the OFPP, and the administrator of the SBA, were responsible for day-to-day implementation (Clark, Moutray, and Saade 2006).²³ As a result, Republican and Democratic presidents have used their power of the purchaser to expand opportunities for small and disadvantaged businesses (U.S. Department of Housing and Urban Development n.d.). President Nixon affirmed agency "efforts to foster and promote minority business enterprises" (E.O. 11458, 1969; E.O. 11625, 1971). President Reagan reaffirmed the government's

20. The order mandated that wage increases could total no more than 7% of a worker's salary and that price increases must be at least .5% less than the company's recent average price increases. The order also required all federal contractors to certify their compliance with the wage and price standards and directed the OFPP to implement sanctions against contractors that failed to comply.

21. Carter directed the OFPP to require that all contractors certify that they were in compliance with wage and price standards, imposing wide-ranging anti-inflation controls on domestic firms.

22. Congress retained power in the area of wage and price controls, and it has only infrequently, and then within specific limitations, allowed the president to issue directives concerning this controversial area of the national economy. Congress has authorized the president to enforce wage and price controls only with specific grants of authority and firm expiration dates. These include the 1942 Emergency Price Control Act (to regulate prices for government contracts); the 1942 Stabilization Act (amending the previous act) to limit wages and agricultural prices; and the 1950 Defense Production Act, again granting the president authority to control wages and prices, and it later amended the act and terminated the authority. In 1970, Congress approved the Economic Stabilization Act, authorizing the president to issue orders and regulations appropriate to stabilize prices, rents, wages, and salaries, with that authority expiring in 1974 (see Rockoff 1984).

23. The final rule requires each agency with contracting authority to establish an Office of Small and Disadvantaged Business Utilization (OFPP Letter 79-1, March 7, 1979).

commitment to the goal of encouraging opportunity for minority entrepreneurs and directed all agencies “to develop a minority business development plan and to develop incentives to encourage greater minority business subcontracting by prime contractors” (E.O. 12432, 1983).

Building on this bipartisan precedent, President Clinton established “mechanisms that ensure that small businesses owned and controlled by socially and economically disadvantaged individuals,” historically black colleges and universities (HBCU), and minority institutions have a “fair opportunity to participate in procurement” (E.O. 12928, 1994). In a 1994 memorandum affirming his commitment to small, disadvantaged, and women-owned businesses in procurement, Clinton encouraged “the use of various tools, including set-asides (and) price preferences as necessary to achieve this policy objective” (Clinton 1994). Prior to the 2004 election (and in effort to reach out to potential new political constituencies), President George W. Bush extended opportunities to businesses owned by Asian Americans and Pacific Islanders—in particular, to provide equal opportunity for public-private partnerships for the community economic development of Asian American- and Pacific Islander-owned businesses and to ensure nondiscrimination in federal procurement (E.O. 13339, 2004).

Presidents also have used their purchasing power to create opportunities for women-owned businesses—another crucial electoral constituency.²⁴ For example, President Carter created the National Women’s Business Enterprise Policy and directed that “[e]ach department and agency of the Executive Branch shall take appropriate action to facilitate, preserve and strengthen women’s business enterprise and to ensure full participation by women in the free enterprise system.” (E.O. 12138, 1979). President Clinton, in an effort to help Al Gore’s electoral prospects with women voters in the 2000 presidential election, promised to “ensure maximum participation of women-owned small businesses in the procurement process” (E.O. 13157, 2000). Clinton also required increased access for disadvantaged businesses to contracting opportunities, directing agencies “to take all necessary steps to increase [such] contracting” (E.O. 13170, 2000).

In 2004, President George W. Bush, a wartime president, required a strengthening of opportunities in contracting for businesses owned by service-disabled veterans (E.O. 13360, 2004). President Obama, building on the precedent of reaching out to veterans, established the Interagency Task Force on Veterans Small Business Development. Because only about 1% of recent federal contracts had gone to small businesses owned by service-disabled veterans, Obama requested proposals “to improve training and counseling for veteran-owned firms” (Obama 2010a). Obama also established the Interagency Task Force on Federal Contracting Opportunities for Small Businesses to coordinate efforts to ensure that all small businesses have a fair chance to participate in contracting opportunities, especially under the American Recovery and Reinvestment Act—known as the federal stimulus package (Obama 2010b).

