REINING IN THE UNCONSTITUTIONAL POWERS OF FEDERAL LABOR UNIONS AND ARBITRATORS*

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The Federal Service Labor-Management Relations Statute (the Statute), codified in Chapter 71 of Title 5 of the U.S. Code, gives federal-employee unions considerable power over the Executive Branch. To date, courts have not examined, and no President has challenged, the constitutionality of federal unions' authority. There are, however, strong arguments that core provisions of the Statute are unconstitutional—at least as currently applied.

These arguments arise under the Supreme Court's jurisprudence interpreting three Clauses of Article II of the Constitution, the Vesting Clause, the Take Care Clause, and the Appointments Clause, as well as the Court's case law on what is known as the "private non-delegation doctrine." Together, these constitutional doctrines confirm that Article II vests all executive power in the President. Congress may not transfer a portion of that power to subordinate employees or their representatives—as Congress has purported to do in the Statute.[1]

The Constitution's Framers consciously vested executive power in a single official. At the Constitutional Convention they rejected all proposals for a multimember executive. They wanted to avoid the problems that plagued the Continental and Confederation Congresses, which were plural executive bodies. So the Framers deliberately concentrated executive power—and responsibility—in a single President, who could act decisively and would be solely accountable for executing the law. Accordingly, the Supreme Court has repeatedly held that Article II's Vesting Clause and Take Care Clause give the President general administrative control of the entire Executive Branch.

The Statute as interpreted upends this constitutional design in four principal ways. First, collective bargaining agreements (CBAs) dictate most workforce management procedures. They also preempt conflicting federal

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[1] *See infra*, Section I.

rules and regulations as long as they remain in effect—typically for 7 to 10 years. Any interim changes to workforce management policies during the term of the CBA require union consent.[2]

Second, the "unilateral change" doctrine prevents agencies from immediately changing policies that substantively affect working conditions—irrespective of whether they conflict with a CBA. Agencies must instead give unions an opportunity to bargain, and then complete bargaining, before making any changes affecting unionized employees. If unions bargain to impasse, such "mid-term" bargaining can take well over a year. The unilateral change doctrine allows unions to forestall almost any executive changes they dislike, regardless of the agency's contractual obligations.[3]

Third, arbitrators and the Federal Labor Relations Authority (FLRA) have construed the Statute to require union consent before some provisions can be incorporated into CBAs during term renegotiations. This interpretation gives union officers decisional control over some CBA provisions, a form of rulemaking power.[4]

Fourth, the Statute lets private arbitrators judge most federal labor-management disputes. Arbitral awards are either completely unreviewable or reviewed very deferentially. Arbitrator's power largely neuters the President's supervisory authority over—and responsibility for—Executive Branch management.[5]

These four aspects of the Statute effectively prevent the President from changing most agency working conditions over union opposition—stymieing Presidents of both parties. For example, President Biden promised in his 2022 State of the Union address that federal employees would quickly return to in-person work. Federal unions like the American Federation of Government Employees (AFGE) and the National Treasury Employees Union (NTEU) largely blocked that directive. As a result, and against presidential wishes, agency headquarters in Washington, D.C. remain largely vacant. President Trump issued an executive order intended to make it easier to remove underperformers by shortening the duration of agency "performance improvement periods" (PIPs). Union CBAs similarly prevented that directive from taking effect in many agencies. Under the

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[2] *See infra*, Section II.

[3] *See infra*, Section III.

[4] *See infra*, Section IV.

[5] *See infra*, Section VI.

Statute the President can propose management policies, but those policies only take immediate effect if unions agree.[6]

The Statute likewise gives private arbitrators the final word on most federal workforce management decisions. The Department of Veterans Affairs (VA) fired an employee who pleaded guilty to possessing and intending to deliver methamphetamine. The employee's union filed a grievance and an arbitrator ordered him reinstated. No one in the President's chain of command could countermand that order.[7]

AFGE recently highlighted just how far union control over agency operations can extend. The union negotiated a series of four-to-six-year CBAs with the outgoing Biden Administration that will last throughout the second Trump Administration. They overtly intended to prevent President Trump from modifying Biden policies. In a press release AFGE's Environmental Protection Agency (EPA) Council openly boasted that their new contract "positioned the Agency to carry out its work to protect the planet regardless of who is in power."[8]

There are strong reasons to conclude that the Constitution does not allow unions and arbitrators to interfere with the President's executive authority in this manner. The President possesses administrative and supervisory control over the Executive Branch, as well as responsibility for its actions. The Supreme Court's Vesting Clause and Take Care Clause cases hold that the President must remain in control of—and responsible for—executive operations.[9] As Chief Justice Roberts has explained, "Congress cannot reduce the Chief Magistrate to a cajoler-in-chief."[10] Examining the Statute through the lens of the private non-delegation precedents yields the same conclusion. Congress cannot transfer administrative control over federal agencies to unions or arbitrators.[11]

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[6] *See infra*, Section II.B.

[7] JAMES SHERK, AFPI CENTER FOR AMERICAN FREEDOM RESEARCH REPORT: UNION ARBITRATORS OVERTURN MOST FEDERAL EMPLOYEE DISMISSALS 6 (2022), https://americafirstpolicy.com/assets/uploads/files/Research_Report_-_Union_Arbitrators_overturn_Most_Federal_Employee_Dismissals_1.pdf [https://perma.cc/QNB4-T677].

[8] Press Release, American Federation of Government Employees, AFGE Council 238 Reaches New Contract with the EPA (May 30, 2024), https://afge238.org/news/press-release-afge-council-238-reaches-new-contract-with-the-epa/ [https://perma.cc/UBS2-2X2P].

[9] *See infra*, Sections II.A–C.

[10] Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 502 (2010).

[11] *See infra*, Section II.D.

Appointments Clause analysis similarly suggests that these applications of the Statute are unconstitutional.[12] The Appointments Clause is the flip side of Article II's private non-delegation and Vesting Clause requirements. It requires that all "Officers of the United States"—officials in continuing positions who exercise significant power under the laws of the United States—must be appointed by the President, by an agency head, or by a court of law. Federal union officers seem to fit this bill. They fill continuing positions required to exist by law. And their control over CBA contents and the timing of agency operational changes represents significant executive power. They are thus constitutional officers who require constitutional appointments. Nonetheless, federal union officers are not appointed consistently with Appointments Clause requirements. Arbitrators also perform adjudicatory duties that courts consider "significant" for Appointments Clause purposes. And in many cases their positions are "continuing" under Appointments Clause jurisprudence. They also require appointment by a proper authority. While Congress can generally design agency HR processes, the officers running those processes must receive constitutional appointments.[13]

While the Statute appears unconstitutional as currently applied, straightforward applications of the canon of constitutional avoidance could correct most of these defects.[14] Courts could interpret the Statute to allow the President to terminate CBAs or repudiate provisions of CBAs that he determines unreasonably impede his Article II supervisory authority over the Executive Branch. Such an interpretation would prevent unions from binding Presidents to offending policies their predecessors negotiated. The unilateral change doctrine is also a creation of FLRA case law; the Statute does not expressly require it. If the doctrine creates constitutional concerns, it should be narrowed or abandoned. So too the interpretation that union officers can veto some proposed CBA provisions. Finally, courts could hold that the Statute implicitly requires principal officers appointed in accordance with the Appointments Clause to arbitrate federal-sector grievances. This conclusion would ensure both presidential supervision of arbitral awards and constitutionally conforming appointments.

Only one provision of the Statute needs to be outright invalidated to remove constitutional concerns. Section 7116(a)(7) provides that existing

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[12] *See infra*, Section V.

[13] *See infra*, Section VI.D.

[14] *See infra*, Sections II.F, III.B, IV.C, VI.E.

CBAs take precedence over conflicting federal rules and regulations.[15] This priority given to CBAs lets union officers control when agencies can implement federal rules—a form of rulemaking power, which only constitutionally appointed officials can wield.

Adopting the constructions discussed above and invalidating § 7116(a)(7) would ensure unions and arbitrators do not impede the President's Article II authority over—and responsibility for—the functioning of the Executive Branch. At the same time, these corrections would allow most of the Statute to operate unimpeded. Congress can constitutionally give federal employees a voice in agency operations and provide them a forum to make their concerns heard. Congress cannot give them decisional control over Executive Branch management. The Constitution vests the President alone with the executive power. The Statute must be interpreted consistently with that fundamental requirement.

I. EXECUTIVE POWER UNDER ARTICLE II

Article II of the U.S. Constitution provides that "[t]he executive Power shall be vested in a President of the United States of America" and requires the President to "take Care that the Laws be faithfully executed."[16] These Clauses have long been understood to give the President "general administrative control" of the Executive Branch.[17] As the Supreme Court has explained:

> The entire "executive Power" belongs to the President alone. But because it would be impossible for one man to perform all the great business of the State, the Constitution assumes that lesser executive officers will assist the supreme Magistrate in discharging the duties of his trust […]. These lesser officers must remain accountable to the President, whose authority they wield.[18]

Constitutionally, the President administers the Executive Branch. This requirement has been most often litigated in the context of removal power. But the President's supervisory authority extends far beyond dismissals. The President has "the power of appointing, overseeing, and controlling

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[15] 5 U.S.C. § 7116(a)(7).

[16] U.S. CONST. art. II, §§ 1, 3.

[17] Myers v. United States, 272 U.S. 52, 164 (1926).

[18] Seila Law v. CFPB, 140 S. Ct. 2183, 2197 (2020) (cleaned up).

those who execute the law."[19] He is responsible for "secur[ing] [] unitary and uniform execution of the laws" and may "supervise and guide" subordinate officials' "construction of the statutes under which they act."[20] The President similarly has "responsibility for the efficient operation of the Executive Branch."[21]

The Framers deliberately vested executive power in a single official. America originally had a multi-headed executive. The Continental Congresses and the Confederation Congress were assemblies whose members jointly wielded executive power. The Framers considered proposals during the Constitutional Convention to continue to continue to divide executive authority between multiple officials.[22] The delegates voted down all these proposals in favor of concentrating power—and responsibility—in a single chief executive. The Supreme Court has described the Framer's reasoning:

The Framers deemed an energetic executive essential to "the protection of the community against foreign attacks," "the steady administration of the laws," "the protection of property," and the "security of liberty." Accordingly, they chose not to bog the Executive down with the" habitual feebleness and dilatoriness" that comes with a diversity of views and opinions. Instead, they gave the Executive the "[d]ecision, activity, secrecy, and dispatch" that "characterise the proceedings of one man."[23]

The Framers consciously replaced an executive assembly with a single executive.[24] They believed that a "feeble executive implies a feeble

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[19] Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 501 (2010) (citing 1 ANNALS OF CONG. 463 (Joseph Gales ed., 1834)).

[20] *Myers*, 272 U.S. at 135.

[21] Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers, AFL-CIO v. Austin, 418 U.S. 264, 273 n.5 (1974).

[22] For example, the New Jersey plan would have created a multi-member executive board. *See* MADISON DEBATES, THE AVALON PROJECT, YALE L. SCH. (June 15, 1787), https://avalon.law.yale.edu/18th_century/debates_615.asp [https://perma.cc/3GU4-2UXA].

[23] *Seila Law*, 140 S. Ct. at 2203 (quoting THE FEDERALIST NO. 70 (Alexander Hamilton)).

[24] Justice Breyer has similarly explained that the "Founders . . . consciously decid[ed] to vest Executive authority in one person rather than several. They did so in order to focus, rather than to spread, Executive responsibility thereby facilitating accountability. They also sought to encourage energetic, vigorous, decisive, and speedy execution of the laws by placing in the hands of a single, constitutionally indispensable, individual the ultimate authority that, in respect to the other branches, the Constitution divides among many . . . .

execution of government," and so they "vested the President with 'supervisory [] responsibilities of the utmost discretion and sensitivity.'"[25] Under the Constitution, the President alone is responsible for the Executive Branch. "It is *his* responsibility to take care that the laws be faithfully executed. The buck stops with the President[.]"[26]

The Supreme Court has allowed some congressional restrictions on the President's executive authority, but has not defined precisely how far Congress can go. One measure that courts hold clearly goes too far is giving private parties executive power. Since the Constitution divides federal power between the Legislative, Executive, and Judicial Branches, Congress cannot give private entities federal authority. This principle has come to be known as the private non-delegation doctrine (not to be confused with the more well-known *public* non-delegation doctrine).[27] The private non-delegation doctrine is a corollary to the Vesting and Take Care Clauses. The focus in private non-delegation cases shifts from examining the restrictions on presidential authority to examining the authority third parties wield over government operations.

This doctrine is inherent in the Constitution's separation of powers and the Founding-era rule against double-delegation. The private nondelegation doctrine was tested in the 1930s when Congress attempted to delegate federal power to private parties. For example, New Deal legislation allowed coal producers to set wages and prices for the entire industry by majority vote. The Supreme Court invalidated this arrangement in *Carter v. Carter Coal Co.*, holding that giving private parties this power was "legislative delegation in its most obnoxious form."[28] Congress subsequently amended the law to let private boards propose

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The authority explaining the nature and importance of this decision is legion." Clinton v. Jones, 520 U.S. 681, 712 (1997) (Breyer, J., concurring in the judgment).

[25] Trump v. United States, 144 S. Ct. 2312, 2329 (2024) (quoting Nixon v. Fitzgerald, 457 U.S. 731, 750 (1982)).

[26] Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 493 (2010).

[27] The public non-delegation doctrine prohibits Congress from delegating its lawmaking authority to the executive branch. Professor Cass Sunstein has famously argued that the public nondelegation doctrine "had one good year [1935], and 211 bad ones (and counting)." Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000). This argument has no application to the private non-delegation doctrine, which prohibits delegations of federal power to private parties. As discussed *infra*, courts have regularly and recently applied the private non-delegation doctrine to strike down transfers of federal power to private parties.

[28] 298 U.S. 238, 311 (1936).

wage and price rates that a federal agency approved, disapproved, or modified, and the Court upheld the modified law in *Sunshine Anthracite Coal Co. v. Adkins*.[29] The Court explained that federal power remained within the Executive Branch as the agency determined prices and the private producers "function[ed] subordinately" to it.[30]

Carter Coal and *Adkins* remain good law in relevant respects, and courts continue to enforce the private non-delegation doctrine.[31] As the Fifth Circuit has explained: "a cardinal constitutional principle is that federal power can be wielded only by the federal government . . . a private entity may wield government power only if it functions subordinately to an agency with authority and surveillance over it."[32]

The Appointments Clause is another structural safeguard preserving the constitutional separation of powers. It provides that only the President, department heads, or the courts of law can appoint "Officers of the United States."[33] So while Congress legislates and can create new offices, it cannot appoint the officers who fill them. Only the President, the heads of executive departments (themselves appointed by and accountable to the President), or the courts can wield that authority. Similarly, Congress generally cannot limit the President's authority over the Executive Branch by authorizing other entities to appoint executive officers.[34]

The Appointments Clause also ensures presidential responsibility for federal appointments. The Supreme Court has explained that:

> The Framers understood [] that by limiting the appointment power, they could ensure that those who wielded it were accountable to political force and the will of the people … The Appointments Clause prevents Congress from distributing power too widely by limiting the actors in whom Congress may vest the power to appoint.[35]

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[29] 310 U.S. 381 (1940).

[30] *Id.* at 399.

[31] *See, e.g.*, Ass'n of Am. Railroads v. Dep't of Transp., 721 F.3d 666, 673 (D.C. Cir. 2013).

[32] Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, 53 F.4th 869, 872 (5th Cir. 2022) (*Horsemen's I*).

[33] U.S. CONST. art. II, § 2, cl. 2.

[34] *See* United States *ex rel.* Zafirov v. Florida Med. Assocs., LLC, No. 8:19-CV-01236-KKM-SPF, 2024 WL 4349242 (M.D. Fla. Sept. 30, 2024) (holding that self-appointed relators could not bring litigation on behalf of the Federal government without a constitutionally conforming appointment). *But see* Morrison v. Olson, 487 U.S. 654 (1988) (holding that Congress could authorize courts to appoint inferior Executive Branch officers).

[35] Freytag v. Comm'r, 501 U.S. 868, 883–85 (1991).

If constitutional officers must be appointed pursuant to the Appointments Clause, this requirement raises the question of who is an "Officer of the United States." The Constitution does not say. While it sets forth a few offices that fall under the Appointments Clause, like Ambassadors and Supreme Court justices, it does not otherwise define the term. The Supreme Court has held that individuals are "officers" who must be appointed in accordance with the Appointments Clause if (1) they hold "continuing position[s] established by [federal] law," in which (2) they "exercise significant authority pursuant to the laws of the United States."[36]

II. THE INVIOLABILITY OF FEDERAL CBAS IS INCOMPATIBLE WITH ARTICLE II

Constitutionally, the President runs the Executive Branch. In practice, federal labor law greatly diminishes the President's actual control over—and responsibility for—executive operations in several ways. One of the greatest intrusions on presidential authority comes from making CBAs binding and irrevocable during their term. This prevents agencies from changing any policies encompassed in a union contract—or from implementing conflicting government-wide rules—for the better part of two to three presidential terms (the typical duration of a CBA). In this way, previously negotiated CBAs can significantly—and in some cases unconstitutionally—restrict the President's authority over the Executive Branch.

A. CBAs Deprive the President of Control Over Agency Management Procedures

CBAs prescribe the procedures for exercising core management rights—such as how agencies hire, fire, or evaluate employees. These contract articles cannot be changed, without union consent, until the contract expires and is renegotiated. This deprives the President of control over agency management procedures for multiple presidential terms.

CBAs generally govern agency conditions of employment—with some exceptions. Agencies do not have to negotiate matters specifically provided for by law or covered by government-wide rules or regulations.[37] As a result, most federal unions cannot bargain over pay or benefits—those

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[36] Lucia v. SEC, 138 S. Ct. 2044, 2051 (2018); *see also* Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73 (2007) [hereinafter *Officers of the United States*].

[37] 5 U.S.C. §§ 7103(a)(14), 7117(a)(1).

terms of employment are set by law.[38] But where agencies have discretion over working conditions, the agency heads must bargain over them. The resulting CBAs are binding on the agency until the agreements expire.[39]

Unions generally cannot bargain over the substance of core management rights.[40] Subjects like an agency's mission, budget, or organization are off the table. So are decisions about who gets hired, promoted, suspended, or dismissed, or employee work assignments.[41] However, these management rights come with a major carve-out. Federal unions can negotiate the procedures for exercising management rights, as well as "appropriate arrangements" for employees "adversely affected" by their exercise.[42] So while CBAs cannot dictate who an agency will fire or hire by name, they can (and typically do) dictate dismissal[43] and hiring[44] procedures, as well as arrangements for laid-off employees (like preferential re-hiring) that would otherwise infringe on management rights.[45] CBAs similarly can determine how agencies promote employees,[46]

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[38] *See, e.g.*, Fraternal Order of Police, Lodge #1F, 57 F.L.R.A. 373, 383 (2001) (holding that a union proposal to require a position to be paid at the GS-7 level was non-negotiable because wage levels are "specifically provided for by statute . . . [they are] excluded from the definition of conditions of employment."). However, some agencies are not covered by the General Schedule. Exclusive representatives in those agencies can negotiate over employee pay.

[39] 5 U.S.C. § 7114(c)(3).

[40] 5 U.S.C. § 7106(a).

[41] *Id.*

[42] 5 U.S.C. § 7106(b).

[43] *See, e.g.*, MASTER AGREEMENT BETWEEN THE DEPARTMENT OF VETERANS AFFAIRS AND THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, art. 27, § 10 (2011) [hereinafter MASTER AGREEMENT] (requiring ninety-day performance improvement periods before agency can dismiss poor performers).

[44] *Id.* at art. 61, § 4 (requiring agency to give first priority to current employees when filling vacant positions).

[45] Courts have held that 5 U.S.C. § 7106(b)(3) authorizes appropriate arrangements that would otherwise conflict with management rights. *See* AFGE v. FLRA, 702 F.2d 1183, 1186–88 (D.C. Cir. 1983) (opinion of Scalia, J.).

[46] *See, e.g.*, Social Security Admin., 64 F.L.R.A. 259 (2009) (interpreting CBA to require agency to consider providing upward mobility rights to employees who have stagnated in grade and to give previously passed-over employee retroactive promotion with back wages and interest); *see also* U.S. Dep't of State, Passport Serv., 73 F.L.R.A. 201 (2022) (upholding arbitrator award overturning employee's negative performance rating and requiring agency to give career ladder promotion pursuant to CBA).

assign work,[47] and evaluate performance.[48] They also typically set telework and remote work policies.[49] In short, they can govern most aspects of agency workforce management.

CBAs Take Precedence Over Agency Regulations

The FLRA has also ruled that CBAs "take precedence" over agency rules and regulations.[50] And while unions cannot bargain over matters covered by government-wide rules or regulations, section 7116(a)(7) of the Statute prohibits agencies from enforcing any rules or regulations that conflict with existing CBAs until they expire.[51] So government-wide rules—including executive orders—cannot be enforced until conflicting CBAs terminate.[52]

CBAs typically last three to six years.[53] CBAs also almost universally contain "continuance" clauses that keep them legally in effect until a new contract is negotiated, a process that takes an average of about four years.[54]

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[47] *See, e.g.*, Fed. Aviation Admin., 63 F.L.R.A. 502 (2009) (upholding CBA provision requiring the agency to solicit volunteers for reassignments before selecting employees for reassignment); *see also* AFGE, Local 1164, 60 F.L.R.A. 785 (2005) (upholding arbitration award construing contract to require agency to use seniority system to assign qualified employees to specialized units).

[48] *See, e.g.*, Pat. Off. Pro. Ass'n, 47 F.L.R.A. 10, 65–66, 70–71 (1993) (finding negotiable various requirements governing employee performance appraisal process).

[49] *See* NTEU v. FLRA, 1 F.4th 1120 (D.C. Cir. 2021) (overturning FLRA decision that union telework proposals were non-negotiable). *See also* Press Release, American Federation of Government Employees, AFGE Council Representing EEOC Employees Resolves FLRA Complaint with Agency over Failure to Bargain Reentry to Physical Worksites (Dec. 1, 2022), https://www.afge.org/publication/afge-council-representing-eeoc-employees-resolves-flra-complaint-with-agency-over-failure-to-bargain-reentry-to-physical-worksites/ (announcing CBA that guarantees employees 3 days of telework a week).

[50] Dep't of the Army, Fort Campbell Dist., 37 F.L.R.A. 186, 194 (1990) (holding that CBAs "take precedence over agency rules and regulations with respect to matters to which they both apply").

[51] 5 U.S.C. § 7116(a)(7). For a summary of the case law on implementing government-wide rules and regulations that conflict with a CBA, see *U.S. Pat. and Trademark Office*, 65 F.L.R.A. 817, 819 (2011).

[52] *See, e.g.*, U.S. Dep't of Veterans Affs., 72 F.L.R.A. 287 (2021) (holding that under 5 U.S.C. § 7116(a)(7), a conflicting agency CBA preempted the implementation of Executive Order 13837).

[53] *See, e.g.*, MASTER AGREEMENT, *supra* note 43, at 299 (specifying a 3-year contract duration); 2022 NATIONAL AGREEMENT BETWEEN THE INTERNAL REVENUE SERVICE AND NTEU art. 54, § 1 (2022) (specifying a 6-year contract duration), https://www.nteu73.org/wp-content/uploads/2022/07/2022-contract.pdf.

[54] *See infra* Appendix.

Consequently, the Statute is applied to prevent the President from changing working conditions covered by CBAs for upwards of 7 to 10 years—the duration of the contract and subsequent re-negotiations. During this period, the agency cannot change course on matters covered by the CBA, nor can the President enforce an executive order telling it to do so.

Prolonged Restrictions on Presidential Power

CBAs can lock in policies even longer if unions deliberately drag out negotiations.[55] As discussed in greater detail below, the overwhelming majority of union leaders are agency employees paid by their agency to perform union business. However, when they negotiate CBAs they are formally acting on behalf of the union as a third party and are not subject to agency control.[56] Union negotiators accordingly have complete freedom to—and often do—prolong bargaining to forestall policies they oppose.

For example, the VA negotiated its master CBA with AFGE in 2011. The Trump Administration reopened the contract in 2017. AFGE opposed making concessions and used stalling tactics to drag out bargaining. Negotiations did not conclude until August 2023—following six years of negotiations and more than a dozen years after the contract first took effect.[57]

As a result, the Statute has been interpreted to deprive the President of control of agency management procedures for prolonged periods. Once a provision is put in a CBA, neither the President nor his subordinates can change it—absent union consent—for the better part of two to three presidential terms. Until the CBA expires and is renegotiated, its terms remain wholly outside presidential control.

The outgoing Biden Administration openly used this aspect of the Statute to stymie the re-elected President Trump. After Trump won 2024 election several agencies reopened their contracts and negotiated extensions of CBA articles to prevent President Trump from changing course. For example, shortly after President Trump announced he would

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[55] *See, e.g.*, Decision on Request for General Statement of Policy or Guidance, 71 F.L.R.A. 491 (2019) (describing questions raised by the Department of Agriculture about union stalling tactics).

[56] 5 U.S.C. § 7116(a)(2).

[57] Jory Heckman, *VA signs new labor agreement with AFGE, its first update in more than a decade*, FED. NEWS NETWORK (Aug. 8, 2023), https://federalnewsnetwork.com/workforce/2023/08/va-signs-new-labor-agreement-with-afge-its-first-update-in-more-than-a-decade/?readmore=1. [https://perma.cc/KKS9-H2LQ]

return federal employees to in-person work the Social Security Administration (SSA) agreed to extend their AFGE telework agreement until 2029. That agreement guarantees SSA employees between two and five days of telework a week, depending on their occupation.[58] If this aspect of the Statute is constitutionally valid, President Trump will not be able to alter SSA management policies throughout his entire second term.

