

Federal Circuit Bar *Journal*



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- ★ Brief of Amicus Curiae Administrative, Constitutional, and Intellectual Property Law Professors Urging Reversal and Supporting Petitioners in *United States v. Arthrex, Inc.*
- ★ Slippery Slope? More Like Sliding Scale: Reviving Section 232 Litigation by Adopting Sliding Scale Analysis to Meaningfully Constrain Presidential Action
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Federal Circuit Bar *Journal*

*The National Quarterly Review
of the United States Court of Appeals for
the Federal Circuit*

Volume 31, Number 2

Published by
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Federal Circuit Bar Journal

Volume 31, Number 2

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The 2021 Honorable Daniel M. Friedman Lecture on Excellence in Appellate Advocacy*

The Honorable Sharon Prost, Circuit Judge, United States Court of Appeals for the Federal Circuit**

Introduction

Thank you, Chief Judge Moore, and good afternoon all. Admittedly, when I accepted this invite, I believe we all thought we would be in person by now. So, I'm disappointed, and appreciate, perhaps a bit more, lawyers' complaints about telephonic arguments and not being able to see and read the faces of judges. Now you can see me, I hope, but I can't see the audience. If we were in person, I could at least observe the yawns, rolled eyes, and checking of iPhones to give me some signals for how to proceed. Lacking any of that feedback, I suppose I am left to my own devices.

First, I would like to recognize Judge Friedman's former law clerks, his judicial assistant Claudia Morgan of course, and the [Federal Circuit] Bar Association, for setting up this event as a fitting tribute to our wonderful

* The Tenth Annual Friedman Memorial Lecture was delivered virtually on November 19, 2021, by the Honorable Sharon Prost, Circuit Judge at the Federal Circuit. The Friedman Lecture on Excellence in Appellate Advocacy was established to honor the life and work of Federal Circuit Judge Daniel M. Friedman, an esteemed federal jurist, leading appellate advocate for the U.S. government, an extraordinary teacher of and mentor to his judicial law clerks and all who crossed his professional path. The Lecture has been edited for print. Additional information regarding this lecture, past lectures, and the Friedman Memorial Committee can be found on the Federal Circuit Bar Association website, at www.fedcirbar.org.

** The Honorable Sharon Prost was appointed to the Federal Circuit by President George W. Bush in 2001. Judge Prost served as Chief Circuit Judge from May 31, 2014, to May 21, 2021. Prior to her appointment, Judge Prost served as Minority Chief Counsel, Deputy Chief Counsel, and Chief Counsel of the Committee on the Judiciary, U.S. Senate from 1993 to 2001. She also served as Chief Labor Counsel (Minority), Senate Committee on Labor and Human Resources from 1989 to 1993. Prior to her work on Capitol Hill, Judge Prost served for fifteen years in five different agencies of the executive branch, including the Department of Treasury, National Labor Relations Board, and General Accounting Office. Judge Prost received a B.S. from Cornell University in 1973, an M.B.A. from The George Washington University in 1975, a J.D. from the Washington College of Law, American University in 1979, and an LL.M. in tax law from The George Washington University School of Law in 1984.

colleague. It is such an apt and terrific way to honor his memory, that I can almost see a smile on his face. I also welcome his family, who have been steadfast supporters of this event. It is wonderful that you are always with us in sharing these moments.

I. Remembrances About Judge Friedman

Let me begin with a few remarks and remembrances about Judge Friedman. As the years pass, I feel more and more honored, and just lucky, that I got to work with him closely, and many of those memories bring a smile to my face. Almost every morning we would see him come in around 11:00 a.m. or earlier. Often garbed in his trench coat, he walked by our chambers on the way to his own. He'd always peak in—to spy if Beaseley was in that day. Beaseley is a dog—not a judge or a clerk—but nonetheless a favorite of Judge Friedman. If he spied the baby gate in the corridor signaling her presence, he'd approach with a delighted smile and a warm good morning.

If I had to describe Judge Friedman in one word, it would be a “gentleman” or, as I like to say and did at his memorial service, a “*mensch*.” I never observed him talk to or treat anyone differently. He did not talk down or up to anyone. His demeanor was constant: direct, inviting and always attentive. While the workforce underwent enormous changes during his career, Judge Friedman never missed a beat. He reacted to and treated everyone of any age or stature or position in precisely the same way: always with respect and kindness.

Now I'm honored to be asked to give the Lecture this year. I view it as quite a daunting task. And I made a big mistake: I thought I'd best prepare by reading the eloquent remarks of my predecessors—very intimidating. But the good news for me is that because their eloquence so clearly exceeded anything I am capable of, I just wrote off immediately trying to match it. There are some general themes running through many of the lectures, however, that can bear the weight of repetition. And so, I will run through with you this afternoon some general views of appellate advocacy here at the Federal Circuit followed by what I view are important data points in appellate briefing and oral argument.

II. Observations on the Pandemic

But before I do that, I'd just like to offer a few observations on a topic that I know no previous speaker has discussed because the events of the past two years were unprecedented for the country and our court. That is how we proceeded during the pandemic to move forward with deciding our cases. As you know, briefing went on as usual but oral arguments presented an obvious challenge. And as many of you may or may not know, we are one of the few, if only, circuits that normally hears argument in all lawyered cases under

a demanding routine of fifteen panels the first week of every month, with three panels running concurrently each morning of the week, typically with four argued cases. Keeping that going was no small matter and, largely thanks to our wonderful staff and judges who proved to be very nimble, we pulled it off as best we could. We opted for telephonic arguments as we could not imagine jumping into Zoom with the structure and scheduling of consecutive and concurrent arguments and, of course, at the time did not realize how long the shutdowns would last.

Now I'm sure everyone has her own critique of how things went, but as the former Chief Judge, I could not have been prouder of everyone involved and was enormously relieved that we moved forward maintaining the same efficiency in deciding cases as before the pandemic. I heard quite different things from advocates, but principally two comments. The first, to my surprise: many really liked the telephonic arguments, finding them easier to prepare for and less stressful. The major downside that many recognized, however, was that they could not see the faces of the judges and take cues from those faces. Surprising, as I never thought my expression during argument gave anything away, except for an infrequent eye roll. But I appreciate what they were saying—much harder for the advocates, and even the judges, to not interrupt each other in the absence of observing anybody's gestures.

From the judges' perspective, I think many viewed our telephonic arguments as a great success given nothing like this had ever happened. There were shockingly few miscues and dropped calls. While all missed the in-person exchanges, on the positive side was the fact that there were no distractions, making it easier to focus solely on the spoken words and nothing else.

In any event, I don't think anyone would disagree that we are all glad that is hopefully over, and, as you know, under the leadership of Chief Judge Moore we are pretty much back in business with closed but in-person arguments.

III. Comments on Appellate Advocacy

A. Briefing

So, turning finally for some brief comments on appellate advocacy in our court. To begin, two general observations that are the starting point for anyone with an appeal in our court. As many (at least former clerks) know, life here is like being on a treadmill that never stops—never. Indeed, when I came to this position from one on the Senate Judiciary Committee, my workload and stress level was expected to decrease—and it did, substantially. But what I did not see coming is that we don't have any recesses at the Federal Circuit. None of these congressional three weeks on, one week off, during which *nothing* or very little is going on. Here, it never stops, and every month we each get a set of briefs in about fifteen new cases scheduled for argument five weeks after receipt. So, after completing the prior court week, we have

three weeks, sometimes four, to comb through fifteen new cases which, it happens, is not our principal effort—writing opinions from prior months is.

So, when you are out there writing those briefs, making sure you use up every last word of the word count, you ought to keep that in mind. It ought to bear on how much you say and how you say it. Others have emphasized what we all know to be among the most important pillars of brief writing—indeed maybe of everything you do in life—*candor* and *clarity*. Repeating as I often do what my friend Judge [Richard] Taranto says, in reading fifteen sets of briefs, there's a problem if you have to read any paragraph, let alone many paragraphs, over more than once to either figure out what it's trying to say or why it's there at all.

And *candor*—hope I don't have to explain in any detail. If you don't appreciate it: you have three judges and at least three law clerks pouring over your briefs and appendices. One miscite, misstatement, or misleading suggestion may be forgiven—maybe. More than one and you've lost the confidence of your reader, and the consequences of that are not good for either your reputation as a lawyer or for your client. So even if your objective is not to do the right thing, self-interest ought to force you in that direction.

Another note that you've heard from my colleagues before: limit the number of issues you are raise on appeal. It's hard, I know. And admittedly, every once in a while, judges will call you out for not having *raised* a particular argument. But you just can't have an appeal which raises and gives proper treatment to seven or eight or ten different issues—it necessarily dilutes the strength and seriousness of your presentation.

Some seemingly more trivial matters can also make a difference. Speaking for myself and perhaps others, it helps me a great deal—and therefore you—to have a concise, but clear and informative, table of contents. The reason hopefully does not escape you. With fifteen sets of briefs, if I could I'd probably try and read them all more than once—but that is not humanly possible, and so as I go back and forth with cases during the weeks of preparation, a friendly clear table of contents is my best friend.

B. Oral Argument

Oral argument is just a variation of the same theme, but a really different twist. If you understand one thing about pursuing your appeal here, it should be that the brief is your time and the argument is ours, and if you have the proper respect for our court you will know—for sure—that the panel hearing your case has been through the record and knows your case in painful detail. So, your job should be clear: you have fifteen minutes to respond fully and candidly to the questions posed to you, and God help you if you get no questions. Anyone who views that as a welcome development as she has fifteen minutes uninterrupted to make her case doesn't belong in the courtroom.

Just a few additional random observations on oral argument:

Think about it as not just a conversation between you and the judge questioning you. There are four people who are part of the dialogue and being able to keep all of them in play is a good thing. And our best advocates keep close track of prior comments by judges and use them as building blocks as the argument progresses.

Second, and we see this with surprising frequency: don't approach each question as a hostile one. Unlike the [Internal Revenue Service ("IRS")], sometimes judges are really trying to help you, likely because they agree with your position and hope you can convince their colleagues, too. In fact, on occasion the judge is so clearly on your side that she will reframe your answer to improve on it in an effort to apparently persuade other panel members. You obviously want to go with the flow in those circumstances.

Three, I would hope and assume that your preparation does not consist of practicing a speech in the mirror but rather coming up with the best and hardest questions you can think of and practicing the answers. So, if you are properly prepared—and also have the respect for our court that it deserves—you should expect hard questions and indeed welcome them.

Four, we all know about hypotheticals. Just know that you can't run, and you can't hide. Accept them as a complement and opportunity. The court is likely asking for your help in figuring out the boundaries of what to say and do. And please, please, don't start your response with: "that is not my case." A well-respected advocate not too long ago started his response to the Chief Justice that way: "Well, of course, that is not this case." And the Chief cut him off there and said, "Mr.—I wasn't confused about that." Not a great start.

Fifth, just in keeping with the theme that this is not about you, this is about the court: everything about your presentation should reflect that. A number of great advocates stand at the podium with their arms folded—great way to not have to remember to stop flailing. Speaking of which—no weapons either. No pens waving through the air in a flourish.

The point is this: we all have egos. We all want to be noticed and remembered. Got it. But following the best arguments by the best advocates, I expect their goal is that the only thing remembered about their presentation is the words they spoke.

Sixth, so that you don't walk away thinking that those of us on the bench are infallible—that would be very un-Judge Friedman-like—you have to be prepared for some curve balls. Hey, with fifteen new cases every month it's not inconceivable that you'll get a question from a judge who is confusing your case with another. You obviously need to politely clear that up. Or, on occasion, a judge will repeat the same question you just answered from another judge because they may not have been paying attention. It's not that hard to just do your best and go with the flow.

Finally, a winning strategy is not to disparage the district court judge or the tribunal from which you are appealing. Sure, you're here trying to convince us

she got it wrong, but references to the district court's inexperience in patent cases, or worst yet, that this judge just really dislikes patent cases—yes, we've heard that—is not a way to score points with a panel of her colleagues.

Conclusion: Judge Friedman's Civility

OK. That's some of the nuts and bolts. But I can't end without mentioning the overarching theme that should be ingrained in your presentation and your practice. And it is necessarily called out as part of the Friedman Lecture, and it truly exemplifies this man's career, and that is another "C" word: civility.

I don't know how many of you had ever seen Judge Friedman visibly angry, or at least annoyed. It was indeed a rare occurrence. But on the bench and through his pen, the one thing that got his ire was the lack of civility by advocates, including, of course, *ad hominem* attacks against the other side. For example, he really disliked the lawyers calling the other side's case frivolous. He would have none of it—it had no place in the profession he loved, cared for, and protected.

I would just conclude by again expressing my thanks to all who keep Judge Friedman's legacy going with these events. He remains in our hearts and, of course, he lives on in his lucid, clear, persuasive, and non-footnoted opinions.

Brief of Amicus Curiae Administrative, Constitutional, and Intellectual Property Law Professors Urging Reversal and Supporting Petitioners in *United States v. Arthrex, Inc.**

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Mark A. Lemley,^{**} Joshua D. Sarnoff^{††}

* This Brief of Amicus Curiae was originally submitted to the Supreme Court. Brief of Amicus Curiae Administrative, Constitutional, and Intellectual Property Law Professors Urging Reversal and Supporting Petitioners in 19-1434 & 19-1452, *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021) (Nos. 19-1434, 19-1452 & 19-1458). It is reprinted herein in its original form, with minimal editing and formatting changes. Arthrex, Inc. owns a patent that was subject to inter partes review by a panel of three Administrative Patent Judges (“APJs”), which found that the patent was invalid. *See Arthrex*, 141 S. Ct. at 1978. Arthrex appealed this decision to the Federal Circuit, arguing that the appointment of APJs by the Secretary of Commerce violated the Appointments Clause of the U.S. Constitution. *See id.* The Federal Circuit agreed with Arthrex, holding that APJs were principal officers because neither the Secretary nor the Director of the U.S. Patent and Trademark Office (“PTO”) had the authority to review their decisions or remove them at will. *See id.* The court remedied the constitutional violation by severing the portion of the Patent Act that restricted the removal of APJs. *See id.* On appeal, the Supreme Court was asked to decide (1) whether APJs are principal officers, requiring presidential appointment and advice and consent of the Senate, and if so (2) whether invalidating their tenure protections, making them removable at-will by the Secretary, is the appropriate remedy. *See id.* at 1978–79. The Supreme Court held that “the unreviewable authority wielded by APJs during inter partes review is incompatible [under the Appointments Clause] with their appointment by the Secretary [of Commerce] to an inferior office.” *Id.* at 1985. The Court further held that the appropriate remedy was to render inoperative the statutory restrictions that prevented the Director of the PTO from reviewing final decisions rendered by APJs during inter partes review. *See id.* at 1987 (plurality opinion).

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Interest of the Amici Curiae

Amici curiae are professors of administrative, constitutional, and intellectual property law, who have taught, written, and/or litigated on the subjects of these consolidated cases. Amici have no interest, financial or otherwise, in these cases, and they are filing this brief solely to provide the Court with their analysis, which differs from that of the petitioners, on the basis on which this Court should reverse the judgment below. Amici agree that the Administrative Patent Judges (“APJs”) whose appointments are at issue are inferior officers and hence were properly appointed under the Appointments Clause. However, if the Court concludes that APJs are principal officers, amici urge the Court not to approve the remedy adopted by the Federal Circuit and supported by the United States—striking the “for-cause” limitation on removal of APJs. Rather, the resolution of how to comply with the Appointments Clause should be left to Congress.

Introduction and Summary of Argument

As long as there have been patents, there have been alleged infringers who have been sued by the owner of the patent. Infringement cases are litigated in federal courts where the legal issues have been decided by Article III judges and the factual questions resolved by juries. In many infringement cases, the alleged infringer will contend that the patent is invalid even though properly issued by the Patent & Trademark Office (“PTO”). Patents are issued through an *ex parte* non-adversary process in which trained patent examiners review the application to determine whether the patent and the various and often numerous claims that are made meet the standards required by law for a valid patent. During this process, private third parties (i.e., a competitor or potential infringer) are not allowed to participate.

The PTO is a busy office. For example, in 2019, the office issued 391,103 patents. *Patent Counts by Origin and Type Calendar Year 2019*, U.S. PAT. & TRADEMARK OFF. (2019), https://www.uspto.gov/web/offices/ac/ido/oeip/taf/st_co_19.htm [<https://perma.cc/EW8A-KR94>]. Many patents have little or no commercial value and hence never become the subject of infringement litigation. But for those patents that generate litigation, the court proceedings are lengthy and costly and are often conducted before judges and juries with no training in patents. After prior efforts to provide an alternative forum for resolving patentability disputes were unsuccessful, Congress created “inter partes” review in the America Invents Act of 2011 (“AIA”), 35 U.S.C. §§ 311 *et seq.*

The basic principle of inter partes review is that any party, including an alleged infringer, may petition the PTO to commence an administrative proceeding to review the patentability requirements of novelty and nonobviousness in 35 U.S.C. §§ 102 & 103. If the PTO grants the petition and

concludes that the patent is invalid, any parallel infringement action will be dismissed. *Fresenius USA, Inc. v. Baxter Int'l, Inc.*, 721 F.3d 1330, 1338–40 (Fed. Cir. 2013).

If the PTO agrees to undertake inter partes review, the case is assigned to a panel of three Administrative Patent Judges (“APJs”) who are appointed by the Secretary of Commerce. 35 U.S.C. §§ 6(c), 6(a). As of October 2019, there were 266 APJs.¹ Typically, one of the APJs assigned to a case is an expert in the subject matter of the patent as well as in patent law generally. § 6(a). APJs are part of the Patent Trial and Appeal Board (“PTAB” or “Board”), whose other members include the Director of the PTO, who is appointed by the President with the advice and consent of the Senate, § 3(a), and the Deputy Director, the Commissioner for Patents, and the Commissioner for Trademarks, who are appointed by the Secretary. § 6(a).²

An inter partes case is adjudicated in what is “less like a judicial proceeding and more like a specialized agency proceeding.” *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2143 (2016). However, it has “many of the usual trappings of litigation. The parties conduct discovery and join issue in briefing and at an oral hearing. §§ 316(a)(5), (6), (8), (10), (13).” *SAS Inst. Inc. v. Iancu*, 138 S. Ct. 1348, 1354 (2018). Based on that record, a panel of three APJs decides the legal and factual issues of novelty and nonobviousness and issues a final written decision. 35 U.S.C. § 318(a). There are no other officers within the Department who have the authority to review, or do in fact do review, decisions of APJs before they may be appealed to the Federal Circuit by either the patent owner or by the party challenging the patent. *Id.* §§ 319, 141(c).³

The Federal Circuit in these cases concluded that APJs are principal rather than inferior officers under the Appointments Clause. The parties agree that the answer to this question is determined in part by the duties that APJs perform and the degree of supervision over them. It is agreed that APJs serve only as judicial officers, meaning that they have no authority to issue rules or otherwise make policy. The Director of the PTO has administrative supervisory

¹ See *Composition of PTAB*, U.S. PAT. & TRADEMARK OFF. (Oct. 24, 2019), <https://www.uspto.gov/sites/default/files/documents/What%20is%20PTAB%20for%20website%2010.24.19.pdf> [<https://perma.cc/RE7P-4B5D>].

² Until 2008, APJs were appointed by the Director, but because the Director is not a Department Head, and because Congress determined that APJs are inferior officers, it required the Department Head to make the appointment. Pub. L. No. 110–313, 122 Stat. 3014, § 1(a)(1)(B) (2008).

³ A case may be reheard by the Board pursuant to 35 U.S.C. § 6(c), but no party has suggested that rehearings are frequently granted. They are heard by panels of at least three, and so even if the Director, who is the only principal officer on the Board, sat on all of them, rehearings would not solve the problem identified by the Federal Circuit.

authority over them but has no power to review specific decisions. Although the Director has certain other duties and powers that affect APJs, none of them is significant enough to constitute meaningful supervision of the kind that those officers found to be principal officers in other contexts have possessed. The same is true of other officials in the Department, including the Secretary. And, as noted above, none of them has express authority to review the substance of a decision of an APJ panel in an inter partes proceeding.

Although the statute creating the office of APJ does not have specific protections against “at will” removal, the parties agree that, under a general statute that is not limited to APJs, they may be disciplined or removed “only for such cause as will promote the efficiency of the service.” 5 U.S.C. § 7513(a). Thus, although the Secretary may seek the removal of an APJ for cause, an APJ, like other federal employees, may obtain review of such an effort before the Merit Systems Protection Board. The validity of those restrictions on removal is not the basis for any direct challenge in these cases, but the Federal Circuit concluded that their elimination would cure the Appointments Clause violation that it found.

In these consolidated petitions, the parties agree that APJs are not employees and that they are at least inferior officers. It is further agreed that, if APJs were properly designated as inferior officers by Congress, the method of their appointment provided by law satisfies the Constitution. The issue now before this Court is whether APJs are principal officers who must be, but were not, appointed by the President with the advice and consent of the Senate.

The Federal Circuit recognized that this Court has not set forth a definitive test by which to determine whether Congress’ designation of inferior officer status is constitutional. It examined various factors that it found relevant, and it found, on balance, that APJs were not inferior officers. That conclusion is incorrect. As demonstrated below, the “totality of all the circumstances” method is not an administrable way to resolve these questions, nor is it compelled by the Constitution. Instead, amici urge the Court to decide this case by relying on two objective factors that support the conclusion that APJs and other similarly situated officers in other Departments are inferior officers.

First, Congress determined by its careful selection of the method by which APJs are appointed that APJs are inferior officers. Under the express provisions of the Appointments Clause, an officer may not be an inferior officer unless Congress has, by law, so provided. When Congress authorized the Secretary to appoint APJs, the Senate gave up the power to oversee their appointment that it has for principal officers. In addition, when the President signed the AIA into law, he surrendered his power to appoint APJs, although he may still make “suggestions” to the Secretary. There is no reason to suppose that Congress would have agreed to an alternative means of appointment here or in other similar situations unless it concluded that the duties of the office at issue were such that it could confidently leave their appointment to one of the

three alternative appointing authorities provided in the Appointments Clause, here the Head of the Commerce Department. As several Justices have recognized, at least where Congress has created an inferior office, there should be a rebuttable presumption that Congress has acted constitutionally. Because there is no basis to second-guess that determination in this instance, such a presumption should apply here.

