The Procurement Power

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GOVERNING FOR IMPACT

I. INTRODUCTION

For decades, the President has issued requirements for government contractors. The settled understanding has been that these rules are an appropriate exercise of the President's statutory authority over procurement if they bear a sufficiently close nexus to the aims of increasing the economy and efficiency of government contracting. So long as that nexus is present, the President can set contractor rules that advance other important economic and social policies. For instance, Presidents have used the procurement power to prohibit discrimination by contractors, mandate that contractors provide paid sick leave, and raise the minimum wage contractors must pay.

Recent events have unsettled that understanding. In light of an unprecedented Biden Administration order requiring federal contractors' employees to receive the Covid vaccine, the Fifth, Sixth, and Eleventh Circuits have questioned the scope of the President's power to set rules for contractors. These courts have sought to narrow the reach of the Federal Property and Administrative Services Act of 1949 ("FPASA") — long understood as the source of the President's procurement power — and invoked the major questions doctrine as an extratextual limitation on the President's authority.

Although the threat represented by these decisions is real, it should not deter the Administration from issuing contractor rules. The adverse FPASA decisions, issued by the nation's most conservative courts of appeals, were, at least in part, likely a response to the contractor vaccination mandate's unusual scope and subject matter. The reasoning in these opinions, if adopted broadly, would invalidate many decades of presidential practice. We doubt most courts would be interested in taking that radical and unlikely step. To that end, federal courts have largely approved the other signature Biden Administration contractor rule — that federal contractors pay a $15 minimum wage.

The Administration should not strip itself of the procurement power authority by failing to use it. Instead, the administration should take prudent steps to better inoculate contractor rules from legal challenge. This guidance offers concrete suggestions for how to mitigate the risk of a contractor rule being stuck down. The Administration should consider:

- Building strong administrative records that include factual findings
- Justifying new rules with reference to the economy and efficiency of the government contracting system as a whole

- Emphasizing and analogizing to past procurement practice
- Including severability clauses in contractor rules when appropriate
- Explore a constitutional justification for contractor rules.

The procurement power is an important and powerful tool to advance economic justice for the many Americans who work for federal contractors. The Administration should not shy away from using that power unless it is forced to. To the extent procurement orders face judicial headwinds, that is consistent with other, broader challenges to good governance. But just as the Administration has not stopped issuing bold regulations in response to the advent of the major questions doctrine, neither should it preemptively stop using its procurement power. In other contexts, the Administration recognizes that not only are ambitious regulations to protect workers and families important on their own terms, they also foster compliance even when challenged in court and signal to the American people how government can work for them. The same is true for the procurement power.

II. BACKGROUND

Statutory authority

The Administration has the power, through awarding contracts, to decide who to do business with. Consequently, it may establish rules and set conditions for its contractors. FPASA[1] has long been understood as the principal source of that authority.[2] FPASA was enacted after World War II in response to calls to streamline and centralize the federal procurement process.[3] To that end, it specifies that its "purpose . . . is to provide the Federal Government

[1] Pub. L. 81-182, 63 Stat. 377 (1949). FPASA "covers two . . . portions of the United States Code: subtitle I of Title 40, and most of Title 41, subtitle I, division C." *Georgia v. President of the United States*, 46 F.4th 1283, 1290 (11th Cir. 2022).

[2] FPASA is also called the "Procurement Act," *see id.*, or the "Property Act," *see Commonwealth v. Biden*, 57 F.4th 545, 547 (6th Cir. 2023).

[3] In 1949, the so-called Hoover Commission, convened by Harry Truman and chaired by Herbert Hoover, recommended an overhaul of federal procurement with the goal of improving the government's "dispatch," "internal coordination and harmony," "consistency of administrative policy," and "economy of operation." Concluding Report to the Congress by the Commission on Organization of the Executive Branch of Government 3 (May 1949).

with an economical and efficient system for," among other things, "[p]rocuring and supplying property and nonpersonal services."[4] "The President may prescribe policies and directives that the President considers necessary to carry out" FPASA.[5]

Historical uses of the procurement power

For many decades, Presidents have used their power over procurement to set rules would-be contractors must follow to obtain federal business. Those rules have frequently advanced important social and economic policies. For instance, Presidents since Franklin Delano Roosevelt have, by executive order, prohibited federal contractors from discriminating on the basis of certain protected traits.[6] While early anti-discrimination orders were founded on the President's war powers, the D.C. Circuit has observed that "only the FPASA could have provided support for the Executive action" after the end of the Korean War in 1953.[7]

Presidents have advanced many other policy goals through contractor rules. President Carter required federal contractors to adhere to a series of anti-inflationary price and wage practices.[8] President George W. Bush required contractors to notify employees of their right not to join a union or pay mandatory union dues for costs unrelated to representational activities;[9] barred federal agencies and contractors from requiring or prohibiting the use of project labor agreements in federal projects;[10] and mandated contractors' use of the E-Verify system to confirm their employees' authorization to work in the United States.[11] President

[4] 40 U.S.C. § 101(1).
[5] 40 U.S.C. § 121(a).
[6] *See, e.g.*, Executive Order 8802, 6 Fed. Reg. 3109 (1941) (barring racial discrimination by agencies, unions, and companies doing war-related work); Executive Order 9346, 8 Fed. Reg. 7183 (1943) (requiring federal contracts to have antidiscrimination provisions); Executive Order 10479, 18 Fed. Reg. 4899 (1953) (requiring agency heads to "obtain[] compliance" with antidiscrimination provisions); Executive Order 10925, 26 Fed. Reg. 1977 (1961) (setting mandatory text for contractual antidiscrimination provisions); Executive Order 11246, 30 Fed. Reg. 12319 (1965) (reaffirming antidiscrimination policy, requiring contractors to adopt affirmative action policies, and instituting recordkeeping requirements); Executive Order 11478, 34 Fed. Reg. 12985 (1969) (extending Executive Order 11246 to bar sex discrimination); Executive Order 13672, 79 Fed. Reg. 42971 (2014) (extending Executive Orders 11246 and 11478 to bar sexual orientation and gender identity discrimination).
[7] *AFL-CIO v. Kahn*, 618 F.2d 784, 790 (D.C. Cir. 1979); *see also Contractors Ass'n of E. Pa. v. Sec'y of Lab.*, 442 F.2d 159, 170 (3d Cir. 1971) ("While the orders do not contain any specific statutory reference other than the appropriations statute, they would seem to be authorized by the broad grant of procurement authority." (citations omitted)).
[8] Executive Order 12092, 43 Fed. Reg. 51375 (1978).
[9] Executive Order 13201, 66 Fed. Reg. 11221 (2001).
[10] Executive Order 13202, 66 Fed. Reg. 11225 (2002).
[11] Executive Order 13465, 73 Fed. Reg. 33285 (2008).