B. CBAs Affect Agency Operations

Management procedures have a large impact on agency operations. They are a major means by which agencies—like other employers—govern their workforces. Academic research unsurprisingly finds that federal unions significantly affect agency operations. One law review article documented how union CBAs prevented "structural deregulation" at the Internal Revenue Service (IRS). Union contracts stymied privatization efforts by making reductions-in-force difficult, undercut policies intended to shift enforcement incentives, and made it hard for managers to tie employees' pay to their performance. This undermined efforts by the Clinton and George W. Bush Administrations to reorient the IRS away from aggressive enforcement.[59] The author describes the Statute as effectuating "separation of powers by contract."[60]

Federal unions' influence on agency operations was on full display under the Obama, Trump, and Biden Administrations. For example:

Mandatory promotions. Many Federal CBAs contain provisions governing the promotion process. The FLRA holds that these provisions are enforceable; agencies can be required to promote specific employees who meet contractual promotion criteria.[61] The IRS agreed to a CBA that replaced in-person promotion interviews with a system that automatically ranked the "best qualified" candidates and forwarded them to the selecting

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[58] Erich Wagner, *SSA, AFGE reach deal to lock in current telework levels until 2029*, GOV'T EXEC. (Dec. 6, 2024), https://www.govexec.com/workforce/2024/12/ssa-afge-reach-deal-lock-current-telework-levels-until-2029/401501/ [https://perma.cc/E7GC-CBFK]

[59] Nicholas Handler, *Separation of Powers by Contract: How Collective Bargaining Reshapes Presidential Power*, 99 N.Y.U. L. REV. 45, 108–10 (2024).

[60] *Id.* at 45.

[61] *See, e.g.*, Nat'l Fed'n of Fed. Emps., Loc. 2030, 56 F.L.R.A. 667 (2000) (upholding arbitrator's finding that CBA required agency to promote grievants to the next higher grade once they met the requisite conditions for a promotion); *see also* Social Security Admin., 51 F.L.R.A. 1700 (1996); EPA, 61 F.L.R.A. 247 (2005) (same).

official. During the Obama Administration an arbitrator interpreted the CBA as prohibiting the selecting official from getting input or recommendations from any other source. When IRS selecting officials made promotion decisions with the assistance of interview panels, NTEU filed a grievance, which went before an arbitrator pursuant to the terms of the CBA. The arbitrator ordered the IRS to stop using panels to interview promotion candidates. He also ordered the Obama Administration to give "priority consideration" to thousands of unsuccessful candidates who had higher automated scores than the internal candidates ultimately promoted. IRS had to consider these candidates for all available promotions before considering any other internal or external candidates—regardless of whether supervisors believed their performance merited promotion.[62]

Implementing the Accountability Act. Poor performance and misconduct at VA became a national scandal during the Obama Administration.[63] Then-candidate Donald Trump campaigned on VA reform, promising to make it easier to fire employees who put veterans at risk.[64] Within months of taking office for his first term President Trump signed the Department of Veterans Affairs Accountability and Whistleblower Protection Act (Accountability Act). The Accountability Act created a new "Section 714" dismissal process that, among other things, allowed VA to remove poor performers without PIPs.[65]

AFGE promptly grieved VA's use of Section 714 authority. AFGE argued that while the U.S. Code no longer mandated PIPs, their collective bargaining agreement still did.[66] AFGE contended VA could not eliminate

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[62] NTEU, Chapter 83, 68 F.L.R.A. 945 (2015).

[63] Matthew Daly, *VA chief: 18 vets left off waiting list have died*, ASSOC. PRESS (June 6, 2014), https://apnews.com/article/8b9b161e0fb74b3b989d7984e140098e.

[64] Louis Nelson, *Trump outlines 10-point plan to reform Veterans Affairs department*, POLITICO (July 11, 2016), https://www.politico.com/story/2016/07/trump-veterans-affairs-plan-225377.

[65] *See* 38 U.S.C. § 714. The standard removal processes for federal employees are codified in Chapters 43 and 75 of Title 5 of the U.S. Code. Chapter 75 does not require PIPs and can be used to address poor performance and misconduct. However, agencies must meet a higher burden of proof to prevail (a preponderance of evidence). Chapter 43 can only be used for performance based-removals. Agencies using Chapter 43 need to satisfy a lower burden of proof (substantial evidence) but must give poor performers a PIP before removing or demoting them. Section 714 allowed VA to remove employees under the lower substantial evidence standard without mandatory PIPs.

[66] AFGE's CBA requires minimum 90-day PIPs before employees can be removed for poor performance. *See* MASTER AGREEMENT, *supra* note 43, art. 27, § 10.

PIPs until the CBA was renegotiated to allow it. An arbitrator sided with the union, and the FLRA upheld the award.[67] The arbitrator forced VA to offer backpay and reinstatement to every AFGE-represented poor performer dismissed without a PIP under Section 714.[68] VA ultimately paid out approximately $10,047,000 in backpay and interest to affected employees, 95 of whom accepted offers of reinstatement.[69] Despite the fact that poor performance at VA had become a national scandal, the President had campaigned on fixing it, and Congress had acted to remove statutory requirements for PIPs, VA's union contract blocked the agency from quickly removing poor performers.

Telework in defiance of presidential priorities. Most of the federal workforce shifted to working remotely during the COVID-19 pandemic. After the pandemic subsided the Biden Administration sought to return federal employees to in-person work. In his 2022 State of the Union address President Biden proclaimed that it was safe to return to the office and that the "vast majority" of federal workers would do so.[70] In August 2023 Biden's Chief of Staff Jeff Zients told Cabinet secretaries that "aggressively" returning employees to the office "is a priority of the President." Zients explained that in-person work is needed to "build a strong culture, trust, and interpersonal connections" and is "critical to the well-being of our teams and will enable us to deliver better results for the American people."[71]

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[67] *See* U.S. Dep't of Veterans Affs., 71 F.L.R.A. 1113 (2020); U.S. Dep't of Veterans Affs., 72 F.L.R.A. 407 (2021).

[68] Settlement Agreement between Department of Veterans Affairs & National Veterans Affairs Council, American Federation of Government Employees, Re: National Grievance, NG-9/29/17, Performance Improvement Plans (July 5, 2022), https://www.afge.org/globalassets/documents/va/pip-settlement/ng-9-29-17-pip-714---settlement-agreement.pdf.

[69] VA disclosed these figures to the America First Policy Institute in response to a Freedom of Information Act request.

[70] Remarks of President Joe Biden – State of the Union Address As Prepared for Delivery, WHITE HOUSE (Mar. 1, 2022), https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/03/01/remarks-of-president-joe-biden-state-of-the-union-address-as-delivered/. [https://perma.cc/84EF-LLE3]

[71] Alexa Thompson, *Scoop: Biden pushes to end remote work era for feds*, AXIOS (Aug. 4, 2023), https://www.axios.com/2023/08/04/biden-end-remote-work-federal-employees.

Nonetheless, federal unions made it clear they would not go along.[72] AFGE policy director Jacque Simon retorted that federal employees "worked heroically throughout the pandemic. The idea that they have to go into the office to please Jeff Zients is absurd."[73] NTEU President Tony Reardon also told reporters that "agencies have long agreed that flexible scheduling is a viable option that does not hinder performance . . . . These contracts, bargained collectively at the agencies where we represent frontline employees, remain in effect. Any changes to those agreements would have to be negotiated with NTEU."[74]

As a result, remote work has remained prevalent.[75] A GAO study of 24 agency headquarters found that, in early 2023, most were less than 25 percent occupied, and none was even half occupied.[76] In December 2023 Zients objected that agencies are "not where they need to be" in returning to in-person work.[77] As of August 2024, half of the work hours of federal employees eligible for telework were still performed remotely.[78] The Statute

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[72] Jacob Wallace, *Federal Government's Return To Office Delayed By Union Disputes*, BISNOW (Feb. 13, 2023), https://www.bisnow.com/washington-dc/news/office/labor-is-thwarting-plans-for-the-federal-governments-return-to-office-117647. [https://perma.cc/BVZ8-K884]

[73] Marc Fisher, *Federal workers are going back to the office — any year now*, WASH. POST (June 26, 2024), https://www.washingtonpost.com/opinions/2024/06/26/federal-workers-work-from-home/.

[74] Erich Wagner, *White House calls on agencies to 'aggressively' reduce telework this fall*, GOV'T EXEC. (Aug. 7, 2023), https://www.govexec.com/workforce/2023/08/white-house-calls-telework-reductions-agencies-fall/389173/. [https://perma.cc/5R54-FT63]

[75] Press Release, Sen. Susan Collins, Senator Collins Questions Secretary of the Treasury on Lack of IRS Employees Returning to Workplace Full-Time (June 6, 2024), https://www.collins.senate.gov/newsroom/senator-collins-questions-secretary-of-the-treasury-on-lack-of-irs-employees-returning-to-workplace-full-time [https://perma.cc/K9ST-95MN] (Treasury Secretary Janet Yellen explaining the NTEU CBA has prevented IRS from returning employees to in-person work).

[76] Federal Real Property: Hearing before Comm. on Transp. & Infrastructure, Subcomm. on Econ. Dev., Public Bldgs., & Emergency Mgmt., 118th Cong. (2023) (statement of David Marroni, Acting Dir., Physical Infrastructure Team, Gov't Accountability Off.), https://www.gao.gov/assets/gao-23-106200.pdf.

[77] *White House says agencies are 'not where they need to be' with return-to-office plans*, FED. NEWS NETWORK (Dec. 19, 2023), https://federalnewsnetwork.com/workforce/2023/12/heres-what-we-know-so-far-about-agencies-return-to-office-plans/. [https://perma.cc/W3XY-CYAV]

[78] OFFICE OF MANAGEMENT AND BUDGET, OMB REPORT TO CONGRESS ON TELEWORK AND REAL PROPERTY UTILIZATION 8 (Aug. 2024) (containing authors' data analysis),

prevented President Biden from implementing telework policies he considered essential for effective government.

The President and his subordinates cannot alter management procedures embedded in CBAs for extended periods of time—typically more than a single presidential term. Naturally, this restraint significantly impacts how agencies operate. Indeed, AFGE has not been shy about using CBAs to affect not just workforce policies, but substantive agency policy.

In 2024 AFGE negotiated an EPA CBA that included a new "scientific integrity" article.[79] The article requires bargaining with the union before altering the scope of the agency's scientific integrity policy and allows third-party arbitrators to adjudicate and impose remedies for alleged scientific integrity violations. These policies will empower career staff and arbitrators—not agency leadership—to decide how EPA uses scientific data in policymaking. An AFGE press release explained that it was intended to stymie a then-potential second Trump Administration's ability to reverse Biden climate policies:

> With former President Trump—who attacked science and gutted the EPA during his presidency—campaigning for a second term, Council 238 worked closely with members to ensure this contract best positioned the Agency to carry out its work to protect the planet regardless of who is in power . . . . This contract is so significant because it provides protections for any employee asserting their scientific rights. An independent arbiter, not a political appointee, will determine whether science is being undermined. It puts employees in the best possible position to continue with the mission of the Agency no matter who sits in the Oval Office. Among the key wins is a new article that promotes scientific integrity and safeguarding the scientific principles are guiding EPA's work,

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https://www.whitehouse.gov/wp-content/uploads/2024/08/OMB-Report-to-Congress-on-Telework-and-Real-Property.pdf [https://perma.cc/A7Y9-MQX6]. Note that OMB reports that 1,057,000 federal employees were telework eligible, 228,000 of these employees were fully remote, and that the remaining telework-eligible employees performed an average of 61.2 percent of their work hours in person. Assuming fully-remote and hybrid telework employees have the same average work hours, these figures imply that hybrid and remote employees performed 52 percent of their collective work-hours remotely.

[79] MASTER COLLECTIVE BARGAINING AGREEMENT, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES COUNCIL 238 AND U.S. ENVIRONMENTAL PROTECTION AGENCY (2024), https://afge238.org/wp-content/uploads/sites/46/Scientific-Integrity-TA.fully-signed.pdf. [https://perma.cc/ELZ9-KBBX].

> ensuring that the Agency can fulfill its mission to address climate change and protect the environment without political interference.[80]

Reporters described the new contract as "using collective bargaining to thwart a potential Trump administration."[81] Not coincidentally, the contract lasts until 2028.

The Statute also effectively makes setting uniform federal management policies impossible. Because § 7116(a)(7) gives existing CBAs precedence over conflicting government-wide rules and regulations—including executive orders—presidential management directives take effect haphazardly across the Executive Branch. Implementation depends on when CBAs expire, whether they have continuance clauses, and how long renegotiations take. President Biden's struggle to return federal employees to in-person work is a prominent example of this phenomenon. Another high-profile example of staggered implementation occurred during the Trump Administration.

Popular perception holds that poorly performing federal employees rarely get fired.[82] Federal employees agree. In a 2017 Office of Personnel Management (OPM) survey, just 31 percent of federal employees reported that, in their work unit, "steps are taken to deal with a poor performer who cannot or will not improve."[83] In 2018 President Trump addressed this problem with Executive Order 13839. The order broadly streamlined the federal dismissal process to make removing poor performers simpler. Among other changes, the order directed agencies generally to limit the term of PIPs to 30 days.[84] Before the order PIPs typically lasted 60 to 120 days—often a requirement of union contracts.[85] Polling showed federal

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[80] AFGE Press Release, *supra* note 8 (quotation marks removed).

[81] Lawrence Ukenye, *How a union joined the Trump-proofing craze*, POLITICO (June 3, 2024), https://www.politico.com/newsletters/weekly-shift/2024/06/03/how-a-union-joined-the-trump-proofing-craze-00161204.

[82] Ian Smith, *Poll: Majority of Americans Think It's Too Difficult to Fire Poor Performing Federal Employees*, FEDSMITH (June 4, 2018), https://www.fedsmith.com/2018/06/04/poll-majority-americans-think-difficult-fire-poor-performing-federal-employees/. [https://perma.cc/E3ZZ-G6FR]

[83] U.S. OFF. OF PERS. MGMT., 2017 FEDERAL EMPLOYEE VIEWPOINT SURVEY 20 (2017), https://www.opm.gov/fevs/reports/governmentwide-reports/governmentwide-reports/governmentwide-management-report/2017/2017-governmentwide-management-report.pdf. [https://perma.cc/2WFX-N86F]

[84] *See* Exec. Order 18,839, § 4(c), 83 Fed. Reg. 25343, 25344–45 (June 1, 2018), https://www.govinfo.gov/content/pkg/FR-2018-06-01/pdf/2018-11939.pdf.

[85] For example, VA's contract with AFGE required minimum 90-day PIPs. *See* MASTER AGREEMENT, *supra* note 43.

employees supported the order by a two-to-one margin.[86] Federal unions, however, decried the order as a "threat to democracy" and resisted its implementation.[87]

Unions uniformly dragged out CBA negotiations to delay implementation. As a result, the requirement for 30-day PIPs took effect unevenly across the government. The order applied immediately to non-union employees, such as managers and supervisors. The timing for unionized employees varied depending on how long their CBAs lasted and how long negotiations took. Many agencies took years to implement the order. For example, AFGE-represented employees at EPA got the shorter PIPs in the summer of 2020.[88] In other agencies union opposition prevented the order from ever taking effect.

At the Department of Veterans Affairs, negotiations with AFGE went to impasse. In November 2020 the Federal Service Impasses Panel (FSIP) eliminated PIPs for Section 714 actions and limited PIPs to 30 days outside of Section 714.[89] AFGE responded by encouraging its members to vote against ratifying the entire CBA, rejecting both the FSIP-imposed terms and the terms AFGE voluntarily accepted.[90] This tactic reset negotiations, keeping the 2011 CBA—and 90-day PIPs—in effect. Soon thereafter, the incoming Biden Administration rescinded EO 13839. Union opposition completely prevented VA from implementing President Trump's directive to shorten PIPs. These examples demonstrate how the Statute has been

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[86] Erich Wagner, *Survey: Half of Feds Support White House Attempts to Ease Firing Process*, GOV'T EXEC. (June 8, 2018), https://www.govexec.com/management/2018/06/survey-half-feds-support-trump-efforts-firing/148818/. [https://perma.cc/X3EE-HFEQ]

[87] Press Release, American Federation of Government Employees, President Trump executive orders are threat to democracy, union says (May 25, 2018), https://www.afge.org/publication/president-trump-executive-orders-are-threat-to-democracy-union-says/.

[88] COLLECTIVE BARGAINING AGREEMENT BETWEEN THE U.S. ENVIRONMENTAL PROTECTION AGENCY AND THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, art. 14, § 6(c) (2010), https://federalnewsnetwork.com/wp-content/uploads/2020/08/081420_afge_epa_cba_FNN.pdf. [https://perma.cc/TZN3-2FD3].

[89] U.S. Dep't of Veterans Affs. and AFGE, 2020 FSIP 022, art. 27 (Nov. 5, 2020), https://www.flra.gov/node/79009. [https://perma.cc/NZ6R-9BPC].

[90] *VA Employees Return to Bargaining Table After Rejecting Trump Labor Panel's Imposed Contract*, AM. FED'N OF GOV'T EMPS. (Jan. 25, 2021), https://www.afge.org/article/va-employees-return-to-bargaining-table-after-rejecting-trump-labor-panels-imposed-contract.

applied to prevent the President from setting uniform workforce policies without union consent.

C. Congress Cannot Divest the President of Responsibility for the Executive Branch

Legal scholars have not yet examined whether unions can lawfully exercise this much power over the Executive Branch. There is a clear and strong argument that giving unions such power is inconsistent with the Constitution. Article II vests executive power in the President alone. The Framers consciously rejected the plural executive model of the Continental and Confederation Congresses. They did not want to "bog the Executive down with the habitual feebleness and dilatoriness that comes with a diversity of views and opinions."[91] Requiring the President to obtain his subordinates' consent to operational changes is inconsistent with vesting executive power in the President alone.

The Supreme Court has permitted some restrictions on the President's executive authority. In *Humphrey's Executor v. United States*, the court approved for-cause removal protections for Federal Trade Commission members.[92] In *Morrison v. Olson*, the Supreme Court also approved removal protections for the independent counsel, an inferior officer.[93] These cases represented the high-water mark of a functionalist approach to constitutional interpretation.

Functionalism no longer commands majority support on the Court, having been replaced with formalism. Recent separation of powers cases have accordingly emphasized the sole vesting of executive authority in the President and the importance of Presidential authority over and responsibility for executive power.[94] Justice Kavanaugh—the median Justice on the Court—has described *Morrison* as "one of the court's biggest mistakes … a terrible decision[.]"[95] Restrictions on Presidential power that

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[91] Seila Law v. CFPB, 140 S. Ct. 2183, 2203 (2020) (cleaned up).

[92] 295 U.S. 602 (1935).

[93] 487 U.S. 654 (1988).

[94] *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010); *Seila Law*, 140 S. Ct. 2183; Collins v. Yellen, 141 S. Ct. 1761 (2020); Trump v. United States, 144 S. Ct. 2312 (2024).

[95] Rachel Weiner, *Kavanaugh on 'one of the court's biggest mistakes'*, WASH. POST (Apr. 25, 2024), https://www.washingtonpost.com/politics/2024/04/25/supreme-court-trump-immunity-case/#link-2PHW4D47SBFAXHDYLBDIUAJFIA.

the court blessed in the functionalist era seem flagrantly out of line with current separation of powers jurisprudence.[96]

The Supreme Court has not overridden *Humphrey's Executor* and *Morrison*, but recent cases have read them very narrowly. In *Seila Law v. Consumer Finance Protection Bureau*, the Supreme Court interpreted *Humphrey's Executor* to apply only to independent agencies that do not exercise significant executive power.[97] In a footnote, the Court noted that the Federal Trade Commission likely fails this test.[98] The Court similarly read *Morrison* to only cover "inferior officers with limited duties and no policymaking or administrative authority."[99] The Court also explained that *Humphrey's Executor* and *Morrison* represent "the outermost constitutional limits of permissible congressional restrictions on the President's removal power."[100]

The modern Court is not upholding significant Congressional restrictions on Presidential control of the executive branch. Even taking *Morrison* at face value, the Court upheld the law because it did not substantively interfere with the President's ability to ensure the law is faithfully executed.[101] The Statute does not pass this original *Morrison* standard, much less those set forth in more recent cases.

The Statute, as currently interpreted, systematically divests the President of administrative control of most of the Executive Branch. Unions represent nearly 1.3 million of the federal government's 2.3 million civilian employees.[102] For those employees, the President cannot modify their hiring, firing, promotion, performance evaluation, or other management procedures until their CBAs expire and multi-year renegotiations conclude. Nor can he truly "secure the unitary and uniform execution of the laws" administered by those unionized agency components without union assent.[103]

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[96] *See, e.g.*, Consumers' Rsch. v. Consumer Prod. Safety Comm'n, 98 F. 4th 646, 649 (5th Cir. 2024) (Willett, J., concurring) ("*Humphrey's Executor* . . . seems nigh impossible to square with the Supreme Court's current separation-of-powers sentiment.").

[97] *Seila Law*, 140 S. Ct. at 2198–2200.

[98] *Id.* at 2198 n.2.

[99] *Id.* at 2200.

[100] *Id.*

[101] Morrison v. Olson, 487 U.S. 654, 691–92 (1988).

[102] *Federal Workforce Data, Status Data: Employment Cubes–September 2023*, U.S. OFFICE OF PERS. MGMT. https://www.fedscope.opm.gov/employment.aspx. [https://perma.cc/6LDS-A5YZ]

[103] Myers v. United States, 272 U.S. 52, 135 (1926).

This restraining and cutting off of the President's ability to supervise and manage the work of the Executive Branch runs contrary to our constitutional structure. The Supreme Court has repeatedly reaffirmed the principle that the Constitution's Vesting and Take Care Clauses require that the President retain "general administrative control" of the Executive Branch.[104] If the President determines that administrative practices impede the faithful execution of the law (such as by making it too hard for VA to remove employees who provide substandard patient care), then he has the power—and the duty—to change them. Congress cannot force the President to spend years bargaining with his subordinates before changing problematic aspects of agency operations. In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, the Supreme Court explained that:

> [T]he Constitution vests certain powers in the President that the Legislature has no right to diminish or modify . . . . The President has been given the power to oversee executive officers; he is not limited, as in Harry Truman's lament, to persuading his unelected subordinates to do what they ought to do without persuasion. In its pursuit of a "workable government," Congress cannot reduce the Chief Magistrate to a cajoler-in-chief.[105]

Yet that is precisely what the Statute does. It requires the President to obtain his subordinates' assent before changing any management procedures encompassed in a CBA. If the President cannot persuade union representatives voluntarily to "do what they ought," he must wait years to renegotiate the CBAs. If an outgoing administration has negotiated CBAs that run through the next Presidential term—as the Biden Administration did—the President cannot effectuate desired changes at all.

This restraint systematically prevents the President from ensuring the "energetic, vigorous, decisive, and speedy execution of the laws."[106] Even if a matter is a presidential priority, which the President considers essential to effective Executive Branch operations (as President Biden viewed returning employees to in-person work), the Statute lets unions block the change for years—typically, more than a single presidential term. It would be hard to describe a more "feeble executive" or "feeble execution of the government."[107]

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[104] Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 492 (2010) (quoting *Myers*, 272 U.S. at 164).

[105] *Id.* at 500–02 (cleaned up).

[106] Clinton v. Jones, 520 U.S. 681, 712 (1997) (Breyer, J., concurring in judgement).

[107] Trump v. United States, 144 S. Ct. 2312, 2329 (2024).

The Legislative Branch cannot give the bureaucracy this power over the President. The Framers considered—and expressly rejected—a multi-headed Executive Branch that would have required internal consensus to act. While the Statute does not formally create a plural executive council, in practice it requires the President to get approval from subordinate executive branch employees before changing most aspects of agency personnel management. This divides control over the executive branch between the President and union representatives. Congress cannot legislatively overturn the Constitutional Convention's vesting of executive power in a single official like this. The "entire 'executive Power' belongs to the President alone."[108]

Nor can Congress divest the President of ultimate responsibility for Executive Branch operations. One of the primary reasons for concentrating executive power in a single official was to concentrate political accountability.[109] In a plural executive, officials can shift blame for poor decisions. Under a unitary executive, final accountability rests with the President alone.

The Statute subverts this constitutional design by depriving the President of political accountability for Executive Branch decisions. For example, veterans might have been frustrated with VA's failure to implement the Accountability Act or by its reinstating poor performers. President Biden could—and did—nonetheless reply that he wasn't responsible because he had to follow a union contract a previous administration negotiated.[110] When it came to VA operations, the buck stopped not with the President but with AFGE.

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[108] Seila Law v. CFPB, 140 S. Ct. 2183, 2197 (2020).

[109] *See* THE FEDERALIST NO. 70, at 477 (Alexander Hamilton) (J. Cooke ed., 1961) ("The circumstances which may have led to any national miscarriage or misfortune are sometimes so complicated, that where there are a number of actors who may have had different degrees and kinds of agency, though we may clearly see upon the whole that there has been mismanagement, yet it may be impracticable to pronounce to whose account the evil which may have been incurred is truly chargeable.").

[110] During the 2024 Presidential election campaign the Biden-Harris Administration attributed the reinstatement of poor performers at VA to the need to honor its union contracts. See Jory Heckman, *VA reinstated 100 employees fired under widely challenged law, paid $134M to hundreds more*, FED. NEWS NETWORK (Oct. 29, 2024), https://federalnewsnetwork.com/workforce/2024/10/va-reinstated-100-employees-fired-under-widely-challenged-law-paid-134m-to-hundreds-more/ ("VA officials said the department, under the Trump administration, failed to bargain with AFGE over the implementation of the 2017 law, violating provisions of its contract with the union.").

Congress cannot displace the President's power in this way. As the Supreme Court has explained:

> The Constitution that makes the President accountable to the people for executing the laws also gives him the power to do so . . . . Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else. Such diffusion of authority "would greatly diminish the intended and necessary responsibility of the chief magistrate himself."[111]

The Statute effectively creates a plural executive, spreading rather than focusing the authority and responsibility that the Constitutional Convention intentionally vested in the President. Prompt changes to major swathes of agency management require assent from union officers. Representatives of subordinate employees—not the President—decide whether agencies can immediately change operations or must wait until CBAs expire. Rather than concentrating control over and responsibility for agency management in the President, the Statute diffuses it throughout the executive branch. The constitution does not permit this.

