Scapegoating and Stereotyping: The Executive's Power over Federal Contractors

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I. INTRODUCTION

On September 22, 2020, former President Donald Trump released Executive Order 13,950, titled Combatting Race and Sex Stereotyping.[1] In its Purpose section, Executive Order ("EO") 13,950 declared that a "destructive ideology" premised on America being "an irredeemably racist and sexist country" is threatening the country and its institutions.[2] The EO contrasted this ideology with what it considered the fundamental values of our country: that all individuals are created equal and should be given an equal opportunity to pursue happiness and prosper (based on individual merit, however).[3] It emphasized that the Federal civil service system itself is based upon merit principles, and that the men and women who serve this country should not be taught "the lie that the country for which they are willing to die is fundamentally racist"—a sentiment former President Trump

1. Exec. Order No. 13,950, 85 Fed. Reg. 60,683 (Sept. 28, 2020).
2. *Id.*
3. *Id.* at 60,684.

asserted was the central theme of critical race theory.[4]

In regard to federal contractors, it claimed that such teachings promote division and inefficiency by increasing workplace animosity that distracts from pursuing excellence and collaboration.[5] Likewise, it mentioned that such blame-focused diversity training can actually reinforce biases and potentially decrease opportunities for minorities in the workplace.[6] Overall, the EO disallowed race or sex stereotyping or scapegoating from being promoted in the Federal workforce and Uniformed Services or by Federal contractors.[7] While President Joe Biden revoked EO 13,950 his first day in office,[8] the question remains whether the executive has the authority to pass such an order affecting diversity trainings conducted by federal contractors.

To analyze whether such an order was legal, Part II of this Note details the Executive's authority over federal contractors under the Federal Property and Administrative Services Act (FPASA). First, it details the lead up to former President Trump passing EO 13,950. Second, it describes the grant of authority within FPASA and the orders issued pursuant to this authority. Third, it details the cases dealing with these executive orders. Fourth, it describes the requirements placed on federal contractors by the FPASA.

Part III begins by summarizing the sufficiently close nexus test from the included case law and shows how an application of this test to Trump's order would likely render EO 13,950 valid. It also highlights the controversy the order has created. Part IV recommends that courts apply a stricter analysis of orders issued under FPASA and that Congress revisit this grant of authority.[9]

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4. *Id.*

5. *Id.*

6. Exec. Order No. 13,950, 85 Fed. Reg. 60,684 (Sept. 28, 2020). The Executive Order did not provide a citation for such research. *But see* Frank Dobbin & Alexandra Kalev, *Why Diversity Programs Fail*, HARV. BUS. REV., July–Aug. 2016, at 52, https://hbr.org/2016/07/why-diversity-programs-fail [https://perma.cc/S828-L3LY] (noting that negative messaging in diversity training—such as detailing the legal case for diversity training in order to avoid paying out huge settlements—can result in adverse effects).

7. Exec. Order No. 13,950, 85 Fed. Reg. 60,683, 60,685 (Sept. 22, 2020). Briefly stated, a federal contractor is a private individual or entity who contracts with the federal government to provide a service, product, labor, or materials. *Federal Contractor Requirements*, EARN, https://askearn.org/topics/federal-contractor-requirements/ [https://perma.cc/2SRB-LN3A].

8. Exec. Order No. 13,985, 86 Fed. Reg. 7,009, 7,012 (Jan. 25, 2021).

9. To exemplify the timeliness of this issue, President Biden issued Exec. Order No. 14,042 on September 9, 2021, titled "Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors." 86 Fed. Reg. 50,985 (Sept. 14, 2021). It cites the Constitution and FPASA as sources of the Executive's authority to pass this EO. *Id.* Section 1 describes the policy of the order—to promote economy and efficiency in Federal procurement through Covid-19 safeguards that will "decrease worker absence, reduce labor costs, and improve the efficiency of contractors and subcontractors at sites where they are performing work for the Federal Government." *Id.*

While EO 14,042 itself does not prescribe these safeguards, it directs the Safer Federal Workforce Task Force ("Task Force") to create this new guidance. *Id.* The Task Force published this guidance on September 24, 2021. Safer Fed. 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 [https://perma.cc/ZB7K-KM8Y]. It requires federal contractors and subcontractors to conform with the following protocols: Covid-19 vaccination of covered contract employees, with exceptions in limited circumstances; compliance by employees and visitors with masking and physical distancing while in covered contractor workplaces; and designation by covered contractors of a person or persons to coordinate these

II. THE EXECUTIVE'S AUTHORITY OVER FEDERAL CONTRACTOR AGREEMENTS

A. The Lead Up to EO 13,950

Trump allegedly released this order in response to Christopher F. Rufo's claim that Sandia National Laboratories, a federal nuclear research lab, held a "re-education camp" for white males to expose their white privilege and deconstruct their white male culture.[10] Rufo later appeared on *Tucker Carlson Tonight*, describing his investigations into diversity trainings conducted by the FBI and Treasury Department.[11] He called on then-President Trump to issue an executive order banning critical race theory in the federal government.[12]

Before Trump released an order, Russell Vought, director of the Office of Management and Budget, released a memorandum directing federal agencies to begin evaluating their training for any critical race theory teachings.[13] Trump then began to tweet about critical race theory[14] as "a sickness that cannot be allowed to continue."[15] While hosting the White House Conference on American History, Trump further criticized critical race theory and *The 1619 Project*.[16] Five days later, the administration released EO 13,950.[17]

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protocols. *Id.* at 1. The Task Force's guidance provides definitions and information on how to comply with these protocols, such as allowing for vaccination exemptions in the case of disability, medical conditions, or a sincerely held religious belief, practice, or observance. *Id.* at 5. This guidance was later approved by the Office of Management and Budget. Determination of the Promotion of Economy and Efficiency in Federal Contracting Pursuant to Exec. Order No. 14,042, 86 Fed. Reg. 53691, 53691–692 (Sept. 28, 2021).

Regardless of whether EO 14,042 and the following guidance makes good policy, the question remains whether the Executive should be allowed to require 20% of America's workforce to be vaccinated or provide proof for a medical or religious accommodation.

10. Christopher F. Rufo (@realchrisrufo), TWITTER (Aug. 12, 2020, 12:40 PM), https://twitter.com/realchrisrufo/status/1293603172842221570 [https://perma.cc/U2KA-4TRW].

11. Tucker Carlson Tonight, *Critical Race Theory Has Infiltrated the Federal Government | Christopher Rufo on Fox News*, YOUTUBE (Sept. 2, 2020), https://www.youtube.com/watch?v=rBXRdWflV7Mn [https://perma.cc/VV2Y-AK27].

12. Christopher F. Rufo (@realchrisrufo), TWITTER (Sept. 1, 2020, 9:31 PM), https://twitter.com/realchrisrufo/status/1300984639108968449 [https://perma.cc/7WW5-BVKV].

13. Memorandum for the Heads of Executive Departments and Agencies No. M-20-34 (Sept. 4, 2020), https://www.whitehouse.gov/wp-content/uploads/2020/09/M-20-34.pdf [https://perma.cc/XG2X-ZD93].