Obama required federal contractors to provide paid sick leave to employees.[12] And Presidents Obama, Trump, and Biden all regulated the minimum hourly wage federal contractors must pay.[13]

Beyond these high-profile executive actions, the Federal Acquisition Regulation ("FAR") contains numerous rules for federal contracts — many of which aim at important social and economic values.[14] For instance, in its "Socioeconomic Programs" subchapter, the FAR — among many other things — requires contractors to take affirmative action to employ veterans[15] and people with disabilities,[16] subjects certain contractors to provisions of the Privacy Act,[17] and mandates that contractors "provide a drug-free workplace."[18] The FAR also requires contractors, where applicable, to establish a "Contractor Code of Business Ethics and Conduct" encompassing, among other things, ethics awareness and compliance programs, auditing to detect criminal conduct, and disclosure of certain wrongdoing to the government;[19] screen for conflicts of interest;[20] set "goals" for engaging small businesses — including "veteran-owned," "service-disabled veteran-owned" and "women-owned" small businesses — as subcontractors;[21] and refrain from hiring people serving prison sentences.[22] These are just a few of the scores of rules and conditions the federal government has set for its counterparties.

Judicial precedent

Federal courts have interpreted FPASA to confer a broad power to set rules and conditions for federal contractors. In the early going, federal courts signaled that FPASA allowed the President to prohibit racial discrimination by federal contractors.[23] The Third Circuit, for

[12] Executive Order 13706, 80 Fed. Reg. 54697 (2015).
[13] Executive Order 13658, 79 Fed. Reg. 9851 (2014); Executive Order 13782, 82 Fed. Reg. 15607 (2017); Executive Order 14026, 86 Fed. Reg. 22835 (2021).
[14] *See generally* C.F.R. Title 48.
[15] 48 C.F.R. § 22.1302.
[16] 48 C.F.R. § 22.1401.
[17] 48 C.F.R. § 24.102.
[18] 48 C.F.R. § 23.504.
[19] 48 C.F.R. § 3.1003; 48 C.F.R. § 52.203–13.
[20] 48 C.F.R. § 3.1103; 48 C.F.R. § 52.203–16.
[21] 48 C.F.R. § 52.219–9; 48 C.F.R. § 19.704.
[22] 48 C.F.R. § 22.201; 48 C.F.R. § 52.222–3.
[23] *See Farmer v. Phila. Electric Co.*, 329 F.2d 3, 8 (3d Cir. 1964) ("In view of [FPASA] . . . we have no doubt that the applicable executive orders and regulations have the force of law."); *Farkas v. Tex. Instruments, Inc.*, 375 F.2d 629, 633 n.1 (5th Cir. 1967) ("We would be hesitant to say that the antidiscrimination provisions of Executive Order No. 10925 are so unrelated to the establishment of 'an economical and efficient system for . . . the procurement and supply' of property and services that the order should be treated as issued without statutory authority. . . . We,

instance, upheld Department of Labor regulations requiring certain bidders for federal and federally funded contracts to adopt affirmative action policies.[24] Those regulations issued pursuant to Executive Order 11246 — the longstanding presidential order barring discrimination by federal contractors.[25] The court found that the long line of presidential prohibitions on racial discrimination by contractors "would seem to be authorized by the broad grant of procurement authority" in FPASA because "it is in the interest of the United States in all procurement to see that its suppliers are not over the long run increasing its cost and delaying its programs by excluding from the labor pool available minority workmen."[26]

In the leading case, *AFL-CIO v. Kahn*, the D.C. Circuit found FPASA to embody a broad grant of authority.[27] "The statute," the court observed, "was designed to centralize Government property management and to introduce into the public procurement process the same flexibility that characterizes such transactions in the private sector. These goals can be found in the terms 'economy' and 'efficiency' which appear in the statute."[28] And "'[e]conomy' and 'efficiency' are not narrow terms; they encompass those factors like price, quality, suitability, and availability of purchase that are involved in all acquisition decisions."[29] The President, empowered to set policy implementing FPASA's provisions, thus has "particularly direct and broad-ranging authority over those larger administrative and management issues that involve the Government as a whole" — an "authority [that] should be used in order to achieve a flexible management system capable of making sophisticated judgments in pursuit of economy and efficiency."[30] Applying these principles, the court upheld President Carter's order seeking to curb inflation by requiring contractors to limit the prices they charged and the wages they paid because "there is a sufficiently close nexus" between that "procurement compliance program" and the "values of 'economy' and 'efficiency.'"[31] In making that determination, the court acknowledged "the prospect of Government contracts being diverted from low bidders . . . to higher bidders," but found the likelihood that an anti-inflationary policy would hold down costs in the long run sufficient to establish a nexus between the new rules and FPASA's aims.[32] While the court emphasized that FPASA did not

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therefore, conclude that Executive Order No. 10925 was issued pursuant to statutory authority, and has the force and effect of law." (citation omitted)).

[24] *Contractors Ass'n*, 442 F.2d at 163–66.

[25] *Id.* at 170–71.

[26] *Id.* at 170.

[27] 618 F.2d 784 (1979).

[28] *Id.* at 787–88.

[29] *Id.* at 789.

[30] *Id.*

[31] *Id.* at 792.

[32] *Id.* at 792–93.

"write a blank check for the President to fill in at his will,"[33] it also rejected Judge MacKinnon's dissenting view that FPASA concerned only the "comparatively narrow authority to manage the procurement of federal government property, supplies, and services" to achieve "uniformity in procurement decisions."[34]

FPASA thus authorizes contractor rules bearing a "sufficiently close nexus" to efficiency and economy.[35] And in determining whether the government had demonstrated that nexus, *Kahn* assumed a deferential posture toward the government's rationale. Applying *Kahn*, many decisions have sustained FPASA orders. In *UAW-Labor Employment and Training Corp. v. Chao*, for instance, the D.C. Circuit upheld an executive order requiring employers to notify workers of their rights not to join a union or pay mandatory dues for costs unrelated to representational activities.[36] According to the government, "[w]hen workers are better informed of their rights, including their rights under the Federal labor laws, their productivity is enhanced."[37] That was enough for the court — the link between the order and FPASA's goals "may seem attenuated . . . , and indeed one can with a straight face advance an argument claiming opposite effects or no effects at all," but "under *Kahn*'s lenient standards, there is enough of a nexus."[38] Likewise, in *Chamber of Commerce of the United States v. Napolitano*, the District of Maryland upheld an executive order requiring federal contractors to confirm their employees' work authorization using the E-Verify system.[39] Accepting the government's justification that E-Verify would increase efficiency by decreasing the likelihood of federal contractors facing immigration enforcement actions, the court found the President acted within his "broad discretion to regulate government contracting under the Procurement Act."[40] More recently, the Tenth Circuit in *Bradford v. Department of Labor* upheld President Biden's executive order setting a $15 minimum wage for federal contractors.[41] The court found that "the DOL's rule has a sufficiently close nexus to the values of economy and efficiency," accepting the government's rationale that a higher wage "ehanc[es] worker productivity and generat[es] higher-quality work by boosting workers'