D. The Statute Violates the Private Nondelegation Doctrine

The Supreme Court's Vesting and Take Care Clause precedents point to the conclusion that the Statute as currently interpreted gives federal unions too much power. So does the private non-delegation doctrine. This doctrine holds that, since Article II vests executive power in the President, private parties cannot wield it. As the D.C. Circuit recently explained:

> For a delegation of governmental authority to a private entity to be constitutional, the private entity must act only as an aid to an accountable government agency that retains the ultimate authority to approve, disapprove, or modify the private entity's actions and decisions on delegated matters.[112]

Appeals courts have accordingly held that private parties cannot possess rulemaking authority. They cannot stop agencies from amending their regulations or dictate the timing of such amendments. While federal unions represent agency employees, they are formally private entities not subject to agency control. The Statute is nonetheless read to give federal unions the

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[111] Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 514 (2010) (quoting THE FEDERALIST NO. 70, at 478 (Alexander Hamilton (J. Cooke ed., 1961)).

[112] Alpine Sec. Corp. v. Fin. Indus. Regul. Auth., 121 F.4th 1314, 1325 (D.C. Cir. 2024).

unilateral ability to block changes to CBAs before they expire. CBAs have a higher legal status than agency regulations. The private non-delegation doctrine accordingly requires agency control over whether and when they are modified. As currently interpreted, the Statute does not permit this. It therefore straightforwardly violates the private non-delegation doctrine.

Recent litigation in the Fifth and Sixth Circuits illustrates this constitutional principle. In 2022 the Fifth Circuit invalidated a federal law—part of the Horseracing Integrity and Safety Act (HISA)—that required the Federal Trade Commission (FTC) to promulgate regulations developed by a private entity, the Horseracing Integrity and Safety Authority. The law also prohibited the FTC from subsequently rescinding or modifying those regulations without the Horseracing Authority's consent. The appeals court found that this scheme impermissibly transferred rulemaking authority to a private party.[113]

Congress then amended HISA to allow the FTC to modify the horseracing regulations at will, and in 2023 the Sixth Circuit upheld the amended law because it ensured the FTC held unilateral authority over the final rules:

> The FTC's power to abrogate and change the Authority's rules creates a clear hierarchy . . . . The FTC now may create new rules or *modify existing rules as it deems appropriate* to advance the purposes of [the] Act . . . the FTC *may unilaterally change regulations*, [and] is free to prescribe the rules, showing that it retains ultimate authority . . . . That makes the FTC the primary rule-maker, and leaves the [Horseracing] Authority as the secondary, the inferior, the subordinate one.[114]

The Statute does not meet these baseline non-delegation requirements. Instead of a "clear hierarchy" with unions "subordinate" to agencies, the Statute requires union assent to change workforce policies embedded in CBAs. Unions can force agencies to adhere to CBAs for the entirety of the CBA term and any subsequent renegotiations.[115] The private

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[113] *Horsemen's I*, 53 F.4th 869, 887–89 (finding that FTC's inability to modify or rescind Horseracing Authority rules on its own distinguishes the law at issue from prior precedents where agencies retained final regulatory authority).

[114] Oklahoma v. United States, 62 F.4th 221, 230 (6th Cir. 2023) (emphasis added).

[115] *See, e.g.*, NTEU v. Chertoff, 452 F.3d 839, 858–60 (D.C. Cir. 2006) (collective bargaining is a term of art that prohibits agencies from terminating contracts at will); *see also* NTEU v. Federal Labor Relations Authority, 45 F.4th 121 (D.C. Cir. 2022) (continuance clauses keep CBAs in full force and effect until renegotiations conclude).

non-delegation doctrine forbids giving private entities this much control over agency regulations—much less CBAs that "take precedence" over regulations.[116] Just as it was unconstitutional to require Horseracing Authority consent before the FTC could terminate or modify its horseracing regulations, it is unconstitutional to require union consent before agencies can abrogate or unilaterally change CBAs.

Indeed, the Statute gives federal unions even greater rulemaking authority than Cabinet Secretaries in at least one respect. Agency heads cannot tell the President or OPM they will not implement new civil service rules. But federal unions have independent authority to block—or authorize—the implementation of presidential directives that affect working conditions.

For example, unions at VA stymied the implementation of Executive Order 13837.[117] President Trump issued this order in May 2018 to combat abuses of "official time"—the practice of letting federal employees perform union business while on the clock.[118] Some federal employees spend all their official work hours on union business (so-called "official time"). EO 13837 limited federal employees to spending no more than one-quarter of their duty time on official time. It also prohibited union officials from engaging in certain activities—like lobbying—while on the clock.[119]

These requirements conflicted with AFGE's VA contract, which was being renegotiated when EO 13837 was issued.[120] At the time, and despite waiting lists for patient care, approximately 500 VA employees—including doctors and nurses—performed entirely union work.[121] Under the contract's continuance clause, the CBA remained in effect during renegotiation. So, without AFGE's consent, VA could not legally implement the order until negotiations concluded.[122] AFGE officers unsurprisingly did not consent to reducing their subsidies. Instead, they dragged out

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[116] *Fort Campbell District*, 37 F.L.R.A. at 194.

[117] Exec. Order No. 13,837, *Ensuring Transparency, Accountability, and Efficiency in Taxpayer-Funded Union Time Use*, 83 Fed. Reg. 25335 (May 25, 2018).

[118] *See* 5 U.S.C. § 7131.

[119] *See* Exec. Order 13,837, *supra* note 117, at § 4.

[120] *See* MASTER AGREEMENT, *supra* note 43, art. 48.

[121] News Release, U.S. Department of Veterans Affairs, U.S. Department of Veterans Affairs Secretary Clarifies Collective Bargaining Authority Related to Professional Conduct, Patient Care (Aug. 17, 2018), https://www.va.gov/opa/pressrel/pressrelease.cfm?id=5096. [https://perma.cc/H95W-AWJE]

[122] *Department of Veterans Affairs*, 72 F.L.R.A. 287.

negotiations for the entirety of President Trump's term.[123] Contract negotiations did not conclude until 2023—after President Biden had rescinded the order. Union opposition entirely prevented EO 13837 from taking effect at VA.[124]

Unions unilaterally decide if agencies—and even the President—can modify or must adhere to CBAs. In that way, unions exercise rulemaking power, which the Constitution does not permit private parties to wield.

E. An Incumbent President Cannot Use CBAs to Restrict the Article II Authority of Succeeding Presidents

Under Article II of our Constitution, all executive authority is vested in one President, who may serve for no more than two fixed four-year terms. The President's authority expires when his term of office concludes. No President can wield or extend his executive authority beyond the end of his term in office. For example, President Biden took office on January 20, 2021. He could not, during his 2021–2025 term, have purported to appoint or dismiss officials in 2026.[125] Only President Trump, who was sworn in for his second term on January 20, 2025, has that power.

Similarly, the decisions made in office by one President cannot take away or constrain the ability of a later President to exercise his Article II authority to supervise the operations of the Executive Branch or to execute faithfully the requirements of the law. The Supreme Court has explained that an incumbent President "cannot . . . bind his successors by diminishing their powers."[126] This fundamental principle forbids a President from contracting away his successor's executive power. A President cannot contract away power he does not possess.

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[123] AFGE used various tactics to prolong negotiations, such as encouraging their members to vote against ratifying contract articles the union had agreed to prevent FSIP-imposed articles from taking effect. *See VA Employees Return to Bargaining Table After Rejecting Trump Labor Panel's Imposed Contract*, AM. FED'N OF GOV'T EMPS. (Jan. 25, 2021), https://www.afge.org/article/va-employees-return-to-bargaining-table-after-rejecting-trump-labor-panels-imposed-contract.

[124] VA was able to reassign Title 38 employees from official time to agency business using separate statutory authority granted under 38 U.S.C. § 7422(b).

[125] Authority of the President to Prospectively Appoint a Supreme Court Justice, 46 Op. O.L.C., at *4 (2022) ("The President could not forestall the rights and prerogatives of his own successors by appointing successors to offices expiring after his power to appoint has itself expired.") (cleaned up).

[126] Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 497 (2010).

For the same reason, a President cannot indirectly diminish his successors' powers by authorizing his subordinate officers, such as Cabinet secretaries, to negotiate and sign CBAs that contract away his successor's executive power. "What cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows."[127] Nonetheless, CBAs that span multiple Presidential terms purport to do exactly that. Indeed, Presidents of both parties have expressly sought to use CBAs to prevent their successors from changing course.

As the Biden Administration left office it agreed to a series of CBAs extending union contracts to 2028 or 2029, deliberately preventing the incoming second Trump Administration from renegotiating them.[128] As discussed above the Biden EPA agreed to a CBA—which will last until mid-2028, plus subsequent renegotiations—with provisions openly intended to make it harder for President Trump to implement his policies.[129] The outgoing Trump Administration also came close to finalizing an Immigration and Customs Enforcement (ICE) CBA that, by its terms, would have prevented the incoming Biden Administration from relaxing border security.[130] The Constitution does not permit this result. Styling a presidential action as a contract between a subordinate officer and a private

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[127] Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 143 S. Ct. 2141, 2176 (2023).

[128] *See* Kevin Bogardus, Robin Bravender, & Scott Streater, *Feds race to ink union deals that last beyond Trump*, E&E NEWS (Dec. 12, 2024), https://www.eenews.net/articles/feds-race-to-ink-union-deals-that-last-beyond-trump/ [https://perma.cc/6WLP-EDQZ]; *see also* Wagner, *supra* note 58.

[129] Stephen Lee, *EPA Union Deal to Shield Science From Politics as Election Looms*, BLOOMBERG NEWS (May 29, 2024), https://news.bloomberglaw.com/environment-and-energy/epa-union-deal-to-shield-science-from-politics-as-election-looms [https://perma.cc/QFV5-4X32]; *see also* Employees Council 238, *Largest EPA Union responds to 2024 Election Results*, AM. FED'N OF GOV'T EMPS. COUNCIL 238 (Nov. 7, 2024), https://afge238.org/news/largest-epa-union-responds-to-2024-election-results/ [https://perma.cc/74RB-SAUA] ("We fought for and won a union contract that puts our members in the best position possible to continue with the mission of the Agency—regardless of who sits in the Oval Office. From a first-of-its-kind scientific integrity article that protects workers from political interference to whistleblower protections, to language that ensures diversity, equity, inclusion, and accessibility is prioritized for all EPA employees, we have bold protections in place").

[130] Nicole Sganga & Camilo Montoya-Galvez, *Homeland Security officials scrap Trump-era union deal that could have stalled Biden's immigration policies*, CBS NEWS (Feb. 16, 2021), https://www.cbsnews.com/news/ice-officers-union-agreement-trump-homeland-security/. [https://perma.cc/CM9L-WP5S].

entity like a federal labor union does not alter the analysis and cannot expand the limits and duration of the President's constitutional powers.

Of course, an immediate objection can be raised to the argument that CBAs negotiated by a previous President should not bind the next administration: CBAs are contracts between unions and agencies, and agencies are ongoing legal entities. While the President's authority may terminate when his term ends, agencies perdure and are bound by their prior commitments.

The response to this objection is straightforward: CBAs are unlike other agency actions because they implicate Article II executive authority, not Article I legislative authority. When an agency issues a regulation, takes an enforcement action, or otherwise exercises authority over private parties, it does so under congressionally granted authority. "[A]n agency literally has no power to act . . . unless and until Congress confers power upon it."[131] Any externally focused agency activities occur—and only occur—on the terms Congress sets. Nothing in the Constitution prevents Congress from passing laws like the Administrative Procedure Act (APA) that treat agencies as ongoing entities and generally holds them to their prior actions in interactions with private parties.

CBAs are different. While negotiated with federal unions, they govern how the President exercises his constitutional authority over the federal workforce. Article II vests the executive power—"the power of appointing, overseeing, and controlling those who execute the laws"—in the President alone, and only for a fixed term.[132] The President necessarily delegates this authority to agency heads and subordinate officials, but this delegation is just that—a delegation and not a divestment. Delegated executive power remains constitutionally vested with the President of the day.

While agencies may be legally ongoing authorities, individual Presidents are not. They are term-limited and cannot project executive power beyond the limits of their terms. Styling executive directives as contracts between the President's officers and subordinate employees makes no difference. Federal officers cannot contractually limit the use of executive authority after the current President's term ends. That authority has not—and cannot be—delegated to them. It belongs to future Presidents, who have not yet been elected and are not party to the agreement. Under

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[131] La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986).

[132] Seila Law v. CFPB, 140 S. Ct. 2183, 2197 (2020) (cleaned up).

the Constitution, neither the President nor his delegees may contractually constrain a future President's executive authority.

F. The President Has Constitutional Authority to Repudiate Offending CBA Provisions

These constitutional challenges would disappear if the President could terminate CBAs or repudiate specific CBA provisions in instances where he determines that they interfere with his ability to supervise the Executive Branch effectively or to carry out his other Article II duties, including the faithful execution of the laws. Unions could not bind the President to policies he opposed—or frustrate his management of the federal workforce—if it were recognized that the President must retain authority to exercise his Article II powers notwithstanding conflicting CBAs.

There are strong arguments that the "doctrine of constitutional avoidance" requires courts to interpret the Statute this way. If the Statute cannot be read to preserve the President's authority, then the provisions that have been interpreted to force adherence to previously negotiated CBAs are likely unconstitutional.

The doctrine of constitutional avoidance is a cardinal canon of statutory construction. If a court concludes that the most natural reading of a statute either violates the constitution or raises serious constitutional questions, but a permissible—albeit perhaps strained—alternative reading is constitutional, then the Court will interpret the statute to avoid the constitutional question. The cases applying this doctrine are legion.[133]

The Supreme Court has regularly applied this canon in separation of powers cases, holding that laws that do not expressly restrict presidential power will not be construed to do so. For example, in *Public Citizen v.*

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[133] *See, e.g.*, DeBartolo Corp. v. Gulf Coast Trades Council, 485 U.S. 568, 577–78 (1988) (construing the National Labor Relations Act to avoid First Amendment concerns that would be raised by prohibiting union hand billing); Bond v. United States, 572 U.S. 844 (2014) (construing the Chemical Weapons Convention Implementation Act to avoid federalism concerns by holding it does not reach purely local crimes); NFIB v. Sebelius, 567 U.S. 519 (2012) (construing the Affordable Care Act healthcare mandate as a tax instead of as a penalty, thereby avoiding concerns the mandate exceeded Congressional authority under the interstate commerce clause); Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 210–11 (2009) (construing political subdivisions covered by the Voting Rights Act to include utility districts, despite statutory language defining such subdivisions as counties or county-equivalents, thereby avoiding questions about the constitutionality of VRA pre-clearance).

Department of Justice, the Supreme Court held that the Federal Advisory Committee Act (FACA)—which requires federal advisory bodies to meet publicly—did not apply to an American Bar Association (ABA) committee that advised the President about prospective judicial nominees.[134] FACA was naturally read to cover the ABA committee, but the Court held this construction would raise "formidable constitutional difficulties."[135] Since FACA did not expressly cover the President, the Court avoided the constitutional concerns by interpreting the law not to apply to the committee.

Similarly, in *Franklin v. Massachusetts* the Supreme Court held that the APA does not cover the President.[136] The APA applies to "agencies," defined as "each authority of the United States." While this broad language would appear to include the President, that construction would subject presidential decisions to judicial review for abuse of discretion. The Court held:

> Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA. We would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion . . . . As the APA does not expressly allow review of the President's actions, we must presume that his actions are not subject to its requirements.[137]

The Statute does not contain an "express statement" forcing the President to adhere to the terms of CBAs. The doctrine of constitutional avoidance thus calls for construing the Statute to allow the President to terminate CBAs or repudiate specific CBA provisions when he deems it necessary to carry out his constitutional responsibilities. This reading of the Statute would eliminate the Article II concerns discussed throughout this Section. While such a reading of the Statute may not be the most natural, it is a permissible reading.

A straightforward reading of the Statute makes CBAs binding until they expire. Section 7114(c)(3) of the Statute provides that CBAs "shall be binding on the agency and the exclusive representative." Courts have also

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[134] 491 U.S. 440 (1989).

[135] *Id.* at 466.

[136] 505 U.S. 788 (1992).

[137] *Id.* at 800–01.

interpreted the term "collective bargaining" as a term of art that prevents agencies from abrogating CBAs.

After 9/11, Congress created the Department of Homeland Security (DHS) and gave it authority to establish a more flexible collective bargaining system. The George W. Bush Administration created a system that allowed DHS to abrogate CBAs at will. Federal unions promptly sued. In *NTEU v. Chertoff*, both the district court and then the court of appeals concluded that this system did not actually provide "collective bargaining" and struck it down. As the D.C. Circuit explained:

> "[C]ollective bargaining" is a term of art, defined in other statutory schemes … None of the major statutory frameworks for collective bargaining allows a party to unilaterally abrogate a lawfully executed agreement . . . . [C]ollective bargaining is a method of structuring the formation of labor contracts, and the notion of mutual obligation is inherent in contract law …. To imagine that a system might "ensure collective bargaining" without imposing mutual obligations is simply bizarre.[138]

Nonetheless, these arguments need not be dispositive. The Statute says CBAs bind "agencies"; it says nothing about the President who stands above agency officials and supervises the exercise of all executive authority under the Constitution. Under the *Franklin* rule, the President is not an agency, and statutory silence should not be construed to tie his hands. The district and circuit courts did not consider this argument, or the constitutional arguments that inviolable CBAs can operate to neuter the President's supervisory authority and violate the private non-delegation doctrine.

Furthermore, there are statutory grounds to interpret the Statute implicitly to allow the President—but not agencies acting unilaterally—to terminate CBAs or CBA articles. The Civil Service Reform Act of 1978 (CSRA), which included the Statute, provides that:

> [E]xcept as otherwise expressly provided in this Act, no provision of this Act shall be construed to . . . limit, curtail, abolish, or terminate any function of, or authority available to, the President which the President had immediately before the effective date of this Act.[139]

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[138] NTEU v. Chertoff, 452 F.3d 839, 860 (D.C. Cir. 2006); *see also* NTEU v. Chertoff, 385 F. Supp. 2d 1, 35–40 (D.D.C. 2005).

[139] Civil Service Reform Act of 1978, PUB. L. NO. 95-454, § 904.

Prior to the Statute's passage, federal collective bargaining was governed by executive orders. Like the Statute, those orders made CBAs binding upon agencies and unions.[140] But the whole system operated under plenary presidential control.[141] Through those executive orders the President decided which agencies would engage in collective bargaining and what they would bargain over. For the same reason, the President could have issued an order terminating a CBA if he deemed it necessary (although this did not in fact happen). CBAs did not restrict presidential power before the Statute's passage—they were based on presidential power.

Congress "expressly provided" for many of these matters in the Statute, like the scope of bargaining.[142] But the Statute says nothing about presidential termination of CBAs or CBA provisions. It only makes CBAs binding upon agencies. Thus, before the Statute became law, CBAs bound agencies, but "authority [was] available to[] the President" to abrogate them. The CSRA's rule of construction implies that the President retains that authority.

Congress also directed that the Statute "should be interpreted in a manner consistent with the requirement of an effective and efficient Government."[143] This interpretive directive similarly argues for interpreting statutory silence to allow the President to terminate CBAs; long-term CBAs frustrate uniform workforce management policies. The government would operate more efficiently if the President could terminate CBAs or CBA provisions when he deemed it necessary for the efficient operations of government. Thus, two separate congressional interpretive directives call for construing the Statute to allow the President to terminate offending CBAs.

Recognizing Presidential—but not agency—authority to abrogate CBAs also avoids the issue that troubled courts in the *Chertoff* litigation. Agencies would remain bound by the CBAs they negotiated unless a higher authority intervened. While the D.C. Circuit did not reach the question, the district court found this permissible:

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[140] Exec. Order 11,838, 3 C.F.R. 957, § 15.

[141] *See* Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers, AFL-CIO v. Austin, 418 U.S. 264, 273 n.5 (1974) (holding that an executive order that comprehensively regulated federal collective bargaining before the Statute's passage was "plainly a reasonable exercise of the President's responsibility for the efficient operation of the Executive Branch").

[142] *See, e.g.*, 5 U.S.C. § 7106.

[143] 5 U.S.C. § 7101(b).

> The Court finds an important distinction between a "government-wide" regulation which might invalidate a contract term and a "Department-wide" regulation. In the latter case, the very entity which committed itself to contract terms has used its discretion to invalidate those terms; in the former case, the actor is outside the scope of the collective-bargaining relationship.[144]

The Statute can be construed to permit the President to terminate CBAs or CBA articles. Under the doctrine of constitutional avoidance, courts should do so, as necessary to avoid major constitutional concerns. This would address all of the constitutional concerns created by irrevocable CBAs. If it is not possible to give the Statute this construction, then courts should declare the components of the Statute that prevent the President from terminating objectionable CBA provisions unconstitutional.

Recognizing this presidential authority would vindicate and reaffirm the President's effective supervision of—and responsibility for—Executive Branch operations. Under this construction, a prior administration's CBAs would only remain in effect if, and to the extent that, the current President finds them acceptable. That in turn would enhance the President's "intended and necessary responsibility" for executing the law. Presidents could no longer aver that agency operations are outside their control. They would instead own the contracts they choose to maintain, as well as those approved by their own appointees. This solution would substantially reduce the potential for union interference with Article II authority.

It makes considerably more constitutional sense to construe the Statute to allow for presidential termination of CBAs than to hold it requires treating as inviolable multi-term CBAs that bind the President to his predecessors' policies and practices. Statutory silence must be interpreted to avoid raising such serious constitutional concerns.

Moreover, very little of the Statute's operations would be impeded by allowing the President to terminate offending CBAs or CBA provisions. In practice, Presidents would rarely terminate contracts they negotiated; this authority would be primarily employed by a newly elected President to eliminate problematic CBA provisions negotiated by a previous administration. It would give an incoming President the opportunity to reset workforce management policies, while other aspects of the Statute would continue unimpeded. And it would properly protect the new

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[144] NTEU v. Chertoff, 385 F. Supp. 2d 1, 36 n.17 (D.D.C. 2005).

President's discretion to pursue the policies of his choice in faithfully carrying out his Article II duties. What would primarily be lost would be an outgoing administration's ability to bind an incoming President to their policies and management practices—precisely the source of the constitutional violation in the first place.

While Presidential termination of CBA articles would entail some disruption for agency workers, the disruption would likely be small when agency CBAs are functioning smoothly. Presidents would likely focus terminations on contracts that obstruct their policies or management approach. The resulting disruption is part of democracy.

Letting federal employees formally weigh in on agency management procedures is constitutionally unproblematic. The constitutional problems arise from letting unions control agency management.

III. THE UNILATERAL CHANGE DOCTRINE IS INCONSISTENT WITH ARTICLE II

An agency cannot change conditions of employment contained in a CBA without union consent. Under FLRA doctrine, the agency cannot unilaterally change any other conditions of employment for unionized employees either. The FLRA holds that agencies must notify unions, offer to bargain, and complete negotiations (including potential impasse proceedings) before substantively changing working conditions. Adjudicators can order any unilaterally implemented changes rescinded. This "unilateral change doctrine" gives unions control over the timing of agency operational changes separate and apart from agency contractual obligations.

The unilateral change doctrine raises serious constitutional concerns, as it gives federal unions co-equal authority to determine the timing of agency operational changes. This power both undermines the President's Article II authority and implicates the private non-delegation doctrine. Moreover, the unilateral change doctrine exists nowhere in the text of the Statute; it is a creation of FLRA case law. Here again, the canon of constitutional avoidance provides a potential means for avoiding constitutional problems.

A. The Unilateral Change Doctrine Lets Unions Control the Timing of Agency Operations

As discussed in Section II, current interpretations of the Statute assume that the President, acting through an agency head, cannot

unilaterally change any working conditions encompassed in a CBA. And even if an agency wants to alter working conditions in ways that do not violate a CBA, it still must give its union an opportunity to negotiate over the change. If the union chooses to bargain the agency cannot make any changes until midterm bargaining concludes.[145] If valid, the unilateral change doctrine can be applied to prevent the President from substantively changing unionized employees' working conditions for years—whether or not the change would contradict anything in the CBA.[146]

Almost all changes to unionized employees' working conditions are held to create a bargaining obligation.[147] Even if the change involves a nonnegotiable management right, agencies must bargain over its impact and implementation. As an example, unions cannot bargain over the substance of employee performance standards or training requirements.[148] But agencies generally cannot change performance standards or training requirements without completing impact and implementation bargaining.[149] FLRA case law is filled with decisions holding agencies violated

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[145] *See* Dep't of the Air Force, Scott Air Force Base, 5 F.L.R.A. 9 (1981) ("[T]he duty to negotiate in good faith under the statute requires that a party meet its obligation to negotiate prior to making changes in established conditions of employment . . . absent . . . a clear and unmistakable waiver of bargaining rights"); *see also* IRS, 19 F.L.R.A. 979 (1985) ("the Respondent violated . . . the Statute by failing to negotiate over the Union's proposals regarding the procedures to be observed and appropriate arrangements for employees adversely affected by an office move prior to the relocation").

[146] Agencies can immediately implement changes when required to do so by a law or a government-wide regulation. They must still undertake impact and implementation bargaining after the fact. *See, e.g.*, U.S. Immigrations and Customs Service and AFGE, 70 FLRA 628, 630 (2018).

[147] The "covered by" doctrine creates an exception to the unilateral change doctrine. If a CBA authorizes an agency to make particular changes, further negotiations are generally not necessary. *See* Dep't of Justice v. FLRA, 875 F.3d 667 (D.C. Cir. 2017).

[148] *See, e.g.*, NTEU v. FLRA, 691 F.2d 553 (D.C. Cir. 1982) (affirming Authority finding that promulgation of performance standards and identification of critical elements was outside the duty to bargain); NTEU, 45 F.L.R.A. 339 (1992) ("right to assign work encompasses decisions as to the type of training to be assigned and the frequency and duration of training").

