PRESIDENTIAL POWER OVER DEFENSE CONTRACTS: HOW AN EXISTING STATUTE AUTHORIZES THE EXECUTIVE BRANCH TO RECOUP PROFITS FROM DEFENSE CONTRACTORS

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The United States pays half-a-trillion dollars to defense contractors every year. Although the U.S. military could not operate without profitable contractors, excessively profitable contracts reduce manufacturing output and can imperil soldier safety. Stretching back to the founding, there is a long history of the executive branch compelling ex post modifications of military contracts to a lower price than the parties agreed to at signing. Sometimes authorized by Congress (but not always), this executive practice of "downward revisions" has fallen into disuse. Nevertheless, at least one statute might authorize this practice today: Public Law 85-804. Commonly understood to provide higher payments to defense contractors, this Note argues that Public Law 85-804 should be interpreted in light of its text and history to authorize downward revisions to excessively profitable defense contracts. Such an interpretation could save soldiers' lives and lower defense costs during today's challenging fiscal and geopolitical times.

 J.D., 2023, New York University School of Law. I am extremely grateful to Professor Noah Rosenblum for thorough and thoughtful feedback on multiple drafts. I also want to thank Professor Peter Shane for a key suggestion late in the writing process. Thank you to all the *New York University Law Review* editors for their excellent improvements to this Note (especially Grant Welby), and to countless friends, co-workers, colleagues, and family members for enduring my ramblings on this topic and providing great input. All errors and omissions are mine alone.

Introduction

"For want of a nail, the shoe was lost;
For want of the shoe, the horse was lost;
For want of the horse, the rider was lost;
For want of the rider, the battle was lost;
For want of the battle, the kingdom was lost,
And all for the want of a horseshoe nail."

—Unknown, 1916[1]

On January 19, 2022, the Committee on Oversight and Reform convened a hearing on military contracting.[2] The committee accused an aerospace component manufacturer—TransDigm—of earning "excess

1 The Real Mother Goose (1916) (ebook).

2 *Price Gouging in Military Contracts: New Inspector General Report Exposes Excess Profit Obtained by TransDigm Group: Hearing Before the H. Comm. on Oversight & Reform*, 117th Cong. (2022) [hereinafter *2022 TransDigm Hearing*].

profits" on its contracts with the Defense Department.[3] Disagreeing with that conclusion was difficult. One component cost TransDigm $125 to produce and the government more than $1,600 to buy.[4] Another component cost TransDigm $189 to produce and the government $7,495 to buy.[5] In total, the Defense Department concluded that TransDigm made excess profits on every reviewed product except one, sometimes with profit margins of nearly 4,000%.[6]

The hearing centered on TransDigm's three-step business model: find sole-source suppliers, acquire them, and raise prices. As a result of this strategy, TransDigm has grown an average of seventeen percent per year over the last seventeen years into a $50 billion company.[7] But what's good for business isn't always good for the taxpayer: If TransDigm's pricing strategys is typical among defense contractors, the Defense Department could be overpaying by at least $15 billion every year.[8]

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[3] *Id.* at 1; *see* Off. of Inspector Gen., U.S. Dep't of Def., DODIG-2022-043, Audit of the Business Model for TransDigm Group Inc. and Its Impact on Department of Defense Spare Parts Pricing ii, 14 (2021) [hereinafter 2021 DoD IG Report] (defining "excess profits" as greater than fifteen percent margins, based on the highest profit percentage identified in the Federal Acquisition Regulations and based on TransDigm's reported industry average of eight percent to twenty-two percent profit margins). This was not TransDigm's first time facing allegations of price gouging. Three years prior, the same committee held a hearing on the same topic with nearly the same witnesses. *See DOD Inspector General Report on Excess Profits by TransDigm Group, Inc.: Hearing Before the H. Comm. on Oversight & Reform*, 116th Cong. (2019) [hereinafter *2019 TransDigm Hearing*]. Within days of that May 2019 congressional hearing, TransDigm voluntarily refunded $16 million to the government. *See* Press Release, H. Comm. on Oversight & Reform, TransDigm to Refund $16 Million to DOD as a Result of Committee Investigation (May 24, 2019) (on file with author).

[4] *2022 TransDigm Hearing*, *supra* note 2, at 33 (noting the price of a plain encased seal for the B-22 Osprey).

[5] *Id.* at 38 (noting the price of a linear actuating cap for the F-15 and "Stratolifter C-125").

[6] 2021 DoD IG Report, *supra* note 3, at 66 (noting that "excess profits" were found for 105 out of 106 reviewed products). For context, the Defense Department awarded TransDigm about $570 million in contracts between January 2017 and June 2019. *Id.* at 20.