[33] *Id.* at 793; *see also id.* at 796–97 (Bazelon, J., concurring); *id.* at 797 (Tamm, J., concurring).
[34] *Id.* at 800 (MacKinnon, J., dissenting).
[35] *Id.* at 792.
[36] 325 F.3d 360, 361 (D.C. Cir. 2003).
[37] *Id.* at 366 (quoting Executive Order 13201, 66 Fed. Reg. 11211 (2001)).
[38] *Id.* at 366–67.
[39] 648 F. Supp. 2d 726, 738 (D. Md. 2009).
[40] *Id.* at 737–38.
[41] 101 F.4th 707, 714 (10th Cir. 2024).

health, morale, and effort; reducing absenteeism and turnover; and lowering supervisory and training costs" — and that these benefits "will offset potential costs."[42]

Consistent with the D.C. Circuit's recognition that FPASA does not "write a blank check,"[43] however, courts have struck down contractor rules. The President, these decisions hold, may not enforce an FPASA order to the extent it conflicts with another statute. For instance, the Fifth Circuit held that Executive Order 11246 could not be read to prohibit an employer's use of a bona fide seniority system — even if such a system perpetuated racial discrimination — "because Congress," in Title VII, "declared for a policy that a bona fide seniority system shall be lawful."[44] Likewise, the D.C. Circuit invalidated an executive order barring federal contractors from hiring permanent replacements for striking workers because the National Labor Relations Act ("NLRA") permitted businesses to do so.[45] Rejecting the government's argument that the FPASA order ought to supersede the NLRA, the D.C. Circuit — mindful of the presumption against statutory repeals by implication and the canon that a specific statute takes precedence over a general one — held that "[t]he Procurement Act was designed to address broad concerns quite different from the more focused question of the appropriate balance of power between management and labor in collective bargaining" dealt with by the NLRA.[46] Nevertheless, the court made clear that absent "any conflict with another statute," "[t]he President's authority to pursue 'efficient and economic' procurement" permits "measures," like Executive Order 11246, that "reach beyond any narrow concept of efficiency and economy in procurement" and represent "policy views that are directed beyond the immediate quality and price of goods and services purchased."[47] Emphasizing the preemption point, a district court preliminarily enjoined an Obama Administration rule requiring contractors to disclose their labor law violations and federal contracting officers to consider those violations when awarding contracts.[48] The court found that the rule likely was preempted by a range of federal labor laws, compelled

[42] *Id.* at *8 (internal quotation marks omitted). The court cited *Kahn* for the proposition that a rule can promote efficiency and economy under FPASA even if it might increase short-run costs. *Id.* The court also rebuffed claims that (1) the mandated wage increase was preempted by statute and implicated the major questions doctrine and (2) FPASA violated the nondelegation doctrine. *Id.* at *9–15. *But see Texas v. Biden*, 2023 WL 6281319 (S.D. Tex. Sept. 26, 2023) (striking down the minimum wage order on FPASA and major questions doctrine grounds).

[43] *Kahn*, 618 F.2d at 793.

[44] *United States v. E. Tex. Motor Freight Sys., Inc.*, 564 F.2d 179, 185 (5th Cir. 1977); *see also United States v. Trucking Mgmt.*, 662 F.2d 36, 42 (D.C. Cir. 1981) ("We find it highly unlikely that Congress would have impliedly approved Executive interference with the same bona fide seniority systems that it had deliberately immunized under [Title VII].").

[45] *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1332–34 (D.C. Cir. 1995).

[46] *Id.* at 1333.

[47] *Id.* at 1333, 1337.

[48] *See Associated Builders & Contractors of Se. Tex. v. Rung*, 2016 WL 8188655, at *1–2 (E.D. Tex. Oct. 24, 2016); *see also* Executive Order No. 13673, 79 Fed. Reg. 45309 (2014), *rescinded by* Executive Order 13782, 82 Fed. Reg. 15607 (2017).

contractor speech in violation of the First Amendment, and violated due process, the Administrative Procedure Act, and the Federal Arbitration Act.[49] Similarly, *Chrysler Corp. v. Brown* rejected Department of Labor regulations issued under Executive Order 11246 requiring federal contractors to disclose to the government "reports and other information about their affirmative-action programs and the general composition of their work forces" that could then be subject to public release.[50] A separate statute, the Trade Secrets Act, barred such disclosures, and the Court held that the regulations did not fall into a narrow exception to that prohibition.[51]

Nor may an agency adopt a contractor requirement if it fails to demonstrate "a reasonably close nexus [to] the efficiency and economy criteria of the Procurement Act."[52] For instance, the Fourth Circuit rejected the application of Executive Order 11246 (the principal executive order barring discrimination by contractors) to an underwriter of "workers' compensation insurance for many companies that contract with the government."[53] It noted the absence of "administrative findings" establishing a "connection between the cost of workers' compensation policies" and "any increase in the cost of federal contracts that could be attributed to discrimination by these insurers."[54]

III. RECENT DEVELOPMENTS

The Biden Administration has pursued two signature FPASA initiatives — a broad mandate requiring federal contractors to ensure their employees receive Covid vaccines and an increase in contractors' minimum wage. Several courts, relying on a narrow construction of FPASA and the major questions doctrine, rejected the contractor vaccination mandate. The minimum wage rule has fared better.

[49] *Rung*, 2016 WL 8188655, at *1–12.
[50] 441 U.S. 281, 307–08 (1979).
[51] *Id.* at 295–307. The Court expressly declined to pass on whether FPASA justified Executive Order 11246. *Id.* at 305–06.
[52] *Liberty Mut. Ins. Co. v. Friedman*, 639 F.2d 164, 170 (4th Cir. 1981).
[53] *Id.* at 166.
[54] Id. at 171–72.

Covid vaccination mandate

In September 2021, President Biden ordered all federal contractors to require their employees to be vaccinated against Covid.[55] Specifically, he required that all executive agencies include in their contracts a clause requiring contractors and subcontractors to follow safety guidance issued by the Safer Federal Workforce Task Force, and he directed the Office of Management and Budget ("OMB") to determine whether that guidance "will promote economy and efficiency in Federal contracting."[56] The Task Force then issued guidance that contractors ensure that "covered" employees receive vaccinations and observe certain masking and social distancing protocols.[57] OMB — first in a one-paragraph determination,[58] and then in a longer analysis[59] — found that the guidance would "improve[] economy and efficiency by reducing absenteeism and decreasing labor costs for contractors and subcontractors working on or in connection with a Federal Government contract."[60] This broad FPASA mandate, though upheld by the Ninth Circuit in a now-vacated decision, was rejected by the Fifth, Sixth, and Eleventh Circuits before the Administration rescinded it.[61]

In *Commonwealth v. Biden*, the Sixth Circuit held that the contractor vaccination mandate exceeded the President's power under FPASA.[62] The court began with remarks on the "stunning" scope of the order, which applied not just to contractors themselves, but to a wide range of contractor employees:

> "Covered contractors" include both prime and subcontractors; covered employees include anyone working on or "in connection with" a covered contract, *or* at a covered workplace; and a "covered workplace" includes anywhere even a single employee works on or, again, "in connection with," a covered contract, whether indoors or outdoors. The upshot is that the President's order effectively mandates vaccination for tens of millions of Americans.[63]

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[55] Executive Order 14042, 85 Fed. Reg. 50985 (2021).
[56] *Id.* § 2(a), (c).
[57] Safer Federal Workforce Task Force, COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors (Sept. 24, 2021), https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc_20210922.pdf.
[58] Determination of the Promotion of Economy and Efficiency in Federal Contracting Pursuant to Executive Order No. 14042, 86 Fed. Reg. 53691 (2021).
[59] Determination of the Acting OMB Director Regarding the Revised Safer Federal Workforce Task Force Guidance for Federal Contractors and the Revised Economy & Efficiency Analysis, 86 Fed. Reg. 63418 (2021).
[60] 86 Fed. Reg. at 53962; *see also* 86 Fed. Reg. at 63418.
[61] *See* Executive Order 14099, 88 Fed. Reg. 30891 (2023).
[62] 57 F.4th 545, 547 (6th Cir. 2023).
[63] *Id.* at 547 (citation omitted).

In striking down the order, the court took a narrow view of FPASA, rejecting *Kahn* and its progeny out of hand.[64] In contrast to those decisions' rule that FPASA authorizes the President to issue contractor rules aimed at the statute's purposes of efficiency and economy, the Sixth Circuit held that FPASA only "empowers the President to issue directives necessary to effectuate the . . . Act's substantive provisions, not its statement of purpose."[65] Only through those substantive provisions, the court reasoned, did "Congress cho[o]se the means by which to pursue the ends" of efficiency and economy.[66] The court suggested that the contrary reading — broadly authorizing presidential action to effect FPASA's purposes — would (1) raise major questions doctrine concerns and (2) at most permit the President to "make contract*ing* more efficient," not "make contract*ors* more efficient."[67] The court was unpersuaded that decades of presidential practice and case law — and Congress's repeated reenactment of FPASA against that legal backdrop — counseled a different result.[68]

The Eleventh Circuit took a similar tack in *Georgia v. President of the United States*, holding that FPASA does not "grant the President free-wheeling authority to issue any order he wishes relating to the federal government's procurement system" but instead authorizes him to carry out FPASA's substantive provisions, which are "quite specific in setting out the procurement-related authority of the GSA Administrator, executive agencies, and other officials."[69] To that end, the court held that FPASA only "establishes a framework through which agencies can articulate specific, output-related standards to ensure that acquisitions have the features they want."[70] A broader reading, the court made clear, would implicate the major questions doctrine.[71] Like the Sixth Circuit, the Eleventh Circuit (1) concluded that FPASA's purpose provision "is not an operative component of the subtitle" the President is authorized to "carry out,"[72] (2) rejected as "untenable" the prevailing "nexus test,[73] and (3) found past presidential practice to be factually inapposite and legally unpersuasive. In

[64] *Id.* at 553.
[65] *Id.* at 551.
[66] *Id.* at 552.
[67] *Id.* at 552–53 ("[T]he most natural reading of [FPASA] is that it authorizes the President to implement systems making the government's entry into contracts less duplicative and inefficient." (internal quotation marks and citations omitted)).
[68] *Id.* at 554–55 (characterizing early FPASA orders as dealing with "the bread-and-butter of procurement," while noting that the more ambitious executive orders barring discrimination by contractors did not expressly rely on FPASA).
[69] 46 F.4th 1283, 1293 (11th Cir. 2022).
[70] *Id.* at 1295.
[71] *Id.* at 1295–96 ("[T]he highly consequential power asserted here" — to make rules for contractors aimed generally at efficiency and economy — "lies beyond what Congress could reasonably be understood to have granted." (internal quotation marks omitted)).
[72] *Id.* at 1298.
[73] *Id.* at 1299–1300.

partial dissent, Judge Anderson reasoned that FPASA's text, historical practice, long standing precedent, and Congress's reenactments of FPASA without change all mean that the President may issue contractor rules aimed at fostering efficiency and economy — and that the contractor vaccination mandate was such a rule.[74] Judge Anderson also rejected the majority's invocation of the major questions doctrine.[75]

The Fifth Circuit, in *Louisana v. Biden*, reached the same destination by a different road.[76] It appeared to accept that "courts have generally landed on a lenient standard" of "the scope of presidential authority under" FPASA, "under which the President must demonstrate a sufficiently close nexus between the requirements of the executive order and the values of economy and efficiency."[77] Instead of paring back the "statutory text['s]" "nearly unlimited" breadth, the Fifth Circuit instead went looking for "extra-statutory limitations on the President's authority under" FPASA.[78] It found one in the major questions doctrine, holding that "[t]o allow this mandate to remain in place would be to ratify an enormous and transformative expansion in the President's power under" FPASA.[79] In the court's view, the contractor vaccine mandate was substantially broader and more impactful than past FPASA practice — in particular because it governed individual employees, not just contractors, and its effects extended beyond the "end of the work day."[80] The court acknowledged that the government has a freer hand when setting rules for its contractors than when regulating the public, but held that "the vast scope of its mandate belies th[e] contention" that the government was acting in its proprietary capacity as a buyer.[81] Judge Graves dissented, arguing that "this is not an enormous and transformative expansion in regulatory authority, but rather is a standard exercise of the federal government's proprietary authority."[82] And, responding to the majority's fears about FPASA's apparent breadth, Judge Graves explained economic and political "factors would prevent the President from handicapping the contractor workforce with extreme contractual terms" — if the President did so, "he or she would hear from the people or from Congress."[83] Here, though, a vaccine mandate was "in the mainstream of American businesses."[84]

[74] *Id.* at 1309–13 (Anderson, J., dissenting).
[75] *Id.* at 1313–17.
[76] 55 F.4th 1017 (5th Cir. 2022).
[77] *Id.* at 1026 (internal quotation marks omitted).
[78] *Id.* at 1027.
[79] *Id.* at 1031 (internal quotation marks omitted).
[80] *Id.* at 1030–31 (internal quotation marks omitted).
[81] *Id.* at 1032–33.
[82] *Id.* at 1038 (Graves, J., dissenting).
[83] *Id.* at 1039.
[84] *Id.* at 1039–40.