[149] *See* U.S. Customs & Border Prot., 63 F.L.R.A. 406 (2009) (agency ordered to rescind changes to the amount of remedial firearms training provided to trainees that were made without impact and implementation bargaining); *see also* 56th Combat Support Grp., MacDill Air Force Base, 43 F.L.R.A. 434 (1991) (agency ordered to rescind changes to employee performance plans after implementing them without impact and implementation bargaining).

the law by implementing unilateral changes without completing midterm bargaining. Recent history provides some examples:

Section 714 implementation at VA. VA began using Section 714 authority soon after Congress changed the law. As discussed in Section II.B, dismissing poor performers without PIPs violated VA's CBA. However, Section 714 made other changes to the dismissal process that did not conflict with the contract. AFGE nonetheless grieved VA's use of these Section 714 flexibilities too.[150]

The FLRA ruled that VA could not use Section 714 authority until impact and implementation bargaining concluded.[151] The Biden Administration subsequently agreed to a settlement that provided backpay, and, as applicable, offers of reinstatement or re-promotion, to most unionized employees dismissed, suspended, or demoted using Section 714.[152] The parties agreed employees dismissed for "grievous misconduct" would not be reinstated. However, the settlement still required VA to give even these employees backpay and to purge many of their personnel records.[153]

VA reported the settlement required offering "relief" to nearly 4,200 current and former employees.[154] By early October 2024 the Biden Administration had processed approximately 1,600 of these cases and paid out over $120 million in backpay. Over 500 VA employees received more than $100,000 in backpay, and a handful received more than $300,000.[155] The

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[150] For example, Section 714 shortened the timelines for both misconduct and performance-based removals.

[151] AFGE, Nat'l Veterans Affs. Council, 71 F.L.R.A. 410 (2019).

[152] The Section 714 settlement excluded AFGE represented employees dismissed without PIPs, as they were covered by a separate settlement agreement. *See* Settlement Agreement, *supra*, note 68.

[153] Settlement Agreement between Department of Veterans Affairs & National Veterans Affairs Council, American Federation of Government Employees (July 28, 2023), http://afgenvac.org/wp-content/uploads/2023/08/NG-8-1-2017-Accountability-Act-714-Bargaining-Settlement-Agreement-07-28-2023.pdf. [https://perma.cc/99LB-XWCT]

[154] Letter from Dep't of Veterans Affs. to Sen. Jon Tester, at 2 (Jan. 2023) (regarding Section 714 Accountability Act Update) https://s3.documentcloud.org/documents/23742333/va714lettesterenclos.pdf [https://perma.cc/CQG3-FSP7].

[155] The Department of Veterans Affairs disclosed these facts to the America First Policy Institute through two Freedom of Information Act requests. VA provided 1,644 employees a collective $124.2 million in backpay through October 2, 2024. Of those employees, 512 received more than $100,000 in backpay, including 48 employees who received backpay of

total cost to taxpayers will exceed $300 million if the remaining claims are paid out at the same rate. VA's disciplinary actions were lawful and did not violate any CBA provision. But AFGE could prevent VA from using the Accountability Act until impact and implementation bargaining concluded.

ICE cybersecurity measures. ICE computer systems experienced "daily malware attacks" during the Obama Administration. IT staff determined that "a significant uptick" in malware infections was caused by employees' accessing personal webmail accounts from their work computers. As a result, ICE shut down access to personal webmail accounts (such as Gmail and Hotmail) from work machines. The ICE union grieved, arguing the agency violated the Statute by changing cybersecurity procedures before completing impact and implementation bargaining. An arbitrator ruled the agency violated the Statute, and the FLRA upheld the award.[156]

Border Patrol vehicle inspection policies. The U.S. Customs and Border Protection (CBP) division chief for the El Paso sector found agents were "failing very badly" at detecting fraudulent documents at border checkpoints. At the same time, CBP received specific intelligence that migrants were using fake documents to cross the border.[157] In response, the division chief changed CBP inspection procedures. The new procedures required agents to send vehicles more frequently to secondary inspection areas for more thorough examinations.

The CBP union grieved, arguing CBP could not change working conditions without negotiations. The union argued—and an arbitrator agreed—that the memo changed working conditions by requiring more work of agents assigned to the secondary inspection area.[158] After much litigation, CBP was found to have violated the Statute by changing working conditions before completing negotiations.[159] CBP had to rescind its check-

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between $200,000 and $300,000, and 3 employees who received more than $300,000 in backpay. The highest-grossing employee received $389,126.47 in backpay. However, only 11 of these employees accepted offers of reinstatement.

[156] U.S. Immigr. & Customs Enf't, 67 F.L.R.A. 501 (2014).

[157] U.S. Customs & Border Prot., 70 F.L.R.A. 501 (2018).

[158] *Id.*

[159] U.S. Customs & Border Prot., 72 F.L.R.A. 7 (2021). *See also* Am. Fed'n of Gov't Emps. v. FLRA, 961 F.3d 452 (D.C. Cir. 2020).

point policy changes and return to the bargaining table, and it was forced to maintain the status quo until bargaining concluded.[160]

Federal unions can indefinitely delay any substantive change to their members' working conditions—including the exercise of core management rights—while bargaining proceeds. As a result, the only prompt management changes the agency head can make are those unions support. Unions can always waive their bargaining rights and allow immediate implementation. But if unions oppose a change, they can insist on and drag out negotiations, forcing agencies to maintain the status quo for a year—or longer.[161]

If binding on the President, the unilateral change doctrine would deprive him of significant control over the Executive Branch. It would require him to obtain his subordinates' consent to make rapid changes in bargaining units covered by CBAs. Without such consensus, under the doctrine, any changes must wait a year or more. That means that in the final year of his term, a President would have little or no ability to make changes over union opposition. This state of affairs is hardly consistent with a Constitution that guarantees "the Executive the decision, activity . . . and dispatch that characterise the proceedings of one man."[162]

Congress cannot condition the President's exercise of executive power on internal Executive Branch consensus. Congress could not, for example, prevent the President from acting without the approval of a majority of Cabinet secretaries. For all the reasons that forcing the President to adhere to CBAs can run afoul of Article II, so does the unilateral change

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[160] *See CBP*, 70 F.L.R.A. 501 ("the Arbitrator directed CBP to return to the status quo ante 'until the parties have bargained over the implementation and impact of the changes in conditions of employment proposed under the [inspection memo].'"); *see also CBP*, 72 F.L.R.A. 7 ("we uphold the [arbitrators'] award.").

[161] Midterm bargaining often takes one to two years if negotiations go to impasse and FSIP resolution is required. *See, e.g.*, Nat'l Ass'n of Gov't Emps., Loc. R1-134, and Naval Underseas Warfare, 2022 FSIP 075 (Navy notified union of proposed working conditions in Dec. 2021, impact and implementation bargaining went to impasse and was decided by FSIP in November 2022). *See also* Dep't of State, Passport Servs., Charleston, and NFFE, Loc; 1998, 2019 FSIP 076 (agency began bargaining over alternative work schedules for six employees in June 2018, FSIP decision issued in April 2020); Dep't of the Navy, Portsmouth Naval Shipyard, and Loc. 4, Int'l Fed'n of Pro. & Tech. Eng'rs, 2015 FSIP 114 (2016) (Navy began negotiating a planned office relocation in the spring of 2015; FSIP decision issued in March 2016).

[162] Seila Law v. CFPB, 140 S. Ct. 2183, 2203 (2020) (cleaned up).

doctrine. Perhaps even more so, as it does not provide even the fig leaf of a contractual obligation impeding presidential discretion.

The unilateral change doctrine also straightforwardly violates the private non-delegation doctrine. It gives unions co-equal control with agencies over the timing of operational changes—policies cannot take immediate effect unless both parties agree. Nothing in the Statute subordinates unions to agencies in the exercise of this power. To the contrary, and apart from any contractual obligations, the Statute is interpreted to give unions unreviewable control over the timing of executive changes.

B. A Better Alternative to the Unilateral Change Doctrine

A straightforward remedy exists for the constitutional concerns the unilateral change doctrine raises: the FLRA should narrow the doctrine to allow agencies to implement changes pending the outcome of bargaining. At a minimum, the Statute must be construed to allow the President to make unilateral changes where he determines that the changes are necessary to the exercise of his Article II duties.

The Statute does not expressly require indefinite negotiations before agencies can change working conditions. It simply requires agencies to negotiate with unions "in good faith" and to avoid interfering with employee rights.[163] The FLRA has interpreted these broad obligations to require postponing operational changes until bargaining concludes, no matter how long that takes.[164]

This interpretation is not irrational. Congress modeled the Statute on the National Labor Relations Act (NLRA). The National Labor Relations Board has construed the NLRA's similar good faith bargaining obligation to forbid changing private-sector working conditions until bargaining concludes.[165] The Supreme Court has upheld that interpretation.[166] And the

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[163] 5 U.S.C. §§ 7114(a)(1), 7114(a)(5).

[164] *See Scott Air Force Base*, *supra* note 145. *See also IRS and NTEU*, *supra* note 145.

[165] *Bargaining in good faith with employees' union representative (Section 8(d) & 8(a)(5))*, NAT'L LAB. RELS. BD. https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/bargaining-in-good-faith-with-employees-union-representative (An employer may not change "wages, hours, working conditions, or other mandatory subjects of bargaining before negotiating with the union to agreement or overall impasse").

[166] *See* NLRB v. Katz, 369 U.S. 736 (1962). *See also* Laborers Health & Welfare Tr. Fund v. Advanced Lightweight Concrete Co., 484 U.S. 539, 544 n.6 (1988) ("The Board has determined, with our acceptance, that an employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment.").

FLRA and courts often look to the NLRA for guidance in interpreting the Statute.[167] So reading the unilateral change doctrine into the Statute has some plausibility.

However, it is far from the best reading of the Statute, much less a mandatory one. Congress did not require the FLRA to adopt NLRA doctrines *in toto*. Congress instead provided that the Statute should be interpreted to meet the particular needs of government. Section 7101(b) of the Statute explains:

> It is the purpose of this chapter to . . . establish procedures which are designed to meet the special requirements and needs of the Government. The provisions of this chapter should be interpreted in a manner consistent with the requirement of an effective and efficient Government.[168]

If the unilateral change doctrine makes the government significantly less efficient—much less if it violates the Constitution—the FLRA could narrow it. For example, the courts or the FLRA could hold that the Statute only requires agencies to give unions reasonable advance notice of proposed operational changes and offer to enter into good faith bargaining during that period. If negotiations take longer than a reasonable but limited period (e.g., 30 days), however, courts or the FLRA should hold the agency can at that point unilaterally implement its proposal while further bargaining proceeds post-implementation. If those post-implementation negotiations produce changes to the policy at issue, agencies could provide (or FSIP could order) applicable retroactive make-whole relief.

This agency-change-with-reasonable-advance-notification approach is more consistent with Congress's directive for interpreting the Statute than is the FLRA's existing unilateral change doctrine. Forcing agencies to postpone changes indefinitely during bargaining prevents them from reacting flexibly to changing circumstances—such as fraudulent border documents or emerging cyber threats. That makes government less effective and efficient.[169]

This approach also reflects important differences between the federal and private sectors. Private-sector unions have strong incentives to

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[167] Libr. of Cong. V. FLRA, 699 F.2d 1280, 1287 (D.C. Cir. 1983) ("the structure, role, and functions of the [FLRA] were closely patterned after those of the NLRB and [the] relevant precedent developed under the [National Labor Relations Act] is therefore due serious consideration").

[168] 5 U.S.C. § 7101(b).

[169] 5 U.S.C. § 7101(b).

negotiate quickly. Their members cannot get pay increases until bargaining concludes. Private unions also pay their negotiators' salaries. Federal unions face no such incentives. Most federal unions cannot negotiate pay.[170] The Statute also requires giving union negotiators official time; federal unions bargain on the agency's dime.[171] So unlike in the private sector, it costs federal unions nothing to drag out negotiations over changes they dislike. Putting a time limit on the unilateral change doctrine recognizes this difference between the two sectors—as Congress intended.

Moreover, putting time limits on the unilateral change doctrine would still realize the policy benefits Congress sought. Agencies would continue to seek employee input and have time for meaningful negotiations. Some agencies and unions have established similar limits on midterm bargaining voluntarily. For example, the SSA contract requires midterm bargaining to begin approximately 30 days after the agency notifies the union of a proposed change, and limits negotiations to 3 workdays.[172] Agencies could also voluntarily delay implementation if they felt negotiations were progressing. Cabining the unilateral change doctrine would primarily prevent unions from thwarting important operational improvements by dragging out negotiations. That is fully consistent with the purposes Congress sought to achieve in the Statute.

The doctrine of constitutional avoidance supports this more narrow interpretation of good faith bargaining obligations. Construing the Statute, as FLRA has done, to give unions broad power to indefinitely delay agency operations changes at-will is constitutionally problematic. As VA's experience attempting to implement the Accountability Act demonstrated, it transfers power from the President to unions to determine how the law will be carried out.

Limited pre-implementation negotiations do not raise the same constitutional issues. If negotiations were expeditious, or bargaining continued after implementation, the President's power to execute the law would be largely unimpeded. The timing and, through FSIP, the substance

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[170] 5 U.S.C. § 7103(a)(14).

[171] 5 U.S.C. § 7131(a).

[172] NATIONAL AGREEMENT BETWEEN THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES (AFGE) AND SOCIAL SECURITY ADMINISTRATION, art. 4, § 2 (2019), https://www.opm.gov/cba/api/documents/d4ec2ca4-3402-4171-ac8a-90a1a4be8c83/attachments/SSA%20AFGE%202019%20CBA.pdf.

of operational changes would remain under presidential control.[173] The doctrine of constitutional avoidance thus calls for avoiding significant constitutional questions by interpreting good faith bargaining obligations more narrowly.

The D.C. Circuit has explained that the NLRA's relevance to interpreting the Statute "will vary greatly depending upon the particular statutory provisions and legal concepts at issue."[174] Where importing an NLRA doctrine in toto would raise serious constitutional concerns in the agency context or would contravene an express congressional interpretive directive, and where the private and federal sectors function quite differently, the FLRA can modify NLRA doctrines to "meet the special requirements and needs of the Government."[175] Allowing agencies to make unilateral changes after a few weeks of midterm bargaining is a better and more constitutionally sound construction of the Statute.

Cabining the unilateral change doctrine is also necessary for the remedy suggested in Section II.F to be effective. The FLRA has interpreted the Statute to require agencies to adhere to the terms of expired CBAs—even in the absence of continuance provisions—until the agreement gets renegotiated.[176] Allowing the President to terminate CBAs that interfere with his authority or to repudiate offending provisions in CBAs would do little if agencies had to follow the problematic CBAs throughout years-long negotiations. The saving construction suggested in Section II can only be effective if the unilateral change doctrine is also narrowed. Accordingly, even if the FLRA's current unilateral change doctrine continued to apply to agency-initiated changes, the President must be permitted to make direct changes in CBA provisions that he believes are necessary to his ability to carry out effectively his executive authority.

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[173] In practice, many agency changes cannot take time to implement. Limited negotiations would consequently have little meaningful effect on the time it takes to implement most operational changes.

[174] Libr. of Cong., 699 F.2d 1280, 1287 (D.C. Cir. 1983).

[175] 5 U.S.C. § 7101(b).

[176] Merit Sys. Prot. Bd., Prof. Ass'n, 30 F.L.R.A. 852 (1988) ("Provisions concerning matters over which an agency is required by the Statute to bargain continue to bind the agency after expiration of the agreement in the absence of an express agreement to the contrary or a modification of those provisions in a manner consistent with the Statute . . . . However, neither party is required, upon an agreement's expiration, to continue adherence to provisions concerning matters which are negotiable only at the election of either party.").

IV. THE CONSTITUTION DOES NOT ALLOW UNIONS TO CONTROL CBA CONTENTS

Unions' power to bind agencies to CBA provisions and to prohibit unilateral changes gives them considerable executive power. Their ability to completely block some changes to CBAs are also effectively a form of federal rulemaking power—something private parties cannot possess.

While styled as contracts, CBAs legally function as agency regulations. They take precedence over conflicting agency regulations and—while they remain in effect—prevent implementing conflicting government-wide rules or regulations.[177] As discussed in Section VII.A, *infra*, ordinary contracts do not have this effect.

The private non-delegation doctrine prohibits private entities from possessing rulemaking power.[178] A third party can of course recommend or propose government regulations. But final control over the content of those regulations must rest with a federal agency. As the D.C. Circuit has explained, "Congress may formalize the role of private parties in proposing regulations so long as that role is merely as an aid to a government agency that retains the discretion to approve, disapprove, or modify them."[179]

At first glance, the role of unions in developing CBAs appears to follow this rule. Unions can propose CBA provisions, but they only take effect if an agency accepts them at the bargaining table or if presidentially appointed FSIP members impose them at impasse. The Statute expressly states that agencies are not forced to agree to union proposals or make concessions.[180] Conversely, if an agency wants certain terms, it can insist on them in bargaining and ask the President's FSIP appointees to impose them. One of President Trump's executive orders essentially directed agencies to

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[177] *See Fort Campbell District*, *supra* note 50; 5 U.S.C. § 7116(a)(7).

[178] Agency rulemaking superficially seems to be an exercise of delegated legislative power. However, as the Supreme Court has often explained, rulemaking is actually executive discretion within legislated boundaries. *See* City of Arlington v. FCC, 569 U.S. 290, 305 n.4 (2013) ("[Agency] activities take 'legislative' and 'judicial' forms, but they are exercises of—indeed, under our constitutional structure they must be exercises of—the 'executive Power.'"). Thus, to the extent unions exercise regulatory authority, they do so as an exercise of delegated executive, not legislative, power.

[179] Ass'n of Am. Railroads v. Dep't of Transp., 721 F.3d 666, 671 (D.C. Cir. 2013) (cleaned up).

[180] 5 U.S.C. § 7103(a)(12).

do just that.[181] Agencies are allowed to engage in "hard bargaining" and may refuse to make concessions.[182] Unions appear wholly subordinate to agencies throughout the bargaining process, ultimately serving in a purely advisory role.

This analysis is incomplete. Agencies and FSIP do have significant control over CBA contents, but not complete control. Some provisions can only be included in CBAs with union consent. And agencies' obligation to bargain in "good faith" has been interpreted to prohibit agencies from making—or FSIP from imposing—provisions unions vehemently oppose. As a result, unions possess decisional control over whether some provisions can be incorporated into CBAs. Such control amounts to an unconstitutional exercise of rulemaking power.

A. Grievance Exclusions

The Statute requires CBAs to include grievance and arbitration procedures. The Statute specifically excludes some subjects from grievance arbitration, such as violations of the Hatch Act or position classifications. The parties can also negotiate to exclude additional matters from grievance procedures.[183] So it may appear that an agency that wishes to exclude a subject from grievance arbitration can make that proposal, insist on it in negotiations, and, if the union refuses to agree, ask FSIP to impose it at impasse.

However, the FLRA and the D.C. Circuit have interpreted the Statute to put the burden of proof on agencies seeking to remove subjects from grievance procedures. The agency must "establish convincingly" that the grievance exclusion is reasonable.[184] FSIP cannot exclude matters unless agencies meet this burden. In practice, this process means agencies generally cannot remove subjects from grievance arbitration without union consent.

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[181] Exec. Order 13,836, *Developing Efficient, Effective, and Cost-Reducing Approaches to Federal Sector Collective Bargaining*, 83 Fed. Reg. 25329 (May 25, 2018).

[182] AFGE, Loc. 148, 11 F.L.R.A. 639, 642 (1983) ("the mere fact that [the agency] was not persuaded to change its position during the negotiations, as set forth above, does not constitute a showing of bad faith.").

[183] 5 U.S.C. § 7121.

[184] AFGE v. FLRA, 712 F.2d 640, 649 (D.C. Cir. 1983) ("We would expect the Panel . . . to rule against a proponent of a limited [grievance] procedure who fails to establish convincingly that, in the particular setting, its position is the more reasonable one").

A prominent example of this process happened during the Trump Administration. Grievance arbitration is a very sympathetic forum for employees who are contesting dismissals. Arbitrators reinstate employees in three-fifths of cases they hear—more than twice the rate of the Merit Systems Protection Board.[185] This outcome can make dismissing unionized employees very challenging, even for grievous misconduct.[186] President Trump addressed this problem with Executive Order 13,839. Among other reforms, this order told agencies to propose removing dismissals from their grievance procedures. If the union disagreed, the order told the agencies to go to FSIP.[187] President Trump also appointed what a union blog described as the "labor relations equivalent of an MS-13 hit team" to serve on FSIP.[188]

Nonetheless, FSIP consistently declined to remove dismissals from CBA grievance procedures.[189] Panel members—presumably sympathetic to the President's policies—repeatedly found agencies had not presented strong enough arguments to meet the high burden of proof. Without strong evidence, the Administration was unable to carry out the President's policy.

The Statute thus gives unions effective decisional control over what subjects are excluded from grievance arbitration. Agencies can remove any subject with union consent. But if unions want to retain grievance arbitration of a matter, agencies and FSIP must clear a high bar to overcome their opposition.

B. Surface Bargaining Prohibited

The interpretation some arbitrators have given "good faith" bargaining obligations also empowers unions to veto bargaining proposals they vehemently oppose. Agencies do not have to make specific con-

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[185] Sherk, *supra* note 7, at 5.

[186] *See, e.g.*, JAMES SHERK, TALES FROM THE SWAMP: HOW FEDERAL BUREAUCRATS RESISTED PRESIDENT TRUMP, at 24 (Sept. 10, 2023), https://americafirstpolicy.com/issues/20222702-federal-bureaucrats-resisted-president-trump [https://perma.cc/5HGU-A5SQ] (recounting how the Department of Labor did not attempt to remove an investigator who sent sexually harassing text messages and pictures of his genitals to an individual he was investigating, using his work phone, in part because the investigator was unionized and career staff believed the union would protect him).

[187] *See* Exec. Order 13,839, § 3, *Promoting Accountability and Streamlining Removal Procedures Consistent With Merit System Principles*, 83 Fed. Reg. 25343, 25344 (June 1, 2018).

[188] *Another Presidential Blunder Handcuffs Agency Managers*, FEDSMILL (Aug. 6, 2017), https://fedsmill.com/stump/. [https://perma.cc/T29H-GF7L]

[189] *See, e.g.*, Dep't of Homeland Sec., Fed. L. Enf't Training Center & NTEU, 20 FSIP 056, at 9 (Nov. 17, 2020).

cessions, and they are free to reject specific union proposals. However, bargaining without intending to reach mutual agreement is considered "surface bargaining"—an unfair labor practice (ULP).[190] Consequently, agencies cannot simply propose terms they know union negotiators will not accept, bargain to impasse, and ask FSIP to impose those provisions. Many arbitrators consider proposing and insisting on dramatic concessions surface bargaining because the union could not be expected to voluntarily agree to them. Similarly, offering "regressive" proposals flatly unacceptable to a union can constitute bad faith bargaining. Unions can file ULP charges and force agencies to rescind such bargaining proposals. Unions did so during both the Trump and Biden Administrations.

During the Trump Administration, SSA proposed reducing official time subsidies for its administrative law judge (ALJ) union 85 percent. Bargaining hit impasse and went to FSIP, which reduced official time by 91 percent.[191] The union filed a ULP grievance charging the agency with bad faith bargaining.

The arbitrator found SSA's proposed official time reductions were "excessive." He concluded "the extremely low proposal" was "a clear example of surface bargaining" and stated "[o]ne must ask why would the Union even entertain such an offer[?]"[192] The arbitrator imposed a status quo ante remedy, nullifying the FSIP-imposed articles and ordering the parties to restart negotiations.[193] Another arbitrator concluded it was bad faith surface bargaining for the Department of Housing and Urban Development to stick to proposals ending official time for processing

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[190] Soc. Sec. Admin., 18 F.L.R.A. 511 (1982) ([the agency] "had no intention of arriving at any agreement . . . these meetings constituted surface bargaining . . . violative of Section 7116(a)(5) and (1) of the Statute").

[191] The Association of Administrative Law Judges represents 1,200 non-management ALJs. SSA proposed reducing official time grants in the bargaining unit from 14,000 hours annually—on a per capita basis, one of the highest rates of any bargaining unit in government—to 2,000 hours annually. Negotiations hit impasse, and FSIP awarded 1,200 hours of official time annually. *See* Opinion and Award, John T. Nicholas, Soc. Sec. Admin. and Ass'n of ALJs, F.M.C.S. Case No. 190827-10408, at 1, 14, 25 (May 17, 2021), https://cdn.govexec.com/media/gbc/docs/pdfs_edit/052021ew2.pdf. [https://perma.cc/WCW6-S38D]

[192] *Id.* at 33.

[193] *Id.* at 37.

grievances, as there was no possibility the union would accept such limits.[194]

VA met a similar fate in the Biden Administration when it proposed allowing Section 714 dismissals without PIPs. Biden's VA prioritized this proposal and stuck to it in negotiations. AFGE responded by filing a grievance. An arbitrator concluded that VA's "regressive" proposal that would "remove longstanding provisions of the agreement" and "'take it' or 'leave it' conduct" was evidence of bad faith surface bargaining.[195] The arbitrator ordered VA to rescind its proposal to eliminate PIPs and restart negotiations.[196] Shortly afterward VA agreed to retain the prior contract language requiring 90-day PIPs.[197] About the same time VA also announced it would stop using Section 714 authority altogether.[198]

FSIP and agencies do not have the final say over CBA contents. Agencies cannot simply bargain to FSIP and ask presidential appointees to give them what they want. Unions can instead compel agencies to withdraw "regressive" bargaining proposals and even FSIP-imposed articles. Unions also largely decide which subjects can be excluded from grievance arbitration. Agencies thus lack "the final word on the substance of the rules" that the private non-delegation doctrine requires.[199] Unions, rather, exercise an "effective veto over regulations developed by" agencies, which is inconsistent with the Constitution.[200]

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[194] Opinion and Award, AFGE Council 222 and Dep't of Hous. & Urb. Dev., F.M.C.S. Case No. 200310-04768, at 39–42 (Mar. 28, 2021), https://afgecouncil222.com/G/20gopoftdurtermnegarbd.pdf [https://perma.cc/T8HF-7C3Z].

[195] Opinion and Award, AFGE Nat'l Veterans Affs. Council & Dep't of Veterans Affs., F.M.C.S. Case No. 220624-07115, at 30–34 (Mar. 9, 2023), https://www.afge.org/globalassets/documents/nvac/va--afge-220624-07115-award.pdf. [https://perma.cc/8UGY-D9U9].

[196] *Id.* at 37.

[197] News Release, American Federation of Government Employees, Major Victory: AFGE, VA Agree to Roll Over Largest Union Contract in Government (Apr. 10, 2023), https://www.afge.org/article/major-victory-afge-va-agree-to-roll-over-largest-union-contract-in-government/.