[7] For historical sales data, see TransDigm Group Inc., 2008 Annual Report 1 (2008) (reporting $435 million in 2006 revenue) and TransDigm Group Inc., Annual Report (Form 10-K) 25 (Sept. 30, 2023) (reporting $6.6 billion in 2023 revenue). For current market capitalization data, see TransDigm Group Incorporated (TDG) Stock Price, News, Quote & History, Yahoo! Fin., https://finance.yahoo.com [https://perma.cc/SC83-V3ZY] (search in the search bar for "TDG").

[8] This number is conservatively estimated by applying TransDigm's ratio of sample excess profits to total contract value ($20.8 million out of $568.6 million, or 3.7%) to Defense Department annual spending on contractors ($420 billion). *See* 2021 DoD IG Report, *supra* note 3, at 20, 76; Heidi M. Peters, Cong. Rsch. Serv., IF10600, Defense Primer: Department of Defense Contractors 1 (2021). A less conservative estimate would apply TransDigm's ratio of sample excess profits to *sample* contract value, but that data is redacted from the report.

Despite committee demands for a refund of $21 million, TransDigm refused to return the requested profits.[9] And why would it? TransDigm and the government signed a contract, TransDigm produced the products, and the government received the products as requested. Everything TransDigm did was legal. As the CEO of TransDigm—who was paid $22 million in 2020—said at the hearing, a "profit limit . . . does not exist in law or policy."[10]

But TransDigm's CEO might have mistaken the absence of *ex ante* profit limitations for a presidential inability to recoup profits *ex post*. Stretching back to the founding, there is a long history of the executive branch compelling *ex post* price reductions to military contracts.[11] This executive practice of "downward revisions"[12] was largely conducted without statutory authorization before the mid-twentieth century. While this executive practice has fallen into disuse, at least one statute—Public Law 85-804—might authorize downward revisions today. Public Law 85-804 states that an authorized department or agency can amend or modify contracts "without regard to other provisions of law . . . whenever [the President] deems that such action would facilitate the national defense."[13] While commonly understood to authorize "upward revisions,"[14] indemnification, and advance payments to defense contractors,[15] this Note argues that the statute's text and history support a broader understanding of the law.

An interpretation permitting downward revisions could benefit national security today, because the goals of contractor profitability, manufacturing output, and soldier safety are not always aligned. For example, between 2013 and 2020, about the same number of U.S. soldiers died in non-combat aviation accidents (224) as died in actual combat

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9 *2022 TransDigm Hearing*, *supra* note 2, at 1 (statement of Rep. Carolyn Maloney, Chairwoman, H. Comm. on Oversight & Reform) ("Our message to TransDigm today is simple: pay back the money."); Letter from Rep. Carolyn B. Maloney & Sen. Charles E. Grassley, to Kevin Stein, President, CEO, and Dir., TransDigm Group Inc. at 2 (Apr. 14, 2022) (on file with author) (noting no refund had been received as of March 17, 2022).

10 *2022 TransDigm Hearing*, *supra* note 2, at 22, 35–36 (noting that Chairman Nicholas Howley made $68 million in 2020—which was more than the CEOs of Boeing, Lockheed Martin, and Raytheon combined—and CEO Kevin Stein made $22 million).

11 *See infra* Section II.A.

12 "Downward revision" is the Author's term for this action. The Author will use this term synonymously with "renegotiation," but use that term when historically relevant.

13 50 U.S.C. § 1431(a) (originally enacted as Act of Aug. 28, 1958, Pub. L. No. 85-804, § 1, 72 Stat. 972).

14 "Upward revision" is the Author's term for the *ex post* modification of a contract to a higher price than the parties initially agreed to at signing.

15 For examples of common actions under Public Law 85-804, see *Presidential Power: Public Law 85-804 (50 U.S.C. §§ 1431-35)*, Brennan Ctr., https://www.brennancenter.org/sites/default/files/analysis/50%20USC%201431-1435.pdf [https://perma.cc/3W38-E7A2].

(226), to say nothing of thousands of other accidental military deaths during this period.[16] In a recent congressional report, "hundreds" of servicemembers cited constant issues with obtaining functional, on-time aviation parts.[17] Without enough spare parts, aircraft are either kept out of operation—which cuts essential flight time for pilots—or kept in operation at a greater risk to soldiers.[18] Although profitable contracts enable a well-supplied military and an innovative defense industry, *excessively* profitable contracts can limit production. When TransDigm's profit margins on a spare part are 4,000%, the military receives one spare part; using Public Law 85-804 to reestablish more normal profit margins would procure thirty-three additional parts for the same price tag.[19] Since TransDigm provides parts for high-use, mission-critical aircraft like the AH-64 Apache and the CH-47 Chinook, extra spare parts might be the difference between life and death for U.S. soldiers.[20]