14. Critical race theory, a variation on the critical legal studies movement's claim that seemingly neutral principles work to conceal the application of force and power, began in the 1970s as an academic framework for analyzing why the civil rights movement alone did not eliminate racial injustice in the United States. Marisa Lati, *What is Critical Race Theory, and Why do Republicans Want to Ban it in Schools?*, WASH. POST (May 29, 2021, 8:00 AM), https://www.washingtonpost.com/education/2021/05/29/critical-race-theory-bans-schools/ [https://perma.cc/36UF-A4NY]. The theory focuses on racism being systemic, woven into our legal systems. *Id.*

15. Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 5, 2020, 6:52 AM), https://twitter.com/realDonaldTrump/status/1302212909808971776 [https://perma.cc/6CEN-B2ZZ].

16. Donald J. Trump, President of the United States, Remarks by President Trump at the White House Conf. on Am. Hist. (Sept. 17, 2020) https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-white-house-conference-american-history/ [https://perma.cc/GS2W-LQ2W]. *The 1619 Project* is an "ongoing initiative" aimed at reframing American history around slavery and black Americans' contributions to our society. *The 1619 Project*, N.Y. TIMES MAG., https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html [https://perma.cc/8SWL-X9L7].

17. Exec. Order No. 13,950, 85 Fed. Reg. 60,683 (Sept. 22, 2020).

B. The President's Authority under FPASA

The Federal Property and Administrative Services Act (FPASA) was created in response to the procurement and property management issues the government experienced during World War II.[18] Section 101 of FPASA states the purpose of the Act is "to provide the Federal Government with an economical and efficient system for . . . [p]rocuring and supplying property and nonpersonal services, and performing related functions including contracting . . . ."[19] Section 121(a) gives the president the authority to issue policies and directives considered necessary to carry out FPASA; these policies must be consistent with the stated goals of FPASA.[20]

C. History of Executive Orders Impacting Federal Contractors

Trump is not the first president to issue an EO affecting federal contractors for societal impact, and he will certainly not be the last.[21] In 1961, President Kennedy issued EO 10,925, establishing the Equal Employment Opportunity Committee.[22] This order required all government contractors to agree to not discriminate against any employee or applicant based on race, creed, color, or national origin.[23] The order was then superseded in 1965 by President Lyndon Johnson's EO 11,246.[24] President Johnson's order imposed the same requirements on federal contractors already imposed by EO 10,925;[25] however, it charged the Secretary of Labor rather than a presidential committee with administering the order.[26] As amended over the years, EO 11,246 now protects employees of federal contractors from discrimination on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin.[27]

President Carter's EO 12,092 furnishes a similar example. It was issued "to encourage noninflationary pay and price behavior by private industry and labor."[28] Such wage and price standards had to be included in all contracts with federal contractors.[29] Likewise, President Clinton issued EO 12,954, which prevented contracting agencies

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18. Kimberley A. Egerton, Note, *Presidential Power over Federal Contracts under the Federal Property and Administrative Services Act: The Close Nexus Test of* AFL-CIO v. Kahn, 1980 DUKE L.J. 205, 206 (1980).

19. 40 U.S.C.A. § 101(1) (West 2021).

20. *Id.* § 121(a) (West).

21. *See* Michael H. LeRoy, *Presidential Regulation of Private Employment: Constitutionality of Executive Order 12,954 Debarment of Contractors Who Hire Permanent Striker Replacements*, 37 B.C. L. REV. 229, 232 (1996) (noting that "virtually all presidents since Franklin Roosevelt have used their general power over procurement to place conditions on private actors who do business with the United States government" (footnote omitted)).

22. Exec. Order No. 10,925, 3 C.F.R. § 101 (Supp. 1961) (superseded by Exec. Order No. 11,246).

23. *Id.* § 301. The contractors were also required to notify each labor union of its commitment to the order; to bind its subcontractors to the order; to supply a compliance report; and to bind all of its subcontractors to filing a compliance report. *Id.* §§ 301, 302(a).

24. Exec. Order No. 11,246, 3 C.F.R. § 403(a) (Supp. 1965).

25. *Compare* Exec. Order No. 10,925 at § 301, *with* Exec. Order No. 11,246 at § 202 (detailing the two executive orders about the EEOC).

26. *See* Exec. Order. No. 11,246 at § 201(detailing the rights and duties of the Labor Secretary).

27. Office of Federal Contract Compliance Programs, *History of Executive Order 11,246*, U.S. DEP'T OF LAB., https://www.dol.gov/agencies/ofccp/about/executive-order-11246-history [https://perma.cc/M77K-KUJQ].

28. Exec. Order No. 12,092, 3 C.F.R. (1979) (revoked by Exec. Order No. 12288).

29. *Id.* §§ 1-102–1-103.

from contracting with employers who permanently replaced lawfully striking employees.[30]

President George W. Bush later issued a series of EOs affecting federal contractors. EO 13,201 required all government contracting departments to include contract provisions requiring employers to post a notice to their employees regarding their right to not pay labor union dues for activities unrelated to representational activity.[31] Bush's EO 13,202 provided that the government would neither prohibit nor deny federal contractors from entering project agreements with labor unions.[32] Lastly, EO 13,465, which amended EO 12,989, directed all government contracting departments to only enter contracts with employers who used an electronic verification system to confirm the employment eligibility of their employees in the United States.[33]

All of the above orders affected federal contractors and the provisions included within their contracts with the federal government. Many also threatened potential cancellation of a contract or debarment from future government contracting if the provisions were not followed.[34]

D. The Bounds of Executive Authority over Federal Contract Agreements

These EOs were not without their own legal disputes; each one was challenged in court, with most of them being upheld as a valid exercise of the executive's authority.[35] *Farmer v. Philadelphia Electric Co.* and *Farkas v. Texas Instrument, Inc.* both dealt with EO 10,925.[36] In *Farmer*—while the case centered on whether the EO created a right of action for the employee-plaintiff—the Third Circuit had "no doubt that the applicable executive orders and regulations have the force of law" under Congress's delegation of authority to the executive through FPASA.[37] However, other courts considered this statement dictum since the plaintiff did not raise the issue of whether the executive had the authority to issue EO 10,925.[38] Similarly, in *Farkas*, the Fifth Circuit noted that while

30. Exec. Order No. 12,954, 3 C.F.R. § 1 (1996). *But see* 61 Fed. Reg. 51,596 (Oct. 3, 1996) (removing the regulations implemented under EO 12,954).

31. Exec. Order No. 13,201, 3 C.F.R. § 2 (2002).

32. Exec. Order No. 13,202, 3 C.F.R. § 1 (2002).

33. Exec. Order No. 13,465, 3 C.F.R. §§ 1–3 (2009).

34. *See* Exec. Order No. 10,925, 3 C.F.R. § 301 (Supp. 1961) ("In the event of the contractor's non-compliance with the nondiscrimination clauses of this contract or with any of the said rules, regulations, or orders, this contract may be cancelled . . ."); Exec. Order No. 11,246, 3 C.F.R. § 202 (Supp. 1965) ("Cancel, terminate, suspend, or cause to be cancelled, terminated, or suspended, any contract, or any portion or portions thereof, for failure of the contractor or subcontractor to comply with the non-discrimination provisions of the contract."); Exec. Order No. 12,954, 60 Fed. Reg. 13023 (Mar. 8, 1995) ("When the Secretary determines that a contractor has permanently replaced lawfully striking employees, the Secretary may make a finding that it is appropriate to terminate the contract for convenience."); Exec. Order No. 13,201, 66 Fed. Reg. 11221 (Feb. 17, 2001) ("In the event that the contractor does not comply with any of the requirements set forth in paragraphs (1) or (2) above, this contract may be cancelled, terminated, or suspended in whole or in part . . .").