24. The 2000 Small Business Reauthorization Act provided for set-aside contracting programs for eligible women-owned small businesses in industries in which they were underrepresented or substantially underrepresented as determined by the SBA (see *Analyzing Information* 2005).

Partisan Politics, Procurement, and Labor-Business Battles

The power of the purchaser and partisan politics have collided in labor-management disputes. Republican and Democratic presidents have sought to influence their parties' electoral fortunes and to deliver benefits to core electoral constituencies. Since the early 1990s, presidents have used executive procurement orders to seek advantage for key (labor or business) groups and to shape (and reshape) the ongoing post-New Deal labor-management political battle.

In an effort to improve his electoral prospects and decrease the role of union money in the 1992 election, President George H. W. Bush informed employees of federal contractors that they were not required to pay for the political activities of unions representing them. Citing a need to ensure the "economical and efficient administration and completion of government contracts," Bush required contractors to post notices declaring that their employees could not "be required to join a union or maintain membership in a union in order to retain their jobs" (E.O. 12800, 1992).²⁵ If a company did not comply with the procurement order, the contract could be "cancelled, terminated, or suspended and the contractor declared ineligible for further contracts" (E.O. 12800, 1992).

Bush also prohibited construction contractors from entering into prehire agreements as a condition of securing contracts (E.O. 12818, 1992).²⁶ The procurement order mandated government neutrality. Agencies could not "require or prohibit contractors to enter into or adhere to agreements with one or more labor organizations on the same or related projects, or keep subcontractors from becoming (or refusing) to become or remain signatories of or adhere to agreements with one or more labor organizations" (E.O. 12818, 1992). Labor groups did not challenge the order in federal court because of the election of Clinton, an ally who immediately revoked the order when he entered the White House in 1993.

To deliver benefits to labor groups, President Clinton repealed all the Bush orders and directed all federal agencies to revoke any rules implementing them. In addition, Clinton issued a new order requiring nondisplacement of qualified workers under service contracts (E.O. 12933, 1994). (Under the current law, when a service contract for maintenance of a public building expired and a follow-up contract was awarded for the same service, the new contractor typically hired the majority of the predecessor's employees.) Under the Clinton order, all solicitations and service contracts for public buildings required contractors performing similar services (at the same building) to offer employees under the predecessor contract the right of first refusal of employment (E.O. 12933, 1994).

After failing to persuade Congress to adopt the 1994 Workplace Fairness Act, which would have prohibited companies from permanently replacing striking workers,

25. In *Communication Workers of America v. Beck* (1988), the Supreme Court ruled that workers were not obligated to pay the portion of their union dues used for political advocacy. The 1935 National Labor Relations Act requires the payment of union dues for nonpolitical purposes only.

26. Prehire agreements are similar to collective bargaining agreements, although prehire agreements are usually entered into before any employee is hired.

Clinton prohibited the federal government from contracting with employers who permanently replaced striking workers. In the mid-1990s, Clinton remarked, "One of the things that I have learned in the last two years is that the President can do an awful lot of things by executive orders" (Dodds 2006, 63). Clinton's order affected a range of major federal contractors, including Bridgestone/Firestone, Pirelli Armstrong Tire, Caterpillar, and Diamond Walnuts (E.O. 12954, 1995). Clinton's motivation was to limit the Court's rulings related to *NLRB v. Mackay Radio and Telegraph* (1938), which conferred on employers the right to hire permanent strike replacements.

Clinton, citing the delegation of statutory authority under the FPASA, claimed the intent to protect "the government as a contracting party from harms related to a labor dispute" rather than to regulate employers' use of permanent replacements (Kimmett 1996, 812). Despite the political intent to deliver benefits to organized labor, the Clinton order suggested that the best way to advance the government's interests (in "economy and efficiency") was to contract with private sector businesses that have "stable relationships with their employees" (E.O. 12954, 1995).

In 2001, in a predictable shift to deliver benefits to business, President George W. Bush repealed Clinton's orders and reissued George H. W. Bush's orders, including the order that employees could be required to pay only the share of union costs relating to collective bargaining, contract administration, and grievance adjustment (E.O. 13201, 2001). Bush also reinstated the "preservation of open competition and government neutrality" (E.O. 13202, 2001) and revoked the right of first refusal and allowed for the displacement of qualified workers under service contracts (E.O. 13204, 2001).