The second fact supporting the inferior officer designation for APJs is that their position is strictly limited to that of an adjudicator who must follow the law as set forth by Congress and, to the extent applicable, by principal officers in the Commerce Department for which they work. They do not have authority to issue rules or otherwise make policy, except to the extent that any adjudication involves policy choices. They also have no authority to commence enforcement proceedings of any kind, civil or criminal. Their duties to decide cases under the patent laws arise when a party seeks review before the PTO, the Director decides (or delegates the decision to decide) whether review is appropriate, and the case is assigned to specific APJs. Although the patent owner may not seek inter partes review, it knows that, when it commences an infringement action, there is a real possibility that such review will be sought and obtained. But it also knows that the Federal Circuit will review an inter partes ruling on the validity of a patent, just like one coming from a federal district court. Those facts all support the reasonableness of Congress' determination that APJs are inferior officers because they have no significant duties inconsistent with that status.

If the Court nonetheless affirms the Federal Circuit's conclusion that APJs are principal officers, it should reject the Federal Circuit's remedy of striking the "for cause" limitation on the removal of APJs. That rejection would not affect the result in these cases because the APJ decision in this case was not made by properly appointed officers and thus cannot stand. However, the outcome in other inter partes review cases will be determined depending on whether the Federal Circuit's remedial ruling is upheld. The United States has taken the position that the elimination of for-cause removal solves the Appointments Clause problem, but that view is mistaken for two reasons.

First, if there is a flaw in the current system, it is that the requirement of Presidential appointment and Senate confirmation for principal officers has not been met. Making APJs subject to removal at will on the back end does not cure the front-end problem of an unconstitutional appointment. One simply has nothing to do with the other, in contrast to a case in which the appointment of the officer is valid, and the only question is whether a restriction on removal is permissible. *See Seila Law, LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020).

There are at least two direct ways that the problem can be solved, but they require Congress to make the change prospectively. Congress could make all APJs principal officers, by requiring that they be appointed by the President

and confirmed by the Senate. It could also create a layer of appellate patent judges who are appointed as principal officers and who would review all APJ decisions, much the way (although not necessarily subject to the same standard of review) that the Securities & Exchange Commission applies when it reviews decisions by its administrative law judges.

Second, to the extent that the attempted cure might be found through a severability analysis, the Federal Circuit did not sever an unconstitutional provision; it re-wrote not just the law creating the inter partes review but the separate law providing for protection for APJs against removal at will. By doing so, the Federal Circuit imposed its view of what an inter partes review system should be in place of the one that Congress actually created.

Under the law governing inter partes review, independent APJs, who are not part of the policymaking process, make determinations of law as to the validity of a patent. But in striking the for-cause removal protection for APJs, the Federal Circuit set aside Congress' system with independent APJs and substituted its own system in which policymakers would be able to influence the outcome of what are decisions of law. It is not that such a system is unthinkable, but it is plainly not the one that Congress created. Therefore, the Federal Circuit's attempt to solve the Appointments Clause problem by altering the independence of APJs was not a proper exercise of the severability power and should be overturned by this Court if it concludes that APJs are principal officers.

I. Argument

A. APJs Are Inferior Officers Under The Appointments Clause

The Appointments Clause, Article II, § 2, provides as follows:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2. All parties agree that Congress sought to make APJs inferior officers and that they were duly appointed as such. The question presented is whether this Court should follow the Federal Circuit, reject the judgment of Congress, and conclude that APJs are principal officers who must be appointed by the President and confirmed by the Senate. Because the ruling of the Federal Circuit was in error, this Court should reverse.

In *Edmond v. United States*, 520 U.S. 651, 661 (1997), this Court observed that “Our cases have not set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointments Clause purposes.” Or as the Court observed in *Morrison v. Olson*, 487 U.S. 654, 671 (1988), “The line between ‘inferior’ and ‘principal’ officers is one that is far from clear,

and the Framers provided little guidance into where it should be drawn. *See, e.g.*, 2 J. Story, Commentaries on the Constitution § 1536, pp. 397–398 (3d ed. 1858).” It is fair to say that the struggles that the judges of the Federal Circuit had in deciding the proper status of APJs demonstrate the uncertainty and complexity with the current approach to deciding this question. In amici’s view, the text of the Appointments Clause provides a direct and readily administrable means of answering this question in most cases and will provide sure-footed guidance to Congress and, if needed, to the lower courts.

The text assigns to Congress the primary, although not exclusive, role for deciding whether an officer is inferior or principal. The Appointments Clause does not simply state that Congress may pass a law creating an inferior office. Rather, it expressly provides for a level of discretion on top of that already present in Article I, § 8, cl. 18, which authorizes Congress to “make all Laws which shall be necessary and proper for carrying into Execution” all powers under the Constitution. U.S. Const. art. I, § 8, cl. 18. Under the Appointments Clause, except for officers expressly designated as principal officers, Congress may provide for an alternative method of appointment for “such inferior Officers, as they think proper.” U.S. Const. art. II, § 2. Given this broad discretionary power, the courts should presume that a congressional determination “as they think proper” of inferior officer status is constitutionally correct, and the courts should do no more than verify that the duties of the office are not plainly inconsistent with that status. If that test is applied to APJs, the presumption holds because Congress was more than reasonable in its determination that they are inferior officers.

1. The Rationale for Deference to Congress

The Appointments Clause is an example of an important check built into the Constitution. As a limit on executive power, the Framers required the Senate’s approval for the appointment of principal officers in the executive branch so that the President alone could not choose them. As such, the provision creates an important check on the executive branch, much the way that the President’s veto gives the President a check on Congress’ power to enact laws.

The Framers also created a means by which the default option of the President plus the Senate could be avoided if that process became too burdensome and the office to be filled was of lesser importance. That alternative is the passage by Congress of a law creating an inferior office and then providing for appointments to it to be vested “in the President alone, in the Courts of Law, or in the Heads of Departments.” U.S. Const. art. II, § 2. This exception to the advice and consent check is significant for several reasons that support amici’s focus on the role of Congress in designating inferior officers.

First, the exception requires the enactment of a law, which requires the agreement of both Houses and the President. No other method for creating

inferior officers is permitted, which means that neither House of Congress nor the President may establish an inferior office on their own, nor choose the method of appointment. Second, creating an exception requires the Senate to surrender its ability to affect the appointments to that office, which it is unlikely to do if the officer exercises significant executive branch functions, and the Senate wishes to exercise some influence over who will carry them out. Third, the President must also surrender some of his powers if the appointment will be made by the courts of law or a Department Head, and he is also unlikely to do that if the appointee will have major executive branch responsibilities. Finally, the House must concur to be sure that the Senate is not abdicating its responsibilities with respect to an important office because the Senators would prefer to spend their time on other matters. *See Weiss v. United States*, 510 U.S. 163, 188 (1994) (“no branch may abdicate its Appointment Clause duties”) (Souter, J., concurring). These are not, to be sure, perfect checks, but they go a long way toward providing basic assurances that the power to create exceptions to the method of appointments of principal offices is not abused. For these reasons, when Congress does what it did for APJs—explicitly create their positions as inferior offices—the agreement of the House, the Senate, and the President to do so is strong evidence that the Appointments Clause has been satisfied.

This idea of placing significant emphasis on the decision of Congress “as they think proper” to create an exception to the default position of the President plus the Senate is not original with amici. When the late Justice Ruth Bader Ginsburg was on the D.C. Circuit, she dissented in *In re Sealed Case*, 838 F.2d 476 (D.C. Cir. 1988), in which the court of appeals sustained a challenge to the constitutionality of the Independent Counsel Act, but was reversed by this Court in *Morrison v. Olson*, 487 U.S. 654 (1988). In her dissent, then- Judge Ginsburg recognized the difficulty of answering the principal officer question in that case and in the myriad of other situations in which it will arise. As she observed,

Because the founding fathers did not settle the question, I regard the matter as one on which Congress’ judgment is owed a large measure of respect—deference of the kind courts accord to myriad constitutional judgments Congress makes, for example, most judgments about what classifications are compatible with the command that all persons shall enjoy ‘the equal protection of the laws.’ U.S. Const. amend XIV § 1.

838 F.2d at 532. The deference to the legislature when equal protection challenges are raised (even where there is no comparable language to “as they think proper”) has been justified for reasons similar to those advanced for applying deference here:

The presumption of constitutionality and the approval given ‘rational’ classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge

of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality. *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 628 (1969) (footnote omitted).

Judge Ginsburg's dissent also noted that the question "concerns the legitimacy of a classification made by Congress pursuant to its constitutionally-assigned role in vesting appointment authority. That constitutional assignment to Congress counsels judicial deference." 838 F.2d at 532. Recognizing that Congress' intent to create an inferior office is not "dispositive," Judge Ginsburg would have sustained the principal officer designation because the proper category of an independent counsel "is fairly debatable," and the contrary arguments there were "insufficiently compelling to justify upsetting Congress' considered judgment on the matter." *Id.*

Justice David Souter in his concurring opinion in *Weiss*, also found the question of whether the military appellate judges there were principal or inferior officers to be a difficult one. 510 U.S. 163, 191–92 (1994) (Souter, J., concurring). In the end he agreed with the approach of Judge Ginsburg in the Independent Counsel case, and because "neither Congress nor the President thought military judges were principal officers, and since in the presence of doubt deference to the political branches' judgment is appropriate, I conclude that military judges are inferior officers for purposes of the Appointments Clause." *Id.* at 194.

Justice Stephen Breyer in *Lucia v. Securities & Exchange Commission*, 138 S. Ct. 2044 (2018), dissented because he would have decided whether the ALJs whose status was at issue there should have been decided on "statutory, not constitutional grounds." *Id.* at 2057 (Breyer, J., dissenting). But in the course of addressing the constitutional issues, he focused on the requirement that inferior officers be designated "by [l]aw" which he considered to be "highly relevant" although "Congress' leeway is not, of course, absolute." *Id.* at 2062. Thus, in deciding questions such as this, he concluded that the Court "should give substantial weight to Congress' decision," *id.*, because the Clause provides Congress with "constitutional leeway." *Id.* at 2063.⁴

Other Justices have expressed similar sentiments regarding deference to the political branches, where they are in agreement on the status of the officer as they are here:

Where a private citizen challenges action of the Government on grounds unrelated to separation of powers, harmonious functioning of the system demands that we ordinarily give some deference, or a presumption of validity, to the actions of the political branches in what is agreed, between themselves at least, to be within their respective

⁴ This Court has recognized at least one situation in which the judgment of Congress might be overridden: inappropriate interbranch appointments of inferior officers. *Morrison*, 487 U.S. at 675–76.

spheres. *But where the issue pertains to separation of powers, and the political branches are (as here) in disagreement, neither can be presumed correct.*

Morrison, 487 U.S. at 704–05 (Scalia, J. dissenting) (emphasis added). In this case, both Congress and the President agree that APJs are inferior officers, thereby strengthening the presumption. *See also Ex Parte Siebold*, 100 U.S. 371, 397–98 (1879) (“But as the Constitution stands, the selection of the appointing power, as between the functionaries named, is a matter resting in the discretion of Congress. And, looking at the subject in a practical light, it is perhaps better that it should rest there, than that the country should be harassed by the endless controversies to which a more specific direction on this subject might have given rise.”).

Second, the deference given to Congress is neither “dispositive,” *Sealed Case*, 838 F.2d at 532, nor “absolute,” *Lucia*, 138 S. Ct. at 2062. However, it is only in those rare cases, where the officer has very significant policy-making duties, that the Court should not defer to Congress’ judgment regarding an inferior officer. In this case, there is no aspect of the duties assigned to APJs that would suggest that they are principal officers.

They have relatively small roles in the PTAB that is headed by the Director, that has three other statutorily designated officers (who are not appointed as principal officers), and that (at last count) has 266 APJs. APJs do not supervise anyone (except perhaps law clerks or clerical staff), and they have no policymaking roles. Regulations regarding inter partes review are issued by the Director, and they are entirely procedural or administrative. *See* 35 U.S.C. §§ 1(a), 316. Individual APJs have no law enforcement powers, nor any ability to investigate a matter or commence a proceeding. Their responsibility is to apply the laws governing novelty and nonobviousness to the facts that the parties develop and to render an opinion on whether the particular patent under review meets the applicable legal standards. In sum, none of the duties of APJs resemble those at the core of executive branch functions identified in cases such as *Morrison*, 487 U.S. at 654.

It is true that no executive branch official has the power to review the outcome of a specific inter partes proceeding, but it is not clear why that fact should be dispositive. The losing party in an inter partes proceeding has a right to take an appeal to the Federal Circuit. In such an appeal, the court will review the legal determinations rendered by APJs de novo. In addition, no individual APJ can make a final decision because all PTAB cases are decided by panels of at least three APJs. 35 U.S.C. § 6(c). Thus, an individual APJ must persuade at least one other APJ on the merits, and the collective determination of the panel is likely to be appealed given the high stakes in most patent disputes.

This Court in *Edmond* upheld the inferior officer status of the civilian judges of the Coast Guard Court of Military Review. 520 U.S. at 666. The only substantive review of the decisions of that court was in the United States

Court of Appeals for the Armed Forces, which by statute is situated in the Department of Defense. 10 U.S.C. § 941. Congress decided that the judges of that Court should be appointed by the President and confirmed by the Senate for 15-year terms, thus eliminating any argument about their status. But, with limited exceptions, review in that Court, which can come from any of the four courts of military review, is discretionary, 10 U.S.C. § 867(a), and in 2019, that Court reviewed 425 petitions and granted only 52 or 12.2%.⁵ Nothing in the Constitution requires that further review of a decision by an inferior office be in the executive branch, and the availability of an Article III court as of right would seem to most observers to be much more meaningful supervision of the decisions by a panel of APJs than a one in eight chance of review by a further court in the military justice system. Or at least Congress could reasonably so conclude.⁶

No decision of this Court involving the inferior officer status of individuals performing duties comparable to APJs is to the contrary. All this Court's prior cases involving various officers performing adjudicative functions would be decided the same way under the test of a strong presumption in favor of the correctness of Congress's determination advocated by amici. Thus, the statute at issue in *Edmond*, 10 U.S.C. § 866(a), expressly provided for the creation of the court of military review on which the inferior officers sat, thereby triggering the presumption. Although that statute did not expressly provide for appointment by the Secretary of Transportation, the Head of the relevant Department, this Court had no difficulty in finding that the statute authorizing the Secretary to appoint officers in the Department included the power to appoint those appellate judges. 520 U.S. at 658.⁷

Applying the test proposed by amici would not alter the result in *Freytag v. Commissioner*, 501 U.S. 868 (1991). The principal question there was whether the Tax Court was a "court of law" or a "Department" within the meaning of the Appointments Clause, after this Court concluded that the special trial

⁵ U.S. CT. APPEALS FOR ARMED FORCES, ANNUAL REPORT OF U.S.C.A.A.F. FOR FISCAL YEAR 2019, at 8 (2019), <https://www.armfor.uscourts.gov/annual/FY19AnnualReport.pdf> [<https://perma.cc/MY3D-GU7V>].

⁶ If there were an absolute requirement that a principal officer in the executive branch must review every adjudication of an inferior officer, then the statute upheld in *Crowell v. Benson*, 285 U.S. 22 (1932), would be unconstitutional because the Deputy Commissioner who made the final agency decision there was an inferior officer. Although there were many constitutional challenges raised in *Crowell*, they did not include one under the Appointments Clause. The same problem appears to exist today under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 919, 921, 939, 940.

⁷ In future cases, Congress would be advised to include the method of appointment in the law creating the office, as it did for APJs.

judges were officers, not employees.⁸ Their appointment by the Tax Court was expressly provided for by a law passed by Congress, *id.* at 870, thereby satisfying amici's primary test. Congress also specified four specific categories of cases that special trial judges could hear, and for three of them, this Court observed that they are authorized "not only to hear and report on a case but also to decide it. § 7443A(c)." *Id.* at 873. In the fourth category, they are only permitted "to hear the case and prepare proposed findings and an opinion. The actual decision then is rendered by a regular judge of the Tax Court." *Id.* Decisions in those three categories are reviewable in the courts of appeals, but not by any Tax Court Judge or any other non-Article III officer. However, if, as the Federal Circuit implied, the Constitution required that a principal officer in the executive branch have the power to review every decision of an inferior officer, then special trial judges would not be inferior officers.

The result in *Morrison* would also be unchanged under amici's analysis. However, the part of the opinion that ruled that the Independent Counsel was an inferior officer would become much simpler. Congress had clearly provided for the appointment of independent counsels by one of the alternatives provided in the Appointment Clause, so that amici's presumption would apply. Independent counsels were not named in the Appointments Clause as persons who must be appointed as principal officers, nor were their functions so obviously significant that Congress was barred from treating them as inferior officers. And while independent counsels performed traditional executive branch functions (unlike APJs), the scope and direction of their authority was limited by the Attorney General and the court that appointed them, and they were supervised to a greater or lesser extent by both. Because there was nothing else about their duties that required them to be treated as principal officers, the presumption in favor of accepting Congress's judgment that the office was an inferior office would not have been overcome.

2. The Test Used by the Federal Circuit Is Unclear and Unworkable

Amici are not proposing that this Court abandon a well-established test for drawing the line between principal and inferior officers. Indeed, the Federal Circuit's treatment of the issue illustrates the lack of a clear and administrable test for answering the question, which may in part be due to the different contexts in which the question has recently arisen. Moreover, the Federal Circuit's three factor approach, 941 F.3d 1320, 1329 (Fed. Cir. 2019), in which it looked at a variety of facts regarding the duties of the officer in question and the relationship between the officer and others at the agency,

⁸ *Lucia* relied on *Freytag* to reach the conclusion that the ALJs there were inferior officers, not employees. Because all ALJ decisions there were reviewable by the SEC, there was no argument that they were principal officers.

and then sought to combine them in a holistic way to reach a conclusion, is unsatisfactory for several reasons.

First, it requires courts to balance a variety of factors, such as the extent to which specific decisions of the officer are reviewable; what other means of control other officers have over the officer in question and how significant are they; who can remove the officer from federal service and/or alter the duties and benefits of the office, and under what standard; and any other factor that a court may decide is relevant. *Id.* at 1329, 1331–32, 1334–35. And if that balancing is to take place, the court must decide how much weight to ascribe to each factor and how to determine that weight. The Federal Circuit appears to have followed that approach, but it is far from clear how it determined either which factors cut in which direction or how much each counted in its ultimate judgment. Although the United States differs with the Federal Circuit on how to apply the factors that the Circuit Court relied on, it supports a similar amorphous approach that depends on “the cumulative effect” of these factors, U.S. Br. 13, 15, 20, 33, under which an officer is inferior if there is “some level of direction and supervision by a superior.” *Id.* at 20.

This approach is reminiscent of how Justice Antonin Scalia described the concurring opinion of Justice William Brennan, in a personal jurisdiction Due Process case, *Burnham v. Superior Court of California*, 495 U.S. 604, 626 (1990):

[Because] Justice BRENNAN’s approval of applying the in-state service rule in the present case rests on the presence of *all* the factors he lists, and on the absence of any others, every different case will present a different litigable issue. Thus, despite the fact that he manages to work the word “rule” into his formulation, Justice BRENNAN’s approach does not establish a rule of law at all, but only a “totality of the circumstances” test, guaranteeing what traditional territorial rules of jurisdiction were designed precisely to avoid: uncertainty and litigation over the preliminary issue of the forum’s competence.

That kind of open-ended inquiry is entirely appropriate for Congress to make when deciding whether “they think proper” that a particular office should be an inferior office. It has no place, however, in a court which is expected to provide a reasoned explanation for its rulings so that Congress can know whether its designation of any office as inferior will be upheld in the courts.

Second, the apparent theory behind looking at a variety of factors is that Congress took them into account when it created the office and in deciding that it should be an inferior office. That approach might make sense if all the factors were known to Congress when it enacted the law because they were either part of the law creating the office or were found in laws previously enacted.

However, many of the facts relied on by the Federal Circuit (and the parties arguing that APJs are inferior offices under the rationale used by the Federal Circuit) are not in any statutory law, but are the result of either rules issued

by the Director or practices that have developed as the inter partes review process has evolved. Accordingly, the status of an officer should be fixed by Congress at the time that the office is created, and agencies, through both formal and informal means, should not be able to alter that status.

Third, the importance of a clear test is not so much for the courts and litigants, although they would benefit from it. Rather, a clear rule would enable Congress to know what it must and must not do when it wishes to create an inferior office. Moreover, under the Government's very open-ended test, the agency for which the officer works can alter the facts on which the officer's status will be determined, as shown by its heavy reliance on standard operating procedures issued by the PTO. U.S. Br. 5–7, 28–32. As a result, there is no way for Congress to be certain that it has properly designated an office as inferior without changing the way in which the statute operates. But if the status of an office is determined only by the laws that Congress has enacted, and not based on subsequent conduct by the agency, then Congress will be much better able to determine whether it can, constitutionally, create an inferior office or whether it must provide that the officer be appointed by the President with the advice and consent of the Senate.

These cases illustrate why it is so important that Congress be able to make accurate predictions when it creates an office. These cases will be decided ten years after the AIA was passed, and if the APJs are held to be principal officers, thousands of cases may be overturned, not because of any unfairness in the way that the cases were litigated, but because Congress guessed wrong in concluding that APJs are inferior officers. For this reason, it is essential that the test for inferior officers be clear and easy to apply by Congress, the courts, and the parties so that situations like this do not arise again. The test proposed by amici meets that standard; the test embraced by the Federal Circuit, and that urged by most of the parties to these cases, does not.