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[16] Note that there is a slight difference in the time period for each statistic (the difference between calendar year and fiscal year). *Active Duty Military Deaths by Year and Manner*, Def. Cas. Analysis Sys., https://dcas.dmdc.osd.mil/dcas/app/summaryData/deaths/byYearManner [https://perma.cc/CGJ5-76WZ] (last updated May 2022) (tabulating the number of "Hostile Action" and "Accident" deaths per calendar year); Nat'l Comm'n on Mil. Aviation Safety, Report to the President and the Congress of the United States, at i (2020) (noting the number of "noncombat military aviation mishaps" in the 2013 to 2020 fiscal years); *see also* Connor Echols, *Recent String of Deadly Military Crashes Is No Accident*, Responsible Statecraft (June 10, 2022), https://responsiblestatecraft.org/2022/06/10/recent-string-of-deadly-military-crashes-is-no-accident [https://perma.cc/5EKC-GEL3].

[17] Nat'l Comm'n on Mil. Aviation Safety, *supra* note 16, at 37.

[18] *See id.* at 37, 60 (noting "the danger of compounding risks on top of each other" and how "[f]light time is the lifeblood of military aviation safety and readiness").

[19] Assuming profit margins of 15% on the same total price. *See* 2021 DoD IG Report, *supra* note 3, at 66 (showing margins as high as 3,850.6%).

[20] Proving that a particular part failure contributed to a crash is difficult given the lack of public access to crash reports and data. *See, e.g.*, Jason Paladino, *The Navy's Terrible Accident Record Is Now Hidden from Public View*, Atlantic (Oct. 8, 2018), https://www.theatlantic.com/technology/archive/2018/10/the-navys-accident-data-is-now-hidden-from-public-view/572461 [https://perma.cc/H7BF-8JWF] ("[A]mid a dramatic five-year spike in aviation accidents, the Navy has put aviation safety data that used to be public behind a wall."). Yet when military accident reports are released, some critics contend that the reports are subjectively skewed to place accident responsibility on pilots instead of faulty equipment. *See, e.g.*, W.J. Hennigan, *Fatal Problems Plague the U.S.' Costliest Fighter Jet*, L.A. Times (Dec. 19, 2011), https://www.latimes.com/business/la-xpm-2011-dec-19-la-fi-fighter-jet-down-20111220-story.html [https://perma.cc/H2AL-2AS4] ("Last week's report generated much debate over whether the Air Force turned Haney, an experienced and award-winning aviator, into a scapegoat to escape more criticism of the F-22. . . . But the report did not say what caused Haney's F-22 to malfunction in the first place."). TransDigm is known to provide spare parts for types of aircraft that have been involved in fatal crashes. *See* Off. of Inspector Gen., U.S. Dep't of Def., Review of Parts Purchased from TransDigm Group, Inc. 11–12 (2019); Tara Copp, *Military Times Crash Database, Fiscal 2011 through 2018*, Mil. Times (Apr. 9, 2019), https://www.militarytimes.com/news/your-military/2019/04/09/military-times-crash-database-fiscal-2011-through-2018 [https://perma.cc/4B3P-D8A7] (noting several fatal and non-fatal crashes involving the AH-64 and CH-47 in 2018).

This Note covers the history of federal intervention in defense contracts and argues that the executive branch could use Public Law 85-804—in tandem with updated regulations—to unilaterally revise defense contracts downward in egregious circumstances like TransDigm's. Part I provides an overview of the defense industry and current procurement law. Part II illustrates the history of downward revisions in defense contracts and the origins of the constitutional power to contract. Part III demonstrates how the text and regulations of Public Law 85-804 permit downward revisions. Part IV analyzes four other potential judicial concerns (executive practice, non-delegation, "major questions," and Fifth Amendment concerns), and argues that they should not guide interpretations of Public Law 85-804. Part V suggests several new regulations and procedures to protect contractors subject to downward revisions. Finally, the Note concludes by underscoring the importance of political messaging when conducting downward revisions.

I
A Brief Overview of Defense Contracting

The United States military today could not operate without contractors, and any attempt to regulate the defense industry must be preceded by an appreciation for its size, complexity, and importance. Section I.A outlines the defense market in the United States, and Section I.B identifies the key statutory and regulatory authorities governing defense contracting today.

A. The Defense Industry

The military requires an exceptional range of goods and services to operate, and defense contractors are often called upon to fulfill these requirements. In 2022, the Defense Department managed over 3.9 million contracts to keep itself supplied and running.[21] In addition to fighter jets, nuclear submarines, and laser-guided munitions, the military contracts for more quotidian needs: IT support, sanitation services, base construction, and more.[22] For some products, like oil,

[21] *See* Spending by Prime Award, USASpending.gov, https://www.usaspending.gov/search [https://perma.cc/JTL4-9ZFN] (search "Time Period" field for "FY 2022," search "Award Type" field for "Contracts," search "Awarding Agency" field for "Department of Defense," and submit search).