The Ninth Circuit upheld the contractor vaccination mandate. In *Mayes v. Biden*, the court rebuffed a range of challenges.[85] It first rejected the application of the major questions doctrine. In the court's view, the doctrine could not bar the President — "the most democratic and politically accountable figure official in government" — "from exercising lawfully delegated power."[86] Beyond that, the court concluded that the mandate was not a "transformative expansion" of "regulatory authority" both because it was an exercise of the government's power as proprietor, not a regulator, and it fit within a long tradition of FPASA orders setting rules for federal contractors.[87] Next, the government had identified a sufficiently close nexus between the mandate and FPASA's economy and efficiency goals.[88] The court disagreed with the Sixth and Eleventh Circuits' narrow reading of FPASA, explaining that "prescribing vaccination-related steps that contractors must take in order to work on government contracts would directly promote an economical and efficient 'system' for both procuring services and performing contracts" and concluding that the vaccination mandate was of a piece with earlier executive orders closely tied "'to the ordinary hiring, firing, and management of labor.'"[89] The court closed by dismissing arguments that FPASA violated the nondelegation doctrine ("[t]he Procurement Act has a clear intelligible principle that easily clears the low bar" of nondelegation cases) and offended federalism principles ("the federal government undisputedly has the power to regulate the performance of federal contracts").[90] After the Administration rescinded the contractor vaccination mandate,[91] however, the Ninth Circuit vacated *Mayes* as moot.[92]

Minimum wage mandate

President Biden issued another major FPASA order — a $15 minimum wage requirement for federal contractors. That rule has fared well in court. The Tenth Circuit, the only court of appeals to have ruled on the minimum wage mandate so far, upheld it.[93] It relied on the longstanding understanding of the procurement power, holding that the minimum wage mandate bore a "sufficiently close nexus to the values of economy and efficiency" because the government rationally concluded it would "enhanc[e] worker productivity and generat[e] higher-quality work by boosting workers' health, morale, and effort; reducing absenteeism

[85] 67 F.4th 921 (9th Cir. 2023). The Ninth Circuit reversed the district court's grant of a preliminary injunction against the contractor vaccination mandate. *See Brnovich v. Biden*, 562 F. Supp. 3d 123 (D. Ariz. 2022).
[86] *Id.* at 933 (internal quotation marks omitted).
[87] *Id.* at 935–39 (internal quotation marks omitted).
[88] *Id.* at 940.
[89] *Id.* at 942–43 (quoting *Commonwealth*, 23 F.4th at 607).
[90] *Id.* at 942–43.
[91] Executive Order 14099, 88 Fed. Reg. 30,891 (2023).
[92] *Mayes v. Biden*, 89 F.4th 1186 (9th Cir. 2023).
[93] *Bradford*, 101 F.4th at 714.

and turnover; and lowering supervisory and training costs" — a long-term benefit that the government reasonably predicted would outweigh any short-term costs.[94] It also observed that the Obama and Trump Administrations, pursuant to the longstanding view of the procurement power, had also regulated the contractor minimum wage.[95] The Tenth Circuit batted away a series of extrastatutory challenges to the minimum wage mandate, including that it was preempted by other federal wage statutes, violated the major questions doctrine, and that FPASA — at least if construed broadly — violated the nondelegation doctrine.[96]

In the district courts, the mandate has a one-and-one record. The District of Arizona upheld it as a straightforward exercise of the President's FPASA authority, rejecting major questions and federalism objections.[97] The Southern District of Texas, in an opinion by Judge Tipton, rejected the mandate, echoing the analyses the Fifth, Sixth, and Eleventh Circuits applied to the contractor vaccination mandate — that "the President's authority under the Procurement Act is a supervisory role of directing subordinate executive actors as they carry out the Procurement Act's specific provisions," that FPASA "does not confer authority for the President to decree broad employment rules, and that the minimum wage mandate ran afoul of the major questions doctrine.[98] Both of these decisions are pending on appeal.

IV. ADVICE FOR POLICYMAKERS

The Administration should act boldly despite recent setbacks

The President's power to set rules for federal contractors under FPASA faces new threats. The Sixth and Eleventh Circuits have held that the President may only issue orders carrying out FPASA's "substantive" provisions, not orders broadly pursuing economy and efficiency in federal contracting. The Fifth Circuit refused to yield to FPASA's broad grant of authority, instead searching out an "extra-statutory" ground to limit the procurement power — an aggressive version of the major questions doctrine.[99] And at least one judge has made an

[94] *Id.* at 721 (internal quotation marks omitted).
[95] *Id.* at 714–715.
[96] *Id.* at 723–730. Judge Eid dissented on the ground that FPASA was an impermissible delegation of legislative authority. *Id.* at 733–742 (Eid, J., dissenting).
[97] *Arizona*, 2023 WL 120966, at *5–9.
[98] *Texas*, 2023 WL 6281319, at *8–9, *10–13 (internal quotation marks and alterations omitted).
[99] *Louisiana*, 55 F.4th at 1025, 1028; *see also Farkas*, 375 F.2d at 632 n.1 (stating in dicta that a contractor nondiscrimination order was a valid exercise of statutory authority).

even graver argument against the procurement power — that FPASA, as traditionally understood, represents an unconstitutional delegation of legislative power.[100]

However, FPASA is the federal government's best tool to set conditions and rules for its contractual counterparties. Given both the share of the economy government contractors represent and the federal government's authority to decide with whom it will do business, the Administration should be loath to cast FPASA aside prematurely. In addition to these policy considerations, there are several legal reasons why these developments should not deter the Administration from continuing to use the procurement power to set important rules for federal contractors.

First, the adverse decisions should be understood as reactions to the contractor vaccination mandate, which was unusual in several ways. Both the Sixth and Eleventh Circuits, in propounding narrow readings of FPASA, emphasized early and often the sheer breadth of the contractor vaccination mandate — in particular, that it applied to employees rather than just employers and required an irreversible medical treatment — as an indication that the President was not really exercising FPASA's proprietary power, but instead regulating the public.[101] To that end, the Fifth, Sixth, and Eleventh Circuits all invoked the major questions doctrine in rejecting the mandate.[102] The Sixth Circuit also suggested procedural irregularities that may have increased the mandate's vulnerability.[103] Beyond that, the contractor vaccination mandate was an aggressive move on a charged topic. Indeed, other Biden Administration efforts to mandate Covid vaccination failed in court.[104] All of these circumstances created a uniquely vulnerable FPASA rule. It would be an unforced error to overread the contractor vaccination mandate's demise — in the three most conservative courts of appeals — as a death knell for FPASA generally.

That is because — second — the decisions striking down the contractor vaccination mandate represent such a radical break with decades of judicial and bipartisan executive consensus that less extreme courts are unlikely to follow them. The overwhelming weight of the case law, stretching back fifty years, holds that the Administration's FPASA power is broad. According to the D.C., Third, Fourth, Tenth, and (briefly) Ninth Circuits, the President may issue contractor rules that have a "sufficiently close nexus" or a "demonstrable relationship"

[100] *Bradford*, 101 F.4th at 733–42 (Eid, J., dissenting).
[101] *Commonwealth*, 57 F.4th at 548; *Georgia*, 46 F.4th at 1297; *see also Louisiana*, 55 F.4th at 1031.
[102] *Commonwealth*, 57 F.4th at 552; *Georgia*, 46 F.4th at 1295–96.
[103] Commonwealth, 57 F.4th at 547–48.
[104] *See Nat'l Fed'n of Indep. Bus. v. Dep't of Labor*, 595 U.S. 109 (2022); *Feds for Med. Freedom v. Biden*, 63 F.4th 366 (5th Cir. 2023) (en banc), *vacated as moot*, *Biden v. Feds for Med. Freedom*, 144 S. Ct. 480 (2023); *Doster v. Kendall*, 54 F.4th 398 (6th Cir. 2023), *vacated as moot*, *Kendall v. Doster*, 144 S. Ct. 481 (2023).