There is one further reason why the complicated test adopted below and advanced by the parties is ill-advised. This will not be the last case involving the status of individuals who perform adjudicative functions at federal agencies. Those include the Social Security Administration and the Department of Justice (immigration), whose officers perform quite different functions than APJs and have very different levels of supervision. In addition, the ability of the agency head or others to alter the manner in which those individuals carry out their duties and are subject to active supervision would mean that there might never be a definitive answer to the status of those and countless other agency adjudicators if the totality of the circumstances approach were followed. Adoption of the straightforward and readily administrable test proposed by amici would avoid these difficulties.

For all of these reasons, the Court should conclude that, giving Congress the appropriate deference for its conclusion that “they think [it is] proper” for APJs to be inferior officers, and lacking any reason to believe that Congress's

judgment was erroneous regarding ALPs was improper, the decision of the Federal Circuit should be reversed.

B. The Remedy Imposed By The Federal Circuit Is Not Authorized By Law

If the Court nonetheless concludes that APJs are principal officers, it should reject the remedy imposed by the Federal Circuit, which makes APJs removable at will, but does not change their method of appointment. Regardless of the remedy chosen, the judgment of the Federal Circuit—that the appeals of these parties whose cases were decided by APJs who were not constitutionally appointed—would still stand because the remedy is prospective only. In theory, the Court could decline to address the remedy issue because it does not alter the judgments below. However, if it does, the decisions in other cases decided by APJs after the Federal Circuit imposed its remedy would engender a new round of litigation. In those cases, parties would argue, as do amici, that the Federal Circuit’s remedy is not authorized by law, and, therefore, decisions by improperly appointed by APJs would also have to be set aside. Accordingly, the Court should decide the remedy question in these cases.

The Federal Circuit’s reliance on *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), for its remedy is misplaced. Although the plaintiffs argued that the Board members at issue were principal officers, the Court did not decide that question. Nor would plaintiffs have likely succeeded because Congress expressly provided for very significant supervision of the Board’s work by the SEC. *See* 15 U.S.C. § 7217. Rather, the Court found an independent constitutional violation based on the Board’s “multilevel protection from removal,” and struck that second protection as the proper means to cure the violation. 561 U.S. at 484. For that reason, the Federal Circuit erred in relying on *Free Enterprise*.

There are two independent reasons why the remedy is unlawful, either one being sufficient to reject it. First, and most significantly, the Appointments Clause requires that principal officers be appointed by the President with the advice and consent of the Senate. The Federal Circuit’s effort to solve the appointment problem fails because the Appointments Clause does not include removal at will as a substitute for Presidential appointment and Senate confirmation for a principal office.

The Federal Circuit’s “cure” also creates an anomaly at the PTO because other inferior officers are not removable at will. Indeed, it is principal not inferior officers who traditionally serve at the pleasure of the president, further demonstrating why the Federal Circuit’s remedy has it precisely backwards.⁹

⁹ Amici take no position on whether, absent a statute, the President and the Senate alone could cure the problem prospectively by having the President appoint and the Senate confirm

In this connection, amici note that the United States, which in this case means the Department of Justice on behalf of the executive branch, did not include the legality of the remedy as one of its questions presented, but instead suggested that “the court’s choice of remedy mitigates the harm that the merits decision might otherwise have inflicted,” Pet. in 19-1458 at 15.¹⁰ That assertion suggests that the problem found by the Federal Circuit was loss of power by the President, rather than a failure to assure that APJs were appointed by the full process set forth in the Appointments Clause. Moreover, the “mitigation” view must be seen in light of the goal of this Administration to declare unconstitutional the limits on removals of many principal and inferior officers. It succeeded in convincing this Court to strike down such a restriction in *Seila Law, LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2192 (2020), and it tried to do so for the ALJs in *Lucia*, but this Court refused to decide that question. 138 S. Ct. at 2050. Accordingly, the self-interest of this Administration in eliminating all restrictions on the removal of officers, with no analysis of how that constitutes a proper Appointments Clause remedy, should be seen for what it is and disregarded by the Court on this issue.

The theory that the Federal Circuit used to impose its remedy was that of severability: the courts should try to sever the unconstitutional part of an unconstitutional law and then decide whether Congress would have preferred to have the law without the severed portion or no law at all. In most cases, as in *Seila Law*, the Court opts for saving as much of the law as it can in lieu of voiding the entire law. See *Barr v. Am. Ass’n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2349–54 (2020). There are, however, very significant problems in applying that approach to the unconstitutionality of treating APJs as inferior officers.

The first error in employing a severability analysis here is that this is not, as in most cases, a situation where a provision of the law that is unconstitutional can be disregarded and still leave Congress’ plan in place. The problem is not what is in the AIA, but what is not in it. If APJs are principal officers, then eliminating their current method of appointment will not cure the problem: that can only be solved by adding a requirement that APJs be appointed by the President and confirmed by the Senate, or by adding another layer of principal officers who would review APJ decisions. Both of those remedies require congressional addition, not judicial subtraction.

Second, the removal restrictions are not part of the AIA or for that matter any statute governing the operation of the PTO or even the Department of

APJs going forward, which is a different question from whether altering the bases on which APJs can be removed from office solves the problem of an unconstitutional appointment.

¹⁰ Petitioner Arthrex, Inc. agrees with amici that the Federal Circuit’s remedy was improper. Pet. in 19-1458 at 25–33.

Commerce as a whole. They are included in the statute applicable to federal employees in most agencies, 5 U.S.C. § 7513(a). Thus, if the decision applies only to APJs, the Federal Circuit will have created very significant differences in protection for APJs than for comparable employees in other agencies, which should counsel against the Federal Circuit's remedy.

Third, Congress created a careful structure for adjudicating inter partes cases, with independent APJs as the deciders of legal issues of novelty and nonobviousness. The Federal Circuit has replaced the centerpiece of this system with APJs who will now be looking over their shoulders to be sure that they decide cases in a way that they will not be fired for their decisions. Perhaps that system might be acceptable to Congress and consistent with the Constitution, but it is surely a very different one than Congress created in the AIA. Or as this Court put it regarding the statute that Congress enacted in *Wiener v. United States*, 357 U.S. 349, 356 (1958), “a fortiori must it be inferred that Congress did not wish to have hang over the Commission the Damocles’ sword of removal by the President for no reason other than that he preferred to have on that Commission men of his own choosing.”

Fourth, APJs decide other kinds of cases before the PTO with the same or similar procedures as used for inter partes review. Congress also provided in the AIA for a similar process, with somewhat different rules on timing, availability, and legal issues subject to review—the post-grant review process. 35 U.S.C. §§ 321 *et seq.* In addition, those same APJs also sit on ex parte appeals from denials of patent applications, as well as inter partes reexaminations, which may not require a principal officer to conduct them. Yet all of these proceedings will be affected by the Federal Circuit's remedy.

The Federal Circuit misunderstood its role and the basics of the doctrine of severability. The doctrine allows courts to sever a portion of an unconstitutional law, but no case allows a court to strike down an unrelated law as the Federal Circuit did here. Moreover, “[the Court] cannot rewrite a statute and give it an effect altogether different from that sought by the measure as a whole.” *Murphy v. NCAA*, 138 S. Ct. 1461, 1482 (2018). That is the job for Congress, especially where, as here, it is highly doubtful that the remedy solves the constitutional flaw, and there are so many reasons that suggest that the remedy that the Federal Circuit imposed was not one that Congress would have selected.

Conclusion

For the foregoing reasons, the Court should reverse the judgment of the Federal Circuit and hold that APJs are inferior officers under the Appointments Clause. However, if the Court concludes that APJs are principal officers, it should hold that the Federal Circuit erred in concluding that the violation of the Appointments Clause could be remedied by excising the existing for-cause

limitation on the removal of APJs and instead of leaving the resolution of the violation to Congress.

Slippery Slope? More Like Sliding Scale: Reviving Section 232 Litigation by Adopting Sliding Scale Analysis to Meaningfully Constrain Presidential Action

David McConnell*

Introduction

Section 232 of the Trade Expansion Act of 1962 (“Section 232”) allows the President of the United States, pursuant to a report written by the Secretary of Commerce with input from the Secretary of Defense, to take whatever action is deemed necessary to control imports of products which “threaten to impair the national security.”¹ Against the backdrop of the Cold War, Congress and domestic producers of goods thought it was important for the country to be able to adapt quickly to national security threats.² Some even wished to see stronger economic protections for certain industries, such as specific subsets of the steel industry used for military purposes.³ However, decades after the Cold War, Section 232 does little to protect national security, and instead

* J.D., expected May 2022, The George Washington University Law School. I would like to thank Professor Amanda Burks for her feedback during the drafting process, Professor Erika Pont for her general support throughout law school, the staff of the *Federal Circuit Bar Journal* for making this Note readable, Baylee and Josh for listening to me complain about writing this note, and my parents for letting me occupy the kitchen table and living room on numerous weekends during the COVID semesters so I could actually write this note.

¹ 19 U.S.C. § 1862(a)–(c) (2018).

² See *Trade Expansion Act of 1962: Hearing on H.R. 11970 Before the S. Fin. Comm.*, 87th Cong. 25 (1962) [hereinafter *Trade Expansion Act Hearing*] (statement of Robert S. McNamara, Secretary of Defense) (expressing support for the measure due to a need to support global troop deployments, and focusing on America’s role—along with its allies—in defending the “free world”).

³ See *id.* at 1250 (statement of H.S. Potter, Vice President, Sales, Carpenter Steel Co., Chairman, Tool & Fine Steel Industry Committee) (arguing that Section 232 was not strong enough to protect domestic and should be revised to “absolutely insulate key industries” to protect them from foreign imports).

creates much economic uncertainty.⁴ For example, when President Trump declared Section 232 tariffs on steel and aluminum, the United States' aluminum prices surpassed global aluminum prices.⁵ The energy sector suffered from shortages in steel pipes and allies like the EU and Canada imposed retaliatory tariffs on U.S. products.⁶ These harms spotlight the problems created by Section 232 tariffs: consumers paid more for the same product, supply lines were disrupted, U.S. manufacturers were forced to pay more to export their products, and political tension and retaliation resulted. In short, consumers, producers, and the rest of the nation suffer when presidents invoke Section 232 tariffs. As the consequences of the recent steel and aluminum tariffs demonstrate, the language in Section 232 does not sufficiently protect producers and importers from presidents who may abuse their Section 232 powers for political gain.⁷

Because of this lack of protection, various scholars suggest solutions to better protect the United States, including congressional limitations on the President's power under Section 232.⁸ Some suggest that Congress should amend Section 232 to require congressional approval of any proposed Section 232 action.⁹ Others believe Section 232 should be revised to clarify the "intelligible principle" toward which the President should guide his or her exercises of congressionally delegated power.¹⁰ These scholars suggest that Congress should either revise the law to limit the scope of the President's Section 232 powers or add a "duration" period for Section 232 tariffs.¹¹ Finally, others argue Congress should more explicitly define "national security" in order to

⁴ See Linfan Zha, Note, *The Wall on Trade: Reconsidering the Boundary of Section 232 Authority Under the Trade Expansion Act of 1962*, 29 MINN. J. INT'L L. 229, 229–32 (2020) (explaining that multiple businesses have shifted production away from the United States as a result of Section 232's use, and that the Department of Defense is concerned that the United States' use of Section 232 may damage relationships with other nations).

⁵ See *Trump Steel and Aluminum Tariffs Analysis*, IHS MARKIT, <https://ihsmarkit.com/solutions/trump-steel-aluminum-tariffs.html> [<https://perma.cc/C6VF-DP3T>] (last visited Feb. 28, 2022).

⁶ See *id.*

⁷ See Jessica Hernandez, Comment, *One Nation Under Trump: More Power to Him?*, 28 UNIV. MIA. BUS. L. REV. 143, 168 (2019) (arguing that President Trump considers the United States' economic interests as tantamount concerns to national security interests in deciding whether to impose Section 232 measures).

⁸ See, e.g., Kayla Scott, Note, *Steel Standing: What's Next for Section 232?*, 30 DUKE J. COMP. & INT'L L. 379, 442 (2020); Zha, *supra* note 4, at 273.

⁹ See Scott, *supra* note 8, at 442.

¹⁰ E.g., Rachel Moody, Note, *Let's Tariff Like it's 1773: The Intelligible Principles are Coming! Section 232 Tariffs on Steel*, 8 LSU J. ENERGY L. & RES. 311, 326–28 (2019).

¹¹ *Id.*

“align” the measure with the meaning of the phrase in international agreements.¹² While each of these scholars argues that Congress is the appropriate body to constrain the President’s Section 232 actions, congressional limitations are not the only option.

The Federal Circuit is uniquely positioned to reign in the President’s Section 232 authority because it has sole jurisdiction over appeals from the Court of International Trade (“CIT”), and the CIT has sole jurisdiction over Section 232 claims.¹³ Therefore, the Federal Circuit has the first—and often final—review of every Section 232 appeal. As such, the Federal Circuit is poised to cabin this authority.

The Federal Circuit has not possessed broad review powers regarding Section 232. When reviewing a case involving Presidential action pursuant to Section 232, the Supreme Court held that Section 232 was not an unconstitutional delegation of power, and this decision has left modern litigants only two viable options for challenging Section 232 actions: either the President has misconstrued the statute or acted outside the statute’s authority.¹⁴ However, there is a gap in Section 232 jurisprudence regarding how the Federal Circuit should make this determination.¹⁵

Utilizing this gap in the Supreme Court’s jurisprudence, the Federal Circuit should adopt a “sliding scale”¹⁶ analysis to determine whether the President has acted outside of Section 232’s authority. The Federal Circuit should grant greater deference to the President’s assertion of a national security threat in the Section 232 context when the party challenging the action cannot show that current national security risks are less concerning than those threats contemplated by the framers of Section 232. Conversely, if the challenging party does sufficiently show that today’s risks are much less concerning, courts, and ultimately the Federal Circuit, should more closely scrutinize whether the measure was within the statute’s limitation of controlling imports that “threaten to impair the national security.”¹⁷

¹² See Zha, *supra* note 4, at 273.

¹³ See 28 U.S.C. § 1295(a)(5) (2018) (granting the Federal Circuit exclusive jurisdiction over appeals from the CIT); *id.* § 1581(i)(1)(B) (granting the CIT exclusive jurisdiction over cases against the federal government arising out of tariffs).

¹⁴ See *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 558–60 (1976); see also *Severstal Exp. GMBH v. United States*, No. 18-00057, 2018 WL 1705298, at *7 (Ct. Int’l Trade Apr. 5, 2018) (describing the available avenues for pursuing Section 232 action post-*Algonquin*).

¹⁵ See *Algonquin*, 426 U.S. at 558–60; see also *Severstal Exp. GMBH*, 2018 WL 1705298, at *7.

¹⁶ *E.g.*, *Serco, Inc. v. United States*, 101 Fed. Cl. 717, 721 (2011).

¹⁷ 19 U.S.C. § 1862(c) (2018).

This Note proceeds with a brief explanation of Section 232 and its history. Then, this Note summarizes how President Trump used Section 232 in ways that varied from those of previous presidents. This modern analysis is coupled with an examination of case law regarding Section 232 as well as proposed legislative actions designed to constrain Presidential authority under Section 232. Because neither the law nor legislative action is sufficient to check Section 232, the Federal Circuit should adopt a sliding-scale standard of review for Section 232 cases. A sliding-scale standard of review accounts for the interests of both businesses and the President, and leads to a substantive and nuanced review of Section 232 actions. Finally, this Note responds to objections to this standard, further demonstrating that a sliding scale is an appropriate solution to the Section 232 problem.

I. Background

A. Breaking Down Section 232

Section 232 empowers the President to invoke a wide range of trade remedies which would either increase total imports of certain products or erect trade barriers to certain products that “threaten to impair the national security.”¹⁸ For the President to exercise this power, the Secretary of Commerce (either on the Secretary’s own or pursuant to a request by any department or agency head, known as “application of an interested party”)¹⁹ investigates the imported good’s impact on national security.²⁰ To do this, the Secretary of Commerce must alert and consult with the Secretary of Defense regarding the investigation, and the investigation may be subject to notice and comment requirements.²¹ Within 270 days of the start of the investigation, the Secretary of Commerce must provide the President with a report regarding the imported good and any related threats to national security or lack thereof.²² All non-confidential parts of this report must be published in the *Federal Register*.²³

Within ninety days of receipt of the Secretary of Commerce’s report, the President must (1) determine whether he or she agrees with the Secretary of Commerce’s assessment of the national security risks,²⁴ and (2) “determine the nature and duration of the action” necessary to prevent the imports from

¹⁸ *Id.* § 1862(a).

¹⁹ *Id.* § 1862(b)(1)(A).

²⁰ *See id.* § 1862(b).

²¹ *See id.* § 1862(b)(1)(B), (b)(2)(A)(iii).

²² *See id.* § 1862(b)(3)(A).

²³ *See id.* § 1862(b)(3)(B).

²⁴ *See id.* § 1862(c)(1)(A)(i).

threatening national security.²⁵ If the President decides action is needed to protect national security, the President must implement that action within fifteen days of his or her decision.²⁶ Within thirty days of the President determining the question of action, the President reports to Congress his or her reasons for deciding or declining to act on the Secretary of Commerce's report.²⁷ The statute provides a lengthy list of factors for the President to consider in determining whether the import of a good threatens national security.²⁸

There are two notable drawbacks to Section 232. First, there is no real judicial or congressional check on the President's power under this statute.²⁹ Second, the executive branch must follow a rigid procedural schedule to proclaim tariffs and other measures under this Act.³⁰ As the CIT found, Section 232's procedures "are constraints on power."³¹ Section 232 is flawed in that it both grants too much authority and also procedurally limits that power. Thus, the only generally applicable limitations to the statute are the statute's terms and procedural requirements.³²

B. Legislative History

Congress passed Section 232 at the height of the Cold War, a time when national security was at the forefront of legislators' minds. As a result, Congress deemed it important to create authority for broad, unilateral actions. Thus, Section 232 should, and historically has, been read with a Cold War-era, military conflict mindset.³³

²⁵ *Id.* § 1862(c)(1)(A)(ii).

²⁶ *See id.* § 1862(c)(1)(B).

²⁷ *See id.* § 1862(c)(2).

²⁸ *See id.* § 1862(d).

²⁹ *But see id.* § 1862(f) (providing a special congressional check on Presidential actions which, "adjust imports of petroleum or petroleum products").

³⁰ *See, e.g., id.* § 1862(c)(1)(B).

³¹ *Transpacific Steel LLC v. United States (Transpacific Steel I)*, 415 F. Supp. 3d 1267, 1275 (Ct. Int'l Trade 2019) (striking down President Trump's Proclamation 9772, which placed steel tariffs on Turkey, in part because he issued the tariff long after the ninety-day period for Presidential action had expired).

³² *See Severstal Exp. GMBH v. United States*, No. 18-00057, 2018 WL 1705298, at *7 (Ct. Int'l Trade Apr. 5, 2018) (stating Presidential action under Section 232 is reviewable for "clear misconstruction of [the] statute . . . or action outside delegated authority" (quoting *Corus Grp. v. Int'l Trade Comm'n*, 352 F.3d 1351, 1361 (Fed. Cir. 2003))); *see also* 19 U.S.C. § 1862 (lacking any additional statutory protections or institutional checks).

³³ *See* Richard O. Cunningham, *Leverage is Everything: Understanding the Trump Administration's Linkage Between Trade Agreements and Unilateral Import Restrictions*, 51 CASE W. RES. J. INT'L L. 49, 56 (2019) (explaining that historically Section 232 was used

The Cold War motivations underlying Section 232 are evidenced in several ways.³⁴ First, in 1962, then-Secretary of Defense Robert McNamara wrote the Senate Finance Committee that he supported Section 232 because it would “strengthen [the United States’] own defenses” by making the U.S. economy stronger.³⁵ Further, he argued Section 232 was necessary to support “oversea troop deployments.”³⁶ Troop deployments were certainly a real issue at the time as the number of U.S. forces in Vietnam nearly quadrupled from 1961 to 1962.³⁷ Additionally, the Demilitarized Zone (“DMZ”) between North and South Korea was a recent creation.³⁸ The DMZ was far from peaceful, and was the site of several smaller conflicts throughout the 1960s.³⁹ The Korean War itself was recent history. The war occurred between 1950 and 1953, saw 1,789,000 Americans deployed to the combat zone, and left 36,574 Americans killed and 103,284 Americans wounded.⁴⁰ At the time Secretary McNamara recommended Section 232, war was both a real possibility for the future and a recent memory.

The Conference Report, created by the Conference Committee during the bill reconciliation process, illustrates that the Cold War-era fear of Communism pervaded the entire Trade Expansion Act of 1962, even though Communism is not explicitly referenced in Section 232.⁴¹ The Conference Report indicates that the President should terminate or not enforce trade agreements with, “any country or area dominated or controlled by Communism.”⁴² The Senate attempted to limit this provision to cover only trade agreements with the Soviet Union, China, “and any other country or area dominated or controlled by the foreign government or foreign organization controlling the

to protect products vital to the nation’s “defense needs” for which “imports threaten adequate supply”).

³⁴ See generally *Trade Expansion Act Hearing*, *supra* note 2.

³⁵ *Id.* at 25.

³⁶ See *id.*

³⁷ See *Vietnam War Allied Troop Levels 1960-73*, AM. WAR LIBR., <http://www.american-warlibrary.com/vietnam/vwatl.htm> [<https://perma.cc/622H-CZ9M>] (last visited Feb. 28, 2022) (reporting that the number of U.S. troops in Vietnam increased from 3,205 in 1961 to 11,300 in 1962).

³⁸ See *Demilitarized Zone: Korean Peninsula*, ENCYC. BRITANNICA, <https://www.britannica.com/place/demilitarized-zone-Korean-peninsula> [<https://perma.cc/47XQ-GJN5>] (last visited Feb. 28, 2022).

³⁹ See *id.*

⁴⁰ See DEP’T OF VETERANS AFFS., AMERICA’S WARS FACTSHEET (2021), https://www.va.gov/opa/publications/factsheets/fs_americas_wars.pdf [<https://perma.cc/WRK4-6XK4>].

⁴¹ See H.R. REP. NO. 87-2518, at 1, 5–7 (1962) (Conf. Rep.).