[22] *See, e.g.*, U.S. Dep't of Def., Defense Budget Overview §§ 2–7, 2–12, 4–3, 10–31 (2021), https://comptroller.defense.gov/Portals/45/Documents/defbudget/FY2022/FY2022_Budget_Request_Overview_Book.pdf [https://perma.cc/8RRP-LD5V].

there is no larger customer in the world than the United States military.[23]

As a result, both the federal government and investors pour a lot of money into defense companies every year. In 2020, the Defense Department paid around $420 billion to defense contractors[24] out of its $724 billion in total spending.[25] This government spending has created a valuable and growing market. The five largest defense contractors have a market capitalization of almost $500 billion, more than the economic output of seven U.S. states combined.[26] Investing $10,000 into those five defense contractors after the September 11th attacks would have returned almost $100,000 two decades later—about $40,000 more than the benchmark S&P 500 would have returned.[27] And the market remains bullish on future contractor profitability: TransDigm itself is forecasted to have double-digit earnings-per-share growth over the coming years.[28]

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[23] *See The US Military and Oil*, Union of Concerned Scientists (June 30, 2014), https://www.ucsusa.org/resources/us-military-and-oil [https://perma.cc/G6Q3-XPAA] (explaining that the U.S. military is the world's top customer for oil); Amanda Macias, *The US Military Is the Largest Buyer of Jack Daniel's Single Barrel*, Bus. Insider (Dec. 10, 2014), https://www.businessinsider.com/the-us-military-loves-jack-daniels-2014-12 [https://perma.cc/4VE9-2U4F] (explaining the same for Jack Daniel's Single Barrel whiskey).

[24] Peters, *supra* note 8, at 1.

[25] U.S. Dep't of Def., National Defense Budget Estimates for FY 2021, at 6 tbl. 1-1 (2020), https://comptroller.defense.gov/Portals/45/Documents/defbudget/fy2021/FY21_Green_Book.pdf [https://perma.cc/TM3X-3C6C].

[26] The top five defense contractors in the United States are Boeing, RTX (formerly Raytheon), Lockheed Martin, Northrop Grumman, and General Dynamics. Peters, *supra* note 8, at 2. For contractor market capitalizations, see Yahoo! Fin., *supra* note 7 (search for "BA," "RTX," "LMT," "NOC," and "GD") (last modified November 16, 2023). For state-by-state GDP, see *GDP by State*, Bureau of Econ. Analysis, https://www.bea.gov/data/gdp/gdp-state [https://perma.cc/ZTG4-NAN3] (last modified October 4, 2023) (including Alaska, the Dakotas, Montana, Rhode Island, Vermont, and Wyoming based on current-dollar GDP).

[27] *See* Jon Schwarz, *$10,000 Invested in Defense Stocks When Afghanistan War Began Now Worth Almost $100,000*, Intercept (Aug. 16, 2021), https://theintercept.com/2021/08/16/afghanistan-war-defense-stocks [https://perma.cc/QW7K-8EH7].

[28] Wells Fargo Equity Rsch., TDG: FY23 Outlook Looks Beatable (2022) (on file with author) (forecasting a twenty-three percent compound annual growth rate over the next three years for TransDigm). *See generally* Allison Lampert, Abhijith Ganapavaram & Maiya Keidan, *Financial Turbulence Widens Door to Private Equity in Fast-Growing Aerospace Sector*, Reuters (Mar. 24, 2023), https://www.reuters.com/business/aerospace-defense/financial-turbulence-widens-door-private-equity-fast-growing-aerospace-sector-2023-03-24 [https://perma.cc/MQ52-XFU2] (noting expectations of double-digit growth in demand for aftermarket parts and repairs).

B. Procurement Law Basics

Defense contracting is governed by a complex array of congressional statutes and executive regulations.[29] The latest overhauls of the federal contracting system occurred in the mid-1990s, and Congress occasionally amends these provisions through the annual National Defense Authorization Act (NDAA).[30] Day-to-day contracting is mostly governed by various provisions of the Federal Acquisition Regulations (FAR) and its defense-specific accompaniment, the Defense Federal Acquisition Regulation Supplement (DFARS).

Through the defense reforms of the 1990s, Congress sought to lower defense costs through market competition and off-the-shelf commercial procurement rather than through profit controls.[31] Yet these objectives came with two exemptions from previous requirements to share cost data with the government. First, the new "commercial item exception" exempted contractors from sharing cost data if the product was deemed to be "commercial"—regardless of the price or public availability.[32] The Defense Department soon assessed that the term "qualifies most items that [the Defense Department] procures as commercial items."[33] Over the years, contractors have even tried to sell advanced military aircraft as commercial items.[34] Second, even if the item is not commercial, the Truth in Negotiations Act (TINA) exempts contractors from sharing cost data if the value of a sole-source contract is below a certain threshold.[35] The current TINA threshold exempts any contract below

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29 *See* S. Rep. No. 103-258, at 2 (1994) (describing the complexity of purchasing goods and services for the government).