[198] Eric Katz, VA will no longer use its marquee civil service law to punish employees, GOV'T EXEC. (Mar. 24, 2023), https://www.govexec.com/pay-benefits/2023/03/va-will-no-longer-use-its-marquee-civil-service-reform-law-punish-employees/384419/. [https://perma.cc/N9S9-2QTF]

[199] Oklahoma v. United States, 62 F.4th 221, 230 (6th Cir. 2023).

[200] Ass'n of Am. Railroads v. Dep't of Transp., 721 F.3d 666, 671 (D.C. Cir. 2013).

C. Union Control Over CBA Contents Should Not Be Read into the Statute

Interpreting the Statute to allow unions to veto CBA provisions is not only a violation of the private non-delegation doctrine; it is also a bad reading of the law. The statutory obligation to bargain in good faith does not require the parties to seek mutual consensus. It only requires them "to approach the negotiations with a sincere resolve to reach a collective bargaining agreement."[201] FSIP impasse proceedings are part of the Statute, and FSIP-imposed articles are part of a CBA.[202] If either party thinks that FSIP will give them a better deal than the other side offers, refusing concessions and sending the dispute to FSIP helps reach a CBA. The resulting CBA may include provisions one party finds unacceptable, but the Statute contemplates that. It expressly provides that the parties do not have to "agree to a proposal or to make a concession."[203]

The arbitral awards that treat "regressive" proposals or surface-bargaining-to-FSIP as bad faith are divorced from the text of the Statute. Moreover, the FLRA has not endorsed the view that "regressive" proposals violate good faith bargaining obligations—arbitrators have grafted that interpretation into their analysis. But because "bad faith" bargaining is highly dependent on context, and the FLRA must defer to arbitrators' interpretation of the facts, those rulings are hard to challenge.

The FLRA could easily eliminate constitutional concerns with this aspect of the Statute by holding that only conduct that seeks to prevent a CBA from being negotiated—such as refusing to meet for negotiations—violates good faith bargaining obligations. While mutual consensus is often desirable, the parties should not be forced to seek it.

Similarly, the Statute says nothing about the burden of proof at FSIP for grievance exclusions. The FLRA imposed this requirement as a matter of policy, and the D.C. Circuit deferred to the Authority's interpretation.[204] The D.C. Circuit concluded that the FLRA's policy rested on a permissible—not a mandatory—construction of the Statute.[205]

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[201] 5 U.S.C. § 7114(b)(1).

[202] *See* AFGE, Locs. 225, 1504, & 3723 v. FLRA, 712 F.2d 640, 646 n.24 (D.C. Cir. 1983). ("[A] Panel-imposed settlement, once adopted by the parties, should be regarded as part of a 'collective bargaining agreement.' . . . [T]he Act apparently assumes here, as elsewhere, that a Panel resolution is to be treated as part of an 'agreement.'").

[203] 5 U.S.C. § 7103(a)(12).

[204] *AFGE v. FLRA*, 712 F.2d at 649.

[205] *Id.*

If a statutory interpretation raises serious constitutional concerns, then it must be abandoned in favor of any other permissible interpretation that avoids those concerns. Statutory silence should not be interpreted to infringe impermissibly on the President's Article II authority. The FLRA or the courts should hold that FSIP has full discretion over grievance exclusions. This result would give the presidentially appointed FSIP—not unappointed union officers—control over what grievance procedures cover. Doing so would eliminate Article II concerns with union authority over these matters and would be consistent with the text of the Statute. Such a holding does not require striking down a word of the Statute.

V. THE POWER GRANTED TO FEDERAL UNION OFFICERS VIOLATES THE APPOINTMENTS CLAUSE

As explained in Section I, the Supreme Court has held that an individual who occupies a continuing position under law to which is delegated significant authority pursuant to the laws of the United States is an officer of the United States for Appointments Clause purposes.[206] Senior federal union officers meet these requirements. Thus, unless courts construe the Statute to reduce union power, senior union officers must be appointed consistently with the Appointments Clause—something the Statute expressly forbids.[207]

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[206] Lucia v. SEC, 138 S. Ct. 2044, 2051 (2018).

[207] In its recent *Horsemen's II* decision, the Fifth Circuit rejected an Appointments Clause challenge to the enforcement powers of the Horseracing Authority based on the view that the requirements of the private non-delegation doctrine and the Appointments Clause "appear mutually exclusive" and the latter will apply only to entities that qualify as "governmental" under the Supreme Court's analysis in *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995). *See* Nat'l Horsemen's Benevolent & Protective Ass'n v. Black (*Horsemen's II*), 107 F.4th 415, 437 (5th Cir. 2024). But the Court in *Lebron* decided only that Amtrak is a governmental entity for First Amendment purposes; it did not address the applicability of the Appointments Clause. A position in a non-governmental entity may still constitute an "office" for Appointments Clause purposes if the position is "continuing" in nature and is "invested by legal authority with a portion of the sovereign powers of the federal government." *Officers of the United States*, *supra* note 36 at 73–74; *see also id.* at 96–98, 117–22 (explaining that officers of the United States for Appointments Clause purposes may include individuals who are not employed by an entity of the federal government).

A. Union Officers Occupy Continuing Positions Under Law

Federal union officers occupy continuing positions, as provided for in the Statute. Under the Statute, certified bargaining representatives remain employees' representatives indefinitely.[208] Unions' statutory duties are ongoing and continuous, not temporary or time-limited. The law further requires federal unions to elect officers to perform these duties (or supervise subordinate union officials who perform them).[209] Federal law extensively regulates the process of selecting and removing these union officers. By law, local union officers must be elected by a secret ballot vote of members for a term of no more than three years. National union officers must be chosen by either a secret ballot vote of members or by a convention of delegates chosen by secret ballot for a term of no more than five years.[210]

Union offices also continue irrespective of who happens to fill them. For example, when AFGE President David Cox resigned in 2020 amidst allegations of sexual harassment and corruption, he was succeeded as President by AFGE's National Secretary-Treasurer, Everett Kelley. Union officers thus fill continuing positions provided for by statute with regular and ongoing responsibilities.

Further, the union officers who exercise these statutory responsibilities are typically federal employees paid to perform these functions. The Statute requires agencies to give union representatives "official time" to perform union business during duty hours.[211] Agencies must provide official time for CBA negotiations, and unions can negotiate additional time for other purposes, such as processing grievances.[212]

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[208] A union generally remains certified as an exclusive bargaining representative unless the union members affirmatively vote to decertify it.

[209] The Statute generally requires federal unions to follow the procedures required of private-sector unions under the Labor-Management Reporting and Disclosure Act (LMRDA), which includes electing officers to run the union. The Statute incorporates by reference the LMRDA definition of a union officer: "[A]ny constitutional officer, any person authorized to perform the functions of president, vice president, secretary, treasurer, or other executive functions of a labor organization, and any member of its executive board or similar governing body." *See* 5 U.S.C. §§ 7120(a)(1), (d); 29 U.S.C. §§ 402(n), 481; 29 C.F.R. § 458.29.

[210] *Id.*

[211] 5 U.S.C. § 7131.

[212] *Id.*

In fiscal year 2019 agencies paid $135 million for more than 17,000 employees to spend 2.6 million hours on official time.[213] Many federal employees perform solely union business. In the Department of Veterans Affairs alone, approximately 500 employees hold nominal agency jobs but work full time as union officers and representatives.[214]

Local and council union officers are agency employees who perform statutory duties for fixed terms in positions provided for by law in agency buildings, during duty hours, for which they are by law compensated.[215] These attributes easily satisfy the "continuing position" criteria for officer status under the Appointments Clause.

B. Union Officers Exercise Significant Authority Pursuant to Law

Union officers also exercise "significant authority pursuant to law" for the same reasons the Statute violates the private non-delegation doctrine. The Appointments Clause violation is the flip side of the non-delegation violation.[216]

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[213] U.S. OFF. OF PERS. MGMT., TAXPAYER-FUNDED UNION TIME USAGE IN THE FEDERAL GOVERNMENT: FY 2019 (2020).

[214] *See* VA News Release, *supra* note 121. Note that the Trump Administration rescinded authorization for VA medical personnel to work on official time, but the Biden Administration reversed that directive.

[215] Federal unions do elect national officers whose salaries are paid by union dues, not agencies. However, these officers primarily focus on internal union administration, politics and lobbying, litigation, and high-level strategy. They typically do not wield authority over agencies. Instead, local or council union officers perform the nuts-and-bolts work of negotiating CBAs and enforcing their terms. These officers are almost exclusively federal employees on official time.

[216] The Fifth Circuit's decision in *Horsemen's II* holding that private non-delegation and Appointments Clause violations are mutually exclusive rests on a misreading of *Lebron*. *Horsemen's II* interpreted that case to set forth a three-part test that a corporation must satisfy to be considered part of the government for constitutional purposes. *See Horsemen's II*, 107 F.4th 415, 436–39 (5th Cir. 2024). But *Lebron* merely decided that passing this test was sufficient to render an entity governmental; the court made it clear that these were not necessary conditions. One of the prongs of the *Lebron* test is whether an entity is created by special law. *See* 513 U.S. 374, 397 (1995). *Lebron* observed that *Pennsylvania v. Board of Directors of City Trusts of Philadelphia*, 353 U.S. 230 (1957), held a private trust a governmental actor for constitutional purposes; the Court reasoned the case for governmental status was even stronger when a corporation was specifically created by federal law. *See Lebron*, 513 U.S. at 397. Under the Fifth Circuit's reasoning, *Lebron* implicitly overruled *Pennsylvania*; however, the decision actually approvingly cited it. Moreover, applying the *Lebron* test to the Appointments Clause would render that Clause a tautology. Another

The Department of Justice's Office of Legal Counsel (OLC) has explained that "significant authority" for Appointments Clause purposes means "power lawfully conferred by the government to bind third parties, or the government itself, for the public benefit . . . . [S]uch authority primarily involves the authority to administer, execute, or interpret the law."[217] This description aptly captures senior union officers' authority under the Statute. They negotiate mandatory rules of agency procedure that bind the government and significantly affect the administration of most federal laws. The Statute gives union officers this authority to "safeguard the public interest."[218]

The Supreme Court's Appointments Clause jurisprudence finds it constitutionally significant when positions exercise "independent authority" or issue decisions with "independent effect."[219] It is also relevant if a position entails "significant discretion."[220] Senior union officers possess independent and discretionary authority over agency operations in at least three ways[221]

First, senior union officers independently decide if agencies can modify policies contained in CBAs. As explained in Section II, *supra*, agencies need union consent to change CBA terms or implement conflicting government-wide regulations before a contract expires. Union officers have authority to approve or block changes to most workforce policies for seven to ten years (or longer). This ability is revealed in large matters, like AFGE's

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prong of the *Lebron* test is whether the government controls a corporation's leadership. The Court concluded Amtrak was governmental in part because the President appointed its directors. But whether the President appoints an entity's leaders cannot be the test for whether the Appointments Clause applies. The purpose of an Appointments Clause test is to determine whether the President (or an agency head) must make appointments; concluding that the Appointments Clause does not apply because Congress has given appointing authority to someone else would render the Clause a dead letter. The Supreme Court has accordingly never suggested that *Lebron* provides the exclusive test for the scope of the Appointments Clause.

[217] *Officers of the United States*, *supra* note 36, at 87.

[218] 5 U.S.C. § 7101(a)(1)(A).

[219] Freytag v. Commissioner, 501 U.S. 868, 882 (1991); Lucia v. SEC, 138 S. Ct. 2044, 2053 (2018).

[220] *Lucia*, 138 S. Ct. at 2047–48.

[221] OLC similarly considers a position's intrinsic legal authority relevant for Appointments Clause analysis, holding that an office "must include some continuing legal authority, as opposed to simply existing to assist someone who does have legal authority[.]" *Officers of the United States*, *supra* note 36, at 118.

EPA contract designed to stymie a re-elected President Trump. It also applies to the mundane details of agency administration.

For example, VA wanted to limit the "area of consideration" for promotions to GS-7 Patient Aligned Care Team (PACT) nurses to lower-graded PACT nurses. Doing so would give incumbent PACT nurses priority consideration. However, VA's CBA with AFGE required facility-wide areas of consideration. VA needed permission from senior AFGE officers to use the agency's preferred area of consideration.[222] VA officials sought this permission over e-mail, repeatedly asking AFGE officers "what is the final word" and stating that "we need a call" and "the service is eager to move forward."[223] Because union officers have independent control over matters covered by existing CBAs, VA needed their permission to change its internal promotion procedures.

Second, as covered in Section III, the unilateral change doctrine gives union officers independent control over the timing of agency operational changes, regardless of whether the proposed change conflicts with the CBA. A union president can freeze most proposed changes by insisting on negotiations, even if the subject of the proposed change is not covered by the CBA. If an agency wants changes the local union president supports (like transitioning to remote work during the pandemic), the changes can take immediate effect. If an agency wants changes the local union president opposes (like returning employees to in-person work after the pandemic is over), nothing can happen until midterm bargaining concludes a year or more later. The Statute has been construed to give union officers independent discretionary authority over the timing of agency operational changes.

Third, the Statute has been interpreted to give union officers independent discretionary authority to authorize or prohibit agencies from

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[222] The America First Policy Institute obtained e-mails exchanged between Oscar Williams, 2nd Executive Vice President of AFGE's National VA Council, Debra Cook-Rice, President of AFGE Local 2207, and Elizabeth Shotwell, a labor relations specialist for the Department of Veterans Affairs, through a Freedom of Information Act request. The full e-mail exchange can be provided by the authors upon request.

[223] E-mail from Elizabeth Shotwell to Oscar Williams on (Aug. 15, 2023) ("Please respond if this deviation from the contract 1st AOC (facility wide) is acceptable and can be accomplished without a grievance from AFGE."); e-mail from Elizabeth Shotwell to Oscar Williams (Aug. 24, 2023) ("so what's the final word on the AOC for the posting? PACT only? PACT and Specialty?"); e-mail from Elizabeth Shotwell to Debra Cook-Rice (Aug. 24, 2023) ("We need a call on the AOC for the PACT LPN posting"); e-mail from Elizabeth Shotwell to Debra Cook-Rice (Aug. 28, 2023) ("Any word on this AOC for this posting? The service is eager to move forward.").

making some modifications to CBAs during renegotiations. As discussed in Section IV, *supra*, agencies' good faith bargaining obligation means union officers can unilaterally block some "regressive" CBA terms, such as eliminating PIPs at the VA. In addition, agencies and FSIP generally cannot exclude matters from binding arbitration (such as grievances over removals) without union officers' consent.

Independent and discretionary authority over agency administration is "significant authority" for Appointments Clause purposes. Notably, control over the substance and timing of CBA changes is a form of rulemaking power because the contracts "take precedence" over conflicting government regulations.[224] The Supreme Court has expressly held that only constitutional officers can wield rulemaking authority.[225]

C. Officer Status Depends on Union Duties

For the reasons described above, senior federal union officers meet the Appointments Clause test for officer status: they are federal employees who exercise significant administrative and rulemaking authority in continuing positions as provided for in federal law. Indeed, many senior union officers are likely "principal officers" under the Constitution—officers who can only be appointed by the President with Senate consent.

The hallmark of a principal officer is unreviewable authority.[226] Senior union officers have the power to exercise final and unreviewable authority over particular agency operations. In these instances, no Executive Branch official supervises or can countermand the decisions of union officers to prevent government-wide rules from taking effect before a CBA expires. No one can overturn their decisions to exclude "regressive" bargaining proposals from CBAs, or to require potentially protracted midterm bargaining before effectuating operational changes. Consequently, the union officers who exercise this unreviewable executive authority are likely principal officers. If so, they require appointment by the President with Senate consent to perform their statutory duties.

At the same time, many union officers are likely not constitutional officers at all. Any official authorized to exercise the union's statutory authority—such as deciding whether the union will waive its bargaining

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[224] *Fort Campbell District*, 37 F.L.R.A. at 194.

[225] Buckley v. Valeo, 424 U.S. 1, 138–41 (1976).

[226] United States v. Arthrex, Inc., 141 S. Ct. 1970, 1985 (2021) ("Only an officer properly appointed to a principal office may issue a final decision binding the Executive Branch.").

rights or agree to an agency proposal—is likely a constitutional officer. This sphere encompasses virtually every local and regional union president. Other members of the executive board, such as union vice presidents, secretaries, and treasurers, could be officers if the union has assigned them the responsibility to exercise the powers conferred on the union under the Statute (as interpreted by the FLRA). If those powers are reserved to the union President and the other union officers perform purely internal union business—such as union bookkeeping—they would not be constitutional officers. Subordinate union officials, such as stewards who receive complaints and process grievances, do not exercise meaningful authority over agencies under the Statute and cannot be considered officers.

D. Clarifying the Constitutional Violation

Appointments Clause analysis shows senior federal union officers are likely principal officers who must be appointed by the President with Senate consent. However, the Statute expressly forbids giving these union officers constitutionally conforming appointments. Under the law, they must be elected by federal employees, not appointed by the President.[227]

Analyzing union power through the lens of Vesting Clause and Take Care Clause precedents and the private non-delegation doctrine shows the Statute gives federal unions unconstitutional authority. Appointments Clause analysis points to the same conclusion. The fact that three separate constitutional doctrines produce this common result reinforces the conclusion that parts of the Statute are constitutionally defective.

Appointments Clause analysis also clarifies the constitutional violation. The Supreme Court has allowed some congressional restrictions on presidential executive authority but has not clearly indicated how far Congress can go.[228] Nonetheless, the Supreme Court has repeatedly held that, if Congress creates ongoing positions with significant authority over government operations, those positions must be filled pursuant to the Appointments Clause. The Statute creates positions with such significant authority without providing for valid appointments; this omission is a constitutional defect.

The Statute's unconstitutionality can be easily seen by considering how courts would evaluate an analogous position with authority over

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[227] 5 U.S.C. §§ 7120(a)(1), 7120(d).

[228] This is in part because the Supreme Court now evaluates separations of powers violations through a formalist, not functionalist, analysis, but has yet to overturn many of the prior functionalist precedents.

agency rulemaking. Consider a law requiring each agency to have a "regulatory change authorizer." Agencies could not modify regulations after issuance for seven to 10 years without this official's approval. This official could also unilaterally veto some regulatory proposals and could delay sub-regulatory guidance for one to two years in his or her discretion. The position would be filled by a federal employee, paid to perform these duties during working hours, who would serve a renewable fixed term. These attributes easily satisfy the requirements of an office, and courts would require the "regulatory change authorizer" to be appointed pursuant to the Appointments Clause.

Senior federal union officers have essentially identical attributes, except that they have significant authority over agencies' internal rules of operation instead of externally binding regulations. This distinction does not cure the constitutional violation.[229] Congress can create paid positions with independent discretionary authority over agency operations, but those positions are constitutional offices subject to the Appointments Clause. To comply with the Appointments Clause senior union officials must either be appointed by the President, with Senate consent, or they must lose their decisional authority over agency operations. What they cannot do is exercise independent managerial control over the Federal workforce without a constitutionally valid appointment.

E. Union Contracts Cannot Take Precedence Over Agency Regulations

Applying the canon of constitutional avoidance in the ways suggested in Sections II through IV would remove much—but not all—of the "significant authority" senior union officers wield. Doing so would end the control over operational timing that the unilateral change doctrine gives union officers, prevent CBAs from binding the President, and give FSIP full control over contract articles that go to impasse. Although that would put executive management under full presidential supervision, § 7116(a)(7) of the Statute would still give union officers significant rulemaking authority.

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[229] If anything, union officers' role in Executive Branch operations makes their role even more unconstitutional. Giving a third-party discretionary authority over external agency regulations can be seen as Congress's requiring an external factual predicate to be met before an exercise of its Article I legislative power becomes effective. Giving a third-party discretionary authority over internal Executive Branch operations, however, affirmatively restricts the exercise of the President's inherent Article II executive power. It cannot be justified as a limited use of Article I authority. See the discussion in Section VII.B, *infra*.

Since only constitutional officers can wield rulemaking authority, curing the Appointments Clause violation likely requires invalidating § 7116(a)(7).

Section 7116(a)(7) prohibits agencies from implementing any rule or regulation that conflicts with an existing CBA so long as the contract remains in effect. As discussed in Sections II.A and B, this restriction lets union officers decide when federal regulations that conflict with existing CBAs take effect. With union consent, new regulations can apply immediately; without it, new rules may not take effect until the CBA expires—potentially a decade later (or more).

Recognizing presidential authority to terminate CBA provisions removes the impediment to the President's Article II authority—the President can simply terminate any CBA provision that obstructs his directives. But adopting that construction would still leave senior union officers with rulemaking power. By default, unless the President intervenes, they would still determine when rules and regulations that conflict with CBAs become effective. Union officers' decisions about when regulations become effective would remain on par with those of Cabinet secretaries. This authority is significant rulemaking power, even if subordinate to presidential control. Presidential supervision does not eliminate Appointments Clause requirements for subordinate officials.

For example, Title 5 allows the President directly to issue civil service rules and regulations or delegate that authority to the OPM director.[230] The fact that the President can override OPM-issued civil service regulations does not change the fact that OPM directors exercise rulemaking power when they issues such regulations. Congress could not vest the appointment of the OPM director in someone other than the President simply because the President can issue civil service regulations directly. The authority to issue—or prevent enforcement of—federal regulations is rulemaking power that can only be vested in a constitutionally appointed officer.

Consequently, curing the Appointments Clause violation also likely requires courts to hold § 7116(a)(7) invalid and sever it from the Statute. This remedy would change relatively little of the Statute's operations, besides allowing government rules and regulations to take effect immediately, irrespective of CBA contents.

Section VII.A explains why union officers cannot argue that § 7116(a)(7) merely requires agencies to uphold their contracts. The sovereign

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[230] 5 U.S.C. §§ 1103(a)(7), 1104(a)(1), 3301, 3302.

acts doctrine allows agencies to implement "public and general" regulations that violate their contracts. Contractors have no authority to categorically block enforcement of conflicting government regulations. That authority is instead a form of rulemaking power.

If courts adopted the constructions of the Statute set forth in Sections II through IV, *supra*, and if they severed § 7116(a)(7), union officers would no longer exercise significant authority over agency operations. Consequently, the method of their appointment would be constitutionally irrelevant. Absent those holdings, union officers exercise significant authority over agency operations in continuing positions provided for by law. Such authority necessitates constitutionally conforming appointments.

VI. PRIVATE ARBITRATORS CANNOT WIELD EXECUTIVE POWER

The Statute gives too much power to union officers. It also gives too much authority to third-party arbitrators. Unions can advance grievances to binding arbitration. The resulting arbitral awards are either completely unreviewable or reviewed extremely deferentially. If—as is almost always the case—the arbitrator is a private citizen, this practice arguably violates both the Article II Vesting and Take Care Clauses and the private non-delegation doctrine. It also appears to violate the Appointments Clause; arbitrators are also likely principal officers. However, this constitutional defect can easily be fixed without invalidating the Statute—courts could require a Senate-confirmed principal officer, like the OPM Director, to arbitrate federal grievances. This straightforward remedy would both subject grievance arbitration to presidential supervision and satisfy Appointments Clause concerns, curing two constitutional defects with one stroke.

A. Binding Arbitration Neuters the President's Supervisory Authority

Unions can grieve any claimed breach of a CBA or "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment."[231] If the union and agency cannot resolve the grievance, the union can send it to binding arbitration.[232] Any subsequent arbitration award is legally binding.[233] Consequently, the

[231] 5 U.S.C. § 7103(a)(9).
[232] 5 U.S.C. § 7121(b)(1)(C)(iii).
[233] 5 U.S.C. § 7122(b).

Statute gives federal unions the power to enforce—through binding arbitration—both their CBAs and all other federal workforce policies.

The Statute says nothing about how the arbitrators who make these decisions get selected, leaving the matter to collective bargaining. In practice, arbitrators are universally selected in one of two ways. In the first method the parties select a new arbitrator for each grievance, typically by asking the Federal Mediation and Conciliation Service (FMCS) for a list of names from the FMCS master arbitration roster. The parties take turns striking names until one remains; that arbitrator adjudicates the dispute.[234] Alternatively, the parties create a standing panel of arbitrators. That panel typically gets selected either by mutual consent or with the parties' striking names from a larger list until only a few remain.[235] However, those remaining arbitrators handle all grievances arising under the contract, rather than only deciding a single case.

Agencies cannot appeal arbitral awards concerning adverse actions (i.e., dismissals, demotions, reductions in pay, and long-term suspensions).[236] These awards are final and binding, with generally neither administrative nor judicial review if the employee prevails.[237] Agencies can appeal awards concerning other matters to the FLRA.[238] However, the Statute requires the FLRA to review these awards very deferentially.[239] As

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[234] *See, e.g.*, MASTER AGREEMENT, *supra* note 43, at art. 44, § 2.

[235] *See, e.g.*, COLLECTIVE BARGAINING AGREEMENT BETWEEN THE U.S. PATENT & TRADEMARK OFFICE AND THE NATIONAL TREASURY EMPLOYEES UNION CHAPTER 243 (2013), https://www.commerce.gov/sites/default/files/2018-12/agreement-uspto-and-nteu-chapter-243.pdf. [https://perma.cc/CZ2T-FXV6].

[236] Under 5 U.S.C. § 7121(f), arbitral awards governing adverse actions are subject to judicial review in the same manner as decisions of the Merit Systems Protection Board. Under 5 U.S.C. § 7703, only employees—not agencies—can appeal adverse MSPB decisions to the Federal Circuit. Under 5 U.S.C. § 7122(a) matters covered by § 7121(f)—adverse actions—cannot be reviewed by the FLRA either.

[237] The Office of Personnel Management Director—not an agency—may appeal an arbitral award or MSPB decision to the Federal Circuit, but only if the Director believes they mistakenly interpreted a civil service law, rule, or regulation, and that interpretation will have a "substantial impact" on such law, rule, or regulation. *See* 5 U.S.C. § 7703(d)(1). The OPM director cannot seek judicial review in the mine run of arbitral awards and MSPB cases.

[238] The Department of Veterans Affairs could appeal the arbitral ruling reinstating employees dismissed under Section 714 to the FLRA because the union grievance concerned an unfair labor practice—implementing changes without concluding bargaining—rather than directly challenging the underlying adverse actions.