⁴² *Id.* at 6.

world Communist movement.”⁴³ This more limited language would seemingly only apply to countries controlled by Russia or China, but it was rejected in favor of broader language, demonstrating that Congress granted the President broad powers to navigate the Cold War trade environment.⁴⁴ Section 232 is, at base, a protectionist measure passed to help the United States win the Cold War.

C. Historical Context

The underlying historical context demonstrates why tensions between the United States and Russia weighed heavily on legislators’ minds. In 1961, the United States sponsored an attempted overthrow of Cuba’s government during the Bay of Pigs.⁴⁵ Later that year, the United States launched Operation Mongoose, which aimed to support an internal revolution seeking to overthrow the Castro regime in Cuba.⁴⁶ This U.S. interference in Cuban affairs resulted in the Soviet Union sending “medium-range ballistic missiles in Cuba.”⁴⁷ This period’s defining event, the Cuban Missile Crisis, occurred less than a month after Section 232’s Conference Report was passed.⁴⁸ While debating and passing the Trade Expansion Act of 1962, legislators knew about recently finished wars, saw the potential for future conflicts, and were living through a time when the United States felt on the brink of nuclear war.⁴⁹ It is no wonder that legislators during this period felt “it [was] virtually impossible to separate economic and national security implications.”⁵⁰

⁴³ *Id.* at 7.

⁴⁴ *See id.* at 6–7.

⁴⁵ *See The Bay of Pigs and the Cuban Missile Crisis, 1961-1962*, U.S. DEP’T STATE: ARCHIVE, <https://2001-2009.state.gov/r/pa/ho/time/ea/17739.htm> [<https://perma.cc/4KFX-L6PP>] (last visited Feb. 28, 2022).

⁴⁶ *See id.*

⁴⁷ *Id.*

⁴⁸ *See id.*; *see also* H.R. REP. NO. 87-2518.

⁴⁹ *See, e.g.*, President John F. Kennedy, Remarks Upon Signing the Trade Expansion Act (Oct. 11, 1962) (stating that the Trade Expansion Act of 1962 was necessary for the “prospects of free institutions and free societies everywhere,” and that a strong economy was necessary to combat the “world Communist movement”).

⁵⁰ *Trade Expansion Act Hearing*, *supra* note 2, at 2128 (statement of Jennings Randolph, Senator from West Virginia).

D. How Historic Uses of Section 232 Differ from Modern Uses of Section 232

Section 232 was used sparingly prior to the Trump presidency.⁵¹ From 1963 until Trump's presidency, "[the Commerce Department] initiated 26 Section 232 national security investigations."⁵² Further, these investigations did not focus on broad ranges of products like steel or aluminum, but on specific products such as "[a]ntifriction bearings" and "[g]ears and gearing products."⁵³ Considering that these Section 232 investigations (those occurring before 2017) only yielded Presidential action six times,⁵⁴ Section 232 historically played a minor role in the greater realm of U.S. trade policy. Further, five of the six instances of Presidential action were against the same product: oil.⁵⁵ Thus, historically, Section 232 was limited in terms of investigations, scope, and use.

The Trump Administration broke from this history of limited use by launching eight Commerce Department investigations and acting on the results of those investigations four times.⁵⁶ In the span of four years, the Trump Administration launched nearly a quarter of the total Section 232 investigations since the legislation was enacted in 1962, and took 40% of all actions taken under Section 232.⁵⁷ Further, while some investigations centered on specific products such as titanium sponge, other investigations broke with tradition by targeting broad categories of products like steel, aluminum, and "automobiles and certain automotive parts."⁵⁸

The Trump Administration's actions did not correlate with certain products' apparent threats to national security.⁵⁹ The Trump Administration did not take action to constrain imports of uranium ore, for example, but authorized negotiations to control imports of the ever-dangerous "automobiles and certain automotive parts."⁶⁰ While uranium ore is a greater threat to national security than automobile parts, President Trump chose to use

⁵¹ See RACHEL F. FEFER, CONG. RSCH. SERV., IF10667, SECTION 232 OF THE TRADE EXPANSION ACT OF 1962 2 (2021).

⁵² *Id.*

⁵³ RACHEL F. FEFER ET AL., CONG. RSCH. SERV., R45249, SECTION 232 INVESTIGATIONS: OVERVIEW AND ISSUES FOR CONGRESS 60–61 (2021).

⁵⁴ See *id.* at 3, 60–63.

⁵⁵ See *id.*

⁵⁶ See FEFER, *supra* note 51, at 1–2.

⁵⁷ See *id.*; FEFER ET AL., *supra* note 53, at 3.

⁵⁸ FEFER, *supra* note 51, at 2.

⁵⁹ See *id.*

⁶⁰ *Id.*; FEFER ET AL., *supra* note 53, at 16–17.

national security-based trade remedies to limit imports of automobile parts.⁶¹ The comparison between automobile parts and uranium does not illustrate that Trump should have limited his actions only to uranium, but illustrates that Trump was using Section 232 powers on products that were very different from those targeted by previous presidents. The Trump Administration used Section 232 more often and less predictably than the legislation had been previously used.

Further, the Trump Administration used Section 232 for economic and political, rather than national security, purposes. For example, the administration imposed steel and aluminum tariffs by finding the harm to the domestic steel industry created a national security risk, even though the prospective harm would not affect the production of steel for national security purposes.⁶² This decision was about industry health and not national security as evidenced by the recommended solution: imposing tariffs which would enable U.S. steel mills to operate at the minimum capacity to ensure the “long-term viability of the U.S. steel industry.”⁶³ These imports were subjected to Section 232 action because they “jeopardized the health of the domestic industry and thus, threatened U.S. economic welfare.”⁶⁴ Notably, steel and aluminum workers were among the groups who supported President Trump in his 2016 election.⁶⁵ Ultimately, President Trump imposed Section 232 tariffs, but suspended them for a period to allow nations to renegotiate terms for steel and aluminum trades.⁶⁶ Thus, President Trump used Section 232 tariffs as a bargaining chip in international trade negotiations which helped him fulfill campaign promises.⁶⁷

Similar arguments can be made for Section 232 actions on “autos and auto parts.”⁶⁸ Specifically, President Trump took Section 232 actions against “autos and auto parts,” and, using the fear of these increased tariffs as leverage, renegotiated NAFTA in line with his campaign promises.⁶⁹ These improper uses of Section 232, i.e., declaring Section 232 tariffs as leverage rather than for genuine national security concerns, necessitate a check to prevent the executive branch from abusing the statute.

⁶¹ See FEFER, *supra* note 51, at 2.

⁶² See FEFER ET AL., *supra* note 53, at 6; see also Cunningham, *supra* note 33, at 58.

⁶³ FEFER ET AL., *supra* note 53, at 7; see also Cunningham, *supra* note 33, at 58.

⁶⁴ Cunningham, *supra* note 33, at 58.

⁶⁵ See *id.* at 57.

⁶⁶ See *id.* at 58.

⁶⁷ See *id.* at 58–59.

⁶⁸ *Id.* at 59, 71–74.

⁶⁹ *Id.* at 72–74.

President Biden's administration replaced the Trump Administration on January 20, 2021.⁷⁰ As of early 2022, President Biden has not taken any Section 232 actions or proclaimed any Section 232 tariffs. However, he has decided to continue the Trump Administration's Section 232 tariff on aluminum rather than revoke it.⁷¹ Additionally, President Biden has launched a Section 232 investigation into neodymium magnets which are "used in some defense and critical infrastructure systems."⁷² While this most recent investigation could be viewed as a return to using Section 232 strictly for national security interests, it is still troubling that the Trump Administration's Section 232 tariffs remain, and thus it is too early to tell whether the Biden Administration will abuse Section 232 like the previous administration. Though the President has changed, the abuse of Section 232 may remain largely the same.

Presidents are misusing Section 232, but this does not mean they are using it irrationally. Presidents could use Section 232 to unilaterally fulfill trade-based campaign policies, force other nations to renegotiate trade treaties, or project an image of global strength.⁷³ The problem is that Section 232 grants the President broad power, but limits the President's ability to use that power to situations in which national security is jeopardized.⁷⁴ Unfortunately, because the judicial system does not meaningfully review whether Presidential action is truly based on a threat to national security, the President is incentivized to block legislative solutions via the veto to hold onto this unchecked, unilateral power.⁷⁵ This incentive, coupled with recent improper uses, is why the President's powers under Section 232 need to be constrained by the courts. The practical difficulties of using legislative processes to constrain that power is why this Note argues the Federal Circuit should work within existing Supreme Court framework to reign in the President's Section 232 power.

⁷⁰ See *Inauguration Day 2021, in Photos*, POLITICO (Jan. 20, 2021, 10:32 AM) <https://www.politico.com/gallery/2021/01/20/inauguration-day-2021-in-photos-003741?slide=0> [<https://perma.cc/3ERR-4BKM>].

⁷¹ See Joseph R. Biden, *A Proclamation on Adjusting Imports of Aluminum into the United States*, WHITE HOUSE (Feb. 1, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/01/a-proclamation-on-adjusting-imports-of-aluminum-into-the-united-states/> [<https://perma.cc/QNL5-CRGP>].

⁷² FEFER, *supra* note 51, at 2.

⁷³ See Cunningham, *supra* note 33, at 58–59

⁷⁴ See 19 U.S.C. § 1862(a)–(c) (2018).

⁷⁵ See Amy L. Stein, *A Statutory National Security President*, 70 FLA. L. REV. 1183, 1224 (2018).

II. Analysis

Several governmental bodies have attempted to reign in the President's authority under Section 232.⁷⁶ However, no solution has gained traction in either the legislature or judicial system to date. This Part examines judicial attempts to remedy this problem and the obstacles that those attempts have faced. After showing why judicial remedies have failed thus far, Section II.B examines proposed legislative solutions, and argues those solutions are insufficient remedies because they either face too strenuous a judicial standard or allow the President to remedy any flaws in the Section 232 process without changing the substance of the President's actions.

A. The Judicial Landscape Surrounding Section 232

The judiciary has witnessed two major forms of challenges to Section 232: delegation challenges and Equal Protection Clause challenges.⁷⁷

1. Delegation Challenges

In 1967, the Supreme Court heard a delegation challenge to Section 232 in *Federal Energy Administration v. Algonquin*.⁷⁸ In *Algonquin*, a group of governors, congressmen, and utility companies filed suit, alleging that the President's Section 232 proclamation of increased licensing fees on imported oil exceeded the President's statutory and constitutional authority.⁷⁹ They argued Section 232 was not a legitimate delegation of congressional power to the President because it lacked an "intelligible principle,"⁸⁰ toward which the President should direct his use of the delegated power.⁸¹ The Supreme Court found that Section 232 "easily fulfills" the intelligible principle test.⁸²

The Supreme Court held that the combination of harm to national security, the intricate process the executive branch must follow to invoke Section 232, and the remedies (limited by type and scope) created a sufficient intelligible principle to make this a constitutional delegation of power.⁸³ Further, the Court declined to adopt a narrow reading of the President's permissible

⁷⁶ See Scott, *supra* note 8, at 393–97, 441.

⁷⁷ See *id.* at 393–95, 412.

⁷⁸ 426 U.S. 548 (1976); see also Scott, *supra* note 8, at 397 (arguing modern delegation challenges to Section 232 face "an uphill battle to distinguish" themselves from *Algonquin*).

⁷⁹ See *Algonquin*, 426 U.S. at 555–57.

⁸⁰ *Id.* at 559 (defining intelligible principle as a principle "to which the [President] is directed to conform" (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928))).

⁸¹ See *Algonquin*, 426 U.S. at 558–59.

⁸² *Id.* at 559.

⁸³ See *id.* at 559–60.

actions under Section 232, finding that limiting the President's ability to act to only situations where the "strict quantitative level of imports" threatened national security "would be inconsistent with the range of factors that can trigger the President's authority."⁸⁴ *Algonquin* decided that Section 232 was a constitutional delegation of power, and this reduced the potential ways remaining to challenge the statute to whether there has been "a clear misconstruction of the governing statute . . . or action outside delegated authority."⁸⁵

Despite the Supreme Court's rejection of the delegation argument in *Algonquin*, other delegation-like challenges have been raised in recent years before the CIT, such as *Severstal Export GMBH v. United States*.⁸⁶ In *Severstal Export*, a steel importer sued the U.S. government seeking a preliminary injunction to prevent the imposition of a 25% tariff on the importer's steel.⁸⁷

Because the importer sought a preliminary injunction, the CIT had to consider the plaintiff's likelihood of success on the merits.⁸⁸ To that end, the importer argued that the President's actions fell beyond the scope of his Section 232 powers.⁸⁹ The importer argued that the President's decision was not based on national security concerns, but on a desire to renegotiate trade agreements relating to steel imports.⁹⁰ The court rejected this argument, finding that even if the importer could prove that the President had improperly used Section 232, this proof would still be insufficient to demonstrate the President acted beyond his delegated authority.⁹¹ Thus, Section 232 has not only been found to be a constitutional delegation of authority, but a constitutional delegation of broad authority.⁹²

A final piece in this puzzle of delegation analysis is *American Institute for International Steel, Inc. v. United States*.⁹³ The American Institute for International Steel, Inc. ("AIIS") brought this case in response to the same steel tariff challenged in *Severstal Export*.⁹⁴ AIIS argued that the power given

⁸⁴ *Id.* at 561.

⁸⁵ *Severstal Exp. GMBH v. United States*, No. 18-00057, 2018 WL 1705298, at *7 (Ct. Int'l Trade Apr. 5, 2018) (quoting *Corus Grp. v. Int'l Trade Comm'n*, 352 F.3d 1351, 1361 (Fed. Cir. 2003)); *see also Algonquin*, 426 U.S. at 558–60.

⁸⁶ *Severstal Exp. GMBH v. United States*, No. 18-00057, 2018 WL 1705298 (Ct. Int'l Trade Apr. 5, 2018)

⁸⁷ *See id.* at *1–2.

⁸⁸ *See id.* at *3.

⁸⁹ *See id.* at *7.

⁹⁰ *See id.* at *9.

⁹¹ *See id.* at *10.

⁹² *See id.* at *10; *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 559–60 (1976).

⁹³ 806 F. App'x 982 (Fed. Cir. 2020).

⁹⁴ *See id.* at 986–87.

by Section 232 was so broad that it was not power which Congress was free to delegate to the President.⁹⁵ AIIS attempted to distinguish from *Algonquin* by arguing that *Algonquin* was limited to the narrow facts of that case (namely a license-fee authority) and therefore should not bind this case which involved tariffs.⁹⁶ The Federal Circuit rejected this argument, ruling that there was “no basis on which *Algonquin* can be properly distinguished.”⁹⁷

AIIS also argued that later Supreme Court decisions stripped judicial review over areas upon which the *Algonquin* decision was based, and that, because a core piece of *Algonquin*'s rationale had been rejected, the *Algonquin* standard should be reconsidered.⁹⁸ The Federal Circuit summarily dismissed this argument, writing, “Nothing in *Algonquin*'s analysis rests on a premise about judicial review that later Supreme Court decisions have changed.”⁹⁹ Further, the Federal Circuit expressed that there “ha[d] been no material change,” in the way courts review Presidential action pursuant to Section 232.¹⁰⁰ However, the Federal Circuit qualified its use of the *Algonquin* test, and thus potentially indicated a willingness to reconsider the test, writing, “We will not guess at precisely what analysis might be needed in the absence of *Algonquin* or conduct such an analysis without the parties’ briefing developed under any new standard.”¹⁰¹

Unless the Federal Circuit is given a new test for reviewing Section 232 action or shown concrete ways in which judicial review of these cases is no longer feasible, it would appear that the court is not interested in altering the *Algonquin* standard which found Section 232 satisfied the intelligible principle test.¹⁰²

This review of previous cases illustrates the current limitations on checking Presidential authority under Section 232 with non-delegation challenges. These challenges must first circumvent the *Algonquin* decision which, according to precedent, controls the issue by demanding total deference to the President.¹⁰³ Escaping *Algonquin* is a tough task, as demonstrated by *American Institute for International Steel*, where the plaintiffs’ attempts to distinguish the case from *Algonquin*, undermine the *Algonquin*'s rationale, and demonstrate

⁹⁵ See *id.* at 983.

⁹⁶ See *id.* at 989.

⁹⁷ *Id.*

⁹⁸ See *id.* at 989–91.

⁹⁹ *Id.* at 991.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 990.

¹⁰² See *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 559 (1976).

¹⁰³ See *id.*

changes in the legal landscape post-*Algonquin*, all fell on deaf ears.¹⁰⁴ Even if all of these challenges could be met, non-delegation challenges are inherently weak as the Supreme Court has not used the doctrine to invalidate a law since 1935.¹⁰⁵ Thus, non-delegation challenges are unlikely to provide a significant check on the President's Section 232 authority.

2. Equal Protection Clause Challenges

Another line of jurisprudence present in Section 232 cases involves Equal Protection Clause challenges.¹⁰⁶ Transpacific Steel LLC made this argument before the CIT in the 2020 case of *Transpacific Steel LLC v. United States*.¹⁰⁷ *Transpacific Steel* is a highly complex case¹⁰⁸ concerning the Trump Administration's steel tariffs.¹⁰⁹ The situation was unique in that President Trump issued Proclamation 9772, which imposed a 50% tariff on steel imported from Turkey (a larger tariff than was placed on steel from other countries).¹¹⁰

Transpacific Steel LLC, a U.S. steel importer, sued to recover the funds it lost to this tariff on Turkish steel.¹¹¹ Transpacific argued that Turkish steel is similarly situated to other types of imported steel, and that Proclamation 9772 imposed an additional burden on Turkish steel imports without a rational basis.¹¹² Thus, the company argued the measure violated the U.S.

¹⁰⁴ See *Am. Inst. for Int'l Steel, Inc. v. United States*, 806 F. App'x 982, 989–91 (Fed. Cir. 2020).

¹⁰⁵ See Scott, *supra* note 8, at 392–93 (explaining that since the last use of the non-delegation doctrine, many broad grants of congressional power have been delegated to the President, and many scholars have deemed the doctrine “dead”).

¹⁰⁶ See, e.g., *Transpacific Steel LLC v. United States (Transpacific Steel II)*, 466 F. Supp. 3d 1246 (Ct. Int'l Trade 2020), *rev'd*, 4 F.4th 1306 (Fed. Cir. 2021).

¹⁰⁷ 466 F. Supp. 3d 1246 (Ct. Int'l Trade 2020), *rev'd*, 4 F.4th 1306 (Fed. Cir. 2021).

¹⁰⁸ Beyond the Equal Protection challenges focused on in this paragraph, the plaintiff steel companies also argued (1) that the President did not follow the proper protocol to proclaim the increased steel tariff (the court accepted this argument); (2) that the President's decision to proclaim this tariff was used to get leverage for trade negotiations, and not to protect national security (the court found that the process employed in this case was insufficient to establish a national security threat existed, but did not consider the argument that something other than national security motivated the President's actions); and (3) that they had a property interest in their steel imports that had been denied without constitutional Due Process (the court found this argument unnecessary, given that the statutory procedures were not followed in this case, but seemed to express doubt as to whether the plaintiff had articulated a property interest in this case). See *id.* at 1251–55, 1258–59.

¹⁰⁹ See *id.* at 1249–51.

¹¹⁰ See *id.* at 1250–51.

¹¹¹ See *id.* at 1249.

¹¹² See *id.* at 1255.

Constitution's Equal Protection Clause because the tariff imposed a burden on it that was not imposed on similarly situated importers, i.e., steel importers not importing from Turkey.¹¹³ The court found that although the Proclamation discriminated on the basis of national origin, an Equal Protection Clause violation would only follow if (1) there is no rational basis for the distinction, or (2) the purpose was achieved "in a patently arbitrary or irrational way."¹¹⁴ Here, the court found that there was a legitimate purpose behind Proclamation 9772 because it was passed to protect national security.¹¹⁵ However, the court found that there was no rational justification for an elevated tariff rate applied solely to Turkey because the President's evidence only spoke to the risks posed by global steel imports, rather than specifically to Turkish steel imports.¹¹⁶

The United States appealed the CIT's decision to the Federal Circuit. In July of 2021, the Federal Circuit reversed.¹¹⁷ The Federal Circuit found that Transpacific failed to demonstrate that the order did not satisfy the rational basis test, and therefore did not violate the Equal Protection Clause.¹¹⁸ However, because the ruling was based on failure to meet the required standard rather than in the Equal Protection Clause's inapplicability to Section 232 litigation, the Equal Protection Clause remains a potential pathway to challenging Section 232 measures.

While *Transpacific Steel* demonstrates Equal Protection-based challenges to Presidential authority under Section 232 can proceed, that case dealt with an unusual and highly fact-specific scenario.¹¹⁹ However, these challenges fail to serve as a meaningful check on the President because the President can simply draft the Section 232 remedy without drawing a distinction between imports from different countries, taking this argument away from importers. In cases where the President treats all countries the same for Section 232 purposes, this challenge will not be available.¹²⁰ Additionally, not every measure that draws distinctions between imports from different countries lacks a rational basis, and therefore even some cases targeting measures like those at issue in *Transpacific Steel* will not be open to Equal Protection challenges.¹²¹

¹¹³ *See id.*

¹¹⁴ *Id.* at 1256–57 (quoting *Belarmino v. Derwinski*, 931 F.2d 1543, 1544 (Fed. Cir. 1991)).

¹¹⁵ *See id.* at 1257.

¹¹⁶ *See id.* at 1257–58.

¹¹⁷ *See Transpacific Steel LLC v. United States (Transpacific Steel II)*, 4 F.4th 1306 (Fed. Cir. 2021).

¹¹⁸ *See id.* at 1333–34.

¹¹⁹ *See Transpacific Steel II*, 466 F. Supp. 3d at 1250–51, 1257–58.

¹²⁰ *See* 19 U.S.C. § 1862(c)(1)(A)(ii) (2018).

¹²¹ *See, e.g., Transpacific Steel II*, 4 F.4th at 1310–11.