30 *See* J. Ronald Fox, Defense Acquisition Reform 1960–2009: An Elusive Goal 169, 191 (2011); *NDAA for FY 2023 Passes Congress with Annual Changes to Federal Contracting Policies*, Thompson Hine (Dec. 21, 2022), https://www.thompsonhine.com/insights/ndaa-for-fy-2023-passes-congress-with-annual-changes-to-federal-contracting-policies [https://perma.cc/M98X-29M3] (describing changes in the 2023 NDAA).

31 *See* S. Rep. No. 103-258, *supra* note 29, at 5, 12–14, 24; *see also* 10 U.S.C. § 3453 (stating a preference for the acquisition of commercial items).

32 S. Rep. No. 103-258, *supra* note 29, at 6; *see* Mandy Smithberger, *Testimony: Watchdog Report Makes Case for Pentagon Reforms*, POGO (Jan. 19, 2022), https://www.pogo.org/testimony/2022/01/testimony-watchdog-report-makes-case-for-pentagon-reforms [https://perma.cc/9VWW-UQUA] (describing the exemption and arguing against it).

33 Off. of Inspector Gen., U.S. Dep't of Def., Commercial and Noncommercial Sole-Source Items Procured on Contract N000383-93-G-M111 at 14 (1998).

34 *See* Smithberger, *supra* note 32 ("The Air Force . . . tried to purchase C-130J and C-17 transport planes [as commercial items] as well.").

35 *See id.* ("But even at a lower Truth in Negotiations Act threshold, TransDigm could have simply claimed the parts were 'commercial items,' and regardless of the price agreed upon, the government would have no recourse for defective pricing or overpricing."). The Truth in Negotiations Act is now called the Truthful Cost or Pricing Data Act, although it is better known by its former title. *Id.* at n.3.

$2 million,[36] and forty-two percent of defense contract dollars don't go through a competitive bidding process (compared to only seventeen percent of civilian contract dollars).[37]

Some reformers have concentrated on indirectly reducing defense costs by closing these loopholes and improving data sharing.[38] But Public Law 85-804 is a simpler yet underexplored authority for directly reducing excessive defense costs. Public Law 85-804 broadly permits amendments and modifications to contracts "whenever [the President] deems that such action would facilitate the national defense."[39] And in contrast to TINA and its exceptions, Public Law 85-804 applies to all defense contracts. Whereas TINA can only reveal costs, Public Law 85-804 could reduce them.

II
The History of Downward Revisions to Defense Contracts

Understanding the history of downward revisions is critical to understanding the text of Public Law 85-804. In recent decades, the Supreme Court has begun to disfavor new regulatory efforts—such as the FDA's attempt to regulate tobacco products—through what some scholars call an "antinovelty" approach to constitutional analysis.[40] Yet the downward revision of defense contracts is anything but novel. Rather than representing a radical overreach by the executive branch, compelled revisions to military contracts in the United States have an extensive history that even predates the Constitution.

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[36] FAR 15.403-4(a)(1) (2022). As one example of TINA threshold avoidance, between January 2017 and June 2019, 5,023 Defense Department contracts were awarded to TransDigm below the TINA threshold—amounting to $270 million worth of contracts that avoided cost sharing requirements. 2021 DoD IG Report, *supra* note 3, at 20.

[37] *A Snapshot: Government-Wide Contracting*, Gov't Accountability Off. (May 2023), https://gaoinnovations.gov/Federal_Government_Contracting [https://perma.cc/Y4HE-85MN].

[38] *See, e.g.*, Smithberger, *supra* note 32; *see also* Sara Sirota, *Sen. Elizabeth Warren and Rep. John Garamendi Launch Plan to Stop Defense Contractor Price Gouging*, Intercept (June 9, 2022), https://theintercept.com/2022/06/09/defense-contractor-price-gouging-elizabeth-warren-john-garamendi [https://perma.cc/67C8-6Q3D] (discussing the proposed Stop Price Gouging the Military Act).

[39] *See* 50 U.S.C. § 1431(a); *infra* Appendix, Table 1.

[40] *See* Ryan D. Doerfler, *Executive Orders and Smart Lawyers Won't Save Us*, Jacobin (Dec. 1, 2019), https://jacobin.com/2019/12/executive-orders-supreme-court-law-college-debt [https://perma.cc/3B9Q-888X] (discussing the anti-novelty doctrine in the context of tobacco regulation). The antinovelty approach exists, but it is unclear when legislative novelty is a relevant consideration and how much it should be weighed in a constitutional analysis. For more detail on this idea, see Leah M. Litman, *Debunking Antinovelty*, 66 Duke L.J. 1407, 1411, 1423 (2017) ("The use of antinovelty rhetoric is now commonly employed by the federal courts.").