35. *See generally* VANESSA K. BURROWS & KATE M. MANUEL, CONG. RSCH. SERV., R41866, PRESIDENTIAL AUTHORITY TO IMPOSE REQUIREMENTS ON FEDERAL CONTRACTORS (2012) (detailing executive orders challenged in court and concluding that "Courts will generally uphold orders issued under the authority of FPASA").

36. *See generally* Farmer v. Phila. Elec. Co., 329 F.2d 3 (3d Cir. 1964); Farkas v. Tex. Instrument, Inc., 375 F.2d 629, 632 (5th Cir. 1967).

37. *Farmer*, 329 F.2d at 8.

38. *See* Liberty Mut. Ins. Co. v. Friedman, 639 F.2d 164, 169 (4th Cir. 1981) (arguing that this

the validity of EO 10,925 was not challenged, the order was issued pursuant to FPASA and thus had the force and effect of law.[39]

In *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, contractor plaintiffs challenged the validity of the "Philadelphia Plan," which the Secretary of Labor instituted pursuant to EO 11,246,[40] requiring specified ranges of minority hires for a federally funded construction project.[41] The Third Circuit upheld the Philadelphia Plan under a *Youngstown* analysis;[42] it decided that the plan fell under the first category of EOs since Congress had delegated authority for implementing a federally funded project to the executive.[43] While the court noted that the President has "implied contracting authority,"[44] it also stated that the plan fell within the executive's FPASA authority.[45]

On the other hand, the Fifth Circuit held that the President could not prohibit a bona fide seniority system under EO 11,246, since Congress had specifically exempted such systems from Title VII.[46] Likewise, the D.C. Circuit found "it highly unlikely that Congress would have impliedly approved executive interference with the same bona fide seniority systems it had deliberately immunized," leading to the same conclusion as the Fifth Circuit.[47]

In *Chrysler Corp. v. Brown*, the Supreme Court considered the Department of Labor's disclosure program—issued under EO 11,246—requiring federal contractors to supply information regarding their affirmative action programs and general workforce.[48] The Court noted that the quasi-legislative authority of executive agencies can only be exercised pursuant to grants of power from Congress.[49] It asked whether Congress ever

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understanding of EO 10,925 was not necessary to the *Farmer* decision).

39. *See Farkas*, 375 F.2d at 632 n.1 ("Indeed, appellees make no such challenge to its validity."). *But see Friedman*, 639 F.2d at 169 (arguing that this conclusion was dictum since the issue of statutory authority was not raised).

40. EO 11,246 replaced EO 10,925 and charged a cabinet member rather than a presidential committee with ensuring federal contractors engaged in anti-discrimination and affirmative action.

41. Contractors Ass'n of E. Pa. v. Sec'y of Lab., 442 F.2d 159, 162–63 (3d Cir. 1971).

42. In his concurrence, Justice Jackson laid out three categories for cases dealing with the executive's authority to issue EOs. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring). Under the first category, the President acts according to Congress's express or implied authorization, and his power is at its maximum. *Id.* In the second, the President acts without Congress's authorization and must rely on his implied powers. *Id.* In the third, the President acts in contradiction with Congress's will, and "his power is at its lowest ebb." *Id.*

43. *Id.* at 171. The Third Circuit determined that the plan violated neither Title VII—since a general prohibition against discrimination was not a limit on the executive's authority to define affirmative action on a contractor—nor the National Labor Relations Act (NLRA)—which does not "place any limitation upon the contracting power of the federal government." *Contractors Ass'n of E. Pa.*, 442 F. 2d at 171–74.

44. *Id.* at 174.

45. *See id.* at 170 (finding that the Philadelphia Plan was supported by the presidential procurement authority under Title 40 and 41). Subsequent courts have focused on the latter finding—that EO 11,246 is valid under the executive's FPASA authority rather than some implied authority. *See, e.g.*, AFL-CIO v. Kahn, 618 F.2d 784, 792 (D.C. Cir. 1979).

46. United States v. E. Tex. Motor Freight Sys., Inc., 564 F.2d 179, 185 (5th Cir. 1977) ("Congress has declared for a policy that a bona fide seniority system shall be lawful. The Executive may not, in defiance of such policy, make unlawful or penalize a bona fide seniority system.").

47. United States v. Trucking Mgmt. Inc., 662 F.2d 36, 44 (D.C. Cir. 1981).

48. Chrysler Corp. v. Brown, 441 U.S. 281, 286 (1979).

49. *Id.* at 302.

contemplated giving Executive agencies authority to require disclosure regulations, which would implicate public disclosure of trade secrets or confidential business information.[50] It ultimately found that the connection—between any arguable statutory authority granted by Congress and these regulations—was "so strained" that the Department of Labor could not require such a disclosure program.[51]

In *AFL-CIO v. Kahn*, the D.C. Circuit considered whether Congress "authorized the President to deny Government contracts above $5 million to companies that fail or refuse to comply with the voluntary wage and price standards" under EO 12,092.[52] In regards to FPASA, the court commented that Section 205(a) (now Section 121(a)) granted the President direct and broad authority over administrative and management issues affecting the government.[53] Finally, the court, en banc, determined this EO was within the Executive's power under FPASA based upon the "sufficiently close nexus" between the economy and efficiency of government procurement and this procurement compliance program.[54] Interestingly, the court did not find that the EO violated the Council on Wage and Price Stability Act, which did not authorize mandatory price and wage standards.[55] Instead, the court implied, without deciding, that these regulations were not mandatory because contractors *choose* to do business with the government; they are not required to accept a government contract.[56]

Using the reasonably close nexus test from *Chrysler* and *Kahn*, the Fourth Circuit found that the nexus was not met for the Department of Labor to determine that workers' compensation insurers of a federal contractor were subcontractors and therefore had to comply with the recordkeeping and affirmative action requirements of EO 11,246.[57] The court found the connection between cost of such an insurance policy—which was sold by Liberty Mutual to a wide range of employers—and the possible increase in cost based upon potential discrimination by the insurers was "simply too attenuated to allow a reviewing court to find the requisite connection between procurement costs and social objectives."[58]

In *Reich*, the D.C. Circuit found that EO 12,954, allowing for debarment of federal contractors who hire permanent replacements for strikers, was preempted by the NLRA.[59] The court noted that prior EOs "reach[ed] beyond any narrow concept of efficiency and economy in procurement," such as EO 12,092 and 11,246.[60] However,

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50. *Id.* at 306. The Court clarified that the important consideration for the reviewing court is whether it can reasonably "conclude that the grant of authority contemplates the regulations issued." *Id*. at 308.

51. *Id.* at 308.

52. *Kahn*, 618 F.2d at 785.

53. *Id.* at 789.

54. *Id.* at 792. The court reasoned that if the voluntary program was successful, this may slow inflation throughout the entire economy, which would lower government procurement costs over time. *Id.* at 793.

55. *Id.* at 794.

56. *Kahn*, 618 F.2d at 794.

57. *Friedman*, 639 F.2d at 172.

58. *Id.* at 171. The court also differentiated this case from *Contractors Ass'n of E. Pa.*, since in that case there were factual findings of a "demonstrable relationship" between discrimination among construction contractors and the cost of those contractors. *Id.* at 170–71.

59. Chamber of Com. of the U.S. v. Reich, 74 F.3d 1322, 1339 (D.C. Cir. 1996). The court also noted the substantial impact this EO would have on American corporations, considering that nearly 22 percent of the workforce is employment by federal contractors and subcontractors. *Id.* at 1338.