B. Potential Legislative Checks to the President's Section 232 Authority

Because of the difficulties in providing a meaningful judicial check on Section 232 authority, some scholars have contended that “[t]he best avenue for limiting presidential actions under Section 232 is for Congress to amend Section 232.”¹²² One suggested solution is for Congress to pass a “legislative veto” which conforms to the structural requirements the Supreme Court laid out in *INS v. Chadha*.¹²³ It is thought that such a veto would be effective, even if it could not actually be used to veto the executive action, because it would cause the President to fear Congress may retaliate by withholding funding from certain programs.¹²⁴ It is also thought that the invocation of this veto could harm the President’s reelection prospect by signaling abuse of Section 232 to the public.¹²⁵

While all legislative solutions have certain problems,¹²⁶ the legislative veto has a more severe one; namely, it ignores the Supreme Court’s strict view, expressed in *Chadha*, that the veto power is an executive branch power.¹²⁷ Specifically, the Court found that the veto power, and conversely the power to override the veto, are “enduring checks” on the power of the legislative and executive branches respectively.¹²⁸ The Court summarized its strong, formalistic view of the separation of powers by writing, “the carefully defined limits on the power of each Branch must not be eroded.”¹²⁹ Given the Court’s strong language, it is plausible that any legislation granting veto power to the legislative branch might be struck down by the Supreme Court.

The legislative veto is not the only potential legislative solution to this problem. Others have argued that Section 232’s problems are best remedied by increasing “congressional oversight.”¹³⁰ Specific plans include the proposed “Global Trade Accountability Act,” which would require passing a joint-resolution of Congress before the President takes what the proponent calls a “unilateral trade action,” and legislation which would require the President to

¹²² Scott, *supra* note 8, at 440.

¹²³ *Id.* at 441; *see also* *INS v. Chadha*, 462 U.S. 919, 955–56 (1983) (finding that a legislative veto did not pass constitutional muster because the act of invoking the legislative veto was one of Congress’s “legislative functions” meaning that it must conform to the constitutional norms of “presentment and bicameralism”).

¹²⁴ *See* Scott, *supra* note 8, at 441–42.

¹²⁵ *See id.* at 442.

¹²⁶ *See infra* notes 139–151.

¹²⁷ *See Chadha*, 462 U.S. at 957–59.

¹²⁸ *Id.* at 957.

¹²⁹ *Id.* at 958.

¹³⁰ *E.g.*, Zha, *supra* note 4, at 271–72.

obtain “congressional approval for all trade actions in the name of national security.”¹³¹ However, these actions would only create the same problems in the legislature as currently exist in the presidency; for example, Congress could use Section 232 as trade “leverage”¹³² to further industry or local interests.¹³³

Another proposed legislative solution calls for Congress to provide a more explicit, limited definition of the phrase “national security.”¹³⁴ The current definition is so broad that the President can readily misuse Section 232 while credibly claiming it meets the national security requirement.¹³⁵ Proponents suggest Congress could define national security in Section 232 consistently with the General Agreement on Tariffs and Trade’s Article XXI definition of “essential security interest,” which would limit Section 232’s permissible scope to “the protection of [U.S.] territory and its population from external threats, and the maintenance of law and public order internally.”¹³⁶ This would limit the President’s Section 232 authority by requiring him or her to make more specific showings of the “threat to national security” for which Section 232 is being invoked, while still leaving the President the ability to take Section 232 actions once these standards are satisfied.¹³⁷ This system is designed to prevent “the mere existence of injury caused by imports” from being a sufficient basis for invoking Section 232.¹³⁸

These are far from the only proposed legislative solutions to Section 232’s sweeping scope.¹³⁹ However, drawbacks exist that make legislative solutions poor vehicles for addressing Section 232 abuses. A legislative solution is only meaningful if it can be passed, and there is little likelihood of that occurring. Of all the bills introduced to the 116th Congress (which sat from January 3, 2019, until January 3, 2021) only 4% received a vote, and only 2% became law.¹⁴⁰ In terms of raw numbers, of the 16,601 proposed pieces of legisla-

¹³¹ *Id.* at 272.

¹³² Cunningham, *supra* note 33, at 58–59.

¹³³ See Zha, *supra* note 4, at 272–73.

¹³⁴ See *id.* at 273.

¹³⁵ See *id.*

¹³⁶ *Id.* (quoting Panel Report, *Russia—Measures Concerning Traffic in Transit*, ¶ 7.130, WTO Doc. WT/DS512/R (adopted Apr. 26, 2019)).

¹³⁷ *Id.* at 274 (arguing that in order to take Section 232 action, the President should have to show “(1) a real, as opposed to a speculative, threat to national security interest and (2) is narrowly tailored to protect that interest.”).

¹³⁸ *Id.* at 274–75.

¹³⁹ See, e.g., *id.* at 275–77; Scott, *supra* note 8, at 442–44; Moody, *supra* note 10, at 325–28.

¹⁴⁰ See *Statistics and Historical Comparison*, GOVTRACK, <https://www.govtrack.us/congress/bills/statistics> [<https://perma.cc/7MX3-CFLJ>] (last visited Mar. 14, 2022).

tion only 746 bills ever received a vote, and only 344 bills became law.¹⁴¹ However, a critic could claim a comparison to the 116th Congress is unfair because today, the same political party controls both houses of Congress,¹⁴² whereas the 116th Congress saw the House of Representatives controlled by Democrats and the Senate controlled by Republicans.¹⁴³ This objection does not meaningfully change the analysis: an examination of the 115th Congress (where both the House of Representatives and the Senate were controlled by Republicans)¹⁴⁴ reveals that of the 11,474 bills presented to the Congress only 867 received a vote and of those, only 443 became law.¹⁴⁵ Expressed as a percentage, only 6% of all bills received a vote and less than 3% became law.¹⁴⁶ Even with Democrats controlling the House of Representatives and Senate,¹⁴⁷ assuming the comparison between the 117th and 115th Congress is fair, the odds of a legislative reform to Section 232 passing Congress are slim.

Further, this inaction problem is likely to worsen. A recent comparison of “four decades” of data from “twelve OECD [Organization for Economic Cooperation and Development] countries” found political polarization had increased the most in the United States.¹⁴⁸ The future outlook is equally bleak as only “21% of Americans say relations between Republicans and Democrats

¹⁴¹ See *id.*

¹⁴² Compare *Party Breakdown: 117th Congress House Lineup*, U.S. HOUSE REPRESENTATIVES PRESS GALLERY, <https://pressgallery.house.gov/member-data/party-breakdown> [<https://perma.cc/9KPU-5Q42>] (last visited Mar. 1, 2022) (describing the number of Republicans in the House of Representatives as 211 and the number of Democrats in the House of Representatives as 222), with *117th Congress: Senate Party Lineup*, U.S. SENATE PRESS GALLERY https://www.dailypress.senate.gov/?page_id=228 [<https://perma.cc/9E2E-8S4L>] (last updated Mar. 1, 2022) (describing the number of Republicans in the Senate as fifty, the number of Democrats in the Senate as forty-eight, and the number of Independents as two while clarifying the two independents, “caucus with the Democrats”).

¹⁴³ See JENNIFER E. MANNING, CONG. RSCH. SERV., R45583, MEMBERSHIP OF THE 116TH CONGRESS: A PROFILE 1 (2020) (listing the House of Representatives as being made up of 237 Democrats, 197 Republicans, and two third parties and the Senate being composed of, “52 Republicans, 46 Democrats, and 2 Independents, who both caucus with the Democrats”).

¹⁴⁴ See JENNIFER E. MANNING, CONG. RSCH. SERV., R44762, MEMBERSHIP OF THE 115TH CONGRESS: A PROFILE 1 (2018) (listing the House of Representatives as containing 238 Republicans and 201 Democrats and the Senate containing “51 Republicans, 47 Democrats, and 2 Independents, who both caucus with the Democrats”).

¹⁴⁵ See *Statistics and Historical Comparison*, *supra* note 139.

¹⁴⁶ See *id.*

¹⁴⁷ See *supra* note 141.

¹⁴⁸ Levi Boxell et al., *Cross-Country Trends in Affective Polarization 2* (Nat’l Bureau of Econ. Rsch., Working Paper No. 26669, 2021).

will get better in the coming year.”¹⁴⁹ Increased political polarization makes it more difficult to effectively govern, and therefore harder to solve problems like abuse of Section 232.¹⁵⁰ This polarization problem exacerbates the preexisting problems with actually passing remedial legislation regarding Section 232.

Even without the statistical and political imaging problems associated with passing Section 232 legislation, the fact remains that the President would have to sign the bill to make it law.¹⁵¹ Given the unilateral power Section 232 vests in the President’s administration, the President is unlikely to sign legislation restricting his or her own power.

In summary, a legislative solution is not feasible because it is unlikely to pass Congress nor be signed by the President.

III. Solution

Given that legislative solutions are unlikely and the existing legal framework does not contain a sufficient check for curtailing the President’s Section 232 power, the Federal Circuit is uniquely situated to develop a judicial check on this power as it hears all appeals regarding Section 232 litigation.¹⁵² However, the Federal Circuit must respect the constraints of existing jurisprudence by limiting its review to whether the challenged measure is “a clear misconstruction of the governing statute . . . or [an] action outside delegated authority.”¹⁵³

The Federal Circuit should adopt a sliding-scale analysis to determine whether a President’s action is outside his or her authority pursuant to Section 232. This analysis allows courts to determine whether the President acted to protect national security by referring to and weighing a number of contextual factors.¹⁵⁴ These factors would allow the court to actually scrutinize the

¹⁴⁹ Vianney Gomez, *Democrats More Optimistic Than Republicans That Partisan Relations in Washington Will Improve in 2021*, PEW RSCH. CTR. (Dec. 1, 2020), <https://www.pewresearch.org/fact-tank/2020/12/01/democrats-more-optimistic-than-republicans-that-partisan-relations-in-washington-will-improve-in-2021/> [<https://perma.cc/TH5A-4HSB>] (finding that of the surveyed Americans 21% expect reduced polarization, 37% expect worse polarization, and 41% expect “about the same”).

¹⁵⁰ See *Researchers Find Broad Impacts from Political Polarization*, UNIV. WYO. (Feb. 10, 2021), <http://www.uwyo.edu/uw/news/2021/02/researchers-find-broad-impacts-from-political-polarization.html> [<https://perma.cc/AVB4-W8Z3>].

¹⁵¹ See U.S. CONST. art. I, § 7.

¹⁵² See 28 U.S.C. § 1295(a)(5) (2018) (granting the Federal Circuit exclusive jurisdiction over appeals from the CIT); *id.* § 1581(i)(1)(B) (granting the CIT exclusive jurisdiction over cases against the federal government arising out of tariffs).

¹⁵³ *Severstal Exp. GMBH v. United States*, No. 18-00057, 2018 WL 1705298, at *7 (Ct. Int’l Trade Apr. 5, 2018) (quoting *Corus Grp. v. Int’l Trade Comm’n*, 352 F.3d 1351, 1361 (Fed. Cir. 2003)).

¹⁵⁴ See, e.g., *Serco, Inc. v. United States*, 101 Fed. Cl. 717, 721 (2011).

President's actions while constraining the areas the court may examine and making the analysis more predictable. If the President can present strong evidence that certain factors are met, then the court would conduct a more deferential review; if the President makes only weak evidentiary showing of several factors, the court would conduct stricter review of whether the President acted within Section 232's authority.¹⁵⁵ In this way, sliding scale review allows a deeply contextual analysis in Section 232 cases, and ultimately, the sorts of laws Section 232 was meant to create will survive while laws that abuse Section 232 will fail.

The scale itself must be linked to some value in order to be meaningful, as a sliding scale without a guiding value would more or less be a simple cost benefit analysis.¹⁵⁶ Section 232 itself sets out this guiding principle by limiting the President's actions to scenarios in which imports "would threaten to impair the national security."¹⁵⁷ Thus, the sliding scale would be used to determine the degree of deference the President's actions will receive.

A. Factors to Consider on the Sliding Scale

To determine whether the Section 232 law was properly enacted to protect national security, the court should use several factors, distilled from notable themes in Section 232's legislative history, to guide its analysis. Linking these factors to Section 232's legislative history ensures that Section 232 actions are appropriately constrained to only those actions Congress sought to allow via this legislation.¹⁵⁸ The following factors can be used to determine whether a Section 232 tariff was passed to protect national security.

1. Factor 1: Is there an External, Military Threat from a Foreign Nation?

The first factor is whether there is an external, military threat from a foreign nation. This is derived from Section 232's Cold War purpose and design.¹⁵⁹ Given that the Cold War was a period during which there was fear of armed conflict between the United States, Russia, and their respective allies,¹⁶⁰ if

¹⁵⁵ *See id.*

¹⁵⁶ *See, e.g.,* Qingdao Taifa Grp., v. United States, 581 F.3d 1375, 1378–79 (Fed. Cir. 2009) (demonstrating that in a preliminary injunction case, the sliding scale analysis is linked on one side to the plaintiff's "likelihood of prevailing" with their likelihood of suffering "irreparable harm"; the ends of the scale are linked to tangible values such that the analysis is directed toward a specific end).

¹⁵⁷ 19 U.S.C. § 1862(a) (2018).

¹⁵⁸ *See supra* notes 33–75.

¹⁵⁹ *See* H.R. REP. NO. 87-2518, at 7 (1962) (Conf. Rep.).

¹⁶⁰ *See Cold War: Toward a New Order*, ENCYC. BRITANNICA, <https://www.britannica.com/event/Cold-War/Toward-a-new-world-order> [<https://perma.cc/9DAV-DCG9>] (last visited

there is evidence of an external military threat from another nation, review of the President's actions under Section 232 should be more deferential as this was the purpose of the statute.

2. Factor 2: Have American Soldiers Recently Been Deployed Abroad?

Another factor is whether American soldiers have recently been deployed abroad. The legislative history reveals the Secretary of Defense believed that Section 232 was necessary to support “oversea troop deployments.”¹⁶¹ As noted, Congress passed Section 232 soon after the Korean War, and at a time when the Vietnam War was beginning to ramp up.¹⁶² Actions taken pursuant to Section 232 to enable the safe deployment of American soldiers are certainly the sort of action contemplated by the bill's framers. The Federal Circuit should weigh this factor more heavily if the import is a product commonly used by deployed soldiers because of the Act's focus on this area.

3. Factor 3: Does the Measure Target Uranium or Other Materials Used to Create or Maintain Nuclear Weapons?

A final factor is whether the Section 232 law targets uranium or other materials required to create or maintain nuclear weapons. Section 232 was passed during the midst of the Cuban Missile Crisis, a period in which the United States was aware that Russia was arming Fidel Castro's new Cuban government with nuclear missiles.¹⁶³ Nuclear weapons and the fear of nuclear proliferation are also hallmarks of the Cold War more generally.¹⁶⁴ For these reasons, regardless of the morality or legality of deploying nuclear weapons, using Section 232 to protect uranium and other materials required to create nuclear weapons was likely contemplated by the bill's framers.

These factors should not be considered an exhaustive list. The list should remain flexible enough to change when the country's national security interests change, and could even include an additional catchall factor to allow for this flexibility. Further, the Federal Circuit could adopt factors outside of this legislative history to account for the ways in which warfare has changed since

Mar. 1, 2022).

¹⁶¹ *Trade Expansion Act Hearing*, *supra* note 2, at 25.

¹⁶² *See Demilitarized Zone: Korean Peninsula*, *supra* note 38; *see also Vietnam War Allied Troop Levels 1960-73*, *supra* note 37.

¹⁶³ *See The Cuban Missile Crises*, OFF. HISTORIAN, <https://history.state.gov/departmenthistory/short-history/cubanmissile> [<https://perma.cc/FQT2-E5UB>] (last visited Mar. 1, 2022).

¹⁶⁴ *See U.S.-Russia Nuclear Arms Control*, COUNCIL ON FOREIGN RELS., <https://www.cfr.org/timeline/us-russia-nuclear-arms-control> [<https://perma.cc/8EYH-CPBV>] (last visited Mar. 1, 2022) (describing nuclear weapons as “perhaps the most alarming feature of the Cold War competition between the United States and Soviet Union”).

1962.¹⁶⁵ This would give the test the flexibility to recognize the President's authority to use Section 232 to protect the United States' national security interests even when they are not the sorts of security threats contemplated during the Cold War. The above factors showcase how the Federal Circuit could justify adopting the sliding scale review.

B. An Example

The following example demonstrates how this new standard could have affected the Federal Circuit's recent appeal of *Transpacific Steel*. For purposes of this example, assume the CIT had found that the President acted beyond the scope of his Section 232 power in imposing additional duties on Turkish steel, but that he followed the proper process for invoking Section 232.¹⁶⁶

The Federal Circuit would first determine whether Turkey posed a military threat to the United States similar to Russia's threat to the United States during the Cold War. The President would struggle here because Turkey is a member of the North Atlantic Treaty Organization ("NATO"), a group of countries allied with the United States for the purpose of "contribut[ing] to the security of the North Atlantic area."¹⁶⁷ Further, U.S. diplomatic officials describe Turkey as "a close ally."¹⁶⁸ Certainly U.S. diplomats were not calling Russia an ally during the Cold War. However, the President would likely respond that the United States is concerned about the future of Turkey as it is beginning to separate ideologically from the United States, and that Congress has stopped supplying Turkey with weapons.¹⁶⁹ Despite ideological

¹⁶⁵ See Benjamin S. Lambeth, *Lessons from Modern Warfare: What the Conflicts of the Post-Cold War Years Should Have Taught Us*, 7 STRATEGIC STUD. Q. 28, 60–65 (2013) (discussing future changes in warfare including the idea of smaller scale conflicts between smaller states or less organized groups).

¹⁶⁶ For purposes of this example, the standard of review the Federal Circuit should apply is ignored, as it is assumed this example case is the case in which the Federal Circuit first adopts these factors. In practice, the facts underlying each factor would be reviewed for abuse of discretion, while the legal conclusions those factors lead to would be reviewed *de novo*. See *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 (2014) (explaining the general rule that decisions of fact are reviewed for abuse of discretion while decisions of law are reviewed *de novo*).

¹⁶⁷ *What Is NATO?*, NATO, <https://www.nato.int/nato-welcome/index.html> [<https://perma.cc/V6SA-UJSC>] (last visited Mar. 20, 2022).

¹⁶⁸ David Ignatius, *Why Is the Trump Administration Enabling Erdogan's Turkey*, WASH. POST (Sept. 3, 2020) https://www.washingtonpost.com/opinions/global-opinions/why-is-the-trump-administration-enabling-turkey/2020/09/03/491ecce6-ee02-11ea-b4bc-3a2098fc73d4_story.html [<https://perma.cc/44R7-PEC6>] (quoting James Jeffrey, State Department special envoy for Syria).

¹⁶⁹ See *id.*

and trade-based separation, it is clear there is no military conflict between the United States and Turkey. Thus, while there is the potential for Turkey to pose a military threat one day, the Federal Circuit would likely find that relations with Turkey had not declined to that level yet.

The Federal Circuit would next consider whether the United States currently has deployed troops in order to ascertain whether the President's action was necessary to that deployment. The Federal Circuit would first ascertain whether troops had been deployed at the time of the tariffs' invocation or during the Section 232 investigation.¹⁷⁰ The Federal Circuit would likely weigh this factor heavily as steel is required in the production of military gear necessary to support troop deployments.¹⁷¹

Next, the Federal Circuit would determine whether the steel at issue is used for a military purpose, and if steel can be obtained from other reliable suppliers. In this case only 3% of domestic steel was "used for military purposes," and the United States could easily obtain steel if it was needed from "reliable foreign countries."¹⁷² Thus, even if the President could prove the United States had deployed troops during the period in which he decided to take Section 232 action, he would have a difficult time demonstrating that Turkish steel imports somehow threatened the United States' required steel supplies. Thus, the Federal Circuit would likely weigh against granting deference to the President.

In this scenario, because the President has failed to meet the first two factors, he would need to show substantial evidence on the third factor¹⁷³ in order for the Federal Circuit to grant deferential review of the President's actions. Unfortunately for the President, the third factor does not apply in this case because the burdened import is steel, and the third factor deals solely with nuclear weapons and material necessary to create them.¹⁷⁴ This analysis would shift the sliding scale from a more deferential review of the President's Section 232 actions to a more critical review of the policy's national security motive. From there, the Federal Circuit would analyze the purpose underlying the law rather than simply deferring to the President's proffered explanation as it does in the status quo.

¹⁷⁰ While it would be difficult to find an answer to this question for this Note, if the standard is adopted it would likely become common practice to introduce evidence in the lower courts as to whether troops had been deployed during the relevant time period.

¹⁷¹ See Zha, *supra* note 4, at 238 (arguing that some steel production is used for national security purposes).

¹⁷² *Id.* at 238–39.

¹⁷³ See, e.g., *Serco, Inc. v. United States*, 101 Fed. Cl. 717, 721 (2011)

¹⁷⁴ See *Transpacific Steel II*, 466 F. Supp. 3d 1246, 1271 (Ct. Int'l Trade 2020) (describing the import at issue in this case as solely steel produced in Turkey).

C. Objections and Responses

This sliding-scale test is not entirely free from objection, but the objections fail because the sliding-scale test operates within both the limits of existing precedent and within the range of the judicial system's institutional competency. First, some may be skeptical that the Federal Circuit would be willing to adopt such a measure in the first place in light of its language in *American Institute for International Steel*.¹⁷⁵ However, this measure is an addition to, rather than a replacement for, the *Algonquin* standard, and thus would not require the Federal Circuit to “guess at precisely what analysis might be needed in the absence of *Algonquin*.”¹⁷⁶ Additionally, as to the Federal Circuit's concern that parties are unprepared to plead under a new standard (here, the sliding scale),¹⁷⁷ if a party included this argument in its initial pleadings and briefs then neither party would be caught off guard by application of this proposed standard. Further, counsel and Federal Circuit judges would be familiar with this test's function, as sliding-scale tests have been previously used by the Federal Circuit in cases involving review of a preliminary injunction.¹⁷⁸ Thus, this is exactly the sort of test the Federal Circuit hinted it may adopt in *American Institute for International Steel*.¹⁷⁹

A final objection may be that courts are not the appropriate body to determine whether national security is jeopardized. After all, some would say the judicial system lacks the institutional competency to decide such issues, as they “inherently involve policy determinations.”¹⁸⁰ Historically, this argument may have seemed viable, but recent precedent from the World Trade Organization (“WTO”) calls into question this traditional assumption. Specifically, in *Russia—Measures Concerning Traffic in Transit*,¹⁸¹ a WTO Panel examined a

¹⁷⁵ See *Am. Inst. for Int'l Steel, Inc. v. United States*, 806 F. App'x 982, 983, 988–92 (Fed. Cir. 2020) (noting that the court is not troubled by the lack of meaningful judicial review of Section 232 actions and believes that the Supreme Court knew about the limits on judicial review in this area when it decided *Algonquin*).