to FPASA's economy and efficiency goals.[105]The Fifth, Sixth, and Eleventh Circuits' decisions, taken on their own terms, signal what would amount to the end of the procurement power. If the President's power to set policy under FPASA were limited to giving effect to the statute's "substantive" provisions,[106] that could call into question all past contractor rules. Finding FPASA to violate the nondelegation doctrine would be similarly disruptive.[107] And holding that FPASA only justifies rules that foster economy and efficiency for the contracting *system* rather than the contractors themselves could also cast many FPASA rules into doubt.[108] (Although, as discussed below, we suspect many FPASA rules could be recast to highlight their system-level economy and efficiency benefits.) We doubt many federal judges — apart from the Fifth, Sixth, and Eleventh Circuits' ideological fellow travelers — would accept an interpretation of FPASA that so profoundly rejects decades of case law and presidential practice. This consideration is all the more reason the Administration should not unilaterally stand down on FPASA.

Third, although the ascendant major questions doctrine is certain to figure into future FPASA fights, we do not expect it to be an effective weapon against many contractor rules. To be sure, the Fifth and Eleventh Circuits expressly relied on the doctrine to strike down the contractor vaccination mandate, and the Sixth Circuit hinted at major questions concerns as well.[109] But rules less expansive than the vaccination mandate should not implicate the major questions doctrine — indeed, the Tenth Circuit recently rebuffed a major questions doctrine challenge to President Biden's contractor minimum wage mandate.[110]

As Professor Thomas Merrill put it, the major questions doctrine comes into play for administrative acts with "three features: first, the agency decision under review is a deviation from its settled sphere of action," "second, the agency decision has the effect of significantly changing the scope of the agency's authority," "and third, the agency action is a big deal."[111] FPASA orders, which arise from a broad statutory grant of discretion and a long regulatory tradition, should almost never represent a "deviation" from the President's "settled sphere of action."

[105] *Kahn*, 618 F.2d at 792; *Liberty Mut.*, 639 F.2d at 170.
[106] *See Georgia, 46 F.4th at 1298–99.*
[107] See *Bradford*, 101 F.4th at 733–42 (Eid, J., dissenting).
[108] See Commonwealth, 57 F.4th at 552–53.
[109] *Louisiana*, 55 F.4th at 1029–31; *Commonwealth*, 57 F.4th at 552; *Georgia*, 46 F.4th at 1295–96; *see also Texas*, 2023 WL 6281319, at *10–13. *But see Bradford*, 101 F.4th at 724–28, at *11–13; *Mayes*, 67 F.4th at 932–939.
[110] *Bradford*, 101 F.4th at 724–28. *But see Texas*, 2023 WL 6281319, at *10–13.
[111] Thomas Merrill, The Major Questions Doctrine: Right Diagnosis, Wrong Remedy 3 (2023).

Such a deviation occurs only when an agency "locate[s] [a] newfound power in the vague language of an ancillary provision" of a statute.[112] But the source of the President's FPASA power is not an "ancillary" provision, a "backwater," or "modest words."[113] It is a law "delegat[ing] broad discretion to achieve broad goals" — and has long been understood as such.[114] FPASA provides that the "President may prescribe policies and directives that the President considers necessary" in service of the statutory goal of "an economical and efficient system" for procurement.[115] By granting the President such broad authority, Congress "sp[oke] clearly" that commensurately broad discretion is authorized. FPASA is not a "mousehole."[116]

Likewise, FPASA is not "little-used."[117] On the contrary, there is a long tradition of the President (and the executive branch generally) imposing a range of conditions and requirements on federal contractors. The government should be prepared to use these "regulatory antecedents,"[118] to demonstrate to courts that an FPASA order does not represent an "unheralded regulatory power."[119] Some courts, resisting the long history of Presidential regulation of federal contractors, have pointed out that the seminal nondiscrimination orders of the 1950s and 1960s did not expressly invoke FPASA.[120] Even accepting the relevance of that observation,[121] "presidents have issued — and courts have upheld — a wide range of orders under FPASA governing federal contractors and their workers, often without a direct connection to cost reduction."[122] Specifically, Presidents have used FPASA not only "to require federal contractors to commit to affirmative action programs when racial discrimination was threatening contractors' efficiency," but also to require contractors "to adhere to wage and price guidelines to help combat inflation in the economy; to ensure compliance with immigration laws; and to attain sick leave parity with non-contracting employers because federal contractors were lagging behind and losing

[112] *West Virginia v. EPA*, 597 U.S. 697, 724 (2022).
[113] *Id.* at 724, 729; *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001),
[114] *Georgia*, 46 F.4th at 1314 (Anderson, J., concurring in part and dissenting in part).
[115] 40 U.S.C. §§ 101, 121.
[116] *Whitman*, 531 U.S. at 468.
[117] West Virginia, 597 U.S. at 730.
[118] *See generally* Richard L. Revesz & Max Sarinsky, *Regulatory Antecedents and the Major Questions Doctrine*, 36 Geo. Envtl. L. Rev. 1 (2023).
[119] *West Virginia*, 597 U.S. at 722.
[120] *Georgia*, 46 F.4th at 1301; *see also Commonwealth*, 57 F.4th at 554.
[121] *But see Kahn*, 618 F.2d at 791.
[122] *Bradford*, 101 F.4th at 727.

talent."[123] And Congress, presumptively aware of these actions, repeatedly reenacted FPASA without change — a well-established indication of legislative approval.[124]

Beyond that, an appropriately tailored FPASA order cannot represent an "enormous and transformative expansion in . . . regulatory authority"[125] because FPASA orders are generally an exercise of the government's *proprietary* power as a market participant, not its *regulatory* power. Through FPASA contractor rules, the government does not ordinarily "bring[] its sovereign power to bear on citizens at large";[126] instead, it exercises its "unrestricted power . . . to determine those with whom it will deal."[127] An executive order limited to "projects []related to those in which the Government has a proprietary interest . . . establishes no condition that can be characterized as 'regulatory.'"[128]

Fourth, even if an FPASA rule is ultimately struck down or withdrawn, it can still have salutary effects. It seems likely, for instance, that many individuals received the Covid vaccine in order to comply with presidential vaccination mandates that have since been withdrawn.[129]

For all these reasons, we recommend that the Administration continue to issue orders based on the traditional understanding of FPASA's scope.

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[123] *Mayes*, 67 F.4th at 938.