60. *Id.* at 1333.

those orders were not found to be in conflict with any other federal law.[61]

In 2002, the D.C. Circuit found that EO 13,202—requiring the government to neither prohibit nor demand contractors to enter labor union agreements—was not preempted by the NLRA and was within the executive's FPASA authority.[62] The court found that the President had exercised his supervisory authority over the Executive branch in Section 3 of the order.[63] Within the order itself, the president limited its implementation "[t]o the extent permitted by law."[64]

Similarly, the D.C. Circuit found that EO 13,201—requiring contractors to post a notice to their employees about their labor union due rights—was not preempted by the NLRA and was within the executive's FPASA authority.[65] The court highlighted *Kahn*'s "lenient standards" and found that even if there was only an attenuated link between workers knowing their rights and potentially increasing productivity (which could then increase the economy and efficiency of the government using those workers), this nexus was enough.[66]

More recently,[67] the District Court for Maryland's Southern Division found that EO 13,465—concerning federal contractors using an E-verify system—did not violate the Illegal Immigration Reform and Immigrant Responsibility Act and was within the President's power under FPASA.[68] The court held that there is no requirement for the President to "base his findings on evidence included in a record."[69] It also stated that it saw the close nexus as requiring little more than a reasonable and rational explanation from the President on how the EO will promote economy and efficiency in government procurement.[70] In this case, President Bush's explanation within the EO—that contractors using an E-verify system will be less likely to employ unauthorized workers and thus create a more efficient and dependable procurement source—met this nexus requirement.[71]

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61. *Id.*

62. Bldg. & Constr. Trades Dept., AFL-CIO v. Allbaugh, 295 F.3d 28, 36 (D.C. Cir. 2002).

63. *Id.* at 33.

64. *Id.*

65. UAW-Lab. Emp. & Training Corp. v. Chao, 325 F.3d 360, 362 (D.C. Cir. 2003).

66. *Id.* at 366–67. The court noted that in *Kahn*, it "emphasized the necessary flexibility and 'broad-ranging authority' that [it] understood the Act to give the President." *Id*. at 366 (quoting *Kahn,* 618 F.2d at 789).

67. It is important to note that EOs issued by both President Obama and President Trump have been challenged in court. *See* Associated Builders & Contractors of Se. Tex. v. Rung, 2016 WL 8188655 (E.D. Tex. Oct. 24, 2016) (finding that Obama's EO 13,673 directly conflicted with the NLRA, comparing it to the EO considered in *Reich*); Am. Fed'n of Gov't Emps., AFL-CIO v. Trump, 318 F. Supp. 3d 370 (D.D.C. 2018) (holding that Trump reduced the scope of protected collective bargaining rights under the Federal Service Labor-Management Relations Statute), *rev'd and vacated*, 929 F.3d 748 (D.C. Cir. 2019) (finding that the district court lacked jurisdiction); Nat. Ass'n of Agric. Emps. v. Trump, 2020 WL 2571105 (S.D. Md. May 21, 2020) (declining to follow *Am. Fed'n of Gov't Emps.*); Serv. Emps. Int'l Union Loc. 200 United v. Trump, 420 F. Supp. 3d 65 (W.D.N.Y. 2019) (following *Am. Fed'n of Gov't Emps.*). However, all of these cases involved reasoning used in the case law described in this Note or dealt with whether the court had jurisdiction over the plaintiffs' claims.

68. Chamber of Com. of U.S. v. Napolitano, 648 F. Supp. 2d 726, 733 (S.D. Md. 2009).

69. *Id.* at 738.

70. *Id.*

71. *Id.*

E. A Boundless Power over Federal Contractors

A thicket of legal analyses grew up around this case law regarding, among other things, how to limit executive authority under FPASA.[72] One such note advocated for a limiting of executive power under FPASA, arguing that the legislative process was the appropriate venue for making social issues into national goals because of its political safeguards.[73] This note acknowledged, however, that using executive power in this way is attractive because it is more flexible and can lead to timelier regulations than the legislative process.[74] Additionally, the note supported a "close nexus" test in the courts between the goals of FPASA—efficient and economic government procurement—and the actions taken in an executive order.[75]

A similar note found *Kahn*'s reasoning flawed, giving too much deference to the President's interpretation of existing labor relations regulation.[76] It argued that the court's understanding of the executive authority under FPASA was so broad "as to make it virtually boundless."[77] In its conclusion, it advocated for limiting the president's power over EO procurement to those orders which would reinforce other federal statutes.[78] If the president acted in Congress's silence, then the President's social and economic objectives should not be allowed to increase procurement costs—an effect seemingly inapposite to FPASA's goals.[79]

Furthermore, a note with a historical view of the executive's use of the FPASA power demonstrated that the stakes surrounding the president's discretion under FPASA are high since almost every president since Franklin Roosevelt used their general procurement power "to place conditions on private actors," meaning that the exercise of this power has been allowed to develop and grow over a long period.[80] It argued that EO 12,954 was not outside the bounds of a president's authority under FPASA based on prior EOs, which brought about unpopular social change during their time.[81] It predicted that judicial oversight of EOs would increase if EO 12,954 were invalidated, and such an

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72. *See*, *e.g.*, Andrée Kahn Blumstein, *Doing Good the Wrong Way: The Case for Delimiting Presidential Power Under Executive Order No. 11,246*, 33 VAND. L. REV. 921 (1980); J. Frederick Clarke, *AFL-CIO v. Kahn Exaggerates Presidential Power Under the Procurement Act*, 68 CALIF. L. REV. 1044 (1980); Michael H. LeRoy, *Presidential Regulation of Private Employment: Constitutionality of Executive Order 12,954 Debarment of Contractors who Hire Permanent Striker Replacements*, 37 B.C. L. REV. 229 (1996); Gordon M. Clay, *Executive (Ab)Use of the Procurement Power: Chamber of Commerce v. Reich*, 84 GEO. L.J. 2573 (1996); Cody Hagan, *Myth or Reality: Obama's Presidential Power Grab by Way of the Executive Order*, 84 UMKC L. REV. 493 (2016) (analyzing the broad executive power bequeathed by *Kahn* and its progeny).

73. Blumstein, *supra* note 72, at 933.

74. *Id.* at 934.

75. *Id.* at 935–36. It is worth noting that some courts applying the "reasonably close nexus" test have not followed a strict nexus test. *See, e.g.*, *UAW-Lab. Emp. & Training Corp.*, 325 F.3d at 366–67 ("[W]e read this as requiring that the executive order have a 'sufficiently close nexus' to the values of providing the government an 'economical and efficient system for . . . procurement and supply.'").

76. Clarke, *supra* note 72, at 1051 ("[T]he President's interpretation of the Procurement Act should receive no deference solely because the subject-matter of his decision is executive 'housekeeping.'").

77. *Id.* at 1052.

78. *Id.*

79. *See id.* at 1069 (noting that it would be virtually impossible to not increase procurement costs, so his suggestions lead to the conclusion that the president may only reinforce congressional acts).