[239] 5 U.S.C. § 7122(a).

the U.S. Court of Appeals for the D.C. Circuit has explained, as "long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, the Authority may not reverse the arbitrator's award even if it is convinced he committed serious error."[240] Believing an arbitrator made a bad call does not justify reversal.

Since arbitrators are private contractors—not government employees—the President has no supervisory authority over them. Further, arbitrators can only be divested of authority over a grievance under extraordinary circumstances.[241]

Consequently, the Statute gives arbitrators the final word on virtually every facet of agency management.[242] Arbitrators routinely decide if just cause exists for disciplinary actions.[243] They decide if dismissed employees should be reinstated and, if so, whether the reinstated employees should get backpay.[244] They determine if suspensions should be overturned.[245] They decide if employees should get promoted.[246] They decide if employees deserve higher performance ratings or performance bonuses.[247] They decide how agencies assign overtime.[248] They determine if agencies can close duty stations or modify shifts.[249]

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[240] Nat'l Weather Serv. Emps. Org. v. FLRA, 966 F.3d 875, 881 (D.C. Cir. 2020) (cleaned up).

[241] *See* AFGE, Council 215, 52 F.L.R.A. 85, 87 (1996) ("To demonstrate that an award is deficient because an arbitrator was biased, a party must show that the award was procured by improper means, that the arbitrator was partial or corrupt, or that the arbitrator engaged in misconduct that prejudiced the party's rights.").

[242] Under 5 U.S.C. § 7121(c), grievances cannot cover claimed violations of the Hatch Act, employee benefits, appointments and certifications, position classifications, and national security-based removals. Every other union grievance is potentially subject to binding arbitration.

[243] *See, e.g.*, Pershing VA Med. Ctr., 72 F.L.R.A. 656 (2022) (upholding arbitrators award mitigating employee suspension to a letter of reprimand based on lack of "just and sufficient cause"); AFGE Loc. 2959, 70 F.L.R.A. 309 (2022) (upholding arbitrators award setting aside letter of reprimand based on lack of just cause).

[244] *See* Sherk, *supra* note 7.

[245] *See, e.g.*, U.S. Dep't of Hous. & Urb. Dev., 73 F.L.R.A. 342 (2022) (upholding award overturning grievants suspension for 5 days).

[246] *See supra* Section II.B (discussing mandatory promotions in federal agencies).

[247] *See, e.g.*, U.S. Dep't of Veterans Affs., 72 F.L.R.A. 677 (2022).

[248] *See, e.g.*, U.S. Dep't of Homeland Sec., 72 F.L.R.A. 340 (2021) (upholding arbitrators award finding agency practices for assigning overtime were contractually deficient).

[249] *See, e.g.*, U.S. Army Garrison, Picatinny Arsenal, 73 F.L.R.A. 700 (2023) (upholding arbitral award prohibiting U.S. army garrison from terminating one duty station and reducing shifts at another duty station for budgetary reasons).

Arbitrators can—and frequently do—force agencies to employ workers the agencies consider highly problematic and unsuitable for federal employment. For example, VA removed an operating room surgical tech in September 2017 for sexual harassment that created a hostile working environment. The employee admitted to peeping at coworkers over bathroom stalls and grabbing coworkers' buttocks on multiple occasions. AFGE nonetheless grieved the removal. In November 2018, an arbitrator found the misconduct occurred but concluded removal was too harsh a penalty. The arbitrator reduced the punishment to a 30-day suspension and ordered VA to reinstate the tech with over a year of back wages.[250] Another VA employee was fired after being arrested and pleading guilty to possessing methamphetamine with the intent to deliver. An arbitrator decided this penalty was also too harsh and ordered the employee reinstated.[251] No one in the President's chain of command believed these employees belonged at VA. They were reinstated only because external arbitrators concluded otherwise. This pattern is not unusual; arbitrators overturn or otherwise mitigate three-fifths of removals and suspensions grieved before them.[252]

Arbitrators dictate most aspects of agency management—not just removals. VA gave another employee an "unsatisfactory" performance evaluation. AFGE grieved, and an arbitrator ordered VA to increase the employee's performance rating to "excellent" and give the employee a $1,000 performance bonus (as well as pay AFGE over $30,000 in attorney's fees). VA had to—and did—comply.[253]

Binding arbitration removes federal employees' accountability to the President. It allows them, at their union's discretion, to contest management decisions in a forum the President has no authority over. Arbitrators often order agencies to hire, promote, assign work to, give bonuses to, positively evaluate, and continue to employ workers that agencies believe do not merit this treatment.[254] These decisions are either completely unreviewable or reviewed highly deferentially. For many agency management decisions,

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[250] Sherk, *supra* note 7, at 5.

[251] *Id.* at 6.

[252] *Id.* at 4–5.

[253] *Department of Veterans Affairs*, 72 F.L.R.A. 677.

[254] Arbitral awards over alleged CBA violations that affect a management right—such as the right to evaluate employee performance—are enforceable if the union can show the relevant CBA language was negotiable under the § 7106(b) exceptions to management rights. *See* IRS, 73 F.L.R.A. 888 (2024).

"the buck stops" with an arbitrator—not the President. Binding arbitration neuters much of the President's supervisory authority over the Executive Branch.

B. Binding Arbitration Violates the Double For Cause Protection Rule

The Supreme Court has already held less onerous restrictions on presidential authority unconstitutional. In Free Enterprise Fund, the Court considered the Public Company Accounting Oversight Board (PCAOB), an entity housed within the Securities and Exchange Commission (SEC). The SEC, a multimember body of commissioners, could only dismiss PCAOB members for cause, and the parties also agreed that the President could only remove SEC commissioners for cause.[255] The Supreme Court held that these multilevel removal protections effectively—and unconstitutionally—shielded PCAOB members from Presidential supervision. The Court explained that:

> Neither the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, has full control over the Board. The President is stripped of the power our precedents have preserved, and his ability to execute the laws—by holding his subordinates accountable for their conduct—is impaired.
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> That arrangement is contrary to Article II's vesting of the executive power in the President. Without the ability to oversee the Board, or to attribute the Board's failings to those whom he *can* oversee, the President is no longer the judge of the Board's conduct. He is not the one who decides whether Board members are abusing their offices or neglecting their duties. He can neither ensure that the laws are faithfully executed, nor be held responsible for a Board member's breach of faith. This violates the basic principle that the President

[255] It is doubtful whether the President can only remove SEC commissioners for cause. The SEC's organic statute does not expressly restrict the President's authority to remove SEC commissioners; rather, the for-cause removal restriction is implied from the multimember nature of the SEC and the fact that commissioners are appointed to serve fixed, staggered terms of years, subject to a political-diversity requirement. However, Supreme Court case law generally holds that presidential appointees serve at the pleasure of the President unless Congress has expressly limited the grounds on which they can be removed. In *Free Enterprise Fund*, both the Obama Administration and the plaintiffs stipulated that SEC commissioners could only be removed for cause, and the Supreme Court accepted that stipulation.

> cannot delegate ultimate responsibility or the active obligation to supervise that goes with it, because Article II makes a single President responsible for the actions of the Executive Branch.[256]

This reasoning implies that binding arbitration is also unconstitutional. Arbitration insulates unionized employees from presidential supervision even more thoroughly than the multilevel removal protections at issue in *Free Enterprise Fund*. The SEC Commissioners who could dismiss PCAOB members for cause were appointed by the President and could be removed for cause. By contrast, the arbitrators who determine if agencies can dismiss unionized employees cannot be removed from their cases, and they do not answer to the President in any way.

If multiple levels of removal protections are unconstitutional, then for-cause protections assessed by officials entirely unaccountable to the President are an even greater violation. Especially since binding arbitration covers not just removals of unionized employees, but promotions, work assignments, performance evaluations, performance bonuses, and every other aspect of agency workforce management.

Under the Statute, the President is "no longer the judge" of unionized employees' conduct—arbitrators are. Nor can he attribute unionized employees' "failings to those he *can* oversee."[257] The President "can neither ensure that the laws are faithfully executed, nor be held responsible for" a unionized employee's "breach of faith."[258] As a result, the President's "ability to execute the laws—by holding his subordinates accountable for their conduct—is impaired."[259]

Congress cannot neuter the President's constitutional authority to supervise and control his subordinates. Yet binding arbitration does so for the majority of federal employees who are unionized.

C. Arbitrators' Authority Also Violates the Private Non-Delegation Doctrine

Arbitrators' authority under the Statute also straightforwardly violates the private non-delegation doctrine, which requires that private parties be "subject to [an] agency's pervasive surveillance and authority" if

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[256] Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 496–97 (2010) (cleaned up).

[257] *Id.* at 496.

[258] *Id.*

[259] *Id.*

they have a role in the exercise of executive power.[260] The agency must have "full authority" to review and approve any enforcement recommendations made by private parties.[261]

Binding arbitration under the Statute fails this test. Arbitrators exercise considerable executive authority with, depending on the subject matter, either minimal or no agency review. The private non-delegation doctrine does not permit this assignment of power, and another law giving similar authority to private arbitrators has already been held unconstitutional.

Arbitrators routinely issue decisions governing run-of-the-mill workforce management choices. They also frequently make decisions that significantly affect agencies' general operations. For example, arbitrators ordered:

- The Department of Defense Education Activity (which provides schooling for the children of U.S. military personnel stationed overseas) to almost completely restructure its payroll processing system.[262]
- The VA to reverse changes to official time procedures made pursuant to EO 13839 and to restore official time hours to agency employees who also worked as union representatives.[263]
- The IRS to reverse changes made to its performance appraisal process and to offer priority consideration for promotions to thousands of applicants who did not receive promotions under the revised system.[264]
- The SSA to permit ALJs to telework more than eight days per month with their supervisor's approval.[265]
- HHS to give performance bonuses to unionized employees after the agency determined a sequester and OMB guidance prohibited such discretionary expenditures.[266]

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[260] Oklahoma v. United States, 62 F.4th 221, 238 (6th Cir. 2023) (cleaned up).
[261] *Id.* at 231.
[262] Dep't of Def. Educ. Activity, 72 F.L.R.A. 382 (2021).
[263] *Department of Veterans Affairs*, 72 F.L.R.A. 287.
[264] *NTEU, Chapter 83*, 68 F.L.R.A. 945.
[265] Soc. Sec. Admin., 69 F.L.R.A. 208 (2016).
[266] Dep't of Health & Hum. Servs., 68 F.L.R.A. 1049 (2015).

- The IRS to reverse an expansion of IT contracting, returning contracted work to bargaining unit employees, and to give backpay to agency employees who lost work opportunities.[267]

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Arbitrators exercise vast executive power. As covered in Part A of this Section, arbitrators wield this power with little agency oversight. The FLRA cannot review arbitral decisions concerning demotions, suspensions of more than fourteen days, or removals.[268] The FLRA must review awards covering all other matters "highly deferentially."[269]

This limited and almost completely deferential review does not subject arbitrators to the FLRA's (or any other agency's) "pervasive surveillance and authority."[270] The FLRA lacks "full authority to review [arbitrators'] enforcement actions" and does not possess the "final say over the . . . enforcement of the law" that the private non-delegation doctrine requires.[271] Empowering private citizens to wield significant executive power, with minimal or no government oversight, is a clearcut private non-delegation violation.

The D.C. Circuit has already concluded as much, albeit under a different law. Congress passed legislation that required Amtrak and the Federal Railroad Administration (FRA) jointly to develop regulations governing railroads. If they could not agree, the Transportation Department would appoint an arbitrator who would decide the issue. The D.C. Circuit held that giving a private arbitrator authority to settle disputes between government agencies was unconstitutional. Explaining that "private entities cannot wield the coercive power of government," the court struck down the portion of the law authorizing binding arbitration.[272] Similarly, private arbitrators cannot constitutionally exercise the nearly unreviewable authority over federal employment dispute the Statute gives them.

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[267] IRS, 68 F.L.R.A. 1027 (2015).

[268] *See, e.g.*, Dep't of Veterans Affs., S. Nev. Health Care Sys., 73 F.L.R.A. 666 (2023).

[269] Nat'l Weather Serv. Emps. Org. v. FLRA, 966 F.3d 875, 881 (D.C. Cir. 2020) (cleaned up).

[270] Oklahoma v. United States, 62 F.4th 221, 231 (6th Cir. 2023).

[271] *Id.* at 229, 231.

[272] Ass'n of Am. Railroads v. Dep't of Transp., 821 F.3d 19, 37 (D.C. Cir 2016). The D.C. Circuit also held that the Due Process Clause prohibited Amtrak—an economically self-interested governmental entity—from issuing regulations that bound its competitors. *See also* Ass'n of Am. Railroads v. Dep't of Transp., 896 F.3d. 539 (D.C. Cir. 2018) (severing and striking down the arbitration provision).

D. Arbitrators Are Likely Covered by the Appointments Clause

Binding arbitration also likely runs afoul of the Appointments Clause. Grievance arbitrators appear to be constitutional officers, and they are probably principal officers. If so, they must be appointed by the President with Senate consent. Allowing unions and subordinate agency employees to select arbitrators is likely unconstitutional.

Arbitrators pass both prongs of the test for constitutional officers. They easily satisfy the "significant authority pursuant to law" criteria. In *Lucia v. SEC*, the Supreme Court held that SEC ALJs were officers.[273] Arbitrators hearing union grievances perform similar adjudicatory duties.[274] If anything, arbitrators have more authority than the SEC ALJs at issue in *Lucia*. The SEC could review and overturn its ALJs' decisions. By contrast, no Executive Branch officials review arbitral awards governing adverse actions, and the FLRA must review other awards highly deferentially.[275] Arbitrators also exercise this authority "pursuant to law." Chapter 71 makes arbitral awards binding upon agencies.[276] If ALJs exercise significant authority pursuant to law, so do grievance arbitrators.

Evaluating whether grievance arbitrators occupy "continuing positions" for Appointments Clause purposes is more complicated, but current precedents show they almost certainly satisfy this requirement as well. The Statute requires agency CBAs to include provisions for binding arbitration, which clearly means resort to the decision-making authority of an individual who occupies the position of arbitrator as provided for in the law.[277] But arbitrators are typically private contractors hired to decide a particular case. Their position terminates once they issue a final award. An arbitrator's position is thus temporary, not permanent.

However, the Supreme Court and lower courts have often held that temporary positions can be "continuing" for Appointments Clause purposes.[278] For example, the Supreme Court unanimously held that the

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[273] 138 S. Ct. 2044 (2018).

[274] Arbitrators take testimony, receive evidence, examine witnesses, rule on motions, regulate the course of hearings, and issue decisions. Arbitrators thus exercise many of the same powers that the Supreme Court held made ALJs inferior officers. *See id.* at 2047–48.

[275] *See supra* Section VI.A (discussing the difficulty agencies face when attempting to overturn an adverse award).

[276] 5 U.S.C. § 7122(b).

[277] 5 U.S.C. § 7121(b)(C)(iii).

[278] *See, e.g.*, Morrison v. Olson, 487 U.S. 654 (1988) (holding that the Independent Counsel occupied an office subject to the Appointments Clause); *In re* Grand Jury Investigation, 916

prior position of Independent Counsel—a prosecutor appointed to pursue a particular case, whose appointment terminated when the case concluded—was a constitutional office.[279] The Second Circuit recently provided a three-part test for determining when temporary positions are continuous enough to be offices: "(1) the position is not personal to a particular individual; (2) the position is not transient or fleeting; and (3) the duties of the position are more than incidental."[280]

Federal labor arbitrators meet every prong of this test. The position of arbitrator does not depend on which individual gets selected to hear the case, and if an arbitrator withdraws from a case, another arbitrator replaces the first. Arbitrators typically take more than a year to adjudicate cases—and in some cases much longer.[281] In one case, a federal arbitrator retained jurisdiction over Department of Defense activities for 13 years.[282] So an arbitrator's role is not transient.[283]

Similarly, arbitrators' duties are much more than incidental to the regular operations of government. They regularly determine major day-to-day aspects of agency personnel management. Most federal union arbitrators satisfy every prong of the test for when courts consider temporary positions "continuing."

Furthermore, in some agencies, permanent panels of arbitrators are retained to hear all grievances arising under the CBA, rather than selecting new arbitrators as grievances arise.[284] The arbitrators who serve on these

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F.3d 1047 (D.C. Cir. 2019) (concluding that Department of Justice Special Counsel Robert Mueller was an officer for constitutional purposes); United States v. Donziger, 38 F.4th 290, 297 (2d Cir. 2022) (special prosecutor appointed to prosecute particular case was an officer); United States *ex rel.* Zafirov v. Fla. Med. Assocs., LLC No8:19-CV-01236-KKM-SPF, 2024 WL 4349242 (holding that a relator litigating a specific case on behalf of the United States, and whose position terminated with the case, was an officer subject to the Appointments Clause).

[279] *Morrison,* 487 U.S. at 672. Note that the majority opinion held that the Special Counsel was an inferior officer, while Justice Scalia in dissent would have concluded that the Independent Counsel was a principal officer. *Id.* at 716, 724 n.4 (Scalia, J., dissenting).

[280] *Donziger*, 38 F.4th at 297.

[281] The America First Policy Institute analyzed a set of over 400 arbitration awards released under a Freedom of Information Act request. The average award was issued 18 months after the union filed the underlying grievance.

[282] *See* Fed. Educ. Ass'n v. FLRA, 927 F.3d 514, 516 (D.C. Cir. 2019).

[283] Courts have often concluded that special prosecutors, hired to pursue a particular case, occupy continuing positions for Appointments Clause purposes. *Supra* note 278. Adjudicators hired to decide a particular case may be analyzed similarly.

[284] *Supra* note 235 and accompanying text.

panels occupy expressly continuing positions. Grievance arbitrators exercise significant authority pursuant to law in continuing positions. That makes them officers, subject to the Appointments Clause.

Moreover, grievance arbitrators are almost certainly "principal officers" who require presidential appointment with Senate consent. They routinely make final decisions binding the Executive Branch.[285] Arbitrators' decisions on major adverse actions (like demotions and removals) are final and unreviewable.[286] So if federal union arbitrators are officers, they may well qualify as principal officers. The D.C. Circuit concluded as much in the Amtrak litigation. The court held that arbitrators appointed to decide Amtrak-FRA disputes were functioning as principal officers because they were unsupervised by any other government officials.[287] That analysis applies with equal force to union grievance arbitration of removals and demotions.

E. Only Principal Officers May Constitutionally Arbitrate Grievances

Arbitrators of federal union disputes can have the final word, or nearly final word, on almost every aspect of agency operations—in violation of the Vesting and Take Care Clauses, the private non-delegation doctrine, and the Appointments Clause. These constitutional violations can be easily solved by having principal officers arbitrate federal grievances.

At first glance it would seem courts could cure excessive arbitrator authority by invalidating limits on reviewing their awards. The Supreme Court solved a similar constitutional violation in *United States v. Arthrex* this way. In that case the Court examined a law that gave administrative patent judges (APJs)—inferior officers—unreviewable authority to void patents.[288] The Court concluded that this final decisional authority was inconsistent with APJs' statutory status as inferior officers. The Court fixed the problem by severing the statutory provisions that prevented the Patent and Trademark Office (PTO) director from reviewing APJ awards. This remedy gave the PTO director, a principal officer, final say over patent revocations—correcting the constitutional deficiency.

This precedent would suggest the Statute could be fixed by striking the provisions that limit FLRA review of grievances (*i.e.*, striking the

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[285] United States v. Arthrex, Inc., 141 S. Ct. 1970, 1985 (2021) ("Only an officer properly appointed to a principal office may issue a final decision binding the Executive Branch.").
[286] *See supra* note 236 and accompanying text.
[287] Ass'n of Am. Railroads v. Dep't of Transp., 821 F.3d 19, 38–39 (D.C. Cir. 2016).
[288] *Arthrex*, 141 S. Ct. 1970.

prohibition on FLRA review of major adverse actions), as well as those provisions that require "highly deferential" review of arbitrator awards.[289] Arbitrators would no longer have the "final say" on agency policies if the FLRA could review all arbitral awards de novo. Arbitrators would instead operate under the FLRA's "pervasive surveillance"—giving them a subordinate status consistent with inferior officers.[290]

However, this potential solution would run into a host of difficulties. Congress deliberately precluded FLRA review of major adverse actions. So this approach would produce an outcome Congress expressly rejected.[291] It would also create an inconsistent framework for judicial review of adverse actions. Congress intentionally drafted the CSRA to channel judicial review of adverse actions to the Federal Circuit alone. This was meant to ensure uniform judicial case law governing federal employment actions, rather than a hodge-podge of different legal standards applicable to employees working under different geographic courts of appeals.

However, if the FLRA reviewed arbitration awards concerning adverse actions, both employees and agencies could then appeal FLRA decisions to the geographically applicable circuit of the U.S. Court of Appeals.[292] At the same time, employees could directly appeal unfavorable arbitral awards to the Federal Circuit.[293] This would mean both the Federal Circuit and the 12 geographically defined appeals courts would interpret the CSRA's adverse action provisions—likely creating circuit splits and conflicting case law. Congress crafted the CSRA to avoid this outcome.

Furthermore, the Statute prohibits judicial review of most FLRA decisions precisely because the FLRA must review them deferentially. The Statute's conference report explains:

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[289] *See* 5 U.S.C. § 7122(a).

[290] This proposed solution would not address the fact that Congress has not provided for agency heads to appoint grievance arbitrators, and the Appointments Clause requires presidential appointment with Senate consent to inferior offices unless Congress "by law" provides otherwise.

[291] H. COMM. ON POST OFF. AND CIV. SERV., 96TH CONG., LEGISLATIVE HISTORY OF THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE, TITLE VII OF THE CIVIL SERVICE REFORM ACT OF 1978, at 1995 (1979), https://www.flra.gov/system/files/webfm/Authority/Archival%20Decisions%20&%20Leg%20Hist/LEG%20HIST%20OF%20THE%20CSRA%20OF%201978%20Mar%2027%201979%20VOL%202.pdf. [hereinafter LEGISLATIVE HISTORY]

[292] 5 U.S.C. § 7123(a).

[293] *Supra* note 235.

> [T]here will be no judicial review of the Authority's action on those arbitrators awards in grievance cases which are appealable to the Authority. The Authority will only be authorized to review the award of the arbitrator on very narrow grounds similar to the scope of judicial review of an arbitrator's award in the private sector. In light of the limited nature of the Authority's review, the conferees determined it would be inappropriate for there to be subsequent review by the court of appeals in such matters.[294]

Striking limits on FLRA review while maintaining the prohibition on judicial review would upset the policy balance Congress deliberately struck. Congress likely would not have exempted most arbitral awards from judicial review if the FLRA reviewed them *de novo*. Eliminating limits on both FLRA review of and FLRA jurisdiction over arbitration awards also looks a lot like the wide-ranging "blue pencil" rewriting of a Statute through severability that the Supreme Court disfavors.[295] The Supreme Court "will not rewrite a law to conform it to constitutional requirements."[296]

Moreover, such blue-penciling may not even cure the constitutional violation. FLRA members can only be dismissed for cause.[297] Giving tenure-protected FLRA members the final say on almost every personnel management decision in the Executive Branch would still significantly insulate federal employees from presidential control. So even creative blue penciling may not be enough.

Another option would be simply striking down the provision authorizing binding arbitration in the first place. That is how the D.C. Circuit ultimately fixed the constitutional defect in the Amtrak litigation.[298] However, binding arbitration is one of the Statute's linchpins; invalidating it makes CBAs effectively unenforceable. Whatever its merits as a policy

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[294] LEGISLATIVE HISTORY, *supra* note 291, at 1995.

[295] *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 509–10 (2010) ("In theory, perhaps, the Court might blue-pencil a sufficient number of the Board's responsibilities so that its members would no longer be 'Officers of the United States.' Or we could restrict the Board's enforcement powers, so that it would be a purely recommendatory panel. Or the Board members could in future be made removable by the President, for good cause or at will. But such editorial freedom—far more extensive than our holding today—belongs to the Legislature, not the Judiciary.").

[296] Reno v. ACLU, 521 U.S. 844, 885 (1997).

[297] 5 U.S.C. § 7104(b).

[298] Ass'n of Am. Railroads v. Dep't of Transp., 896 F.3d. 539, 551 (D.C. Cir. 2018).

solution, courts would likely prefer an option that does not eviscerate the underlying statutory framework.

Fortunately, such an option is readily available. Courts should interpret the Statute to implicitly require that grievances may only be arbitrated by officers appointed by the President with Senate confirmation and who serve at the President's pleasure. This solution would remove all constitutional concerns with arbitral authority and does not contravene the text of the Statute. If the grievance arbitrators were at-will presidential appointees, they would be fully accountable to the President. He would have just as much authority over them as Cabinet members. All Vesting Clause and Take Care Clause concerns with arbitral rulings would disappear. Private non-delegation concerns would vanish for the same reason—decisions would be made by government officials. Appointments Clause requirements for principal officers would also be fully satisfied.

The Statute does not require that arbitrators be presidential appointees, but it does not prohibit it either. The Statute says nothing about how arbitrators are selected, only that CBAs must provide for binding arbitration. Serving as an arbitrator over federal employment disputes is within the scope of duties of some existing principal officers, such as the OPM Director.[299] Courts could (and should) hold that the canon of constitutional avoidance requires that only such principal officers may make the final binding decisions in the arbitration of federal grievances.

In practice, of course, no single officer could adjudicate every federal-sector grievance. But the OPM Director could have subordinate appointees conduct hearings, take testimony, and prepare draft decisions that the director could then review and issue in his name (subject to potential review by the President). This resolution would satisfy all constitutional requirements.[300]

This solution is in some tension with the D.C. Circuit's decision in the Amtrak litigation. In that case the government argued the court should interpret the law to require a government arbitrator, obviating private non-

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[299] *See, e.g.*, 5 U.S.C. § 1101(a)(5)(A) (providing that the OPM director is responsible for "executing, administering, and enforcing ... the laws governing the civil service").

[300] Under *Lucia* such hearing officers would almost certainly be inferior officers who would require appointments by Agency Heads. *See* Lucia v. SEC, 138 S. Ct. 2044, 2051 (2018). However, 5 U.S.C. § 1101(a) gives the OPM Director broad authority to delegate his authority to subordinate employees and to "appoint[] individuals to be employed by the Office." This authority provides a freestanding ability for the OPM Director to appoint inferior officers to assist with his duties.

delegation concerns. The court rejected that proposal, holding that an "agency cannot cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute."[301] If that analysis is accurate, then grievance arbitration might have to be entirely struck down.