¹⁷⁶ *Id.*

¹⁷⁷ See *id.*

¹⁷⁸ See *Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1345 (Fed. Cir. 2018); see also *FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993); *Serco, Inc. v. United States*, 101 Fed. Cl. 717, 721 (2011) (explaining that when deciding whether a preliminary injunction should be granted, there is a sliding-scale relationship between a plaintiff's likelihood of success on the merits and the likelihood of suffering irreparable harm such that an elevated showing of one will allow for a lesser showing of the other, and a lesser showing of one necessitating a heightened showing of the other).

¹⁷⁹ See *Am. Inst. for Int'l Steel*, 806 F. App'x at 990.

¹⁸⁰ Scott, *supra* note 8, at 440.

¹⁸¹ See Panel Report, *Russia—Measures Concerning Traffic in Transit*, WTO Doc. WT/DS512/R (adopted Apr. 5, 2019).

complaint filed by Ukraine which alleged certain Ukrainian goods were not permitted to be moved through Russian borders.¹⁸² Among other defenses, Russia argued that the challenged measures were “necessary for the protection of its essential security interests.”¹⁸³ Russia argued that this placed the matter beyond the Panel’s judicial powers, but the Panel found that, in order to determine the rule’s scope or even whether they had power to review Russia’s claim, they had to have power to interpret the security provision and apply it to the case.¹⁸⁴ Thus, the Russian argument that the Panel could not review the national security question failed.¹⁸⁵

Reviewing the national security question, the Panel began by clearly defining the terms, “emergency in international relations.”¹⁸⁶ It then examined evidence to determine whether Russia’s actions met that definition.¹⁸⁷ Specifically, it looked to the parties’ characterizations of the security risks¹⁸⁸ and how the international community perceived the events in question.¹⁸⁹ Ultimately, the Panel determined that there was a military conflict, and accepted Russia’s defense.¹⁹⁰

This case demonstrates that a judicial body can review the existence of national security interests and threats in a structured, principled way, and therefore the Federal Circuit is well situated to conduct such a review.

Conclusion

As it stands, Section 232 is ripe for abuse by the executive branch, and the President has little incentive to reign in Section 232 action.¹⁹¹ Additionally, while legislative solutions are theoretically possible, Congress has taken no action to limit the President’s authority pursuant to the statute nor explored potential solutions to the problem. Because neither the executive nor legislative branches has shown a willingness to confront, or success in solving, this problem, the Federal Circuit is uniquely positioned to provide a check on the President’s authority under Section 232.¹⁹² Though Section 232 actions

¹⁸² See *id.* § 7.1(b).

¹⁸³ *Id.* § 7.4.

¹⁸⁴ See *id.* § 7.56–7.58.

¹⁸⁵ See *id.* § 7.103.

¹⁸⁶ *Id.* § 7.111.

¹⁸⁷ See *id.* § 7.111–7.125.

¹⁸⁸ See *id.* § 7.118.

¹⁸⁹ See *id.* § 7.122.

¹⁹⁰ See *id.* § 7.123–.126(b).

¹⁹¹ See Stein, *supra* note 75, at 1224.

¹⁹² See 28 U.S.C. § 1295(a)(5) (2018) (granting the Federal Circuit exclusive jurisdiction over appeals from the CIT); *id.* § 1581(i)(1)(B) (granting the CIT exclusive jurisdiction

can only be challenged by asking whether there is “a clear misconstruction of the governing statute . . . or [an] action outside delegated authority,”¹⁹³ the Federal Circuit can set its own standard for determining what constitutes “action outside delegated authority.”¹⁹⁴ To this end, the Federal Circuit should use its next Section 232 case to adopt a sliding-scale review to determine whether to grant deference in determining whether a President’s action is outside his or her authority pursuant to Section 232. Under this new standard, the Federal Circuit could meaningfully review the President’s Section 232 actions while granting appropriate deference to Presidential decisions within the scope of the statute. This change in jurisprudence could provide more stability for producers, ensure lower prices for consumers, and promote more multilateral foreign relations all while respecting the boundaries of the Supreme Court’s precedent.

over cases against the federal government arising out of tariffs).

¹⁹³ *Severstal Exp. GMBH v. United States*, No. 18-00057, 2018 WL 1705298, at *7 (Ct. Int’l Trade Apr. 5, 2018) (quoting *Corus Grp. v. Int’l Trade Comm’n*, 352 F.3d 1351, 1361 (Fed. Cir. 2003)).

¹⁹⁴ *Id.*

Return of the JEDI: How a Cloud-Computing Contract Raises Concerns of Presidential Influence Over Contracting Officers

Katie Iturra*

Introduction

In early 2018, the Pentagon solicited bids for a \$10 billion contract aimed at building a more unified cloud service¹ to centralize the military's extensive network of information.² This ten-year contract, referred to as the Joint Enterprise Defense Infrastructure ("JEDI") contract, attracted major tech giants including Amazon—the perceived front runner to some³ through-

* J.D., expected May 2022, The George Washington University Law School. I would like to thank the *Federal Circuit Bar Journal* Editorial Board for their exceptional work in editing this Note. Special thanks to Professor Joshua Schwartz for his invaluable guidance; to my fellow law peer, Alexa Pappas, for her endless encouragement throughout the writing process; and to my family and friends for their continuous support in my legal career.

¹ A "cloud service" refers to a "wide range of services delivered on demand to companies and customers over the internet. These services are designed to provide easy, affordable access to applications and resources, without the need for internal infrastructure or hardware." *What is a Cloud Service?*, CITRIX, <https://www.citrix.com/glossary/what-is-a-cloud-service.html> [<https://perma.cc/2XEP-XJXR>] (last visited Jan. 3, 2022).

² See Aaron Gregg, *Pentagon Reaffirms Microsoft's JEDI Cloud Contract Win Despite Procurement Mistake*, WASH. POST (Sept. 4, 2020), <https://www.washingtonpost.com/business/2020/09/04/pentagon-reaffirms-microsofts-jedi-cloud-win-despite-procurement-mistake/> [<https://perma.cc/82RQ-YY4K>].

³ Some industry experts viewed Amazon as the front-runner because of "its years of experience handling classified data for the CIA." Aaron Gregg & Jay Greene, *Pentagon Awards Controversial \$10 Billion Cloud Computing Deal to Microsoft, Spurning Amazon*, WASH. POST (Oct. 25, 2019), <https://www.washingtonpost.com/business/2019/10/25/pentagon-awards-controversial-billion-cloud-computing-deal-microsoft-spurning-amazon/> [<https://perma.cc/QX38-7SZ4>]; see also Jay Greene & Aaron Gregg, *Amazon Will Challenge Pentagon's Award of \$10 Billion JEDI Contract to Microsoft*, WASH. POST (Nov. 14, 2019), <https://www.washingtonpost.com/business/2019/11/14/amazon-will-challenge-pentagons-award-billion-jedi-contract-microsoft/> [<https://perma.cc/6DAA-2CTB>] ("Amazon is the commercial cloud-computing market leader, holding a 48% market share . . . Microsoft is the second

out the bidding process.⁴ In the summer of 2019, President Trump became increasingly vocal about his antipathy towards Amazon's CEO, Jeffrey Bezos.⁵ In addition to running the multinational conglomerate, Bezos owns *The Washington Post*, which had been consistently critical of President Trump's administration.⁶ In response to Amazon's lead in the competition, Trump explicitly stated that he would instruct the Defense Secretary to reevaluate the bidding process.⁷ He directed the Department of Defense ("DOD" or "Department") to "screw Amazon" out of the JEDI contract and, in response to an inquiry about the JEDI procurement process at a July news conference, said that he was going to ask the DOD to "look at it very closely."⁸ Later that same year, the DOD awarded the contract to Microsoft.⁹ The DOD claimed that Microsoft's proposal represented the "best value" with the right technology.¹⁰

Although the DOD subsequently canceled the JEDI contract, the issue of whether the President improperly impacted the procurement process has yet to be resolved.¹¹ Trump's vocal antagonism towards Bezos and his public statements regarding what the JEDI decision should be raises questions in light of the DOD's contract award to Microsoft: are presidential statements about government procurement, which may have affected the contracting officer's ultimate determination, improper?

Government procurement involves the purchasing of property or services using federal contracts for the government's direct use.¹² Federal contracts are governed by detailed terms and conditions, laid out under the *Federal*

largest, with a 15.5% share. Amazon is also the only company to hold the [Department of Defense's] highest-level security certification, called Impact Level 6.")

⁴ See Gregg, *supra* note 2.

⁵ See *id.*

⁶ See *id.*

⁷ See *id.*

⁸ Memorandum of Points and Authorities in Support of Plaintiff Amazon Web Services, Inc.'s Renewed Motion to Supplement the Administrative Record at 1, 8–9, *Amazon Web Servs., Inc. v. United States*, 147 Fed. Cl. 146 (2020) (No. 19-cv-01796).

⁹ See Gregg, *supra* note 2.

¹⁰ Amanda Macias & Jordan Novet, *Pentagon Says It Will Stick with Microsoft for \$10 Billion JEDI Cloud Contract*, CNBC (Oct. 28, 2020, 8:07 PM), <https://www.cnbc.com/2020/09/04/pentagon-says-it-will-stick-with-microsoft-for-jedi-cloud-contract.html> [<https://perma.cc/UF9W-JG4R>].

¹¹ See Press Release, U.S. Dep't of Def., *Future of the Joint Enterprise Defense Infrastructure Cloud Contract* (July 6, 2021), <https://www.defense.gov/Newsroom/Releases/Release/Article/2682992/future-of-the-joint-enterprise-defense-infrastructure-cloud-contract/> [<https://perma.cc/CE5Q-59UU>].

¹² See FAR 1.101 (2020).

Acquisition Regulation (“FAR” or “Regulations”).¹³ The FAR directs agency heads to delegate to contracting officers the authority to bind the U.S. Government to contracts.¹⁴ Contracting officers have the sole authority to execute, modify, or terminate a contract.¹⁵ Although contracting officers have wide latitude to exercise their judgment and consider expert opinions in their decisions, these officers may not be pressured to make decisions regarding government contracts “on any basis other than the merits of the matter.”¹⁶

In *McDonnell Douglas Corp. v. United States*,¹⁷ the Court of Federal Claims raised the issue of whether the Secretary of Defense (“SOD”) has the authority to pressure the contracting officer to terminate a federal contract.¹⁸ The court ultimately decided that the SOD wrongly influenced the contracting officer by withdrawing the project’s funding.¹⁹ The Federal Circuit reversed this decision, holding that the Court of Federal Claims erred in not first determining whether a default existed before concluding the termination was improper.²⁰ As such, the court left the issue of the permissible role of high political officials in exercising authority over the contracting officer’s discretion unresolved. Thus, there remains an ambiguity in the law regarding how much influence by a higher official over the contracting officer would be considered “improper.”²¹ The DOD’s decision to award the JEDI contract to Microsoft over front-runner Amazon raises similar questions about the propriety of statements by high political officials in government procurement.²²

Although Amazon’s allegations that President Trump improperly interfered with the JEDI cloud contract remain unresolved, that situation highlights the legal concerns that could be implicated when the President asserts influence over a contracting officer. Such influence, if improper and determinative in the matter, leaves a single individual with the power to substantially and politically control the procurement system and, as a result, “significant segments

¹³ *See id.*

¹⁴ *See id.* at 1.601.

¹⁵ *See id.* (“Contracts may be entered into and signed on behalf of the Government only by contracting officers.”); *id.* at 1.602-2 (“Contracting officers are responsible for ensuring performances of all necessary actions for effective contracting, ensuring compliance with the terms of the contract, and safeguarding interests of the United States in its contractual relationships.”).

¹⁶ *Id.* at 3.401; *see also id.* at 1.602-2.

¹⁷ 35 Fed. Cl. 358 (1996), *rev’d*, 182 F.3d 1319 (Fed. Cir. 1999).

¹⁸ *See id.* at 361.

¹⁹ *See id.* at 377.

²⁰ *See infra* Section I.C; *see also* *McDonnell Douglas Corp. v. United States*, 182 F.3d 1319, 1328–30 (Fed. Cir. 1999).

²¹ *Id.*

²² *See Pentagon Awards Controversial \$10 Billion Cloud Computing Deal*, *supra* note 3.

of the U.S. economy.”²³ Indeed, some commentators express concern that, based on the hundreds of billions of dollars of spending on federal contracts per year, the President may be able to regulate the nation’s economy under the appearance of devising procurement policy.²⁴ The President’s distinct powers, such as the presidential communications privilege,²⁵ can lead to incomplete investigations and therefore an inability to fully determine whether improper influence even took place.²⁶

This Note argues that the law concerning the President’s improper influence over contracting officers is inconclusively defined, leaving the contracting officers’ full discretion at risk. The current state of the law becomes an intense concern if the President exercises such influence because the President has extensive powers and can be left with immense control over the federal procurement system and the U.S. economy. Due to the President’s unique role as head of the executive branch, the President’s influence is especially concerning for it has the potential to go unchecked—unless the judiciary says such influence is improper. Therefore, the Federal Circuit should clearly define what actions constitute improper influence and determine to what extent—if at all—the President may influence a contracting officer.

Part I of this Note explores the pertinent Regulations addressing the authority to bind the Government to contracts and the general responsibilities upon awarding a bid to a contractor. It further explains the Regulations concerning high-ranking government officials’ influence and how such influence has been handled through case law, specifically the Federal Circuit’s decision in *McDonnell Douglas Corp.*²⁷ Finally, it provides background on the Pentagon’s recent decision to award the JEDI cloud contract to Microsoft over Amazon. Part II analyzes the lack of clarity in the law regarding the role of high political officials’ influence on the decisions of contracting officers. Part III recommends amending the FAR to clarify the law concerning the influence of superiors on contracting officers’ decisions and advocates for

²³ VANESSA K. BURROWS & KATE M. MANUEL, CONG. RSCH. SERV., R41866, PRESIDENTIAL AUTHORITY TO IMPOSE REQUIREMENTS ON FEDERAL CONTRACTORS 2 (2011).

²⁴ *See id.*

²⁵ The constitutionally based presidential communications privilege “protects from disclosure any communications that are either by the President directly or by his immediate advisors in the Office of the President to the President.” Aziz Huq, *Background on Executive Privilege*, BRENNAN CTR. FOR JUST. (Mar. 23, 2007), <https://www.brennancenter.org/our-work/research-reports/background-executive-privilege> [<https://perma.cc/VQ85-UYWC>].

²⁶ *See, e.g.*, U.S. DEP’T. OF DEF. INSPECTOR GEN., DODIG-2020-079, REPORT ON THE JOINT ENTERPRISE DEFENSE INFRASTRUCTURE (JEDI) CLOUD PROCUREMENT 6 (2020) [hereinafter REPORT ON THE JEDI CLOUD PROCUREMENT].

²⁷ *See* 182 F.3d 1319 (Fed. Cir. 1999).

the Federal Circuit to develop a test to refine the line between proper and improper influence.²⁸

I. Background

Procurement law is comprised of policies and procedures detailed in the *Federal Acquisition Regulation System*.²⁹ This system contains the rules for all participants in government contracting.³⁰ Contracting officers are responsible for entering into, exiting out of, and overseeing the procurement process as a whole.³¹ The FAR grants contracting officers full responsibility over the procurement process, but the Unitary Executive Theory holds the President has broad authority over the entire executive branch, including over contracting officers' decisions to bind the government to a contract. The Unitary Executive Theory is exemplified in the pertinent developments of the JEDI cloud contract case.

A. Procurement Law

The government's authority to enter into contracts arises from the U.S. Constitution, although such authority is not explicitly addressed.³² In 1831, the Supreme Court recognized the federal government's right to enter into contracts in *United States v. Tingey*.³³ In this case, the government sued Thomas Tingey for payment on a \$10,000 bond executed by Lewis Deblois.³⁴ Deblois had obtained the surety from Tingey, who responded to the lawsuit by questioning the legality of the bond.³⁵ The Court held that although there was no evidence that the government could enter into this voluntary contract, the government has the power to contract both pursuant to a statutory grant and according to principles of sovereignty.³⁶ The power to contract is "an incident to the general right of sovereignty," and necessary to effectively operate the federal government.³⁷

²⁸ See FAR 1.602-1 (2020).

²⁹ See *id.* at 1.101.

³⁰ See *id.*

³¹ See *id.* at 1.602-1 to -2.

³² See *Government Contracts & Procurement*, JUSTIA, <https://www.justia.com/administrative-law/government-contracts-procurement/> [<https://perma.cc/JB7U-P5DX>] (last updated Apr. 2018).

³³ 30 U.S. 115, 128 (1831); see also *Government Contracts & Procurement*, *supra* note 32.

³⁴ See *Tingey*, 30 U.S. at 125.

³⁵ See *id.* at 116, 125.

³⁶ See *id.* at 127–28.

³⁷ *Id.* at 128.

In order to direct the contract process between businesses and government entities, Congress enacted several statutes and regulations setting out procedures the government must follow and placing limitations on the government's ability to contract.³⁸ Specifically, the *Federal Acquisition Regulation System* is an administrative body of law governing how the government should purchase goods and services.³⁹ The FAR allows for uniformity and coordination in the federal acquisition process through its publication of policies and procedures for all executive agencies.⁴⁰

Agency heads⁴¹ delegate the authority to bind the U.S. government to contracts to contracting officers.⁴² Contracting officers have the sole authority to “enter into, administer, or terminate contracts” and are obligated to ensure that all the FAR's requirements have been met.⁴³ Contracting officers are also responsible for ensuring contractors receive impartial, fair, and equitable treatment.⁴⁴ Although the FAR exclusively grants contracting officers the authority to bind the government to contracts, it affords contracting officers “wide latitude to exercise business judgment” and requires them to consider specialists' advice.⁴⁵

The FAR criteria for binding the government to a contract and for terminating a contract for default are tellingly distinguishable.⁴⁶ The FAR criteria for termination due to default falls into two categories.⁴⁷ The factors in the first category require detailed knowledge of the contract's terms and history of performance,⁴⁸ highlighting the contracting officer's role as the best position to terminate a contract for default.⁴⁹ The second category of criteria can

³⁸ See *Government Contracts & Procurement*, *supra* note 32.

³⁹ See *id.*

⁴⁰ See FAR 1.101 (2020).

⁴¹ See *id.* at 2.101 (defining “agency head” as “the Secretary, Attorney General, Administrator, Governor, Chairperson, or other chief official of an executive agency, unless otherwise indicated, including any deputy or assistant chief official of an executive agency.”).

⁴² See *id.* at 1.601.

⁴³ *Id.* at 1.601, 1.602-1 to -2.

⁴⁴ See *id.* at 1.602-2(b), 15.303.

⁴⁵ *Id.* at 1.602-2(c) (“Contracting officers shall . . . [r]equest and consider the advice of specialists in audit, law, engineering, information security, transportation, and other fields, as appropriate.”).

⁴⁶ Compare *id.* at 1.602-1 (providing considerations of a contracting officer when entering into a contract), with Joshua I. Schwartz, *Administrative Law Lessons Regarding the Role of Politically Appointed Officials in Default Terminations*, 30 PUB. CONT. L.J. 143, 165–66 (2001) (describing FAR criteria for default termination of a contract).

⁴⁷ See Schwartz, *supra* note 46, at 165.

⁴⁸ See *id.* at 165–66.

⁴⁹ See *id.*

be found in FAR 49.402-3(f),⁵⁰ which requires the contracting officer to consider seven factors in making the determination to terminate a contract for default.⁵¹ Unlike the first-category factors, certain factors in this list go beyond the scope of the contract's terms and surrounding circumstances and instead require a general policy analysis.⁵² Although the contracting officer may seek other specialists' advice in making their determinations, the officer may not be induced or pressured to act in a way that is not directly related to the contract's merits.⁵³ In general, the government procurement process must be administered "above reproach" and with "complete impartiality and with preferential treatment for none."⁵⁴

Government contracts are selected through a process of sealed bidding or competitive negotiations. When contracting by sealed bidding, contracting officers solicit bids by preparing and publicizing invitations for bids ("IFB").⁵⁵ The contracting officer awards the bidder whose contract is "most advantageous to the Government, considering only price and price-related factors."⁵⁶ In competitive negotiations, the contracting officer issues a request for proposal ("RFP") "to communicate Government requirements to prospective contractors and to solicit proposals."⁵⁷ The government will issue a RFP "when the value of a government contract exceeds \$100,000 and when it necessitates a highly technical product or service."⁵⁸ The contracting officer is required to select the source whose proposal is the best value to the government,⁵⁹ evaluating bidders' proposals based on the factors listed in FAR 15.304.⁶⁰

Unlike the IFB process, which requires the contracting officer to consider the lowest-priced bid, a RFP entails a closer look at the conceptual details of the product or service and the offeror's ability to successfully perform the prospective contract.⁶¹ Based on the FAR factors, the contracting officer considers price, the quality of the product or service, and the source's past performance in government procurement.⁶² Unlike when contracting offi-

⁵⁰ See *id.* at 166; FAR 49.402-3(f).

⁵¹ See FAR 49.402-3(f).

⁵² See *id.*; see also Schwartz, *supra* note 46, at 166.