[124] *See Mayes*, 67 F.4th at 938 ("We must presume that, when recodifying the Act in 2002, Congress knew that the Third, Fifth, and D.C. Circuits had interpreted the President's Procurement Act authority and the statutory terms 'economy' and 'efficiency' broadly."); *see also Kahn*, 618 F.2d at 790 ("Of course, the President's view of his own authority under a statute is not controlling, but when that view has been acted upon over a substantial period of time without eliciting congressional reversal, it is entitled to great respect." (internal quotation marks omitted)); *Kisor v. Wilkie*, 588 U.S. 558, 594 (2019) (Gorsuch, J., concurring in the judgment) ("[T]he government's early, lonstanding, and consistent interpretation of a statute . . . could count as powerful evidence of its original public meaning." (emphasis omitted)).

[125] *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014).

[126] *Louisiana*, 55 F.4th at 1032.

[127] *Perkins*, 310 U.S. at 127.

[128] *Building & Trades Constr. Dep't., AFL-CIO v. Allbaugh*, 295 F.3d 28, 36 (D.C. Cir. 2002); *see also Georgia*, 46 F.4th at 1314 (Anderson, J., concurring in part and dissenting in part); *Mayes*, 67 F.4th at 935 ("[T]he Contractor Mandate is not an exercise of regulatory authority at all, but of proprietary authority" because "the conduct that the Contractor Mandate seeks to regulate is related to the government's proprietary interest here: efficient and economic procurement of services." (emphasis omitted)).

[129] See The Biden-Harris Administration Will End COVID-19 Vaccination Requirements for Federal Employees, Contractors, International Travelers, Head Start Educators, and CMS-Certified Facilities, The White House (May 1, 2023) ("announcing that the Administration will end the COVID-19 vaccine requirements for Federal employees" and others, but that "[t]he Federal government successfully implemented requirements for its workforce in a way that increased vaccination to achieve 98% compliance").

The Administration can draft and justify FPASA rules to mitigate legal risk

The Administration — even as it issues contractor rules pursuant to a broad understanding of the procurement power — can nevertheless take steps to reduce the risk of a successful legal challenge.

Consider making formal factual findings

Courts deciding FPASA cases have generally deferred to the government's assertion that a particular rule will promote efficiency and economy. For example, the D.C. Circuit accepted the Bush Administration's two-sentence explanation why requiring contractors to notify employees of their labor-law rights would promote efficiency and economy, even though the articulated "link may seem attenuated" and "one can with a straight face advance an argument claiming opposite effects or no effects at all."[130] That is appropriate. When reviewing agency action, for instance, courts generally defer to the agency's policy judgments.[131]

But, especially in the face of a skeptical judiciary, the Administration should be prepared to offer comprehensive justifications — supported by formal factual findings — for FPASA rules. *Liberty Mutual* — in which the Fourth Circuit held that the government had failed to demonstrate a link between requiring an insurance underwriter's compliance with Executive Order 11246 and FPASA's goals — shows why. There, the court noted that in prior cases, "administrative findings" had "buttressed the . . . conclusion that the Executive was acting to protect the federal government's financial interest," and therefore helped in "establishing [a] sufficiently close nexus."[132] It observed that "no such findings were made in the case before us."[133] More recently, the Sixth Circuit saw as a derogatory mark that OMB initially justified the implementation of President Biden's contractor vaccination mandate with a "terse,"

[130] *Chao*, 325 F.3d at 366–37; *see Mayes*, 67 F.4th at 935 (implicitly comparing a court's review of an FPASA order to rational basis review in Equal Protection Clause cases).

[131] *See Newspaper Ass'n of Am. v. Postal Reg. Comm'n*, 734 F.3d 1208, 1216 (D.C. Cir. 2013) ("When . . . an agency is making predictive judgments about the likely economic effects of a rule, we are particularly loath to second-guess its analysis." (internal quotation marks omitted)). That remains true even after *Loper Bright Enters. v. Raimondo*, which held that courts are to exercise "independent judgment" rather than defer to agencies on questions of statutory interpretation. 144 S. Ct. 2244, 2262 (2024). *Loper Bright*, in fact, reaffirmed that courts must respect agency policy choices authorized by statute. *Id.* at 2263.

[132] *Liberty Mut.*, 639 F.2d at 170–71.

[133] *Id.*

"one-paragraph notice."[134] To be sure, courts have not always required formal findings of fact establishing a policy's nexus to efficiency and economy,[135] but given that administrative findings of fact[136] and policy judgments[137] may not ordinarily be disturbed, the Administration should not pass up the opportunity to support its FPASA policies with ironclad records.

Justify contractor rules by reference to the economy and efficiency of the procurement system as a whole

FPASA was enacted to centralize and streamline the federal procurement process.[138] Because of this history, the dissenting circuits have concluded that the statute could only justify orders aimed at making federal contracting less "duplicative and inefficient."[139] In the Sixth Circuit's words, FPASA at most allows the President to make "contract*ing* more efficient" not make "contract*ors* more efficient."[140] The Administration, therefore, may wish to explain how a proposed rule improves the efficiency and economy of the contracting process generally.

A good example of a Biden Administration initiative with such a justification readily at hand is the FAR Council's proposed climate disclosure rule.[141] That rule, once finalized, will "enable the Government to understand how and when the risks faced by major contractors (some of which are mission-critical) and their supply chains, including but not limited to increased likelihood of disruptive climate and weather events and material and energy cost fluctuations, may impact the agencies' own missions and activities."[142] By thus giving the government the information it needs to mitigate its exposure to climate change, the proposed rule would tend to reduce waste and inefficiency in contracting generally.

The Administration should consider how it might foreground system-wide efficiency justifications for other rules. Indeed, a review of past FPASA orders shows that it has done so. In mandating the use of E-Verify, for instance, the government explained that it was

[134] Commonwealth, 57 F.4th at 547.
[135] Napolitano, 648 F. Supp. 2d at 738.
[136] *See Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) (courts are obligated to accept agency findings supported by "substantial evidence," a term that "means—and means only—such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" (internal quotation marks omitted)).
[137] *See FCC v. Prometheus Radio Proj.*, 592 U.S. 414, 423 (2021) (so long as "agency action [is] reasonable and reasonably explained," "a court may not substitute its own policy judgment for that of the agency").
[138] *Kahn*, 618 F.2d at 787–88.
[139] *Commonwealth*, 57 F.4th at 553; *see also Georgia*, 46 F.4th at 1296.
[140] *Commonwealth*, 57 F.4th at 553.
[141] *See* 87 Fed. Reg. 68312 (2022).
[142] 87 Fed. Reg. at 68319.

reducing the chances that its counterparties would find themselves bogged down in immigration enforcement proceedings.[143] That can easily be understood as protecting the government's interest in reducing inefficiency in the procurement process. Putting E-Verify in place both mitigated the risk of contractor inefficiency and eliminated a line of due diligence contract officers might otherwise have to conduct.

Analogize to past contractor rules

A consideration frequently triggering judicial scrutiny of administrative action is novelty. For instance, the major questions doctrine only comes into play when a policymaker "claim[s] to discover in a long-extant statute an unheralded power representing a transformative expansion in its regulatory authority."[144] The Administration should therefore make clear that ordinary FPASA rules are neither "novel," "unprecedented," nor "unheralded."[145] We explained above how administrations of all persuasions have used the procurement power broadly, setting a wide variety of rules for federal contractors. When issuing new FPASA orders, the Administration should invoke this history and analogize new contractor rules to past ones. For a wide range of FPASA orders, the Administration should be able to identify regulatory antecedents of similar nature, scope, and effect. Especially for rules affecting working conditions — those related to workers' rights, nondiscrimination, and pay — this tactic should be effective in heading off challenges.