Section II.A explores the long history of defense contract modifications prior to Public Law 85-804's adoption. Section II.B demonstrates how the executive branch has historically controlled procurement.

A. Historical Instances of Downward Revisions to Defense Contracts

1. Pre-American Revolutionary War

The American history of limiting profits and renegotiating defense contracts long precedes the U.S. Constitution. In 1629, the General Court of the Massachusetts Bay Company ruled that no profit was allowed on ammunition, cannons, and powder until the Massachusetts Bay Colony was established, at which point profits on a product could not exceed twenty-five percent of its cost.[41] Puritan leaders of the colony occasionally fined the worst offenders.[42]

Profit regulations were not promulgated only by joint-stock companies and religious leaders. By the mid-1750s, colonial governments began to regulate defense costs like their predecessors. In Connecticut, the legislature first responded to the French and Indian War by establishing profit controls on a range of products.[43] However, soldiers were still outraged by the suppliers' prices, and in one 1758 case the legislature "reduced the accounts of three sutlers by one-seventh to placate the troops."[44] The legislature eventually appointed a seven-person committee in 1761 to set a "just and reasonable price" for every type of product already sold—the first known renegotiation of a defense contract in American history.[45]

2. Early Federal Government

Supply issues plagued the Continental Army during the Revolutionary War, and the colonies employed several methods to lower costs and increase the quality of materiel in response. These methods included reporting obligations, contract inspections, and moral pleas.[46]

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41 Stuart D. Brandes, Warhogs: A History of War Profits in America 24 (1997). Later, in 1639, the General Court revised its law to enable arms sales with profit margins of up to 100%. *Id.* at 25.

42 *Id.* at 25.

43 *Id.* at 27.

44 Harold E. Selesky, War and Society in Colonial Connecticut 129 (1990).

45 *Id.* at 121–22 (noting how the legislature appointed the committees); Brandes, *supra* note 41, at 27.

46 Brandes, *supra* note 41, at 48–50 (discussing rationing, state tax legislation, reporting obligations, and moral pleas, among other methods); Erna Risch, Supplying Washington's Army 254–55 (1981) (discussing the appointment of Ezekiel Cornell in 1782 to settle contract disputes).

Stronger measures were also taken. State legislatures resolved wartime shortages by fixing prices, limiting profits, and compelling sales.[47] Federal legislation was also passed to limit costs and excessive profits, including for thirteen new frigates in 1775.[48] But when statutory steps didn't work, even General Washington himself—usually respectful of property rights—would seize products he thought were being hoarded from the military in the pursuit of greater profit, such as a supply of hides in 1777.[49]

Government efforts to corral materiel cost in the first half of the nineteenth century waxed and waned with the degree of contractor usage. When the War of 1812 began, contractors were again in high demand, and the government employed various methods of cost control, including benchmarking contractor costs, requiring binding agreements, and mandating performance bonds.[50] In the Mexican-American War, contractors were in less demand, and cost control measures largely disappeared for cultural, economic, and production reasons.[51]

3. The Civil War

After a half-century hiatus, public attention to rising defense costs roared back. In the Civil War, the executive branch used fraud prosecutions, contract cancellations, and more—including renegotiated pricing—to manage government finances.[52] A major innovation of the war was the establishment of a contract commission. At the recommendation of Congress's Select Committee on Government Contracts, the Department of War created the Commission on Ordnance

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[47] *See, e.g.*, Risch, *supra* note 46, at 97, 291–92 (discussing how the state legislatures fixed prices and compelled sale of materiel); Brian Balogh, A Government Out of Sight 62 (2009).

[48] 1 Robert J. H. Powel & W. John Kenney, History of Navy Department Renegotiation 7 (1947).

[49] Brandes, *supra* note 41, at 50. Even this method is preferable to earlier methods for restraining profits: when a carpenter named Edward Palmer charged an "excessive fee" for building the "stocks"—a device for public punishment and humiliation—in Boston, he became the first person clamped in them as punishment. *See* Balogh, *supra* note 47, at 34; Kermit L. Hall, The Magic Mirror 40 (1989). Actions like these—while extreme by today's standards—comported with prevailing contract norms at the time of the Founding. *See* Balogh, *supra* note 47, at 35 (discussing how courts prevented unfair exchanges in early America, even if both parties to a contract consented to the transaction).

[50] *See* Brandes, *supra* note 41, at 59–60.

[51] *See id.* at 63–66.

[52] *Id.* at 69, 86, 100. Other methods include threatened confiscations, requisitions of imports, government production of goods, improved administration, solicitations for contract bids, and direct legislative action to recapture profits. *See id.* at 100 (threatened confiscation); John P. Frank, *Recapturing War Profits—A Civil War Experience*, 1947 Wis. L. Rev. 212, 217 (1947) (the others).

