

The President and the Power of the Purchaser: A Theory of Contracting and Executive Action

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Although the Constitution confers legislative power on Congress, presidents frequently have undertaken executive measures that reflected independent decisions on policy. The President as executive — as the CEO of the federal government — is empowered with certain legal prerogatives to manage and coordinate. This paper will highlight the President’s formal and informal capacity to act unilaterally, and thus potentially to regulate on his own, through the government’s role as a buyer — what is referred to here as the “power of the purchaser.” Presidents can act independently to shift policy in any way they wish, and there it will stay until and unless either Congress, the courts (or the market) effectively respond.

Presidents have incentives to expand their institutional power, and they operate within a system of shared powers whose ambiguities give them opportunities to make policy on their own authority. Presidents have expertise, information, and organizational capacity, both in the institution of the presidency and in the bureaucracy, to act. With the “power of the purchaser,” the President has the contractual authority to set additional terms and conditions beyond “efficiency” concerns. The question is not whether the President has the ‘appropriate’ information, preferences, and incentives to arrive at an optimal contract, but to explain theoretically why presidents are motivated to act unilaterally in regulatory areas where Congress will not or has not yet acted.

Presidents have used their “power of the purchaser” to effect big, even historic changes in national policy on their own administrative or managerial authority. Chief executives since FDR have used their general power of procurement to place conditions on private sector firms that do business with the federal government. Over the years, the courts have consistently upheld the broad interpretation given to the FPASA by Presidents charged within its administration, especially in light of the absence of any congressional response to the exercise of that statutory authority. Courts have believed by emphasizing leadership role of President in setting government-wide procurement policy in all agencies, Congress intended the President to play a direct and active role in supervising the government's management functions.