In a predictable shift back toward organized labor, President Obama issued four orders in 2009 to reverse the Bush orders.²⁷ As one observer concluded, "Obama's orders change how the government will conduct contracting—demonstrating a pendulum swing away from business and toward labor interests" (McDevitt 2009). Indeed, presidents have influenced business-labor relations by revoking, accepting, or modifying their predecessors' procurement orders (Peckenpaugh 2001). Moreover, the polarization of parties appears to have only increased the willingness of presidents to exercise their unilateral procurement power in the area of labor-management relations.

Pushing the Limits of Procurement: Clinton and a Republican Congress

After the election of a Republican Congress in 1994, Clinton used the power of the purchaser to influence implementation and enforcement of public policy in a wide range of controversial and contested areas, including environmentally preferable procurement; international child labor; gun control; and overall compliance with federal tax, labor, and employment, environment, antitrust, and consumer protection law. Just like his predecessors and his successors, Clinton used procurement rules—additional contract terms

27. These included Economy in Government Contracting (E.O. 13494); Non-Displacement of Qualified Workers under Service Contracts (E.O. 13495); Notification of Employee Rights under Federal Law (E.O. 13496); and Use of Project Labor Agreements for Federal Construction Projects (E.O. 13502).

and conditions—to achieve political and policy goals that otherwise faced grim prospects in a Congress controlled by the other party (Mayer and Price 2002).

In an effort to reduce the use of substances that cause stratospheric ozone depletion, Clinton directed agencies to “revise their procurement practices and implement cost-effective programs to require the use of ozone-depleting substances and to substitute non-ozone-depleting substances” (E.O. 12843, 1993). Clinton argued that as one of the largest consumers of these substances, the federal government could reduce their use and provide leadership in phasing out the use of such substances, in accord with the Montreal Protocol on Substances that Deplete the Ozone Layer, to which the United States was a signatory.

The sharp increase in petroleum prices, experiences with tighter supply, and international instability renewed concern about U.S. dependence on petroleum imports. Thus, three Clinton procurement orders played a key role in developing alternative fuels policies. One strategy to reduce dependence was to use vehicles that run on alternatives to gasoline and diesel fuel (E.O. 12844, 1993). Clinton specifically used procurement orders to provide “a market impetus for the development and manufacture of alternative fueled vehicles, and for the expansion of the fueling infrastructure necessary to support privately owned alternative fueled vehicles.” Under another order, Clinton put forth the goal of reducing the government fleet’s annual petroleum consumption by 20% (by FY 2005), including using alternative fuel vehicles and high-efficiency hybrids (E.O. 13149, 2000). Clinton also required all federal procurement of microcomputers, including personal computers, monitors, and printers, to meet EPA Energy Star requirements for energy efficiency (E.O. 12845, 1993).

In an effort to address international child-labor abuses, Clinton directed agencies to “take actions to enforce the laws prohibiting the manufacture or importation of goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part by forced or indentured child labor” (E.O. 13126, 1999).²⁸ Under the executive order, federal contractors must certify that they have made “a good faith effort to determine whether forced or indentured child labor was used to produce the items listed.”²⁹ However, Clinton, a supporter of free-trade policies, did offer an exemption for countries that were part of the North American Free Trade Agreement (NAFTA) and for signatories to the World Trade Organization’s (WTO) agreement on procurement.

Facing a Republican Congress that refused to act on his Anti-Gang and Youth Violence Act in the mid-1990s, Clinton called on gun manufacturers to install (voluntary) child trigger locks and used presidential directives to mandate child safety locks on all federally issued firearms. This action was significant because the government purchased (and purchases) a lot of guns—for the armed forces, FBI agents, DEA agents, IRS agents, postal inspectors, immigration agents, and park rangers (Clinton 1997).³⁰ The

28. All federal government agencies must consult the list before purchasing, and contractors must certify that child labor was not involved in their products.

29. For more information on E.O. 13126, see U.S. Department of Labor (n.d.).

30. The order initially covered only handguns but was expanded in May 1997 to cover all firearms issued to federal law enforcement officers.

directive did not mandate use of a particular brand or one specific type of safety-lock device (Sipos 2002; U.S. General Accounting Office 1998; see also Spitzer and Pope 2009).