Contracts in March 1862 to systematically renegotiate pricing.[53] The Commission on Ordnance Contracts renegotiated more than a hundred contracts for rifles and advanced technologies, in one case unilaterally reducing an arms dealer's proceeds by ninety precent.[54] By June 1862, the commission had saved a staggering $17 million—about thirty-five percent of the contract value reviewed.[55]

The Civil War tested the limits of executive wartime powers, including in government contracting. Despite disagreement by the Court of Claims, the Supreme Court largely upheld this type of renegotiation as a legitimate tool to be used by the executive branch in war.[56] Efforts to limit excessive profits would soon reemerge in the years preceding the Spanish-American War.[57] The Civil War thus reinitiated an infrequent yet recurring trend over the next century of defense contracting: Whenever war profits became a political issue, renegotiation became an option.

4. World War I and the Inter-War Period

The military expansion required to administer new territories and fight World War I necessitated many regulatory changes for defense

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53 *See* Comm'n on Ordnance & Ordnance Stores, Report of the Commission on Ordnance and Ordnance Stores, S. Exec. Doc. No. 37-72, at 2 (2d Sess. 1862) [hereinafter Commission on Ordnance Contracts Report] (noting the appointment of Joseph Holt and Robert Dale Owen to "audit and adjust all contracts, orders, and claims on the War Department in respect to ordnance, arms, and ammunition"); *see also House of Representatives*, N.Y. Times, Apr. 30, 1862, at 8 (detailing House debates about the Commission on Ordnance Contracts and the Select Committee on Government Contracts).

54 Frank, *supra* note 52, at 218 (noting over 100 cases); Brandes, *supra* note 41, at 89, 102 (discussing the "technically sophisticated" cannon at issue, and the arms dealer noted above). The Commission was not alone in renegotiation at the time: the Department of the Navy also used renegotiation, and the Department of War later reduced cannon orders because of excessive prices in 1864. *Id.* at 90, 102.

55 Frank, *supra* note 52, at 218–19. The commission worked quickly. It was established in March 1862 and, by the end of April 1862, Congress claimed that it had saved $12 million, as much as the federal government under President John Quincy Adams spent annually in the 1820s. *See* Commission on Ordnance Contracts Report, *supra* note 53, at 2 (recording the committee members' appointment date as March 13, 1862); *House of Representatives*, *supra* note 53 (noting the amount of money saved).

56 Mark R. Wilson, The Business of Civil War: Military Mobilization and the State, 1861–1865 at 197, 199–200 (2006) (discussing how decisions of the Select Committee on Government Contracts, otherwise known as the Holt-Owen Commission, were partially overturned by the new Court of Claims, which themselves were later overturned by the Supreme Court). For an example of the Supreme Court repudiating wartime contract decisions by the Court of Claims, see United States v. Justice, 81 U.S. (14 Wall.) 535 (1871).

57 *See* David I. Walsh, *War Profits and Legislative Policy*, 11 U. Chi. L. Rev. 191, 192–93 (1944) (discussing Congress's attempt to control war profiteering during the Spanish-American War by fixing the price of armor plate); Brandes, *supra* note 41, at 111–14 (analyzing the "armor plate scandal" in greater detail).

suppliers. Congress imposed new taxes on munitions producers, and the President created new boards and committees to both fix prices and negotiate prices downward.[58] After the war, the President ordered investigations and prosecutions of war profiteering, and Congress held hearings on the topic.[59] Yet the results of these efforts were "meager."[60] Public concerns about war profiteering in the 1920s[61] and the onset of the Great Depression accelerated demands for a stronger federal response.[62]

These demands led to a battery of hearings, commissions, reports, and statutes throughout the 1930s that hastened statutory renegotiation in the 1940s.[63] The War Policies Commission in 1930[64] preceded the first major piece of legislation to address war profits: the Vinson-Trammel Act of 1934, which limited naval contracts to profit margins of no more than ten percent.[65] Following the Nye Committee of the mid-1930s, the Vinson-Trammel Act and its profit ceiling were amended several more times.[66] Yet strict profit limitations were both inefficient and ineffective.[67]

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58 *See, e.g.*, Munition Manufacturer's Tax Act, ch. 463, 39 Stat. 780–81 (1916); Jan F. Smith, The United States Renegotiation Board 6–7 (June 1969) (M.B.A. thesis, George Washington University) (on file with author) (analyzing President Woodrow Wilson's War Industries Board and its Price Fixing Committee and discussing how "the principle of negotiation of contracts . . . was to lead to the principle of renegotiation"). *See generally* Paul F. Hannah, *Some Aspects of Price Control in Wartime*, 27 Cornell L.Q. 21 (1941) (discussing wartime price control measures in the United States, England, and Canada).