However, there are also grounds to distinguish the Statute from the law at issue in the Amtrak case. That law required the appointment of "an arbitrator" with no limitation on who could serve. The D.C. Circuit concluded that excluding private officials would impermissibly rewrite the law.[302] The Statute, by contrast, is silent on the appointment of arbitrators. It merely says CBAs must provide for binding arbitration.[303] The fact that arbitrators must be selected is an implication of this directive, but the Statute says nothing whatsoever about who serves in that role. Holding that only principal officers may serve as arbitrators fills in gaps in the Statute—requiring that its application comply with background constitutional requirements—rather than rewriting it. Courts craft remedies like this routinely; the canon of constitutional avoidance requires it.

The Statute can be applied constitutionally by having principal officers arbitrate federal grievances. Federal unions would probably oppose this solution; they would doubtless prefer arbitrators who are wholly unaccountable to the President. But such unaccountable structures are precisely what the Constitution does not permit.

VII. CONSIDERING OBJECTIONS

The Statute—as currently construed—gives federal unions and grievance arbitrators too much authority over agency operations. Sections II, III, IV, and VI have shown how the canon of constitutional avoidance could be applied to give the Statute alternative constructions that avoid these problems, while Section V discussed why § 7116(a)(7) also needs to be held invalid to remove Appointments Clause concerns. Various objections can be raised to this conclusion, but each objection falls apart upon closer examination.

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[301] Ass'n of Am. Railroads v. Dep't of Transp., 721 F.3d 666, 674 n.7 (D.C. Cir. 2013).

[302] *Id.* ("The statute's text precludes the government's suggestion that we construe the open-ended language 'an arbitrator' to include only federal entities. The constitutional avoidance canon is an interpretive aid, not an invitation to rewrite statutes to satisfy constitutional strictures.").

[303] 5 U.S.C. § 7121(b)(C)(iii).

A. Federal Union Power Goes Beyond What Contractors Can Wield

There is an obvious rejoinder to the argument that the Statute unconstitutionally restricts Presidential power: CBAs are contracts entered into by Executive Branch agencies, and the government is bound by its contracts. Unions cannot force CBA provisions onto agencies, they can only propose terms that the President voluntarily accepts—through either his agency heads or FSIP appointees (who decide bargaining impasses). The President can even direct FSIP to impose terms over union objections. Accordingly, the argument would go, if the President objects to a CBA provision, he does not have to accept it. Once he does, though, the Statute simply holds the President to his commitment—just like any other federal contract. In this view, the Statute simply treats unions like any other private contractor.

This argument fails for two reasons. First, the President cannot permanently and irrevocably contract away his supervisory authority over the Executive Branch. Agencies can enter contracts to perform statutory functions, like building the next Air Force One or hiring IT vendors. But neither the President nor his subordinates can surrender the President's inherent constitutional authority—and duty—to oversee Executive Branch operations.

The President can refrain from exercising his executive power in a certain manner, such as by not firing an official he has lost confidence in. Such restraint is a voluntary choice the President bears responsibility for. But the President cannot contractually force himself to use his executive authority in a particular manner throughout his term, thereby tying his own hands. The President has no ability to contractually divest himself of his executive power. The President has even less authority to contractually tie the hands future Presidents, using his current executive authority to bind their future discretion.

For example, contracts committing the President not to fire Cabinet secretaries could not bind the President. They would not stop the President from changing his mind and dismissing those officials. Nor could such contracts prevent a newly elected President from appointing his own Cabinet in contravention of contractual terms. The President's supervisory authority over the executive workforce is similarly inherent to the office and cannot be contractually divested. The Supreme Court has explained:

> The President cannot delegate ultimate responsibility or the active obligation to supervise that goes with it, because Article II makes a

> single President responsible for the actions of the Executive Branch[.][304]

And further:

> Perhaps an individual President might find advantages in tying his own hands. But the separation of powers does not depend on the views of individual Presidents . . . . The President can always choose to restrain himself in his dealings with subordinates. He cannot, however, choose to bind his successors by diminishing their powers, nor can he escape responsibility for his choices by pretending that they are not his own.[305]

If CBAs that block changes to agency management procedures for a decade substantially impede the President's supervisory authority—and they do—then those contracts should be subject to change or termination. The President cannot contractually wash his hands of responsibility for Executive Branch operations. Nor can he contractually diminish his successors' powers, forcing subsequent Presidents to use management procedures that they—and perhaps the voters—find intolerable.

Second, even if CBAs were valid contracts, under the "sovereign acts doctrine" they could not restrict the "public and general" exercise of executive power. This doctrine is why § 7116(a)(7) produces an Appointments Clause violation.

The Constitution allows the government to issue regulations or take other sovereign acts that conflict with its contractual obligations. The Supreme Court settled this issue nearly a century ago in *Horowitz v. United States*.[306] In that case the court rejected a suit for breach of contract when newly issued rules made it impossible for the federal government to fulfill a preexisting contractual obligation. The Court explained that "[w]hatever acts the government may do, be they legislative or executive, so long as they be public and general, [they] cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons."[307]

Horowitz remains good law and the "sovereign acts doctrine" is often invoked. So long as the government is taking public and general acts—that is, not acting specifically to nullify its contractual obligations—contracts

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[304] Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 496–97 (2010).

[305] *Id.* at 497.

[306] 267 U.S. 458 (1925).

[307] *Id.* at 461.

cannot restrict the government's sovereign actions. As the Federal Circuit has explained:

> The [sovereign acts] doctrine is an affirmative defense that is an inherent part of every government contract. It is based on the government's dual roles as contractor and sovereign, and it is designed to balance the Government's need for freedom to legislate with its obligation to honor its contracts.[308]

As a constitutional matter, contracts cannot and do not disable the government's sovereign authority. While there is a case for holding the government to its contracts with private parties, the sovereign acts doctrine rebuts it. Contracts between agency heads and representatives of their subordinate employees are even less capable of binding the President's constitutionally grounded discretion.

Nonetheless, 5 U.S.C. § 7116(a)(7) prevents agencies from enforcing "any rule or regulation" that conflicts with an existing CBA until the CBA expires. The Statute contains no exceptions for "public and general acts." Consequently, CBAs obstructed President Biden's directive to return to in-person work and President Trump's requirement to limit PIPs to 30 days—orders directed at the general federal workforce.[309] *Horowitz* and the sovereign acts doctrine do not allow private contracts to stymie public and general sovereign acts in this manner.

Unions cannot defend their powers by arguing they are just contractors. They wield power that exceeds anything a private contractor can possess. The provisions of the Statute that make CBAs binding and irrevocable elevate them to the level (indeed, above the level) of agency regulations. Union officers accordingly wield rulemaking authority in violation of both the Vesting Clause and the Appointments Clause.

For the same reason, unions cannot argue they merely wield federal employees' collective private power over their own labor. Federal employees have no private authority to negotiate—individually or collectively—contracts that generally constrain an agency's sovereign power. Nor do they have private authority to prevent agencies from unilaterally changing working conditions until collective bargaining negotiations conclude. The authority to block agency regulations and forestall operational changes is necessarily sovereign power.

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[308] Conner Bros. Constr. Co. v. Green, 550 F.3d 1368, 1371–72 (Fed. Cir. 2008).

[309] *See* Section II.B, *supra*.

B. Currin *Does Not Sanction Private Control Over Executive Operations*

The argument that the Statute violates the private non-delegation doctrine may be subject to a ready objection: The Supreme Court has held that Congress can give private parties a veto over agency rulemakings. In *Currin v. Wallace*, the Supreme Court considered a law that directed the U.S. Department of Agriculture (USDA) to develop standards governing the production and sale of tobacco.[310] Those standards only took effect in markets where two-thirds of tobacco growers voted for them. The law effectively gave a minority of tobacco growers a veto over government regulations.

The Court held this arrangement was not an unlawful delegation of government power as "Congress ha[d] merely placed a restriction upon its own regulation by withholding its operation as to a given market" unless growers voted for it.[311] Federal union authority under the Statute appears analogous to the law *Currin* upheld. The Statute broadly permits the President and agencies to change working conditions, subject to the concurrence of employees' representatives. If private tobacco growers can veto proposed USDA standards, then what is to stop federal employees from doing the same to proposed changes in agency operation?

This objection misses a critical distinction: *Currin* dealt with limiting authority Congress legislatively gave the President under Article I. The Statute, by contrast, restricts the President's inherent Article II executive authority.

The Constitution gives Congress the sole authority to regulate interstate commerce. The President would have no authority to set standards governing tobacco sales if Congress had not given it to him. The same applies to most other agency regulations. The President can exercise only the authority over interstate commerce that Congress gives him; no more.

Properly speaking, requiring industry approval of tobacco regulations was a restriction on the use of Article I legislative authority—not a delegation of executive power to private parties. The *Currin* Court was very clear on this point, explaining that:

> Here it is Congress that exercises its legislative authority in making the regulation and in prescribing the conditions of its application. The required favorable vote upon the referendum is one of these

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[310] 306 U.S. 1 (1939).

[311] *Id.* at 15.

> conditions … Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent on future conditions, and it may leave the determination of such time to the decision of an Executive, or, as often happens in matters of state legislation, it may be left to a popular vote of the residents of a district to be effected by the legislation. While in a sense one may say that such residents are exercising legislative power, it is not an exact statement, because the power has already been exercised legislatively by the body vested with that power under the Constitution, the condition of its legislation going into effect being made dependent by the legislature on the expression of the voters of a certain district.[312]

Consequently, the *Currin* tobacco law did not legally delegate executive authority to private parties at all. Congress did not give the President authority to regulate tobacco without grower support. And without that statutory authorization, the President had no executive authority that could be delegated. In *Currin*, private parties did no more than establish the factual predicates that Congress legislatively required for the tobacco regulations to take effect.

By contrast, requiring union consent before agencies can change CBAs or otherwise unilaterally change working conditions does not limit authority legislatively granted under Article I; it restricts the President's inherent Article II executive authority. The President derives this authority directly from the Constitution; it does not depend on an act of Congress. Without the Statute, the President could—and previously did—change federal employees' working conditions and the internal management procedures unilaterally. The President continues to do so for many non-union federal employees.

To the extent Congress can restrict the President's executive authority—and in many cases, it cannot—the President retains all authority that Congress does not affirmatively take away. Unions that block CBA modifications are not simply declining to establish a factual predicate necessary to exercise authority the President would not otherwise possess. They are affirmatively preventing the President from using executive power he would otherwise enjoy.[313] This is an actual transfer of executive

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[312] *Id.* at 16.

[313] *See* Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers, AFL-CIO v. Austin, 418 U.S. 264, 273 n.5 (1974) (holding that an executive order that comprehensively

power to private organizations, fully subject to private non-delegation doctrine requirements. Congress can circumscribe its own legislative enactments; it cannot transfer executive authority to private parties.

C. APA Notice and Comment Procedures Do Not Restrict Executive Power

The unilateral change doctrine looks a lot like the APA. The APA requires agencies to publish most proposed rules for public comment, consider comments, and respond to objections before the final rules can take effect. These procedural requirements give interested private parties significant influence over the timing of agency regulations. If parties do not comment, or submit only supportive comments, agencies can finalize rules quickly. But agencies that receive extensive negative comments must evaluate and respond to them before finalizing their rules—a process that can take many months, if not years. Indeed, the direct final rule process lets agencies issue rules with immediate effect—but only if certain exigencies are present or they do not receive substantive negative comments.[314] The APA thus seems to give third parties control over the timing of agency regulatory changes akin to the control that unions exercise under the Statute. The Supreme Court has never hinted that this control is unconstitutional in the APA context.

The unilateral change doctrine operates quite similarly. It requires agencies to get input from their unions—input they or FSIP can (usually) reject—before changing working conditions. If the APA can force agencies to evaluate feedback from private parties before changing regulations, how is it that the Statute cannot constitutionally compel agencies to get feedback from employees before changing working conditions?

As with the argument from *Currin*, this argument misses the distinction between legislatively granted authority and presidential administrative authority. Congress requires the Executive Branch to use APA notice-and-comment procedures before exercising legislatively granted authority over private parties. This requirement is constitutionally unproblematic. It is also very different from requiring notice-and-comment procedures before the President can exercise his inherent constitutional authority over the Executive Branch.

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regulated federal collective bargaining before the Statute's passage was "plainly a reasonable exercise of the President's responsibility for the efficient operation of the Executive Branch").

[314] Ronald M. Levin, *Direct Final Rulemaking*, 64 GEO. WASH. L. REV. 1 (1995).

As the Supreme Court recognized in *Trump v. United States*, "The President's power to remove—and thus supervise—those who wield executive power on his behalf [] follows from the text of Article II."[315] The Court explained that "Congress cannot act on . . . the President's actions on subjects within his 'conclusive and preclusive' constitutional authority."[316]

The APA itself recognizes this distinction. The APA categorically exempts matters "relating to agency management or personnel" and "rules of agency organization, procedure, or practice" from notice-and-comment requirements.[317] APA requirements only apply to rules that affect third parties outside the agency itself. Such rules rest on Article I legislative authority. Congress has not passed—and the Supreme Court has not approved—legislation requiring the President to go through notice-and-comment procedures before using his constitutional executive authority.[318]

D. The Statute Exceeds the "Outermost Constitutional Limits" of Congressional Power

It could be argued that collective bargaining falls within permissible congressional restrictions on executive power. In its functionalist era the Supreme Court upheld significant restrictions on executive power, preventing the President from removing multimember independent agency heads and some inferior officers. If the President cannot even fire an agency head, how can he claim authority over subordinate rank-and-file employees' disciplinary or promotion procedures?

However, the modern Supreme Court has replaced separation of powers functionalism with formalism. Recent cases like *Free Enterprise Fund*, *Seila Law*, and *Trump v. United States* have emphasized the President's inherent constitutional authority over the executive branch and struck down Congressional intrusion on that authority. While not—or at least not yet—directly overturning *Humphrey's Executor* and *Morrison*, the Court has made it clear those cases will be read narrowly and will not be extended

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[315] 144 S. Ct. 2312, 2328 (2024).

[316] *Id.*

[317] 5 U.S.C. §§ 553(a), 553(b)(A).

[318] The CSRA does extend APA coverage to Office of Personnel Management rules. *See* 5 U.S.C. § 1105. These rules apply only to the Executive Branch. However, most OPM rulemaking uses delegated presidential authority. The President can issue those rules directly without using APA procedures. Requiring OPM to go through notice-and-comment to issue rules does not restrict presidential authority if the President could issue those rules directly in the first instance.

beyond their limited holdings. As Chief Justice Roberts explained in *Seila Law*, tenure protections for "multimember independent agencies that do not wield substantial executive power" and "inferior officers with limited duties and no policymaking or administrative authority" represent "the outermost constitutional limits of permissible congressional restrictions on the President's removal power."[319]

The Statute goes far beyond these outermost constitutional limits. The Court sees tenure protections for independent agency heads as permissible only if they do not wield meaningful Article II power. That holding provides no support for comprehensively restricting—through collective bargaining—presidential authority over agencies with substantial executive power. Similarly, if Congress cannot insulate a single inferior officer with a modicum of administrative authority from presidential removal, it seems implausible that it can neutralize presidential control over the management procedures governing most federal employees. If these prior holdings truly represent the "outermost" limits of congressional authority over the President's supervisory discretion, then forcing the President to adhere to CBAs that comprehensively govern workforce management policies is plainly unconstitutional. Any statutory restraint that neutralizes the President's ability to change agency operations unilaterally or that grants third-party arbitrators the final word on most personnel management decisions across the Executive Branch would be similarly impermissible.

This does not mean the Statute must be struck down in toto. There is nothing problematic with the President's officers formally consulting with representatives of subordinate employees. The constitutional problems arise when those employees, their representatives, or private arbitrators can control executive branch operations. If the President could abrogate problematic CBAs at will, if the unilateral change doctrine was cabined, and if the President appointed the arbitrators, then the infringements on his Article II authority would disappear. Federal collective bargaining can be constitutional, but only if it does not restrict the President's executive power.

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[319] Seila Law v. CFPB, 140 S. Ct. 2183, 2200 (2020).

E. The President Must Retain Some Supervisory Authority Over Federal Employees

The argument that binding arbitration violates the *Free Enterprise Fund* double for cause rule can be met with the objection that this rule only applies to constitutional officers (those subject to the Appointments Clause). The Court expressly reserved the question whether "lesser functionaries subordinate to the officers of the United States must be subject to the same sort of control" as officers.[320] Consequently, that decision could, at most, only directly prohibit binding arbitration over employment-related matters involving unionized federal officers.

Some bargaining units do include constitutional officers and are thus clearly covered by the double for cause removal rule.[321] But the vast majority of unionized federal employees are not "Officers of the United States" under current precedents and thus do not necessarily require the same degree of presidential control. Under this argument, *Free Enterprise Fund* does not necessarily prohibit binding arbitration of non-officer employees' grievances.

However, the *Free Enterprise Fund* Court's reasoning implies that Congress cannot completely displace the President's supervisory and removal authority over federal employees more generally. Just as the President necessarily delegates responsibility to subordinate officers, these officers necessarily sub-delegate their duties to subordinate employees. The overwhelming majority of Executive Branch functions are carried out by line employees, not "officers." For the President to be able to execute the law faithfully, he needs some ability to hold these line employees "accountable for their conduct."[322] *Free Enterprise Fund* emphasized the importance

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[320] Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 506 (2010) (cleaned up).

[321] For example, the Supreme Court held that administrative law judges are inferior officers in *Lucia*. Social Security Administration ALJs are unionized. While their union cannot grieve ALJ removals (as these are expressly provided for in statute), they can grieve other personnel matters. Administrative judges in the Equal Employment Opportunity Commission also enjoy double for-cause removal protections under their CBA. *See* Kent H. Barnett & Russell Wheeler, *Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal*, 53 GA. L. REV. 1, 84 (2018). EEOC administrative judges perform essentially the same "important functions" that the *Lucia* court concluded made ALJs officers. Until April 2022, Department of Justice immigration judges (IJs) were covered by a collective bargaining unit. *See* Exec. Office of Immigr. Rev., 72 F.L.R.A. 733 (2022). The Ninth Circuit has held that IJs are also inferior officers. *See* Duenas v. Garland, 78 F.4th 1069, 1073 (9th Cir. 2023).

[322] *Free Enterprise Fund*, 561 U.S. at 496.

of this chain of command in maintaining the government's democratic accountability:

> Without a clear and effective chain of command, the public cannot determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall . . . . That is why the Framers sought to ensure that "those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community.[323]

There is reason to conclude that when James Madison expressed these sentiments, he was using the term "officers" to mean any federal official with responsibility for an ongoing governmental duty.[324] He was thus explaining the necessity of presidential supervision over the functioning of the entire federal workforce—not only senior officials.

Free Enterprise Fund did not decide whether the Constitution requires the "same sort of [presidential] control" over employees as officers.[325] But the court explained "the President . . . must have *some* power of removing those for whom he cannot continue to be responsible".[326] The Court has never authorized Congress to sever totally the "chain of dependence" between federal officials and the President.

Binding arbitration does exactly that. Arbitrators can have the final or nearly-final word on every major management decision affecting unionized employees. This includes unreviewable authority to reinstate dismissed employees. Even at the height of its functionalist jurisprudence, the Supreme Court never blessed completely stripping the President of supervisory authority over federal employees.[327] It seems unlikely that the modern formalist Court would do so.

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[323] *Id.* at 498 (cleaned up) (quoting 1 ANNALS OF CONG. 499 (Joseph Gales ed., 1834)).

[324] *See* Jennifer Mascott, *Who Are "Officers of the United States"?*, 70 STAN. L. REV. 443 (2018).

[325] *Free Enterprise Fund*, 561 U.S. at 506.

[326] *Id.* at 493 (emphasis added) (quotation omitted).

[327] Morrison v. Olson, 487 U.S. 654, 692 (1988) ("This is not a case in which the power to remove an executive official has been completely stripped from the President, thus providing no means for the President to ensure the 'faithful execution' of the laws.")

F. Responding to Objections that Senior Union Officers Are Not Constitutional Officers

Specific objections can be raised against the conclusion that senior union officers are constitutional officers. These too fall apart under closer scrutiny.[328]

Objection 1: Contractors Can Be Officers

Federal unions could object to the argument that union officers are constitutional officers by arguing they are merely contractors providing services to the government. Contractors necessarily negotiate the terms upon which their services will be provided. The CEOs of companies that contract with the federal government are not considered officers for constitutional purposes. Under this view, the leaders of federal unions should not be considered officers either. The same objection could be raised about grievance arbitrators, who are private contractors—not federal employees.[329]

The problem with this objection is that federal unions represent the federal government's own employees and arbitrators tell agencies how they may manage their workforce. Contractors are generally not considered officers because they assist the government, but do not themselves exercise governmental powers.[330] However, union officers and arbitrators have significant influence and control over how the government itself operates. Authority over agency operations is a mark of a constitutional officer.

OLC explains that contractors are generally not covered by the Appointments Clause because they do not (1) possess executive authority, (2) take actions that have an independent legal effect on the government, or (3) hold continuing positions. However, as OLC has explained, the corol-

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[328] A potential objection not addressed below is that if Federal union's duties make them constitutional officers, so do private-sector unions', as they exercise similar representation powers. This argument misses the fact that private-sector unions have only private duties whose performance directly implicates only their members and the relevant employers. Federal unions represent public employees and have significant influence over agency operations. Authority over how the government administers the law is a classic characteristic of constitutional offices. *See Officers of the United States, supra* note 36, at 87.

[329] The *Lebron* test the Fifth Circuit applied in *Horsemen's II* is inapplicable to arbitrators; that test only governs the constitutional status of corporations. *Horsemen's II*, 107 F.4th at 437–38. Arbitrators are independent contractors and thus out of scope for that test.

[330] *Officers of the United States*, *supra* note 36, at 96–98, 113.

lary to that understanding is that contractors who do meet these criteria would be considered officers under the Appointments Clause.[331]

Federal union officials and arbitrators meet all three criteria. They have authority over agencies' internal rules of operation or can countermand core management decisions, respectively. Private contractors have no such power over the government. As previously discussed, the actions taken by senior union officers and arbitrators—unlike most private contractors' actions—often have independent legal effect. And union officers occupy continuing positions, required by law to be filled by election of the bargaining unit (or by delegates selected by a secret ballot of bargaining unit employees) every three to five years. Arbitrators' offices are similarly continuing for purposes of Appointments Clause jurisprudence.

Contractors can be, and occasionally are, found to be officers subject to the Appointments Clause. Chief Justice Marshall held as much in the early days of the Republic.[332] Over a century ago the Attorney General explained that "the inquiry must always be into the nature of the service to be rendered. If the appointee himself performs any of the functions of government, he is an officer. If he merely renders assistance to another in the performance of those functions, he is an employee."[333] Such an inquiry points to the conclusion that senior federal union officers and arbitrators must be appointed in accordance with the Appointments Clause.

Objection 2: Union Officers Are Assigned Sovereign Authority by Law

Another argument that could be raised against union officers' being subject to the Appointments Clause is that their positions are not expressly created by statute. The Statute vests authority in exclusive representatives generally. It does not create particular union offices with specific duties. Instead, while it requires exclusive representatives to elect officers to fixed terms, it allows them to determine what specific union offices to create and what authority to delegate to them. Under this objection, union officers are not covered by the Appointments Clause because their positions are not specifically prescribed in statute.

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[331] *Id.* at 96–98.

[332] United States v. Maurice, 26 F. Cas. 1211, 1216–20 (C.C.D. Va. 1823) (No. 15,747) (Chief Justice Marshall, sitting as a circuit judge, holding that an individual who contracted to perform the duties of an "agent of fortifications" occupied a federal office subject to the Appointments Clause).

[333] *Officers of the United States*, *supra* note 36, at 98.

This objection takes too narrow a view of the Appointments Clause. Because the union officers occupy continuing positions in their unions to which the Statute assigns a portion of the sovereign authority of the federal government, they are subject to the requirements of the Appointments Clause, regardless of whether the positions they occupy were specifically and expressly created by federal law.[334]

Moreover, even if it were assumed that the Appointments Clause applied only to offices established by federal law, the Statute does establish the relevant offices of federal employee unions. It does so in much the same manner as the law addressed by the Supreme Court in *Edmond v. United States*. There the Court heard an Appointments Clause challenge to decisions made by judges of the Coast Guard Court of Criminal Appeals.[335] The statute in question did not specifically authorize the Secretary of Transportation to appoint Coast Guard judges (Congress subsequently transferred the Coast Guard to the Department of Homeland Security). Instead, it authorized the Secretary to "appoint and fix the pay of officers and employees of the Department of Transportation and [] prescribe their duties and powers."[336] Among other objections, the plaintiffs argued that this general authorization did not provide for constitutional appointments for Coast Guard judges. The Court rejected that argument, holding that:

> [A]lthough the statute does not specifically mention Coast Guard judges, the plain language of [the statute] appears to give the Secretary power to appoint them . . . . We conclude that [the statute] authorizes the Secretary of Transportation to appoint judges of the Coast Guard Court of Criminal Appeals; and that such appointment is in conformity with the Appointments Clause of the Constitution.[337]

Congress may establish federal offices using general provisions. Federal statutes often assign sweeping responsibilities to agency heads, then generally authorize them to appoint subordinate officers and assign responsibilities to those officers as they see fit.[338] Similarly, the Statute gives

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[334] *Id.* at 117–19.

[335] 520 U.S. 651, 653 (1997).

[336] 49 U.S.C. § 323(a).

[337] *Edmond*, 520 U.S. at 656, 666.

[338] *See, e.g.*, 5 U.S.C. § 4802(b) ("The [Securities and Exchange] Commission may appoint and fix the compensation of such officers, attorneys, economists, examiners and other employees as may be necessary for carrying out its functions under the securities laws[.]"); *see also* 5 U.S.C. § 7105(d) ("The [Federal Labor Relations] Authority shall appoint an Executive Director and such regional directors, administrative law judges . . . and other

federal employees exclusive bargaining representatives significant duties and then requires the employee unions to elect officers to perform these duties or to supervise their performance.[339] And, as with the Secretary of Transportation under the law in *Edmond*, the Statute lets unions decide which specific offices to create and which duties to assign them. The Appointments Clause does not require Congress to codify with specificity the functions and duties of every federal office it establishes.