After his 1996 reelection, with Congress controlled by Republicans, Clinton attempted to influence the private sector's compliance with a range of federal tax, labor and employment, environment, antitrust, and consumer protection laws. Vice President Al Gore, the Democrats' 2000 presidential nominee, promised that the president would require all federal agencies to consider contractor compliance with labor laws when making "responsibility determinations" ("Blacklisting Regulations" 2002). At the time, Gore proposed only that the federal government refuse to contract with companies with a history of labor-rights abuses. Under existing rules, Congress required agencies to award contracts only to "responsible" sources (P.L. 98-369). The rules required that all purchases must be made from (and contracts awarded to) "responsible" prospective contractors: an element of being a responsible contractor was to have a "satisfactory record of integrity and business ethics."³¹

The Clinton order required new rules to clarify how contracting officers were to make these "responsibility" determinations. The order was intended to prevent taxpayers from subsidizing contractors who consistently broke the law: chronic violators of labor, environmental, tax, antitrust, or employment laws would be denied the privilege of entering into contracts with the government. Predictably, the directive was supported by labor and consumer groups and opposed by business groups. Opponents coalesced as the National Alliance against Blacklisting, which argued that the Clinton order would give unions inappropriate influence over contracting and could be used as a threatening tool during collective bargaining. For public interest groups, procurement provided an opportunity for the federal government to leverage its buying power to promote "more corporate respect for the law" (Weissman 1999).

The procurement rules, which were to take effect on the last day of the Clinton presidency, specified that companies must have a satisfactory record of integrity and business ethics, including "satisfactory compliance with the law including tax, labor and employment, environment, antitrust and consumer protection laws" (65 *Federal Register* 80256, 2000). Companies that had committed these violations could be disqualified from obtaining contracts. Republicans attempted to impose a moratorium on implementation of the rule, believing that the order would increase the "subjectivity of contract award decisions."³² The House blocked implementation, but the Senate did not act (Gerrard 2001).

31. Under the law, the term "responsible source" means a prospective contractor that has adequate financial resources to perform the contract or the ability to obtain such resources; is able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and government business commitments; has a satisfactory performance record; has a satisfactory record of integrity and business ethics; has the necessary organization, experience, accounting and operational controls, and technical skills or the ability to obtain such organization, experience, controls, and skills; has the necessary production, construction, and technical equipment and facilities or the ability to obtain such equipment and facilities; and is qualified and eligible to receive an award under applicable laws and regulations (41 U.S.C. sec. 43[7][D]).

32. An amendment to HR 4871 (Treasury, Postal Service, and General Government Appropriations Bill).

After Bush won the presidency, he authorized all agencies to postpone implementation of the Clinton “blacklisting” order for six months. The Bush administration cited the lawsuit filed by the Business Roundtable in the U.S. District Court for the District of Columbia, the Chamber of Commerce of the United States, the National Association of Manufacturers, the Associated General Contractors of America, and the Associated Builders and Contractors. The rule was revoked in December 2001. While federal contractors are still required to have a satisfactory record of business ethics and integrity, they do not have to certify their compliance with federal environmental, labor and employment, antitrust, consumer protection, and tax laws.

Almost a decade later, President Obama revisited the Clinton “go-it-alone” procurement strategy. Two of Obama’s allies—John Podesta, the Clinton chief of staff who headed the Obama transition team, and Andy Stern, president of the Service Employees International Union—argued that Obama should use the power of the purchaser to “push up” wages and benefits. According to a proposed Obama “High Road Procurement Policy” (June 25, 2009), “positive weight in the source selection process could be given to bidders based on the labor standards for their workforce” (see Brodsky 2010). This would include whether the bidder pays a livable wage, provides quality, affordable health insurance, an employer-funded retirement plan, and paid sick leave.

Other factors could include the company’s record in complying with tax and labor laws (Brodsky 2010). Obama saw this as a way “to lift more families into the middle class” (Greenhouse 2010). The Chamber of Commerce released a statement saying, “We strongly opposed the Clinton blacklist regulations, and this appears worse than that.” With Republicans gaining political control of the House in 2010 and high unemployment, Obama did not issue a “high road” contracting order (Weigelt 2010).

Procurement and Enforcing Immigration Policy

To exert political influence and control over enforcement of U.S. immigration policy, President Clinton prohibited contracting with companies that “knowingly employ unauthorized alien workers” (E.O. 12989, 1996). Since the passage of the 1986 Immigration Reform and Control Act (IRCA), congressional policy makers have attempted to address the issue of employment of foreign nationals who are in the country illegally or who are legally in the United States but are not authorized to work. Efforts to verify a person’s right to work in the United States were unknown before the passage of IRCA, which set up a paper-based system whereby employers have been required to review employees’ documents, complete I-9 forms, and maintain these records or face fines and penalties (Elsbernd 2010). For the first decade, enforcement of employers’ obligations under IRCA was sporadic and ineffective, leading Congress to make changes with the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). IIRIRA required the attorney general to create programs that would more “efficiently and accurately” verify employees’ work status.