80. LeRoy, *supra* note 72, at 232.

81. *See id.* at 251–61 (detailing how WWII-era EOs helped mobilize the U.S. wartime economy as a way of contextualizing EO 11,246).

invalidation would limit a "remarkably effective power" used by presidents "to curb majoritarian abuses by Congress and state legislatures while introducing unpopular social and economic change."[82]

After the *Reich* decision, a note argued that the legislative history of FPASA indicates that "economy" and "efficiency" mean "policies designed to save money and streamline the procurement process."[83] It reasoned that *Reich* gave current and subsequent presidents ample room to create policy as long as it was not preempted by the NLRA—"a result Congress likely did not intend."[84]

Lastly, another note analyzed whether executive orders have become more tenuously related to their statutory authority under FPASA over time.[85] After reviewing the history and intent of FPASA, it concluded that while the grant of authority to the president in Section 205(a) (now Section 121(a)) appears to grant broad authority, "when taken in context of the Act as a whole, the statutory grant is fairly limited" since the president can only act in a manner consistent with the intent and purpose of FPASA and necessary to its fulfillment.[86] However, it also explained that almost every president has used FPASA since its passage as statutory authority for various EOs.[87] Many of these presidents used FPASA in support of executive actions affecting economic and social issues that were "only tenuously related to procurement."[88]

F. What Does Trump's EO 13,950 Require of Federal Contractors?

In Section 1 of EO 13,950, Trump declared that it will now be the policy of the United States to not promote race or sex stereotyping through the federal workforce or the Uniformed Services, or allow federal funds to be used for such purposes.[89] The EO identified this "malign ideology" as one teaching that certain races and sexes are inherently racist or sexist.[90] It pointed to diversity training materials from Argonne National Laboratories and Sandia National Laboratories as embodying this ideology.[91] Argonne's materials are cited as stating racism "is woven into every fabric of America," while Sandia's training asked those present to acknowledge their privilege to one another.[92]

Tracking FPASA language, Trump claimed that this kind of ideology being taught by federal contractors "promote[s] division and efficiency."[93] The EO pointed back to the government's longstanding practice of prohibiting race and sex discrimination (like EO 11,246) and maintained that training which promotes race and sex stereotyping and

82. *Id.* at 235. It is important to note that these "unpopular social changes" included measures meant to increase diversity in hiring and prevent discriminatory actions by federal contractors.

83. Clay, *supra* note 72, at 2590.

84. *Id.* at 2595–96.

85. *See generally* Hagan, *supra* note 72.

86. *Id.* at 501.

87. *Id.* at 517.

88. *Id.* Hagan also noted that President Obama's use of EOs under FPASA were "far from unprecedented" despite the criticism of Obama's alleged power grab. *Id.*

89. Exec. Order. No. 13,950, 85 Fed. Reg. 60,683, 60,685 (Sept. 28, 2020).

90. *Id.* at 60,683.

91. *Id.*

92. *Id.*

93. *Id.* at 60,684.

scapegoating will lead to divisiveness and "distract from the pursuit of excellence and collaborative achievements."[94]

Section 4 contained the requirements for government contractors.[95] Contractor agreements under the order were to prohibit contractors from teaching its employees that certain races or sexes are inherently superior; that an individual, on the basis of race or sex, is inherently racist or sexist, whether consciously or unconsciously; that an individual should be discriminated against because of his or her race or sex; that individuals should not attempt to treat others without regard to their race or sex; that moral character is based upon race or sex; that individuals because of their race or sex bear responsibility for actions of members of the same race or sex in the past; that individuals should feel guilt or discomfort because of their race or sex; or that meritocracy or the ethics of hard work are inherently racist or sexist.[96] Federal contractors were to bind all subcontractors to this order via subcontract or purchase orders.[97] Noncompliance with the order could have resulted in a whole or partial cancellation or suspension of the contract and possible ineligibility for future government contracts.[98] Ultimately, the order's impact—either through an Office of Federal Contract Compliance Programs investigation or through contract suspension—was never truly felt by federal contractors.

III. ANALYSIS

A. The Sufficiently Close Nexus Test

Under *Chrysler Corp v. Brown* and subsequent opinions, courts have applied the sufficiently close nexus test to determine whether a president acted within his authority issuing an EO.[99] This test asks whether a congressional grant of authority contemplates the specific exercise of authority at issue.[100] Under EO 13,950, the question is whether the authority delegated to the executive under FPASA—to promote economy and efficiency in government procurement—contemplated the executive prohibiting teaching of "divisive concepts." The reviewing court must ask itself if it can reasonably conclude that FPASA contemplated this kind of exercise of authority.[101]

B. Comparison of EO 13,950 to Past EOs

Based upon the applications of the close nexus test, it is likely that EO 13,950 was a valid exercise of a president's authority under FPASA. Previous courts struck down EOs or exercises of authority pursuant to EO directives when they were preempted by

94. Exec. Order. No. 13,950, 85 Fed. Reg. 60,683, 60,684 (Sept. 28, 2020).
95. *Id.* at 60,685.
96. *Id.* at 60,685–86.
97. *Id.* at 60,686.
98. *Id.*
99. Chrysler Corp. v. Brown, 441 U.S. 281, 306 (1979); *Kahn*, 618 F.2d at 785.
100. *See Brown*, 441 U.S. at 306 ("The pertinent inquiry is whether under any of the arguable statutory grants of authority the OFCCP disclosure regulations relied on by the respondents are reasonably within the contemplation of that grant of authority.").
101. *Id.* at 308.

congressional acts[102] or lacked a sufficient nexus with the congressional grant of authority.[103] For example, the Supreme Court found that regulations issued pursuant to EO 11,246 (dealing with discrimination in employment) were not authorized under a congressional act.[104] Although, it is important to note that this case never questioned the President's authority to pass EO 11,246; it merely asked whether the regulations, by an executive agency, requiring federal contractors to disclose their affirmative action practices were ever contemplated by Congress in FPASA or other acts.[105] The Fourth Circuit in *Friedman* also struck down practices under EO 11,246 that required insurance companies providing policies to federal contractors to comply with the EO.[106] The connection between potential discrimination by the insurers and increases in cost to the federal government was too attenuated.[107] Again, the court did not question the EO itself but rather an application of the EO by an executive agency.[108]

However, many other courts have upheld EOs under FPASA and found that the relevant president's explanation for the order satisfied the close nexus test.[109] As the case law stands, the executive can require federal contractors to post notices to employees of their right to not pay certain union dues, because this notice could potentially increase employee productivity.[110] The executive can also require federal contractors to use E-verify to verify their employees' eligibility to work in the U.S. because an employer with a verified workforce may be less likely to deal with enforcement actions and thus provide a more dependable workforce.[111]

Based upon the close nexus test and following case law, EO 13,950 seemed to satisfy the close nexus. EO 13,950 required federal contractors to agree to abstain from teaching racial and sex stereotyping or scapegoating to their employees.[112] Former President Trump reasoned that such "divisive concepts," as defined in Section 2(a),[113] would lead to division and inefficiency by distracting from the pursuance of excellence. This argument is similar to that made on behalf of EO 13,201, promulgated by President George W. Bush—that requiring federal contractors to publish notices to their employees concerning employee rights regarding payment of union dues would increase productivity.[114] While the social goal of preventing federal dollars from funding discussions on inherent racism or white privilege appears removed from government

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102. Since there is no congressional act on diversity and inclusion training, this portion of the Note will not focus on whether EO 13,950 is preempted. See *infra* Section III.D. for a discussion of whether EO 13,950 violates the First Amendment.

103. *Brown*, 441 U.S. at 281; *Friedman*, 639 F.2d at 170.

104. *Brown*, 441 U.S. at 305–06.

105. *Id.* at 305–07. The Court also stated that these regulations were not sufficiently connected to the EO's purpose of ending discrimination in employment. *Id.* at 307.

106. *Friedman*, 639 F.2d at 172.

107. *Id.* at 171.