⁵³ See FAR 1.602-2(c), 3.401.

⁵⁴ *Id.* at 3.101-1.

⁵⁵ See *id.* at 14.101.

⁵⁶ *Id.* at 14.408-1(a).

⁵⁷ *Id.* at 15.203(a).

⁵⁸ *Id.*

⁵⁹ See *id.* at 15.303(b)(6); 10 U.S.C. § 2305(b)(4)(C) (2018); 41 U.S.C. § 3703(c) (2018).

⁶⁰ See FAR 15.304.

⁶¹ See *id.*

⁶² See *id.*

cers determine whether a contract should be terminated for default in consideration of several factors, when they award a source's proposal they do not engage in a "wide-ranging policy analysis."⁶³ Instead, the contracting officer purely weighs the source's prices, evaluates the quality of the source's product, and reviews if and how the source conducted business in past contracts with the government.⁶⁴ Thus, the contracting officer's full responsibility in determining which source to select is especially crucial in the RFP process, for the officer has unique access to the resources to make a fully informed decision.

B. Unitary Executive Theory

The Unitary Executive Theory holds that because the President possesses control of the entire executive branch, any attempt to limit the President's control over this branch is unconstitutional.⁶⁵ This theory is grounded in Article II of the U.S. Constitution, which vests the executive power in the President of the United States.⁶⁶ The Unitary Executive Theory is not grounded in the law, and has never been expressly accepted by the Supreme Court or any federal court as a legitimate interpretation of the Constitution.⁶⁷ Regardless, this theory is popular among law academics and lawyers in intellectual discourse and scholarship.⁶⁸

The Unitary Executive Theory sparked passionate debate among scholars after Justice Antonin Scalia published his dissent in *Morrison v. Olson*.⁶⁹ *Morrison* concerned whether the independent counsel provisions of the Ethics in Government Act of 1978 ("Act") was constitutional.⁷⁰ Specifically, Assistant Attorney General Olson argued that the Act violated separation-of-powers principles and the Appointments Clause.⁷¹ The Act created a special court and gave the Attorney General the power to recommend to that court the

⁶³ See Schwartz, *supra* note 46, at 166.

⁶⁴ See FAR 15.304.

⁶⁵ See *Developments in the Law—Presidential Authority*, 125 HARV. L. REV. 2057, 2142 (2012).

⁶⁶ See U.S. CONST. art. II, § 3.

⁶⁷ See Vicki Divoll, *Transcript: Eight Things I Hate About the Unitary Executive Theory*, 38 VT. L. REV. 147, 148 (2013).

⁶⁸ See *id.*

⁶⁹ 487 U.S. 654, 697 (1988) (Scalia, J., dissenting); see also Divoll, *supra* note 67, at 151; Ian Millhiser, *How Justice Scalia Paved the Way for Trump's Assault on the Rule of Law*, Vox (Feb. 14, 2020, 8:20 AM), <https://www.vox.com/2020/2/14/21135083/justice-scalia-bill-barr-trump-unitary-executive-no-rule-of-law-morrison-olson>.

⁷⁰ See *Morrison*, 487 U.S. at 659–60 (majority opinion).

⁷¹ See *id.* at 668–69.

appointment of an independent counsel to investigate high-level government officials accused of committing a federal crime.⁷²

Olson claimed the Act violated the Appointments Clause because it allowed someone other than the President to appoint a principal officer.⁷³ Olson further argued that the Act violated separation-of-powers principles by reducing the President's power to remove executive officers.⁷⁴ The Court disagreed, holding that the Act is constitutional: the requirement that officers be chosen by the President under the Appointments Clause only applies to principal officers, while Congress can allow the President, the judiciary, or a department head to appoint inferior officers.⁷⁵ The Court also declared that the Act does not violate separation-of-powers principles because the removal power remains in the control of the executive branch and does not impermissibly interfere with the executive branch's functions.⁷⁶ The Court declared that the Attorney General could decide to remove the independent counsel, but only for "good cause,"⁷⁷ granting the counsel great discretion and independence from the President and the President's appointees.⁷⁸

Scalia criticized this result, arguing that the President and Attorney General should be able to remove an independent counsel simply because they disapprove of the counsel's work.⁷⁹ He argued that the Constitution explicitly states that "the executive Power shall be vested in a *President of the United States*."⁸⁰ Therefore, Scalia claimed, *all* of the powers vested in the executive branch, such as the ability to investigate crimes and bring prosecutions, are entrusted in the President.⁸¹ Because the statute deprived the President of his power to remove an executive officer, it undercut his ability to carry out his constitutional duties of having exclusive control over the exercise of purely executive powers.⁸²

Scalia's dissent led to wide debate regarding the Unitary Executive Theory, with proponents arguing for the President's complete authority over the

⁷² See *id.* at 661.

⁷³ See *id.* at 673.

⁷⁴ See *id.* at 669.

⁷⁵ See *id.* at 655.

⁷⁶ See *id.* at 657.

⁷⁷ *Id.* at 686. The Court further expanded upon such cause in association with "physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties." *Id.* at 663.

⁷⁸ See *id.* at 696.

⁷⁹ See *id.* at 705 (Scalia, J., dissenting).

⁸⁰ *Id.* (emphasis in original) (quoting U.S. CONST. art. II, § 1, cl. 1).

⁸¹ See *id.* at 706.

⁸² See Millhisser, *supra* note 69.

executive branch so that the “laws be faithfully executed.”⁸³ Supporters also argue that because the Constitution establishes a hierarchal system where the President contains the most power, Congress should not be able to set up independent executive agencies that are not under the President’s control.⁸⁴ Therefore, limitations on executive power, whether by the imposition of congressional or judicial oversight on executive actions or creation of independent agencies with limited authority, are considered unconstitutional.⁸⁵ Opponents of the theory question whether the theory supports delegation of legislative authority into the executive branch, thus raising serious separation of powers concerns.⁸⁶ These adversaries believe the theory supports the President in executing the law according to his own interpretation, as opposed to being faithful to the law as passed by Congress and interpreted by the courts.⁸⁷

Article II also imposes a supervisory authority on the President.⁸⁸ Article II, Section 2 requires “the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices,” implying a presidential supervisory authority over agency heads.⁸⁹ Under Article II, Section 3, the President has the duty to “take Care that the Laws be faithfully executed”; this has been interpreted as a specific obligation on the President to supervise the executive branch and ensure its execution of the laws is constitutional.⁹⁰

There are three approaches to the question of how broadly a presidential directive authority, or executive action, can be interpreted.⁹¹ Proponents of the Unitary Executive Theory believe that directive authority is constitutionally required because the President has the power to remove the heads of non-independent agencies, and thus should have directive authority over

⁸³ *Developments in the Law*, *supra* note 65; *see also* Millhiser, *supra* note 69.

⁸⁴ *See* Karl Manheim & Allan Ides, *The Unitary Executive*, L.A. LAW., Sept. 2006, at 24, 26–27.

⁸⁵ *See id.*

⁸⁶ *See Developments in the Law*, *supra* note 65.

⁸⁷ *See* Manheim & Ides, *supra* note 84, at 32.

⁸⁸ *See* Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1842 (2015).

⁸⁹ U.S. CONST. art. II, § 2, cl. 1; *see also* Robert V. Percival, *Who’s in Charge? Does the President Have Directive Authority Over Agency Regulatory Decisions?*, 79 FORDHAM L. REV. 2487, 2491 (2011).

⁹⁰ U.S. CONST. art. II, § 3; *see also* Percival, *supra* note 89, at 2942; TODD GARVEY, CONG. RSCH. SERV., R43708, THE TAKE CARE CLAUSE AND EXECUTIVE DISCRETION IN THE ENFORCEMENT OF LAW 3 (2014).

⁹¹ *See* Percival, *supra* note 89, at 2488.

these agency heads.⁹² The second approach interprets the statutes that entrust regulatory decisions to agency heads as implicit grants of directive authority to the President, unless the statutes explicitly limit it.⁹³ Opponents of the Unitary Executive Theory deny the President possesses directive authority, unless a statute directly grants it.⁹⁴ These antagonists believe that although Article II may imply a presidential supervisory authority, it does not express a more significant directive authority.⁹⁵ Instead, Article II's requirement for the President to appoint officers of the United States "by and with the Advice and Consent of the Senate" demonstrates a powerful check on the President's position and is inconsistent with the concept of a directive authority.⁹⁶

Although the President possesses broad discretion and power, in order to preserve the public's confidence in the government and nation's procurement process, the executive branch is expected to follow standards of ethical conduct.⁹⁷ Employees of the executive branch must avoid "creating the *appearance* that they are violating the law or the ethical standards."⁹⁸ Thus, even if they are not engaging in strictly illegal acts, executive branch officials must avoid the appearance of unethical behavior.⁹⁹ The mandate to avoid an appearance of impropriety is labeled under a standard of ethics rather than a rule of law for employees of the executive branch to follow.¹⁰⁰ However, under the Article 134 of the *Uniform Code of Military Justice*, a form of an appearance of impropriety called "fraternization" can become a criminal offense when the conduct "has compromised the chain of command, resulted in the appearance of partiality, or otherwise undermined good order, discipline, authority, or morale," according to the *Manual for Courts-Martial*.¹⁰¹ As such, creating an appearance of impropriety is recognized as a threat to the democratic process, so much so that under military law it comes with criminal sanctions.

⁹² See *id.*

⁹³ See *id.*

⁹⁴ See *id.*

⁹⁵ See *id.* at 2490.

⁹⁶ U.S. CONST. art. II, § 2, cl. 1; see also Percival, *supra* note 89, at 2488.

⁹⁷ See Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635.101 (2020).

⁹⁸ *Id.* (emphasis added).

⁹⁹ See *id.*; see also *Fraternalization in the Military: Legal Issues*, FINDLAW (June 20, 2016), <https://www.findlaw.com/military/criminal-law/fraternization-in-the-military-legal-issues.html> [<https://perma.cc/CYX3-3ZYD>].

¹⁰⁰ See 5 C.F.R. § 2635.101(b)(14); *Fraternalization in the Military: Legal Issues*, *supra* note 99.

¹⁰¹ JOINT SERV. COMM. ON MIL. JUST., MANUAL FOR COURTS-MARSHAL UNITED STATES pt. 4, art. 134, ¶ 101.c.(1) (2019).

C. McDonnell Douglas Corp. v. United States

*McDonnell Douglas Corp. v. United States*¹⁰² raised the issue of whether it is proper for a superior official to influence the contracting officer to terminate a federal contract.¹⁰³ In 1988, contractors McDonnell Douglas and General Dynamics entered into a full-scale engineering and development (“FSED”) contract with the Navy to develop the A-12 stealth attack aircraft.¹⁰⁴ They had prevailed in a competitive procurement process over another team of contractors, promising to produce a series of eight FSED aircraft in exchange for more than \$4 billion, made in installment payments over the span of the five-year contract.¹⁰⁵ In early 1990, however, the Navy became aware that there were problems in the performance of this contract.¹⁰⁶ The contractors had not met the June delivery date of the first aircraft model and were struggling to meet the weight requirements for the aircraft.¹⁰⁷

After various reports found that the A-12 contract could not be completed “within the contract ceiling price,” Secretary of Defense Dick Cheney urged the Navy to express why the DOD should not terminate the A-12 program.¹⁰⁸ The Navy then issued a cure notice.¹⁰⁹ Still believing the contractors would meet its operational needs, however, the Navy began negotiations with DOD officials and the contractors in attempt to restructure the contract.¹¹⁰ The contractors specifically sought relief under Public Law 85-804 for “financial relief that would call for a restructuring of the contract, both in its terms and its allocation of costs.”¹¹¹

Secretary Cheney decided not to grant the 85-804 relief, a decision he anticipated would ultimately lead to the cancellation of the program and the termination of the A-12 contract.¹¹² Secretary Cheney informed the contracting officer, Admiral Morris, of his decision, but Admiral Morris did not

¹⁰² 35 Fed. Cl. 358 (1996), *rev'd*, 182 F.3d 1319 (Fed. Cir. 1999).

¹⁰³ *See id.* at 362.

¹⁰⁴ *See id.*

¹⁰⁵ *See id.* at 361–62.

¹⁰⁶ *See id.* at 363.

¹⁰⁷ *See id.* at 362.

¹⁰⁸ *Id.* at 363–64.

¹⁰⁹ *See id.* at 364. A “cure notice” is required if a contract is to be terminated for default before the delivery date. FAR 49.607(a) (2020). The government must inform a contractor that it considers the contractor’s failure is significant enough to endanger the contract’s performance. *See id.* The cure notice details a set period of time for the contractor to remedy the condition. *See id.*

¹¹⁰ *See McDonnell Douglas Corp.*, 35 Fed. Cl. at 364.

¹¹¹ *Id.*

¹¹² *See id.* at 365.

believe that the negotiations with the contractors were over and attempted to save the program.¹¹³ Without the 85-804 relief, Admiral Morris eventually had no choice but to terminate the contract for default.¹¹⁴ The contractors filed suit in the Court of Federal Claims pursuant to the Contract Disputes Act, following a demand by the Navy for the return of \$1.35 billion in unliquidated progress payments under the terminated contract.¹¹⁵ The contractors sought “equitable adjustment and conversion of termination for default to one for convenience.”¹¹⁶

The Court of Federal Claims held that Admiral Morris’s decision to terminate the A-12 contract was improper¹¹⁷ because he, the contracting officer, and the agency were left with no choice but to terminate the contract for default.¹¹⁸ Admiral Morris clearly wished to continue with the contract regardless of the contractors’ weight and scheduling concerns, but Secretary Cheney pressured the Navy into terminating the contract.¹¹⁹ Even after a cure notice had been issued, the contracting officer and Navy believed that the contractors would meet operational requirements and that the contract should not be terminated.¹²⁰ The court stressed that the contracting officer would have preferred other alternatives contemplated by the FAR, rather than to terminate for default.¹²¹ Secretary Cheney, the court concluded, was unfamiliar with the FAR and the required factors to consider in connection with the decision to terminate.¹²² Instead, Secretary Cheney was motivated by financial concerns when he withdrew support and funding for the program.¹²³ Secretary Cheney’s withholding of 85-804 relief was the immediate cause for the termination of the contract; thus, the contracting officer did not use his own discretion in the decision to terminate and the court found the termination to be improper.¹²⁴

The Federal Circuit reversed this decision, holding that the Court of Federal Claims erred in not first determining whether a default existed before concluding the termination was improper.¹²⁵ The Federal Circuit reasoned that

¹¹³ *See id.* at 366.

¹¹⁴ *See id.* at 368.

¹¹⁵ *See* Schwartz, *supra* note 46, at 158.

¹¹⁶ *McDonnell Douglas Corp.*, 35 Fed. Cl. at 358.

¹¹⁷ *See id.* at 371.

¹¹⁸ *See id.*

¹¹⁹ *See id.* at 368.

¹²⁰ *See id.* at 371.

¹²¹ *See id.*

¹²² *See id.*

¹²³ *See id.*

¹²⁴ *See id.*

¹²⁵ *See McDonnell Douglas Corp. v. United States*, 182 F.3d 1319, 1330 (Fed. Cir. 1999).

the contract may have been properly terminated for default, but the trial court did not give the government the opportunity to establish whether the contractors were in default.¹²⁶ The Federal Circuit held that there needs to be a “nexus between the government’s decision to terminate for default and the contractor’s performance.”¹²⁷ The fact that the contractors struggled to meet certain fundamental contract terms, like the schedule or weight requirement, demonstrates that the trial court could have determined that a default did exist.¹²⁸

The Federal Circuit did not address the issue of the permissible role of high political officials in exercising authority to terminate for default.¹²⁹ The court did not speak on the legality of the Secretary’s influence over the contracting officer and instead focused on whether the contractors were in default.¹³⁰ Therefore, there remains a gap in the law concerning the permissible extent of higher officials’ influence on contracting officers determinations, leaving the door open for the President to influence such an officer’s decisions.

D. The JEDI Cloud Contract Case

In 2018, the DOD, in response to criticism over its antiquated technology as an urgent matter of national security, began an “open and fair competition” for the country’s top technology companies.¹³¹ The DOD requested that these companies build an Internet cloud network for the Department.¹³² The DOD released a request for proposals in July 2018 for the JEDI, specifying “that the contract would have a ceiling of \$10 billion over the course of a decade.”¹³³ As early as August 2018, Amazon’s cloud-computing unit, Amazon Web Services (“AWS”), was seen as the front runner by industry experts because it built cloud-computing services for the Central Intelligence Agency (“CIA”) and

¹²⁶ See *id.* at 1329–32.

¹²⁷ *Id.* at 1329.

¹²⁸ See *id.* at 1328–29.

¹²⁹ See Schwartz, *supra* note 46, at 145–46.

¹³⁰ See *McDonnell Douglas Corp.*, 182 F.3d at 1330.

¹³¹ Christian Davenport & Aaron Gregg, *Pentagon Kicks Off a Winner-Take-All Among Tech Companies for Multibillion-Dollar Cloud-Computing Contract*, WASH. POST (Mar. 7, 2018), <https://www.washingtonpost.com/news/the-switch/wp/2018/03/07/pentagon-kicks-off-a-winner-take-all-among-tech-companies-for-multi-billion-dollar-cloud-computing-contract/> [<https://perma.cc/M9Q2-GB38>].

¹³² See *id.*

¹³³ See Aaron Gregg, *Pentagon Doubles Down on ‘Single-Cloud’ Strategy for \$10 Billion Contract*, WASH. POST (Aug. 5, 2018), https://www.washingtonpost.com/business/capital-business/pentagon-doubles-down-on-single-cloud-strategy-for-10-billion-contract/2018/08/05/352cfec8-972b-11e8-810c-5fa705927d54_story.html [<https://perma.cc/C5UZ-6UZQ>].

is the commercial market leader for commercial-cloud services.¹³⁴ It appeared as though Amazon was on the path to win the contract because based on the Pentagon's released draft requirements for the cloud procurement, Amazon was the only company that could meet such stipulations.¹³⁵ In July 2019, however, President Trump directed Secretary of Defense Mark T. Esper to reexamine and review the procedures involved in the bidding process.¹³⁶ On October 25, 2019, the Pentagon awarded the cloud contract to Microsoft.¹³⁷

This unanticipated selection raised questions as to whether President Trump influenced the contract award decision.¹³⁸ President Trump's history of public animosity towards Amazon's CEO Jeff Bezos—who is also the owner of *The Washington Post*, a publication that has been critical of President Trump's administration—also raised suspicions of improper influence.¹³⁹ Claims made by former-SOD James Mattis that President Trump told him to “screw Amazon” out of the JEDI cloud contract contributed to these speculations.¹⁴⁰

On November 22, 2019, Amazon filed an action in the Court of Federal Claims in protest of the DOD's decision, alleging that the evaluation was flawed and President Trump improperly influenced the bidding process.¹⁴¹ On February 13, 2020, the court issued Amazon a preliminary injunction, ordering the Pentagon to halt work on the JEDI cloud-computing network.¹⁴² The Court of Federal Claims concluded that the injunction was necessary due to a “procurement mistake” in how the DOD evaluated prices for the companies' applications.¹⁴³

¹³⁴ See *id.*; *Pentagon Awards Controversial \$10 Billion Cloud Computing Deal*, *supra* note 3; *Amazon Will Challenge Pentagon's Award of \$10 Billion JEDI Contract to Microsoft*, *supra* note 3.

¹³⁵ See Gregg, *supra* note 133.

¹³⁶ See Gregg, *supra* note 2.

¹³⁷ See *Pentagon Awards Controversial \$10 Billion Cloud Computing Deal*, *supra* note 3.

¹³⁸ See Gregg, *supra* note 2 (“Under the government procurement rules, politicians are not supposed to steer government work toward or away specific companies, but Trump had taken a direct interest in JEDI, saying on television that he would ask defense officials to take a closer look at the procurement strategy.”).

¹³⁹ See *id.*

¹⁴⁰ See Memorandum of Points and Authorities in Support of Plaintiff Amazon Web Services, Inc.'s Renewed Motion to Supplement the Administrative Record at 12, *Amazon Web Servs., Inc. v. United States*, 147 Fed. Cl. 146 (2020) (No. 19-cv-01796).

¹⁴¹ See *Amazon Web Servs., Inc. v. United States*, 147 Fed. Cl. 146, 150 (2020); Aaron Gregg, *Judge's Order Halting JEDI Work Just the Latest Roadblock in Defense Dept.'s Frustrating Journey*, WASH. POST (Feb. 13, 2020), <https://www.washingtonpost.com/business/2020/02/13/court-orders-pentagon-halt-work-microsofts-jedi-cloud-contract-after-amazon-protests/> [<https://perma.cc/6KVR-UEQS>].

¹⁴² See *Amazon Web Servs.*, 147 Fed. Cl. at 146 n.1; see also Gregg, *supra* note 141.

¹⁴³ See Gregg, *supra* note 2.

The court's decision to issue an injunction led to an in-depth investigation by the DOD's inspector general in April 2020.¹⁴⁴ The investigation reviewed the JEDI cloud procurement process and allegations that former DOD officials engaged in ethical misconduct related to the procurement.¹⁴⁵ The investigation's results indicated there was no "evidence to conclude that the DOD personnel who made the source selection for the JEDI contract were influence or pressured to select or not select a particular competitor for the contract."¹⁴⁶ However, the investigation failed to fully evaluate the President's influence in the procurement because the White House prevented key senior DOD officials from being available for questioning.¹⁴⁷ The assertion of a "presidential communications privilege" resulted in the DOD Office of General Counsel instructing several DOD witnesses not to answer inquiries concerning potential communications between DOD officials and the White House about the JEDI contract.¹⁴⁸ Regardless, the Pentagon reached a different conclusion than the court decision by reaffirming its resolution to award the cloud contract to Microsoft, although it halted performance on the contract due to the preliminary injunction.¹⁴⁹

Several unanswered questions remain concerning the President's influence in the contract award.¹⁵⁰ Amazon pursued a "fair and impartial review" of this decision.¹⁵¹ On December 15, 2020, Amazon filed a new protest asking a judge to set aside the decision to award the contract to Microsoft.¹⁵² Amazon argued that President Trump's public bias against AWS unequivocally shows

¹⁴⁴ REPORT ON THE JEDI CLOUD PROCUREMENT, *supra* note 26, at 123; *see also* Ellen Nakashima & Aaron Gregg, *Pentagon's Inspector General Finds No Evidence of Undue Influence in \$10 Billion Cloud Computing Contract*, WASH. POST (Apr. 15, 2020), https://www.washingtonpost.com/national-security/pentagons-inspector-general-finds-no-evidence-of-undue-influence-in-10-billion-cloud-computing-contract/2020/04/15/9b6e4f42-7f08-11ea-9040-68981f488eed_story.html [<https://perma.cc/U3PV-SCSS>].