Beginning in 1997, the Immigration and Naturalization Service allowed but did not require employers to use an electronic system (E-Verify) to check new employees’

social security numbers against a database maintained by the Social Security Administration to confirm that the employees were legally permitted to work in the United States. The system also checked the Department of Homeland Security (DHS) databases for immigration information. For a variety of reasons, many employers chose not to use the system. The new order (E.O. 12989, 1996) enabled Clinton to appear tough on illegal immigration and to prohibit unfair employment practices.

After the failure of immigration reform and with an election in 2008, President George W. Bush required federal contractors to verify their employees' work eligibility using E-Verify (E.O. 13465, 2008). Under the Bush order, contracting "only with providers that do not knowingly employ unauthorized alien workers and that have agreed to utilize the DHS electronic employment verification system to confirm the employment eligibility of their workforce will promote 'economy and efficiency' in procurement." In fact, the order was one of 26 immigration-related initiatives that Bush promised to impose after immigration reform failed in Congress.

These rules were scheduled to take effect on January 15, 2009, less than a week before Obama was to take control of the White House. As a result of a pending challenge and a review by the Obama administration, the implementation date of the new rules was postponed four times.³³ President Obama eventually accepted the Bush E-Verify rule and announced that federal contractors, including those receiving stimulus funds, would be required to use E-Verify starting in September 2009 (U.S. Department of Homeland Security 2009; for details on the rules, see Jonas 2009).

Obama made cracking down on firms that hire illegal U.S. residents a central part of his immigration-enforcement policy, and Republicans in Congress supported making E-Verify mandatory for all employers. In sum, the order—based on "economy and efficiency in government procurement"—ensures that the federal government will not use contractors who employ illegal immigrants, because it is a "less stable workforce." On the enforcement of immigration policy, unlike labor-management procurement issues, Clinton, Bush, and Obama were on the same page.

Procurement to Promote Transparency and Accountability

In 2011, the Obama White House circulated an executive procurement order directing "every contracting department and agency" to require federal contractors to "disclose certain political contributions and expenditures," though no such order has yet been issued.³⁴ A string of Supreme Court decisions has freed corporations, labor unions, and other interest groups to participate in elections as long as they operate independently of candidates. As part of a broader effort by Democrats and the White House to limit the influence of interest groups, which played an expanded role in the 2010 midterm elections, Congress tried to address the problem of anonymous spending with the Democracy Is Strengthened by Casting Light on Spending in Elections (DISCLOSE) Act,

33. See *Chamber of Commerce of the United States of America v. Chertoff* (2008).

34. For a leaked draft of the order, see <http://www.govexec.com/pdfs/042111rb.pdf> (accessed February 15, 2013).

which would have countered the influence of undisclosed contributions by requiring groups to show the names of top donors in campaign advertisements. The bill passed the Democratic-controlled House but did not receive a vote in the Senate (Bacon and Farnam 2011).

Bidders on federal contracts have long been required to disclose contributions made directly through formal political action organizations. But proponents of President Obama's draft order remained concerned that the contractor situation has changed since the Supreme Court's decision in *Citizens United v. Federal Election Commission* (2010), striking down limits on indirect campaign contributions through third-party advocacy nonprofits. As proposed, the Obama order would require any entity bidding for a government contract to disclose political contributions to federal candidates or parties made within the past two years that (in aggregate) exceed \$5,000 (Draft E.O. 2011). Under the proposed order, the disclosed information would be available through a searchable, downloadable database on Data.gov. Companies that win federal contracts must certify that they have disclosed the information as a condition of receiving the award. Most importantly, in terms of politics, the order would *not* apply to public sector unions or grantees, which have tended to support Democrats (Brodsky 2010).