108. *Id.*

109. *See supra* Section II.D (discussing *Kahn*, *Allbaugh*, *Chao*, and *Napolitano*).

110. *UAW-Lab. Emp. & Training Corp.*, 325 F.3d at 366–67.

111. Chamber of Com. of U.S. v. Napolitano, 648 F. Supp. 2d 726, 738 (S.D. Md. 2009).

112. Exec. Order. No. 13,950, 85 Fed. Reg. 60,683, 60,685 (Sept. 28, 2020).

113. *Id.* Examples include teaching that one race or sex is inherently superior to another, that individuals are inherently racist because of their race or sex, or that individuals have privileges because of their race. *Id.*

114. *See supra* Part II.C (describing Bush's EO 13,201).

procurement efficiency, courts have accepted similar justifications in the past.[115]

C. Is the Connection Between DEI training and Government Procurement too Attenuated?

While the D.C. Circuit may have accepted Trump's justification for EO 13,950, a court following the Fourth Circuit may not. D.C. Circuit opinions have accepted *Kahn*'s lenient standards,[116] but the Fourth Circuit in *Friedman* still focused on the Supreme Court's directive to ask whether the congressional grant of authority contemplated the exercise of authority at issue.[117] In *Friedman*, the court found that while an insurance company was within the definition of federal subcontractor, FPASA's grant of authority never contemplated the president requiring an insurance company to comply with affirmative action hiring and disclosure requirements.[118] However, the court again did not question whether the president had the authority to require federal contractors to comply with such requirements.[119]

If a court were to follow a strict analysis of whether Congress contemplated allowing the president to regulate diversity and inclusion training held by federal contractors when it passed FPASA, the answer would likely be no. But such an analysis has been applied only when a court was examining whether a federal subcontractor should also be required to adhere to an executive order[120] and when an executive agency was issuing regulations under an executive order.[121] Neither case questioned whether Congress contemplated allowing the president to issue an EO prohibiting employment discrimination under FPASA. Therefore, even with an analysis like that in *Friedman*, it is still more than likely that EO 13,950 was a valid exercise of the president's procurement power based on past case law.[122]

D. Does EO 13,950 Violate First Amendment Protections?

Following EO 13,950, the American Civil Liberties Union (ACLU) issued an article criticizing the order for violating the First Amendment.[123] It accused the Trump

115. *See UAW-Lab. Emp. & Training Corp.*, 325 F.3d at 366–67 ("The link may seem attenuated (especially since unions already have a duty to inform employees of these rights), and indeed one can with a straight face advance an argument claiming opposite effects or no effects at all. But in *Kahn,* too, there was a rather obvious case that the order might in fact increase procurement costs (as it plainly did in the short run); under *Kahn*'s lenient standards, there is enough of a nexus."); *see also, Kahn*, 618 F.2d at 805–06. (MacKinnon, J., dissenting) (arguing that the majority's opinion permitted the president to choose any economic or social goal he wanted, as long as there is some conceivable future benefit to the economy and efficiency in federal procurement).

116. *Kahn*, 618 F.2d at 785; *UAW-Lab. Emp. & Training Corp.*, 325 F.3d at 366–67.

117. *Friedman*, 639 F.2d at 167–68.

118. *Id.* at 171.

119. *See generally id.*

120. *Id.*

121. *See* Chrysler Corp. v. Brown, 441 U.S. 281, 306 (1979) (asking whether "under any of the arguably *statutory* grants of authority the OFCCP disclosure regulations relied on by the respondents are reasonably within the contemplation of that grant of authority.").

122. *See supra* Section II.C. (describing the impact of EOs passed by former presidents on federal contractors).

123. Sarah Hinger & Brian Hauss, *The Trump Administration is Banning Talk about Race and Gender*, ACLU (Oct. 9, 2020), https://www.aclu.org/news/civil-liberties/the-trump-administration-is-banning-talk-

administration of silencing conversations on race and gender that it disfavors.[124] The commentary viewed EO 13,950 as an attempt to dictate private expression on race and gender discussions by government employees and contractors.[125]

Likewise, on October 29, 2020, the National Urban League and National Fair Housing Alliance filed a complaint against President Trump, alleging that EO 13,950 is an instance of targeted censorship violating First Amendment free speech rights.[126] They claimed that the ability to speak on important issues such as diversity and equality is protected by the First Amendment because 1) the speech is within federal contractors' capacity as a private citizen and 2) the speech deals with matters of public concern.[127] The complaint pointed to the order's chilling effect on diversity training, which is detailed further in the next section.[128]

Under *Pickering v. Board of Education*, the Supreme Court created a balancing test for when government employees speak about matters of public concern. When an employee speaks on matters of public concern and the government regulates that speech, the courts must balance the First Amendment interests of the employee with "the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees."[129] In *Board of County Commissioners v. Umbehr*, this test was extended to federal contractors while adjusting the test to weigh the government's interests as a contractor and not an employer.[130]

When the government *ex ante* regulates employee speech, there is a greater burden on the government in this test.[131] "The Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed" by the expression's hypothetical impact on the government's operation,[132] an arguably difficult thing to prove before the speech has even occurred. The government must go beyond suggesting some possible harm and show that these harms are real and that these regulations will alleviate that harm in a direct, material way.[133] Furthermore, regulations that outright prohibit speech based on content or the speaker's viewpoint propose a significant burden on the employees' free speech rights.[134]

Since EO 13,950 preemptively prohibits any sort of training with what it defines as race and sex scapegoating and stereotyping, it would fall under *United States v. National Treasury Employees Union*. First, there is an issue of whether speaking about race and

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about-race-and-gender/ [https://perma.cc/F8X4-2QV6]. The NAACP also released a statement in response to the order, claiming it aims to constrain freedom of expression. *LDF Issues Statement in Response to President Trump's Executive Order*, NAACP LEGAL DEF. & EDU. FUND (Sept. 24, 2020), https://www.naacpldf.org/wp-content/uploads/LDF-Statement-on-Trump-EO-9.24.20-FINAL.pdf [https://perma.cc/ZA48-KLDT].

124. Hinger & Hauss *supra* note 123.

125. *Id.*

126. Complaint at 55, Nat'l Urb. League v. Trump, No. 1:20-cv-03121 (D.D.C. Oct. 29, 2020), https://www.naacpldf.org/wp-content/uploads/1-Complaint-2.pdf [https://perma.cc/67C3-BW8Y].

127. *Id.*

128. *Id.* at 56.

129. Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cnty., Ill. 391 U.S. 563, 568 (1968).

130. Bd. of Cnty Comm'rs, Wabaunsee Cnty., Kan. v. Umbehr, 518 U.S. 668, 668 (1996).

131. United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 468 (1995).

132. *Id.*

133. *See id.* at 475 (citing Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n, 512 U.S. 622, 664 (1994)).