Include severability clauses where appropriate

Severability clauses help ensure that if part of a regulation is struck down, the rest will stand. As one study prepared for the Administrative Conference of the United States concludes, in the agency context, "when an agency recognizes that some portions of its proposed rule are more likely to be challenged than others and that the remaining portions of the rule can and should function independently," a severability clause is a crucial tool.[146] These clauses, though important for nearly all regulations,[147] may be especially apt for inclusion in contractor rules, given the likelihood of legal challenge. The Administration should therefore consider, when appropriate, structuring multifaceted FPASA rules to impose a series of independent requirements on contractors — and making clear the

[143] *Napolitano*, 648 F. Supp. 2d at 738.
[144] *West Virginia*, 597 U.S. at 724 (internal quotation marks and alterations omitted); *see generally* Governing for Impact, The Major Questions Doctrine: Guidance for Policymakers (2022).
[145] *Id.* at 716, 723, 724, 728.
[146] Charles W. Taylor & E. Donald Elliott, *Tailoring the Scope of Judicial Remedies in Administrative Law*, Administrative Conference of the United States (May 4, 2018).
[147] See Reed Shaw & Peter M. Shane, Protecting Biden Administration Regulations from Regime Change and Skeptical Courts, Washington Monthly (Apr. 16, 2024).

intention that, if one rule is invalidated, the others should remain in force. After all, "[t]he real question for severability analysis" is "the issuing agency's intent."[148] If the Administration explains that it "would have adopted the severed portion on its own," a court is likely to find that severance is appropriate.[149] Given the spate of challenges to FPASA orders, anti-administration judicial headwinds, and some judges' understandable impulse to "split the baby," the Administration should not leave severability clauses on the table.

Consider a constitutional justification for contractor rules

The Sixth Circuit, in striking down the contractor vaccination mandate, observed that President Biden "claimed no inherent constitutional power" for the order.[150] Going forward, however, the Administration may wish to consider whether the President has constitutional authority to set rules and conditions for the government's would-be counterparties. As a matter of first principles, there is appeal to the idea that the President, as the federal government's chief executive, enjoys at least some inherent power to decide with whom the government will do business. And while the Eleventh Circuit opined that the federal government's "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" "rests in Congress's hands in the first instance" — and is therefore circumscribed by FPASA — there may be more to the story.[151]

To that end, at least one order governing federal contracting was founded, according to the D.C. Circuit, on the President's inherent authority, not his FPASA power. In 2002's *Building and Construction Trades Department, AFL-CIO v. Allbaugh*, the court upheld Executive Order 13202, which "provide[d] that, to the extent permitted by law, no federal agency, and no entity that receives federal assistance for a construction project, may either require bidders or contractors to enter, or prohibit them from entering, project labor agreements."[152] Relying on the President's authority to exercise "general administrative control of those executing the laws," the court found the order a permissible "direct[ion] [to] his subordinates [on] how to proceed in administering federally funded projects."[153] And the order headed off any separation-of-powers issue by requiring neutrality as to project labor agreements only "to the extent permitted by law."[154]

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[148] *Davis Cnty. Solid Waste Mgmt. v. EPA*, 108 F.3d 1454, 1459 (D.C. Cir. 1997).
[149] *Id.*
[150] Commonwealth, 57 F.4th at 547.
[151] *Perkins*, 310 U.S. at 127; *Georgia*, 46 F.4th at 1292.
[152] 295 F.3d at 29.
[153] *Id.* at 32–33 (quoting *Myers v. United States*, 272 U.S. 52, 164 (1926)).
[154] *Id.* at 33 (alteration omitted).

Beyond that, it is possible that the antidiscrimination orders of the 1950s and 1960s arose from an inherent authority. The orders themselves do not specify their legal basis.[155] And while the D.C. Circuit held that "only the FPASA could have provided statutory support for the Executive action,"[156] other courts think that "the antidiscrimination orders have long been justified based on intermingled sources of authority, both constitutional and statutory."[157] In discussing regulations issued pursuant to the landmark antidiscrimination order, Executive Order 11246, the Supreme Court determined that "it is not necessary to decide whether [the order] as amended is authorized by the Federal Property and Administrative Services Act of 1949, Titles VI and VII of the Civil Rights Act of 1964, the Equal Employment Opportunity Act of 1972, or some more general notion that the Executive Branch can impose reasonable contractual requirements in the exercise of its procurement authority."[158] In short, while a consensus has emerged that FPASA grants and circumscribes the President's power to set contractor rules, there have been hints of an inherent authority as well.

The time may be right to assert a constitutional basis for contractor rules. Recently, the Supreme Court has emphasized that "[t]he entire 'executive Power' belongs to the President alone."[159] That means "that Article II confers on the President 'the general administrative control of those executing the law.'"[160] As *Allbaugh* suggested, that residual authority may allow the President to impose, or direct subordinates to impose, rules and conditions on federal contractors — at least "to the extent permitted by law."[161] Since, as things stand, presidential FPASA orders must likewise accord with the requirements of other statutes, the power suggested by *Allbaugh* appears coextensive with the longstanding understanding of the President's FPASA powers. The Administration should consider whether to argue for the President's inherent authority to set contractor rules.

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[155] *See, e.g.*, Executive Order 11246, 30 Fed. Reg. 12319 (1965).
[156] *Kahn*, 618 F.2d at 791.
[157] *Georgia*, 46 F.4th at 1301; *see also Commonwealth*, 57 F.4th at 554.
[158] *Chrysler Corp.*, 441 U.S. at 304–06 (citing, among other cases, *Perkins*, 310 U.S. at 127).
[159] *Seila Law LLC v. Consumer Fin. Protection Bureau*, 591 U.S. 197, 213 (2020) (quoting U.S. Const. Art. II, cl 1); *see also Trump v. United States*, 2024 WL 3237603, at *15 (U.S. Jul. 1, 2024) ("[T]he Constitution vests the entirety of the executive power in the President.").
[160] *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010) (quoting *Myers*, 272 U.S. at 164).
[161] *Allbaugh*, 295 F.3d at 33 (alteration omitted). The "to the extent permitted by law" proviso ensures that presidential directives do not run afoul of the separation-of-powers principle, explained in Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), that the President's inherent authority is at its "lowest ebb" when it conflicts "with the expressed or implied will of Congress," *id.* at 637 (Jackson, J., concurring). In light of the qualification, "if an executive agency . . . may lawfully implement the Executive Order, then it must do so; if the agency is prohibited, by statute or other law, from implementing the Executive Order, then the Executive Order itself instructs the agency to follow the law." *Allbaugh*, 295 F.3d at 33.