Political opposition emerged to the draft order. "This order is a purely political act offered under the benign label of disclosure," claimed Rep. Darrell Issa (R-CA), chairman of the House Oversight and Government Reform Committee. The order would not impose the same requirements on the labor unions or other organizations that support the president. Furthermore, it unnecessarily "politicizes the procurement process" (Brodsky 2010). However, after almost a century of efforts by presidents to use the power of the purchaser for instrumental and strategic advantage, the intent of the order was to signal companies away from contributing to opponents of President Obama in the 2012 election.

Conclusion

Although the Constitution confers legislative power on Congress, presidents have used the power of the purchaser to add contract terms and conditions that reflect independent public policy decisions. Historically, the American president has played a major role in setting government-wide procurement policy in all agencies, and Congress intended the president to play a direct role in supervising the government's management functions. Thus, the power of the purchaser has emerged as a powerful tool in the president's policy arsenal.

When confronting electoral or political problems, presidents have incentives to influence purchasing, effect public policy, and influence private sector behavior. Throughout the twentieth century, presidents used the power of the purchaser to obtain strategic, instrumental advantage for themselves and their core constituents. With the unilateral power to change the terms and conditions of federal contracts (and subcontracts), a president can shift the status quo, and there policy stays unless and until Congress, the courts, voters, or the market effectively respond.

Voters may elect a new president who will reverse or not enforce a particular order, but they are unlikely to choose a candidate based on a procurement order. Congress may enact a statute to repeal the policy, but it must have majorities in both chambers and a two-thirds majority to override a veto. Courts may declare an order unlawful, but they have been deferential to executive authority. For different reasons, Congress, the courts, and federal contractors have acceded in most cases to this power of the purchaser.

In the event that Congress seeks to enlarge or limit presidential authority over federal contractors, Congress could amend FPASA to clarify congressional intent to grant the president broader authority over procurement or limit authority to more narrow “housekeeping” aspects of procurement. Congress also could pass legislation directed at particular requirements of procurement orders. Until then, Congress appears to have granted the president wide latitude—the power of the purchaser—to issue executive orders on federal procurement.

Courts have upheld orders issued under FPASA as long as the requisite nexus exists between the president’s actions and goals of economy and efficiency in procurement (*AFL-CIO v. Kahn* 1979; *Building and Construction Trades Department, AFL-CIO v. Allbaugh* 2002, 30; Burrows and Manuel 2011; *Chamber of Commerce v. Napolitano* 2009; *Contractors Association of Eastern Pennsylvania v. Secretary of Labor* 1971, 170; *UAW-Labor Employment and Training Corp. v. Chao* 2003). While the “close nexus” test provides parameters for procurement power, the courts have also placed limits when presidential procurement authority is used to regulate labor-management issues.

The major case involved a conflict between President Clinton’s executive order—debarment of contractors who hired permanent replacements for striking workers—and the 1935 National Labor Relations Act (NLRA) (*Chamber of Commerce v. Reich* 1996).³⁵ The court concluded that the order was “regulatory” in nature because it imposed requirements on contractors rather than protected 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 (Burrows and Manuel 2011).

Ultimately, any private sector firm may choose not to contract with the federal government, but many companies are highly dependent on federal purchasing. Moreover, while government contracts are not perfect substitutes for private market contracts, they offer certain advantages to the private sector. First, the risk of insolvency is substantially lower, and the government as a monopoly provider of many goods and services (i.e., military hardware) is in a position to offer contracting parties access to monopoly profits not available in private markets.

Second, many firms may pass the general costs of additional procurement rules along to the government in the form of higher bids for contracts. If federal contractors expect an adequate profit from their sales to the government, any additional socio-economic or other unrelated procurement rules might be borne by the government (or

35. For an excellent review of legal issues and current case law, see Burrows and Manuel (2011).

consumers) in the form of higher contract or retail prices. However, central elements of the contract are still written by the government, whose superior bargaining power—if not the requirements of law—leave a contractor no choice with respect to its terms.

In sum, when unable to convince Congress to enact particular policies, presidents can and often do strike out on their own. Executive procurement orders are “effective devices for paying political debts, demonstrating action for a constituency, responding to adversaries, or sending political signals—real [and] symbolic” (Cooper 2002, 48). Presidents have used the (unilateral) power of the purchaser to implement some of their most important policy initiatives, basing them on a combination of constitutional and statutory powers that is thought to be available. The president can exercise political control and influence over procurement, over administrative agencies, and over private sector firms that depend on the federal government for business. Procurement—and the power of the purchaser—must be viewed as an additional powerful weapon of coercion and redistribution in the president’s policy-making arsenal.

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