134. *See id.* at 468.

sex stereotyping is a matter of public concern. The Supreme Court has recognized race discrimination as a matter of public concern,[135] and multiple circuits have recognized sex discrimination as such.[136] Next, the federal contractor's interest in its First Amendment rights must be weighed against the federal government's interest as a contractor in promoting efficiency in procurement. Given that EO 13,950 provided few resources or evidence to show that this kind of training was leading to real harm, and that the order seemed to employ viewpoint discrimination by pointing to a "destructive ideology" that needed to be stopped, it is likely EO 13,950 violated federal contractors' First Amendment rights.[137]

E. EO 13,950's Chilling Effect

The ACLU and NAACP are not the only organizations to express disdain for EO 13,950. The National Council of Nonprofits (NCON) highlighted the wide opposition to the order and called on its members who opposed the order to share their formal statements regarding their opposition and report any trends in the field.[138] Their webpage currently contains 17 statements on the order, including a letter signed by 161 for-profits and nonprofits urging the president to withdraw the order.[139]

Attorneys specializing in government contracting have also puzzled over the EO's vague definition of prohibited diversity and inclusion training. Liza Craig from Reed Smith noted that had Trump been reelected, clarifying guidance could have been forthcoming.[140] On December 22, 2020, the U.S. District Court of the Northern District of California issued a preliminary injunction, enjoining multiple federal offices from enforcing sections four and five against federal contractors.[141] Since President Joe Biden was elected, the order has been rescinded.[142] Before the preliminary injunction and in between the two administrations, however, federal contractors and other affected entities like universities had to reevaluate their diversity and inclusion training, some even pausing their training altogether.[143] This impact shows the chilling effect that such

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135. Connick v. Myers, 461 U.S. 138, 148 n.8 (1983) (The "right to protest racial discrimination" is "a matter inherently of public concern").

136. *See, e.g.*, Kokkinis v. Ivkovich, 185 F.3d 840, 844 (7th Cir. 1999); Konits v. Valley Stream Cent. High Sch. Dist., 394 F.3d 121, 125 (2d Cir. 2005).

137. For a more detailed discussion on this issue, see Richard Ariel, *The First Amendment Implications of President Trump's Executive Order on Diversity Training*, PROCUREMENT LAW., Summer 2021, at 11.

138. *The Executive Order on Combating Race and Sex Stereotyping*, NAT'L ASS'N NONPROFITS, https://www.councilofnonprofits.org/trends-policy-issues/the-executive-order-combating-race-and-sex-stereotyping [https://perma.cc/Y2BM-J92J].

139. Letter from Aeronautical Repair Station Association et al. to Donald J. Trump, President of the United States (Oct. 15, 2020), http://image.uschamber.com/lib/fe3911727164047d731673/m/5/b5c62775-5376-4f8d-9384-35b76ce39682.pdf [https://perma.cc/LG95-2ZW4].

140. *See* Kenneth Hein, *Legal Expert Unpacks what Trump's Executive Order on Diversity Training Means for Agencies*, DRUM (Sept. 29, 2020, 10:00 AM), https://www.thedrum.com/news/2020/09/29/legal-expert-unpacks-what-trump-s-executive-order-diversity-training-means-agencies [https://perma.cc/PYC4-BWCF].

141. Santa Cruz Lesbian and Gay Community Center v. Trump, 508 F. Supp. 3d 521 (N.D. Cal. 2020) (granting preliminary injunction).

142. *Id.*

143. *See* Mark Moore, *Colleges Drop 'Diversity' Efforts After Trump Bans Critical Race Theory*, N.Y. POST (Oct. 7, 2020, 2:10 PM), https://nypost.com/2020/10/07/colleges-drop-diversity-efforts-after-trump-bans-

executive orders can have and emphasizes the need to clarify this exercise of executive power.

IV. RECOMMENDATION

A. Future Courts Need to Follow the Fourth Circuit's Lead and Apply a Stricter Analysis

As the case law currently stands, courts give broad discretion to the President to create policy under FPASA.[144] An EO merely needs to meet the sufficiently close nexus between its goals and the goals of FPASA—government procurement economy and efficiency—as well as not violate any other federal law, such as the NLRA.[145] Courts like the D.C. Circuit have essentially applied a rational basis standard to EOs when they are not in direct contradiction with other federal law, asking whether the executive action was reasonably related to the goals of FPASA.[146] The actual motivation of the president when passing the law is irrelevant; the court only looks for whether there was some connection between the order and improving economy and efficiency in procurement.[147]

However, the Fourth Circuit harkened back to the Supreme Court's focus on whether the congressional grant of authority to the executive over government procurement ever contemplated the exercise of authority at issue.[148] If courts were to apply this stricter analysis of the sufficiently close nexus test, this may restrict executive authority under FPASA, rather than allowing it to continue expanding into areas that Congress could not have possibly contemplated at the time FPASA was enacted.

Arguably, Congress never considered that allowing the executive to effectuate economy and efficiency in government procurement would also allow the executive to control whether or not federal contractors and subcontractors—which account for roughly 20% of America's working population[149]—can teach critical race theory. FPASA was created in response to the procurement issues the government experienced during World War II.[150] It was meant to simplify procurement, utilization, and disposal of government property.[151] It granted the president power to prescribe policies and directives, but this power was limited.[152] The policies had to be necessary to execute FPASA and not

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critical-race-theory/ [https://perma.cc/EC65-DTY6] (reporting on how certain schools, including the University of Iowa and John A. Logan College, paused diversity trainings in response to the EO); Hailey Fuchs, *Trump Attack on Diversity Training Has a Quick and Chilling Effect*, N.Y. TIMES (Oct. 13, 2020), https://www.nytimes.com/2020/10/13/us/politics/trump-diversity-training-race.html [https://perma.cc/8VQA-5SNY] (reporting on what one former Clinton Administration official called the "chilling effect" EO 13,950 had on diversity training in the academic and corporate worlds).

144. *See supra* Section II.D. (discussing the broad grant of power afforded to the President under FPASA by the courts).

145. *See supra* Section III.A. (describing the sufficiently close nexus test).

146. *See* Egerton, *supra* note 18 (comparing the court's analysis in *Kahn* to how courts analyze congressional action under the commerce clause).

147. *Id.*

148. *See Friedman*, 639 F.2d at 169 (stating that a congressional grant of legislative authority requires a court to reasonably be able to conclude that a grant of authority contemplates the regulations issued).

149. Office of Federal Contract Compliance Programs, *History of Executive Order*, U.S. DEP'T OF LAB. 11, 246, https://www.dol.gov/agencies/ofccp/about/executive-order-11246-history [https://perma.cc/7QPK-9VXM].

150. Egerton, *supra* note 18, at 206.

151. Federal Property and Administrative Services Act of 1949, ch. 288, 63 Stat. 377 (1949).

152. *Id.* at 486.

inconsistent with its provisions.[153]

While some courts have allowed this simple provision to justify prior executives regulating wage and price standards; federal contractors notifying employees of their union rights; or the utilization of an E-verify system, applying a stricter analysis will restrict executives from further "legislating" in areas that were never contemplated by Congress. EO 13,950 can be differentiated from prior orders in that it does not deal with labor relations or verifying the eligibility of employees to work in the United States.[154] Instead, EO 13,950 tells federal contractors what kinds of conversations they should and should not be having around race and sex. Former President Trump tried to justify these restrictions based upon such training potentially leading to division and inefficiency. Rather than accepting such a justification, courts should read EOs with a stricter close nexus test, asking if Congress contemplated giving the president power to regulate in this area.

B. Congress Should Revisit FPASA and its Grant of Authority to the President

While the courts can apply a stricter analysis to exercises of the procurement power, Congress could also revisit FPASA and consider whether it intended to grant the executive such broad authority over federal contractors. This could be done by defining "economy and efficiency" in FPASA. These terms could be limited such that regulating diversity and inclusion training programs could not be interpreted as furthering economic and efficient government procurement. Amending FPASA rather than addressing each individual EO would more efficiently address these orders expanding the scope of authority.[155] Congress would not have to take the time to legislate to overturn each order;[156] it could instead rely on procurement power restrictions.