¹⁴⁵ *See* REPORT ON THE JEDI CLOUD PROCUREMENT, *supra* note 26, at 3–5.

¹⁴⁶ *See id.* at 123.

¹⁴⁷ *See id.* at 96–98; Nakashima & Gregg, *supra* note 144.

¹⁴⁸ REPORT ON THE JEDI CLOUD PROCUREMENT, *supra* note 26, at 6 (“[W]e could not definitively determine the full extent or nature of interactions that administration officials had, or may have had, with senior DoD officials regarding the JEDI Cloud procurement.”).

¹⁴⁹ *See* Macias & Novet, *supra* note 10.

¹⁵⁰ *See* Gregg, *supra* note 2.

¹⁵¹ *JEDI: Why We Will Continue to Protest This Politically Corrupted Contract Award*, AWS PUB. SECTOR BLOG (Sept. 4, 2020), <https://aws.amazon.com/blogs/publicsector/jedi-why-we-will-continue-protest-politically-corrupted-contract-award/> [<https://perma.cc/8MLA-GYZC>].

¹⁵² *See* Sealed Amended Complaint, *Amazon Web Servs., Inc. v. United States*, 153 Fed. Cl. 602 (2021) (No. 19-1796).

that Trump took direct action to instruct his subordinates to interfere with the awarding of the JEDI contract.¹⁵³ Although Amazon's allegations of bias and bad faith were relatively similar to the allegations made in February, the company chose to also specifically take aim at the Pentagon's reevaluation process.¹⁵⁴ The company claimed that "[t]he demonstrated pattern of bias or undue influence manifest in DoD's flawed JEDI award and re-award reflects an environment of corrupt pressure President Trump fostered throughout his Administration."¹⁵⁵ On December 16, 2020, Microsoft asked the Court of Federal Claims to dismiss the parts of Amazon's bid protest that claimed the DOD awarded the contract to Microsoft due to improper political influence.¹⁵⁶

On July 6, 2021, the DOD released an immediate statement announcing the termination of the JEDI cloud contract.¹⁵⁷ The release stated that due to "evolving requirements, increased cloud conversancy, and industry advances, the JEDI Cloud contract no longer meets its needs."¹⁵⁸ The DOD also announced a new contract and solicited proposals, referred to as the Joint Warfighter Cloud Capability, from both cloud service providers, because these "two vendors are the only Cloud Service Providers (CSPs) capable of meeting the Department's requirements."¹⁵⁹ Even though this legal battle has come to a close, the issues raised in this Note remain relevant and unresolved.¹⁶⁰ The courts still have yet to speak on the improper influence of the Executive in the procurement process and the enormous power that may be left in a single individual's control.

II. Analysis

Both *McDonnell* and the JEDI contract case raise the question of how much influence is permitted from higher officials over decisions within the

¹⁵³ See *id.* ¶¶ 18, 20, 79, 351, 357.

¹⁵⁴ See *id.* ¶¶ 339–51 ("DOD's Proposal Reevaluations and Source Selection Decision Demonstrate that the Re-Award Was the Product of Bias, Bad Faith, and Undue Influence"), 357–73 ("DOD's Re-Award to Microsoft is the Product of an Increasingly Corrupt Environment Under the Trump Administration").

¹⁵⁵ *Id.* ¶ 357.

¹⁵⁶ See Intervenor-Defendant Microsoft Corporation's Renewed Motion to Dismiss, in Part, the Amended Complaint at 20–29, *Amazon Web Servs., Inc. v. United States*, 153 Fed. Cl. 602 (2021) (No. 19-1796).

¹⁵⁷ See Press Release, U.S. Dep't of Def., *supra* note 11.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ See *id.*

contracting officer's ultimate authority.¹⁶¹ *McDonnell* detailed SOD Cheney's influence over the contracting officer in the ultimate decision to terminate the A-12 contract for default.¹⁶² In *Amazon Web Services v. United States*,¹⁶³ the court attempted to decipher whether President Trump guided the contracting officer to award the JEDI bid to Microsoft over Amazon, due to the President's known animosity towards Jeff Bezos, and continues to deal with allegations of bias.¹⁶⁴ Although the Federal Circuit did not address this issue in *McDonnell*,¹⁶⁵ the President's alleged role in the JEDI procurement process could be determined an improper influence on the contracting officer. However, the law remains ambiguous due to the President's role as a supervisor over the executive branch.¹⁶⁶ Based on how broadly the constitutionally-granted presidential supervisory authority is interpreted, the President's influence over a contracting officer may be deemed legally above board.¹⁶⁷ But, if such influence remains unchecked and ill-defined, an appearance of impropriety emerges, negatively impacting the public's overall confidence in the government and in the procurement process; thus, such influence should be deemed improper.¹⁶⁸

A. The President's Improper Influence Over the Contracting Officer

McDonnell is distinguishable from the JEDI contract case in the type and level of influence each higher official had over the contracting officers.¹⁶⁹ In *McDonnell*, the Court of Federal Claims held that the A-12 contract was improperly terminated for default, because the contracting officer was pressured to do so by the SOD refusing support and funding.¹⁷⁰ In the JEDI case, Amazon argued that Microsoft was improperly awarded the cloud contract because the President influenced the contracting officer because of his alleged antipathy towards Amazon's CEO, Jeff Bezos.¹⁷¹ SOD Cheney's influence in

¹⁶¹ See *McDonnell Douglas Corp. v. United States*, 35 Fed. Cl. 358, 363 (1996), *rev'd*, 182 F.3d 1319 (Fed. Cir. 1999).

¹⁶² See *id.*

¹⁶³ 147 Fed. Cl. 146 (2020).

¹⁶⁴ See *id.*

¹⁶⁵ See Schwartz, *supra* note 46, at 146–47.

¹⁶⁶ See Percival, *supra* note 89, at 2491.

¹⁶⁷ See *id.* at 2507.

¹⁶⁸ See 5 C.F.R. § 2635.101 (2020).

¹⁶⁹ See *McDonnell Douglas Corp. v. United States*, 35 Fed. Cl. 358, 377 (1996), *rev'd*, 182 F.3d 1319 (Fed. Cir. 1999).

¹⁷⁰ See *id.* at 363.

¹⁷¹ See Memorandum of Points and Authorities in Support of Plaintiff Amazon Web Services, Inc.'s Renewed Motion to Supplement the Administrative Record at 1, *Amazon Web Servs., Inc. v. United States*, 147 Fed. Cl. 146 (2020) (No. 19-cv-01796); Sealed

McDonnell over the contracting officer was based on legitimate concerns with the contractor's continuing failure to perform.¹⁷² He had become aware of the contractor's scheduling and cost problems, and of the contractor's inability to meet the government's weight requirements and structured deadlines.¹⁷³ Thus, SOD Cheney's decision to force the contracting officer's hand in terminating the contract for default was based on reputable and proper reasoning involving the contractors' overall failure to adhere to the original contract's terms.¹⁷⁴ The SOD's reasoning conformed to the "merits of the matter" and therefore his impact on the contract's termination could not be determined an "improper influence."¹⁷⁵ On the other hand, Amazon's allegation that President Trump's influenced the contracting officer's decision to award the JEDI contract to Microsoft over Amazon was purportedly not based on the merits of either tech company's proposal.¹⁷⁶ Instead, such alleged influence was based on President Trump's personal animosity towards Amazon's CEO and alleged goal of "screwing" him out of such a lucrative opportunity.¹⁷⁷

These two cases are also dissimilar in their treatment of the higher official's role and necessary expertise in regard to the contracting officer.¹⁷⁸ In *McDonnell*, SOD Cheney would have been an excellent resource for the contracting officer in making policy decisions related to the capabilities of weapon systems and other national-security needs.¹⁷⁹ In fact, crucial decision making concerning national defense in isolation by the contracting officer, without consulting those charged with the ultimate responsibility of national security, appears unthinkable.¹⁸⁰ If anything, such critical defense-acquisition decisions made solely by the contracting officer may be insufficient to consider all the relevant complex issues at hand.¹⁸¹ In the JEDI contract case, however, the contracting officer was to evaluate the sources' proposals under multiple factors stipulated by the RFP,¹⁸² including careful considerations of how the

Amended Complaint, *Amazon Web Servs., Inc. v. United States*, 153 Fed. Cl. 602 (2021) (No. 19-cv-01796).

¹⁷² See Schwartz, *supra* note 46, at 146.

¹⁷³ See *id.*

¹⁷⁴ See *id.*

¹⁷⁵ FAR 3.401 (2020); see also Schwartz, *supra* note 46, at 146.

¹⁷⁶ See Gregg, *supra* note 2.

¹⁷⁷ *Id.*

¹⁷⁸ See *McDonnell Douglas Corp.*, 35 Fed. Cl. at 363.

¹⁷⁹ See Schwartz, *supra* note 46, at 146.

¹⁸⁰ See *id.* at 168.

¹⁸¹ See *id.*

¹⁸² See REPORT ON THE JEDI CLOUD PROCUREMENT, *supra* note 26, at 65.

proposals would meet the technicalities and intricacies detailed in the government's Statement of Objectives ("SOO").¹⁸³

Such evaluation does not require wide-ranging policy decisions but instead the knowledge of the proposal's details and of the specifications sought by the government's SOO.¹⁸⁴ This evaluation requires a clear conception of the contract as a whole, as well as the understanding of each offeror's past performance in government procurement.¹⁸⁵ The contracting officer is thus uniquely qualified in their authority to bind the government, for the officer knows the contract's terms and criteria the contractor must meet at an in-depth level. Unlike in *McDonnell*, where the Navy contracting decision required input from high-level government officials working on national-security concerns because it implicated policy decisions,¹⁸⁶ the decision to bind the government into a contract with Amazon did not require the knowledge and advice from the head of the agency, no less from the President. The highly technical nature of the JEDI cloud contract, specifically consisting of the evaluation of several intricate factors, requires the level of familiarity only the contracting officer could possess.

The last major distinction between the *McDonnell* case and the JEDI cloud contract case is the type of authority figure accused of improperly interfering with the government contract.¹⁸⁷ In *McDonnell*, the Court of Federal Claims held that the SOD, Dick Cheney, improperly pressured the contracting officer into terminating the contract for default.¹⁸⁸ In the JEDI cloud contract case, Amazon claims the President improperly interfered with the awarding of the \$10 billion contract, based on his consistent public scrutiny of Amazon's CEO.¹⁸⁹ This distinction is important because the President lacks authority to bind the government to contracts¹⁹⁰; in contrast, it was legally legitimate for the SOD to influence the contracting officer to terminate the A-12 contract for default, for the "authority and responsibility to contract for authorized supplies and services are vested in the agency head."¹⁹¹ Thus, although the contracting officer has sole authority to terminate a contract, the fact that an agency head influenced the officer was legally sound.¹⁹² The

¹⁸³ See *id.* at 27–28.

¹⁸⁴ See FAR 15.305 (2020); see Schwartz, *supra* note 46, at 146.

¹⁸⁵ See *id.*

¹⁸⁶ See *McDonnell Douglas Corp. v. United States*, 35 Fed. Cl. 358, 363 (1996), *rev'd*, 182 F.3d 1319 (Fed. Cir. 1999).

¹⁸⁷ See *id.* at 361.

¹⁸⁸ See *id.* at 377.

¹⁸⁹ See Gregg, *supra* note 2.

¹⁹⁰ See FAR 1.601(a) (2020).

¹⁹¹ *Id.*

¹⁹² See *id.*

President, however, is not delegated legal authority to bind the government, terminate a contract, or administer contracts.¹⁹³ With spending on federal contracts totaling upwards of hundreds of billions of dollars per year, if the President was granted such authority, the executive branch could effectively regulate weighty segments of the nation's economy.¹⁹⁴

Even though the Federal Circuit in *McDonnell* determined that the contract's termination for default was valid due to the contractor's failure to meet scheduling and weight requirements, the court did not address the lower court's concerns that the contracting officer had not wanted the A-12 contract terminated.¹⁹⁵ Thus, the legality of the contracting officer's inability to practice his legally binding discretion in terminating the A-12 contract and whether the SOD's strong-arm tactic of withholding funds was a "proper" influence remain unresolved.¹⁹⁶ Although it was legally permissible for the SOD to terminate the contract due to his position as agency head and that his reason to terminate spoke to the "merits of the matter," the fact that the court did not discuss the legality of the contracting officer's lack of discretion leaves the officer vulnerable to improper influence by higher officials such as the President.¹⁹⁷

Essentially, the Federal Circuit having not drawn the line between improper and proper influence resulted in the decision that the contract was validly terminated, even though the contracting officer would have sought the opposite result.¹⁹⁸ The Court's reasoning was based purely on the SOD's valid grounds to terminate for default.¹⁹⁹ Granted, because in *McDonnell* the person who made the decision was the SOD—the head of his agency who holds unique expertise in defense—his decision to terminate the contract was indeed legal.²⁰⁰ However, if the Federal Circuit allowed the President to make a similar, procurement decision based on his position as Executive and supported by rationales such as the Unitary Executive Theory or the presidential supervisory authority, there would be major implications. A sole individual with unique and extensive powers could have the potential to affect a significant portion of the nation's economy completely unchecked.²⁰¹

¹⁹³ See FAR 1.602-1; see also *Schlesinger v. United States*, 390 F.2d 702, 709 (Ct. Cl. 1968).

¹⁹⁴ See BURROWS & MANUEL, *supra* note 23, at 2.

¹⁹⁵ See *McDonnell Douglas Corp. v. United States*, 182 F.3d 1319, 1326–29 (Fed. Cir. 1999).

¹⁹⁶ See Schwartz, *supra* note 46, at 146.

¹⁹⁷ FAR 3.401 (2020); see Schwartz, *supra* note 46, at 147.

¹⁹⁸ See Schwartz, *supra* note 46, at 147.

¹⁹⁹ See *id.* at 177.

²⁰⁰ See *id.* at 178; FAR 1.601.

²⁰¹ See BURROWS & MANUEL, *supra* note 23, at 2.

B. The President's Unique Power in the Procurement Process

Although the FAR does not grant the President the authority to bind the government to contracts, under the Unitary Executive Theory the President is granted *all* of the powers delegated to the executive branch.²⁰² At the very least, the President has a supervisory role within the executive branch to ensure that the delegation of governmental power is constitutional.²⁰³ Thus, depending on how broadly one interprets Article II of the Constitution, Amazon's allegation that President Trump influenced the contracting officer's decision in the JEDI contract case may be legal.²⁰⁴

The problem with granting the President such broad discretion is that, along with the President's "communications privilege" and the lack of a *legal* requirement compelling the President to avoid the appearance or presence of impropriety, the President would have unchecked power.²⁰⁵ This seemingly unlimited power is ultimately devoid of sanctions for the President's actions. In the JEDI case, President Trump's alleged improper influence over the contracting officer could not be fully investigated, because he asserted his privilege by instructing certain DOD witnesses not to answer any questions concerning the contract.²⁰⁶ Therefore, after blatantly displaying an appearance of impropriety by publicly insinuating that he would influence the outcome of the JEDI contract, Trump disrupted the investigation into that impropriety using his exclusive powers as President.²⁰⁷

Proponents of the Unitary Executive Theory express that influence over agency heads is consistent with the President's directive authority.²⁰⁸ Because the President has the ability to remove non-independent agency heads and is explicitly vested the executive power by the Constitution, proponents believe the President should have the power to influence and even direct all lower-level executive officials.²⁰⁹ The DOD's ability to perform a full, reliable investigation on the matter can be obstructed by a President's assertion of the presidential communications privilege.²¹⁰

After the JEDI contract was awarded to Microsoft, President Trump refused to allow significant, high-ranking officials to answer any questions, therefore

²⁰² See *Developments in the Law*, *supra* note 65.

²⁰³ See *id.*

²⁰⁴ See Percival, *supra* note 89, at 2489.

²⁰⁵ *Id.* at 2533.

²⁰⁶ See REPORT ON THE JEDI CLOUD PROCUREMENT, *supra* note 26, at 96.

²⁰⁷ See *id.* at 7.

²⁰⁸ See Percival, *supra* note 89, at 2494.

²⁰⁹ See *id.* at 2488.

²¹⁰ See *id.*

blocking important avenues of investigation into the contract decision.²¹¹ Meanwhile, Trump continued to make statements suggesting his influence over the procurement process, such as when he explained that he was going to “take a closer look at the procurement strategy.”²¹² Such statements give the appearance of impropriety—that the procurement was tainted by bias—while the President has no fear of prosecution, therefore undermining public confidence in the nation’s government and its procurement.²¹³ Thus, although proponents of the Unitary Executive Theory view the President as merely supervising the contracting officer, the ability to even investigate the matter to see if the President was, in fact, supervising and instructing *legal* activity, was tainted in itself.²¹⁴ Further, the President should not be allowed to establish an appearance of impropriety, as has been highlighted in the JEDI case.²¹⁵

III. Recommendation

Although the FAR defines what it means for the contracting officer to be *improperly* influenced and states that contracting officers are allowed to seek the advice of high officials in their decisions, the current law on how much influence is legally acceptable remains unclear.²¹⁶ The Court of Federal Claims viewed SOD Cheney’s role in the A-12 case as overstepping that line; however, the Federal Circuit reversed the decision on other grounds, not addressing the question of improper influence.²¹⁷ There needs to be a clear line of demarcation, as higher officials may use the ability to advise the contracting officer to fully usurp the powerful authority that belongs strictly with the contracting officer.²¹⁸ President Trump’s role in the JEDI contract decision is an extreme example, as he allegedly used his supervisory position to decide which tech company would receive the \$10 billion contract.²¹⁹ The Federal Circuit should clearly define the line between improper and proper influence of a superior in making the decisions that are the contracting officer’s ultimate responsibility.

²¹¹ See REPORT ON THE JEDI CLOUD PROCUREMENT, *supra* note 26, at 6.

²¹² Gregg, *supra* note 2; see also Frank Konkel, *Trump ‘Looking Into’ Pentagon’s JEDI Contract*, NEXTGOV (July 18, 2019), <https://www.nextgov.com/it-modernization/2019/07/trump-looking-pentagons-jedi-contract/158538/> [<https://perma.cc/AK8Z-SN2C>].

²¹³ See U.S. OFF. OF GOV’T ETHICS, ETHICS & PROCUREMENT INTEGRITY 3 (2007), https://www.fai.gov/sites/default/files/pdfss/OGEprocurementintegrity_07.pdf [<https://perma.cc/SPN9-JVTT>].

²¹⁴ See REPORT ON THE JEDI CLOUD PROCUREMENT, *supra* note 26, at 6.

²¹⁵ See *id.*

²¹⁶ See FAR 1.602-2, 1.602(c) (2020).

²¹⁷ See Schwartz, *supra* note 46, at 146.

²¹⁸ See FAR 1.602.

²¹⁹ See *Amazon Will Challenge Pentagon’s Award*, *supra* note 3.

The court should set this precedent to avoid future high-level officials overstepping their authority and the resulting appearance of impropriety.

Specifically, the court should focus the analysis of whether influence was improper or not on the extent of the contracting officer's ability to practice his or her own discretion. Even though the cause for termination for default in *McDonnell* is legitimate, the FAR clearly designates the ultimate decision to the contracting officer. It is the contracting officer, not his superiors, who knows the intimate details of the procurement process, is in the best position to decide whether to enter into or terminate a contract, and alone legally carries that responsibility.²²⁰ If the court focuses on the contracting officer's discretion specifically in its analysis, then higher officials will have a harder time potentially hiding their politicized objectives behind other legitimate reasons for the contract to be entered into or terminated.

To avoid the appearance of impropriety in the procurement process sparked by a high official's influence over the contracting officer, the executive branch could follow a similar code as the military.²²¹ Although the executive branch has its own standards of ethics that it is required to follow, these standards are not legally enforceable. Due to the extensive power and responsibility involved in the government procurement process and the executive branch in general, this branch could include the capacity to criminally prosecute employees that engage in the appearance of impropriety. With the threat of criminal prosecution, higher officials will be incentivized to avoid public displays of influence over lower-level executive officials.

Conclusion

The contracting officer has the sole authority to execute, modify, or terminate a contract. Under the FAR, the contracting officer may consider high officials' advice in making decisions, but the ultimate decision to bind the government to a contract is solely within the contracting officer's discretion. Although the Court of Federal Claims held in *McDonnell* that SOD Cheney improperly influenced the contracting officer by withholding the project's funding and leaving the officer no other choice but to terminate for default, the Federal Circuit reversed this decision, leaving vulnerable the question of improper influence. This issue is again raised in the JEDI contract case, where President Trump allegedly pressured the contracting officer into awarding the contract to Microsoft over Amazon, based on his animosity towards Amazon CEO Jeff Bezos. The lack of clarity in the law regarding a superior official's influence over the contracting officer's decisions is troubling due to the incredible power and responsibility the officer has over the government's

²²⁰ See FAR 1.602.

²²¹ See FAR 15.304.

procurement process. Such power without consequence can lead to similar results alleged in the JEDI contract case, with the government potentially contracting with a corporation, Microsoft, that did not provide the best value due to an official's, President Trump's, own personal agenda. This may lead to an appearance of impropriety and eventual break down of the public's confidence in the federal government. The Federal Circuit needs to speak to this issue and clarify where the line is in terms of the legality of an official's influence over the contracting officer.

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