Objection 3: Officers Need Not Act Under Agency Control

Another potential counterargument is that federal union officers are not acting on behalf of the federal government when they exercise their powers under the Statute. While virtually all federal union local or council presidents are agency employees conducting union business on official government time, they are not considered to be performing official government business when doing so.[340] Accordingly, this argument goes, they should be considered private actors—not Officers of the United States.

Taken to its logical conclusion, this argument would enable Congress to circumvent the requirements of the Appointments Clause simply by declaring in statute that any particular federal employee is acting in a private capacity when exercising certain sovereign powers. This result cannot follow from a correct constitutional interpretation. The Appointments Clause exists to ensure accountability for the exercise of sovereign government power by whatever actor. Congress cannot sidestep its requirements simply by labeling certain federal employees as private actors who are beyond the control of the agency head and not performing official business when they wield significant authority under the laws of the United States (and are being paid to do so by American taxpayers).

Most federal union officers are federal employees paid to exercise statutory authority over agency operations during working hours in agency buildings. To say that they cannot be constitutional officers because they are not formally under the control of the agency head would reduce the Appointments Clause to a tautology.

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individuals as it may from time to time find necessary for the proper performance of its functions. The Authority may delegate to officers and employees appointed under this subsection authority to perform such duties and make such expenditures as may be necessary.").

[339] *See* 5 U.S.C. § 7120(d); 29 U.S.C. §§ 402(n), 481; 29 C.F.R. § 458.29.

[340] Bureau of Alcohol, Tobacco & Firearms v. FLRA, 464 U.S. 89, 103–07 (1983).

CONCLUSION

The courts have never passed on the constitutionality of the provisions and interpretations of the Statute discussed above. Outside parties have little standing to challenge union or arbitrator interference with presidential authority. Most such challenges would likely need to be brought by either the President or agencies, and to date no Administration has done so. As a result, federal courts have not had an opportunity to examine the scope of permissible union or arbitrator authority under Article II.

That could change. Recently, federal unions have significantly interfered with presidential priorities. They forced VA to offer reinstatement—with backpay—to thousands of employees dismissed under the Accountability Act. They largely prevented agencies from returning to in-person work, despite multiple Biden Administration directives to do so. EPA's union has openly boasted that its new contract with the EPA is intended to stymie the re-elected President Trump's policies. The outgoing Biden Administration granted four- and five-year CBA extensions in an overt attempt to prevent President Trump from changing course. Union overreach may encourage future Presidents to bring constitutional challenges, or to test the validity of interpretations of the Statute that purport to neutralize the President's ability to supervise and manage the executive workforce.

The Statute is highly vulnerable to such challenges. As currently construed, it prevents agencies from changing any working conditions prescribed by CBAs without union consent for seven to 10 years, and even constrains agencies from unilaterally changing working conditions outside the contract. It gives unions the power to veto some CBA provisions during renegotiations. Furthermore, the Statute grants private arbitrators the final, or near final, word on most employment matters.

These provisions are incompatible with Article II's vesting of the executive power in the President. Examined through the lens of Vesting and Take Care jurisprudence, the private non-delegation doctrine, and Appointments Clause precedents, unions exercise too much executive power. Congress cannot legislatively disperse the powers of the presidency into a functionally plural executive.

Courts can correct these constitutional defects by invalidating relatively little of the Statute. Many of these problems can be fixed by reversing FLRA doctrines that are not mandated by law and by applying

the Statute in a manner consistent with the President's Article II authority. The canon of constitutional avoidance requires such constructions of the Statute. "Congress cannot reduce the Chief Magistrate to a cajoler-in-chief."[341] The President must retain authority over—and responsibility for—the Executive Branch.

[341] Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 502 (2010) (cleaned up).

APPENDIX

The below table shows the length of time agencies took, in a representative bargaining unit, to negotiate the CBA that was effective as of June 1, 2024. The table covers cabinet-level departments and the five independent agencies with the most unionized employees. These bargaining units cover over 550,000 Federal employees and represent over 40 percent of all bargaining unit employees covered by the Statute. The average agency spent 4.4 years negotiating their CBAs, while the median agency spent 3.5 years.

Agency	Bargaining Unit	Union	Covered Emps.	Negotiations Start	Effective Date of New Contract	Bargaining Duration (Years)
Cabinet Departments						
Dep't of Agric.	Office of General Counsel	AFGE Local 1106	191	Mar. 28, 2017	Dec. 22, 2023	6.7
Dep't of Com.	U.S. Pat. & Trademark Office	Pat. Office Prof. Ass'n	8,912	Feb. 14, 2019	Jan. 13, 2025	5.9
Dep't of Def.	Defense Logistics Agency	AFGE Council 169	15,466	Feb. 21, 2019	Sept. 9, 2022	3.5
Dep't of Educ.	Agency-wide unit	AFGE Nat'l Council of Dep't of Educ. Locals	2,577	Dec. 16, 2016	Nov. 21, 2022	5.9
Dep't of Energy	Headquarters Employees	NTEU	1,616	Sept. 15, 2019	Jan. 12, 2022	2.3
HHS	Agency-wide unit	NTEU	18,407	July 15, 2015	July 2, 2023	8.0
DHS	Customs & Border Prot.	AFGE Nat'l Border Patrol Council	16,234	Sept. 1, 2012	Nov. 1, 2019	7.2

HUD	Agency-wide unit	AFGE Council 222	5,584	June 8, 2018	Aug. 12, 2020	2.2
Dep't of Interior	Nat'l Park Serv.	AFGE Council 270	1,614	July 15, 2017	Dec. 20, 2020	3.4
DOJ	Bureau of Prisons	AFGE Council of Prison Locals	27,620	Jan. 7, 2020	Aug. 16, 2021	1.6
Dep't of Labor	Headquarters Employees	AFGE Local 12	3,214	Jan. 9, 2019	July 20, 2020	1.5
Dep't of Transp.	Fed. Transit Admin.	AFGE Local 3313	291	Aug. 15, 2018	July 16, 2021	2.9
Treasury	IRS	NTEU	71,388	Sept. 16, 2020	Oct. 1, 2021	1.0
VA	Agency-wide unit	AFGE Nat'l VA Bargaining Council	321,968	Dec. 15, 2017	Aug. 8, 2023	5.6
Major Independent Agencies						
EPA	Agency-wide unit	AFGE Council 238	8,231	May 15, 2010	Aug. 6, 2020	10.2
GSA	Agency-wide unit	NFFE	3,255	Oct. 3, 2011	June 7, 2021	9.7
NASA	Headquarters Employees	IFPTE Local 9	605	June 30, 2016	Sept. 15, 2020	4.2
SSA	Agency-wide unit	AFGE Council 220	42,380	Dec. 15, 2017	Oct. 3, 2019	1.8
FDIC	Agency-wide unit	NTEU	4,189	Mar. 28, 2017	Sept. 18, 2017	0.5
Total			553,742	Average		4.4
				Median		3.5

Representative bargaining units were selected by examining, where data was available, either the largest bargaining unit in the agency or the

unit representing headquarters employees.[342] Bargaining duration was calculated as the difference between when the contract took effect and when either party indicated a desire to begin negotiations.[343] In some cases data limitations required looking at the date negotiations began because the reopening date was unavailable. The author was unable to identify a start date for negotiations between the State Department and the American Foreign Service Association, so the State Department is excluded from this analysis.

Department of Agriculture (USDA)

Negotiations start dates could not be obtained for USDA's contract with the Forrest Service, its largest bargaining unit, so the Office of General Counsel (OGC) was examined instead. AFGE Local 1106 represents USDA OGC employees. USDA and OGC reopened their CBA on March 28, 2017.[344] The resulting contract did not become effective until December 22, 2023—over six and a half years later.[345] AFGE Local 1106 engaged in stalling tactics to prevent the Trump Administration from renegotiating the CBA. These included twice directing members to vote against ratifying articles that the union had agreed to at the bargaining table.[346] This reset negotiations, preventing the entire contract—including FSIP imposed provisions—from taking effect.

Department of Commerce

The Department of Commerce's Patent and Trademark Office (PTO) is negotiating a new CBA with the Patent Office Professional Association. The parties' current CBA was adopted in 1986 and the parties continue to

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[342] In some cases data limitations required looking at a different bargaining unit.
[343] When the sources indicated the month but not the day negotiations began the date was interpolated as the 15th of the month.
[344] U.S. Department of Agriculture Office of the General Counsel, and American Federation of Government Employees, Local 1106, 2020 FSIP 012 (May 21, 2020).
[345] U.S. DEPARTMENT OF AGRICULTURE, OFFICE OF THE GENERAL COUNSEL, AND AFGE LOCAL 1106, COLLECTIVE BARGAINING AGREEMENT 2023 (Dec. 22, 2023), https://www.usda.gov/sites/default/files/documents/ogc-afge-1106-cba.pdf [https://perma.cc/NNX3-L6SG]
[346] *Trump assault on union bargaining intensifies*, ST. LOUIS / S. ILL. LABOR TRIBUNE, Aug. 4, 2020, https://labortribune.com/trump-assault-on-union-bargaining-intensifies/ [https://perma.cc/8D3A-86QS]

operate under it.[347] A FOIA request revealed that Commerce gave notice to terminate that CBA on February 14, 2019. Negotiations began in 2019 and, as of the drafting of this Appendix, remain ongoing—almost six years after they began.

Department of Defense (DOD)

On February 21, 2019, DOD reopened its contract with AFGE Council 169 representing employees in the Defense Logistics Agency.[348] This is one of the single largest bargaining units in DOD, covering over 15,000 employees. AFGE Council 169 engaged in stalling tactics to prevent the Trump Administration from renegotiating the CBA. Negotiations went to impasse and FSIP imposed contract articles in 2020.[349] AFGE encouraged its members to vote down the overall contract, and DOD and AFGE returned to the bargaining table. FSIP imposed new articles in 2021.[350] AFGE again directed its members to reject the articles its negotiators had agreed to, preventing the whole contract from taking effect. DOD returned to FSIP, asking it to impose the remaining articles the parties had agreed to without further negotiations. FSIP did so in 2022.[351] The new CBA finally took effect on September 9, 2022—three and a half years after negotiations began.[352]

Education Department (ED)

ED's contract with the AFGE National Council of Department of Education Locals expired on December 16, 2016, and the parties began negotiations.[353] AFGE dragged out ground rules negotiations in an effort to

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[347] Given the age of the CBA, no attempt was made to try to determine when negotiations on the 1986 contract began.

[348] U.S. Dep't of Def., Def. Logistics Agency and AFGE Council 169, 2022 FSIP 038 (Aug. 3, 2022).

[349]U.S. Dep't of Def., Def. Logistics Agency and AFGE Council 169, 2020 FSIP 041 (Sept. 21, 2020).

[350] U.S. Dep't of Def., Def. Logistics Agency and AFGE Council 169, 2021 FSIP 040 (May 24, 2021).

[351] U.S. Dep't of Def., Def. Logistics Agency and AFGE Council 169, 2022 FSIP 038 (Aug. 3, 2022).

[352] MASTER LABOR AGREEMENT, DEFENSE LOGISTICS AGENCY AND THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES COUNCIL 169 (Sept. 9, 2022), https://www.dla.mil/Portals/104/Documents/Careers/Labor/2022AFGECOUNCIL169CBA.pdf?ver=EDkTxrJoH1-H_3V0MoJ1mQ%3D%3D []

[353] U.S Dep't of Educ., 71 F.L.R.A. 516 (2020).

prevent the Trump Administration from renegotiating the CBA. In the spring of 2018 ED gave AFGE an ultimatum: The agency was moving to substantive contract negotiations and proposed a new CBA. AFGE had 20 days to respond, or ED would implement their proposal. Under FLRA precedent agencies can unilaterally implement proposals if the union declines to negotiate after reasonable notice. The day after ED's notice period concluded AFGE expressed interest in discussing the proposals. ED responded that the union had waived its bargaining rights by not responding within the given period, that the agency was done with stalling tactics, and ED would unilaterally implement their proposed CBA. The union filed a ULP complaint. The Biden Administration settled those charges, withdrew the Trump CBA, and negotiated a new CBA with AFGE.[354] That CBA took effect on November 21, 2022—5.9 years after negotiations began.[355]

Department of Energy (DOE)

A FOIA request revealed that DOE agreed to ground rules with the NTEU unit representing headquarters employees in September 2019. It could not be ascertained how much earlier either party had reopened the contract. The contract was ultimately finalized under the Biden Administration and took effect on January 12, 2022—over two years after negotiations began.[356]

Department of Health and Human Services (HHS)

HHS and NTEU took eight years to negotiate their current CBA. The parties reopened the agency-wide CBA in July 2015. The parties could not agree on ground rules and the dispute went to FSIP. FSIP imposed ground

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[354]U.S Dep't of Educ., 73 F.L.R.A. 165 (2022).

[355]*Huge AFGE Victory: Education Department to Refund Lost Union Dues, Ditch Imposed Contract, Restore Payroll Dues Deduction*, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES (Nov. 21, 2022), https://web.archive.org/web/20221207101040/https:/www.afge.org/article/huge-afge-victory-education-department-to-refund-lost-union-dues-ditch-imposed-contract-restore-payroll-dues-deduction/

[356] 2021 COLLECTIVE BARGAINING AGREEMENT BETWEEN THE DEPARTMENT OF ENERGY AND THE NATIONAL TREASURY EMPLOYEES UNION (DEC. 14, 2021), https://www.energy.gov/sites/default/files/2023-03/2021%20DOE%20Headquarters%20and%20the%20National%20Treasury%20Employees%20Union%20CBA.pdf

rules at the end of the Obama Administration.[357] The Trump HHS rejected those ground rules and initially refused to bargain under them. In May 2018 President Trump issue Executive Orders 13836 and 13837 directing agencies to renegotiate their CBAs to reduce waste. HHS announced it would begin negotiations using the ground rules FSIP had imposed. However, NTEU was no longer eager to bargain. NTEU filed a ULP charge against HHS for using the ground rules the agency had previously rejected.

Substantive negotiations on the contract began in July 2018, although NTEU protested using the ground rules.[358] Two days into bargaining, and in the face of NTEU stalling tactics, HHS brought a mediator from the Federal Mediation and Conciliation Service (FMCS) to negotiations. Two days later the mediator certified that the parties were at impasse; HHS then asked FSIP to arbitrate the dispute. FSIP accepted jurisdiction over most but not all articles and directed the parties to resume mediated negotiations for 30 days. The parties reached agreement on some articles; the remaining articles went back to FSIP. FSIP imposed terms in the disputed articles in April 2019.[359] HHS proceeded to implement the articles FSIP imposed. NTEU filed a ULP against HHS, arguing its 2010 CBA did prohibited implementation until all contract articles were finalized—including those that FSIP had declined jurisdiction over. In January 2020 an arbitrator ruled for NTEU and ordered the agency to reverse implementation. In August 2021 the Biden Administration reset negotiations and spent two years renegotiating an entirely new five-year CBA. The new CBA took effect in July 2023 and will last until July 2028.[360]

Department of Homeland Security (DHS)

The National Border Patrol Council initiated contract negotiations with Customs and Border Protection in 2012, during President Obama's first term.[361] The parties could not reach agreement throughout President

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[357] Dep't of Health & Hum. Servs. and NTEU, 2016 FSIP 113 (Jan. 5, 2017).
[358]Jessie Bur, *HHS and its union ordered to redo contract negotiations*, FED. TIMES (Oct. 4, 2019), https://www.federaltimes.com/management/2019/10/04/hhs-and-its-union-ordered-to-redo-contract-negotiations/ [https://perma.cc/T8DD-UR6J]
[359] U.S. Dep't of Health & Hum. Servs. and NTEU, 2018 FSIP 077 (Apr. 1, 2019).
[360] Drew Friedman, *HHS, NTEU 'reset the relationship' as ink dries on new five-year agreement*, FEDERAL NEWS NETWORK (June 13, 2023), https://federalnewsnetwork.com/workforce/2023/06/hhs-nteu-reset-the-relationship-as-ink-dries-on-new-five-year-agreement/ [https://perma.cc/VNC3-26C7]
[361] U.S. Customs & Border Prot., 71 F.L.R.A. 744 (2022).

Obama's entire second term. Not until November 2019 did DHS get a new Border Patrol CBA—three-quarters of the way through President Trump's first term, and seven years after negotiations first began.[362]

Housing and Urban Development (HUD)

HUD reopened its contract with AFGE Council 222, representing all AFGE locals at HUD, in June, 2018. Negotiations went to impasse, and FSIP imposed a new contract in August 2020—over two years later.[363]

Department of Interior (DOI)

DOI and AFGE Council 270—representing National Park Service employees—signed ground rules for contract negotiations in July of 2017.[364] Negotiations went to impasse, and FSIP imposed contract terms in a December 2020 decision—over three years after ground rule negotiations were completed.[365]

Department of Justice (DOJ)

A FOIA request revealed that DOJ's Bureau of Prisons began negotiations with the AFGE Council of Prison Locals in January 2020. It could not be determined when either party asked to reopen the contract. A new contract was negotiated and took effect in August 2021—about a year and a half after negotiations began.[366]

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[362]COLLECTIVE BARGAINING AGREEMENT BETWEEN THE NATIONAL BORDER PATROL COUNCIL AND U.S. CUSTOMS AND BORDER PROTECTION (Nov. 1, 2019), https://www.afge.org/globalassets/documents/cbas/final-cba-cbp_nbpc-9.13.19.pdf [https://perma.cc/Z47A-8KL8]

[363]U.S. Dep't of Hous. & Urb. Dev. and AFGE Council 222, 2020 FSIP 036 (Aug. 12, 2020).

[364] When ground rules negotiations began could not be determined.

[365] U.*S.* Dep't of the Interior, Nat'l Park Serv., & AFGE Council 270, 2020 FSIP 068 (Dec. 20, 2020).

[366]*AFGE, BOP Sign Unprecedented 5-Year Master Agreement*, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, Aug. 16, 2021, https://www.afge.org/article/afge-bop-sign-unprecedented-5-year-master-agreement/

Department of Labor (DOL)

DOL reopened its CBA with AFGE Local 12, representing headquarters employees, on January 9, 2019.[367] The new contract took effect on July 20, 2020.[368] Negotiations took at total of one and a half years.

State Department

The State Department's CBA with the American Foreign Service Association took effect on August 12, 2019, but the date negotiations began could not be determined.

Department of Transportation (DOT)

DOT's Federal Transit Administration began bargaining a new contract with AFGE Local 3313 in August 2018.[369] The resultant contract took effect on July 16, 2021—nearly three years later.[370]

Department of Treasury

The U.S. Department of Treasury's negotiations with NTEU on a new Internal Revenue Service contract went relatively quickly. The ground rules from the prior CBA called for negotiations to begin in September 2020.[371] Bargaining concluded and the new six-year contract was executed on October 1, 2021—over just a year later.[372]

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[367] U.S. Dep't of Labor & AFGE, Local 12, 2020 FSIP 016 (March 13, 2020).

[368] *U.S. Department of Labor and American Federation of Government Employees, Local 12 Agree to New Collective Bargaining Agreement*, U.S. DEPARTMENT OF LABOR (July 20, 2020), https://www.dol.gov/newsroom/releases/osec/osec20200720 [https://perma.cc/K9MA-F6F2]

[369] U.S. Dep't of Transp., Fed. Transit Admin., and AFGE Local 3313, 2019 FSIP 043 (Nov. 14, 2019).

[370] MASTER AGREEMENT BETWEEN FTA AND AFGE LOCAL 3313 (July 16, 2021), http://www.afge-local3313.org/docs/FTA-Collective-Bargaining-Agreement-2021.pdf [https://perma.cc/39AB-TFWP]

[371] 2019 NATIONAL AGREEMENT, INTERNAL REVENUE SERVICE & NATIONAL TREASURY EMPLOYEES UNION 255 (2018) https://www.irs.gov/pub/irs-utl/2019_national_agreement_irs_nteu.pdf [https://perma.cc/R7MN-SL2U]

[372] 2022 NATIONAL AGREEMENT, INTERNAL REVENUE SERVICE & NATIONAL TREASURY EMPLOYEES UNION 181 (2021), https://www.jobs.irs.gov/sites/default/files/nho_documents/2022-National-Agreement.pdf [https://perma.cc/P46T-9X2Y]

Department of Veterans Affairs (VA)

During the Trump Administration, VA reopened negotiations on their master contract covering all AFGE-represented employees on December 15, 2017.[373] Negotiations went to impasse and FSIP imposed articles in late 2020. AFGE encouraged its members to vote against ratifying the new CBA, which included both FSIP-imposed articles and articles the union voluntarily accepted. Members rejected the contract in January 2021.[374] The Biden Administration subsequently continued negotiations on the CBA, which took effect on August 8, 2023—over five and half years after negotiations began.[375]

Environmental Protection Agency (EPA)

EPA reached a new three-year CBA in 2007 with AFGE Council 238, covering all AFGE-represented employees. In May 2010—during President Obama's first term—AFGE reopened the contract.[376] Negotiations on that agreement lasted throughout rest of the Obama presidency and most of the first Trump Administration, including multiple FSIP interventions. EPA ultimately reached a new CBA on August 6, 2020—over a decade after negotiations began and triple the three-year term of the initial agreement.[377]

This agreement was in effect on June 1, 2024—the date of analysis for this report. However, EPA negotiated the next agreement much more

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[373] U.S. DEP'T OF VETERANS AFFS., TITLE 38 DECISION PAPER (Oct. 25, 2019) https://web.archive.org/web/20210322080209/https:/www.va.gov/LMR/Article_61.pdf [https://perma.cc/U69T-FHSV]

[374] News Release, American Federation of Government Employees, Largest Veterans Affairs Department Union Overwhelmingly Votes Against Ratifying Collective Bargaining Agreement (Jan. 8, 2021), https://www.afge.org/publication/largest-veterans-affairs-department-union-overwhelmingly-votes-against-ratifying-collective-bargaining-agreement

[375] MASTER AGREEMENT, U.S. DEPARTMENT OF VETERANS AFFAIRS AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES 308 (2023) https://afgenvac.org/wp-content/uploads/2023/08/VA-AFGE-2023-Master-Agreement.pdf [https://perma.cc/YXW2-X2AB]

[376] EPA and AFGE, 2020 FSIP 51 (Sept. 8, 2020).

[377] News Release, U.S. Environmental Protection Agency, EPA forces union leadership to negotiating table resulting in new Master Collective Bargaining Agreement with AFGE (Aug. 6, 2020), https://web.archive.org/web/20210330102112/https:/www.epa.gov/newsreleases/epa-forces-union-leadership-negotiating-table-resulting-new-master-collective

quickly. The Biden EPA began negotiations with AFGE Council 238 in 2022 and in July 2024 signed a new CBA that will last until 2028.[378]

General Services Administration (GSA)

A FOIA request indicated that GSA signed ground rules for negotiations with the National Federation of Federal Employees on October 3, 2011. Negotiations on that contract—covering all NFFE-represented employees in the agency—took almost a decade. The resulting CBA was ultimately implemented on June 7, 2021.

National Aeronautics and Space Administration (NASA)

A FOIA request revealed that the International Federation of Professional and Technical Employees Local 9 representing headquarters employees requested contract negotiations with NASA on June 30, 2016. The resulting CBA took effect in September 2020—over four years later.[379]

Social Security Administration (SSA)

SSA reopened their CBA with AFGE Council 220 in December 2017.[380] The union and agency reached agreement in October 2019—slightly less than two years later.[381] The Biden Administration subsequently reopened and renegotiated six articles of this contract in April 2023. Negotiations took until July. AFGE and SSA agreed to extend the entire CBA—both the renegotiated and original articles—until October 2029.[382]

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[378] News Release, U.S Environmental Protection Agency, U.S. EPA Signs New Bargaining Agreement with AFGE (July 9, 2024), https://www.epa.gov/newsreleases/us-epa-signs-new-bargaining-agreement-afge [https://perma.cc/A8TC-4Q9Q]

[379] COLLECTIVE BARGAINING AGREEMENT BETWEEN NASA HEADQUARTERS AND THE NASA HEADQUARTERS PROFESSIONAL ASSOCIATION LOCAL #9 OF THE INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS (2020) https://www.opm.gov/cba/api/documents/7e7a3a49-b43d-4f17-89f8-c449a8cf4b8c/attachments/NASA%20HQ%20CBA.pdf.

[380] Social Security Admin. and AFGE, 2019 FSIP 019 (May 29, 2019).

[381] Nicole Ogrysko, *SSA, AFGE reach new collective bargaining agreement after contentious saga*, FEDERAL NEWS NETWORK (Oct. 3, 2019), https://federalnewsnetwork.com/unions/2019/10/ssa-afge-reach-new-collective-bargaining-agreement-after-contentious-saga/ [https://perma.cc/P6QY-WHL5].

[382] *See* Drew Friedman, *Unions 'sound the alarm' over worsening staff attrition at SSA*, Federal News Network (Apr. 11, 2023),

Federal Deposit Insurance Corp (FDIC)

NTEU requested to reopen their agency-wide agreement with FDIC on March 28, 2017.[383] Negotiations proceeded quickly, and the new CBA took effect on September 18, 2017—six months later.[384]

https://federalnewsnetwork.com/workforce/2023/04/unions-sound-the-alarm-over-worsening-staff-attrition-at-ssa/ [https://perma.cc/7UJF-C5WR]; *see also* News Release, American Federation of Government Employees, Contract covering 42K SSA employees extended through October 2029 (July 19, 2023), https://www.afge.org/publication/afge-reaches-agreement-with-ssa-on-contract-updates-extension/.

[383] Information obtained through a Freedom of Information Act request.

[384] NATIONWIDE AGREEMENT BETWEEN FEDERAL DEPOSIT INSURANCE CORPORATION & NATIONAL TREASURY EMPLOYEES UNION (Sept. 18, 2017), https://www.opm.gov/cba/api/documents/af0f3763-8597-e911-915b-005056a577c8/attachments/1033_FDIC%20&%20NTEU_09172020-redacted.pdf [https://perma.cc/F5B7-9W9M]