C. EO 13,950 Stifled Conversations on Race and Sex

Critical race theory, the body of scholarship that undergirds diversity training efforts targeted by EO 13,950, remains a controversial and contested, a topic on which reasonable people can disagree.[157] But these differences cannot be dealt with by silencing

153. *Id.*

154. *See supra* Section II.C (discussing previous presidential executive orders regarding labor relations and verification of employment eligibility).

155. *E.g.*, Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539, 542 (2005) ("Between 1945 and 1998, Congress legislatively overturned only four of the more than 3,500 executive orders issued." (footnote omitted)).

156. There was a bill introduced on the house floor to mitigate the effects of EO 13,950, but with Joe Biden as president-elect, the bill is likely to go nowhere. H.R. Res. 8595, 116th Cong. (2020).

157. For critiques of critical race theory and diversity training, see, for example, Thomas Chatterton Williams, *Easy Chair: Unending Struggle*, HARPER'S MAG., Aug. 2021, at 5; Anne Applebaum, *Democracies Don't Try to Make Everyone Agree*, ATLANTIC (June 28, 2021), https://www.theatlantic.com/ideas/archive/2021/06/milley-critical-race-theory-marxism-racism-fox-news/619308/ [https://perma.cc/JZF9-EFC6]; Andrew Sullivan, *Removing the Bedrock of Liberalism*, WEEKLY DISH My 28, 2021), https://andrewsullivan.substack.com/p/removing-the-bedrock-of-liberalism-826 [https://perma.cc/AV7C-4L65]; Ross Douthat, *The Excesses of Antiracist Education*, N.Y. TIMES (July 3, 2021), https://www.nytimes.com/2021/07/03/opinion/antiracist-education-history.html [https://perma.cc/W2DP-ZD5U].

viewpoints labeled as "divisive." EO 13,950 is framed as only extending EO 11,246,[158] which as amended prohibits federal contractors from discriminating based on race, color, religion, sex, sexual orientation, gender identity, or national origin. That may be so, but the effect of EO 13,950 has been uncertainty surrounding whether universities or businesses can conduct their diversity and inclusion training during a year of racial reckoning in the United States.

Of course, disagreement exists over whether diversity training truly works. There are many theories as to the best and most productive form of such training.[159] Despite this, more diverse and inclusive work environments are not achieved by ending the conversation altogether because of vague wording in an order. EO 13,950 purported to strengthen prior anti-discrimination efforts by the executive branch, but its effect was stopping entire diversity and inclusion programs.

While EO 13,950 was revoked by President Biden, that should not end this discussion. Thus, EO 13,950 was problematic not only because of the kind of conversations it paused; it was also problematic for the power it wielded over 20% of America's workforce. It did not just tell federal contractors to not discriminate like past orders. EO 13,950 told them how to talk about race within their companies. Present and future executives cannot be allowed to affect social policy in the United States this same way.

Additionally, this EO's effect went beyond impacting federal contractors and places of higher education before it was rescinded. States have passed and are currently considering legislation with similar language to EO 13,950.[160] For example, Governor Reynolds of Iowa signed into law House File 802 on June 8, 2021.[161] While this law only applies to government agencies and entities, school districts, and public postsecondary education institutions, it prohibits any mandatory training that incorporates "divisive concepts," such as race and sex stereotyping and scapegoating.[162] Other states such as Arkansas, Oklahoma, Texas, and Idaho have passed laws preventing critical race theory from being taught in public schools and public institutions.[163] Even after rescission, this

158. *See* Executive Order 13950 — Combating Race and Sex Stereotyping, OFF. OF FED. CONT. COMPLIANCE PROGRAMS (Dec. 28, 2020), https://www.dol.gov/agencies/ofccp/faqs/executive-order-13950#Q6 [https://web.archive.org/web/20210114194018/www.dol.gov/agencies/ofccp/faqs/executive-order-13950] (noting that the race and sex discrimination and scapegoating described in EO 13,950 may also violate EO 11,246 nondiscrimination obligations).

159. *See* Dobbin & Kalev, *supra* note 6 (listing several forms of diversity and inclusion training including hiring tests, grievance procedures, and engagement).

160. These states include Michigan, Tennessee, Georgia, North Carolina, South Carolina, Ohio, South Dakota, Arizona, Kentucky, Utah, and New Hampshire; all are considering some sort of critical race theory training ban in their legislatures. Jack Dutton, *Critical Race Theory is Banned in These States*, NEWSWEEK (June 11, 2021, 6:57 AM), https://www.newsweek.com/critical-race-theory-banned-these-states-1599712 [https://perma.cc/P8TF-2LY9]. "Divisive concept" bans are being considered in the legislatures of Louisiana, Maine, Missouri, Pennsylvania, Rhode Island, Wisconsin, and West Virginia. *Id.*

161. 2021 Iowa Acts Ch.163.

162. *Id.* The law does, however, note that for government agencies and entities, it should not be construed to prevent any promotion of diversity of inclusiveness. *Id.* at 2. For higher education institutions, it shall not be construed to inhibit students or faculty's first amendment rights or to undermine the public institution's "duty to protect to the fullest degree intellectual freedom and expression." *Id.* at 4. Likewise, for school districts, it shall not be construed to prevent them from "promoting racial, cultural, ethnic, intellectual, or academic diversity or inclusiveness," if it comports with the House File 802 and other applicable law. *Id.* at 6.

163. *See* S.B. 627, 93rd Gen. Assembly, Reg. Sess. (Ark. 2021) (prohibiting the propagation of divisive

EO's affects are being felt across the country.

Both the courts and Congress need to reconsider the bounds of this delegation of authority. It finally seems to have expanded too far. The procurement power has been used to effectuate laudable goals, such as ending discrimination in employment practices, but this expansion led to an analysis that does little more than ask whether the president has offered a reasonable explanation for the order under FPASA.

V. CONCLUSION

EO 13,950 required federal contractors to reevaluate their diversity and inclusion efforts that may include "divisive concepts," such as teaching that a certain race or sex is inherently racist or sexist. Since FPASA's passage and president's justifying their EOs through this order, courts have interpreted the executive's procurement authority broadly, allowing executive actions remotely related to economic and efficient procurement. With this precedent, EO 13,950 was likely a valid exercise of the president's procurement authority. To prevent future presidents from quasi-legislating in a way that affects both the federal workforce and a large portion of the private workforce, courts need to apply a stricter analysis of the relation between executive action under FPASA and whether Congress contemplated such an action. Congress should also reevaluate the grant of authority under FPASA, as it seems unlikely that future Presidents will stop using FPASA as a justification for their executive actions. Using the FPASA power to pass orders such as EO 13,950 is attractive to Executives because it allows them to bypass an often slow and unmoving legislative process. However, allowing executives to quasi-legislate this way, with only a distant relation to FPASA's original purpose, enables a system where the head of government directs social issues—a role that the Executive was arguably not meant to fill.

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concepts and reviewing state entity training materials); H.B. 1775, 58th Leg., 1st Sess. (Okla. 2021) (prohibiting discrimination on the basis of race or sex in the form of bias, stereotyping, scapegoating, or classification); H.B. 3979, 87th Leg., Reg. Sess. (Tex. 2021) (prohibiting any requirement for teachers to engage in training, orientation, or therapy that presents any form of race or sex stereotyping or blame on the basis of race or sex); H.B. 377, 66th Leg., Reg. Sess. (Idaho 2021) (prohibiting public schools from directing or otherwise compelling students to affirm that any sex, race, ethnicity, religion, color, or national origin is inherently superior or inferior).