59 Brandes, *supra* note 41, at 187–88, 191.

60 *Id.* at 188.

61 *See id.* at 186–98 (illustrating that war profits from World War I were a domestic political and cultural issue throughout the 1920s).

62 *See id.* at 198; *see also* Staff of Joint Comm. on Internal Revenue Tax'n, 86th Cong., History and Brief Outline of Renegotiation 5 (Comm. Print 1959) [hereinafter History and Brief Outline of Renegotiation] ("The War Policies Commission . . . concluded that restrictions such as price fixing, higher taxes, and priorities were not sufficient to prevent inordinate profits.").

63 *See, e.g.*, Robert M. Howard & Shawn T. Cobb, *Victory Through Production: Are Legacy Costs of War Scuttling the "GOCO Model"?*, 46 Pub. Cont. L.J. 259, 272 (2017) (noting how Congress considered around 200 bills and resolutions related to limiting war profits during the interwar period).

64 Brandes, *supra* note 41, at 199. The War Policies Commission had many notable officials. In addition to cabinet members and senators, future President Dwight Eisenhower was the chief military aide to the commission in 1930. *Id.* at 6.

65 Act of Mar. 27, 1934, Pub. L. No. 73-135, § 3, 48 Stat. 503, 505 (1934); Hudson B. Cox, Renegotiation of Government Contracts Under the 1951 and 1948 Renegotiation Acts 5 (1951) (describing the Vinson-Trammel Act as "the first real statutory attempt at a profit limitation on military procurement").

66 *See* Brandes, *supra* note 41, at 61; *see also* Bank Mgmt. Comm'n, Am. Bankers Ass'n, War Loans 52 (1943) (recounting the history of the Vinson-Trammel Act and subsequent legislation).

67 *See, e.g.*, Cox, *supra* note 65, at 5 (describing how the "flat profit limitations of the Vinson-Trammel approach" did not incentivize contractors to price low, reduce costs, increase output, or even seek federal contracts); William L. Marbury & Robert R. Bowie,

The Supreme Court later indicated that it did not have the power to craft judicial remedies to war profits, and it was clear that a different authority was needed to address this issue.[68] It was in this time that renegotiation—already established as an executive practice[69]—found grounding in congressional statute.

5. *World War II and the Cold War*

Following direct American involvement in World War II, Congress passed two statutes with similar provisions. The first provision was in the First War Powers Act of 1941.[70] Title II of the statute gave the executive branch the power to "enter into . . . modifications of contracts" if doing so would "facilitate the prosecution of the war."[71] The second provision was an amendment to the Sixth Supplemental National Defense Appropriation Act of 1942.[72] The amendment required contractors to "renegotiate" the contract price upon a determination that "excessive profits ha[d] been realized."[73] Both provisions would lapse and be extended several times over the following decades.[74]

Renegotiation and Procurement, 10 Law & Contemp. Probs., no. 2, 1943, at 218, 221 & n.14 (noting how the Vinson-Trammel Act only led to about $7.5 million in assessments over six years (citation omitted)).

[68] *See* William E. Kovacic & Steven L. Schooner, A Modest Proposal to Enhance Civil/Military Integration: Rethinking the Renegotiation Regime as a Regulatory Mechanism to Decriminalize Cost, Pricing, and Profit Policy 3 & n.x (1999) (unpublished paper) (on file with author) (discussing the *Bethlehem Steel* case). In *United States v. Bethlehem Steel Corp.*—a case in which the Court rejected the government's argument that certain World War I shipbuilding contracts were unconscionable—the Court said, "[I]f the Executive is in need of additional laws by which to protect the nation against war profiteering, the Constitution has given to Congress, not to this Court, the power to make them." 315 U.S. 289, 299, 309 (1942). Since the case concerned World War I contracts, the ability of Title II—which Congress passed nine days after *Bethlehem Steel* was argued at the Supreme Court, and which was directed at World War II contracts—to fill this statutory gap was never addressed by the Court.

[69] *See, e.g.*, Marbury & Bowie, *supra* note 67, at 224 ("Up until April, 1942, the renegotiation of contract prices was an integral part of the procurement process."); Walker Lowry, *The Renegotiation Act: A Study in Government Litigation Tactics*, 37 Calif. L. Rev. 382, 392 n.24 (1949) (describing how "[r]enegotiation . . . was already under way on a voluntary basis" by the end of March 1942); Smith, *supra* note 58.

[70] First War Powers Act of 1941, Pub. L. No. 77-354, 55 Stat. 838 (1941).

[71] *Id.* § 201.

[72] Sixth Supplemental National Defense Appropriation Act of 1942, Pub. L. No. 77-528, § 403(c), 56 Stat. 226, 245 (1942).

[73] *Id.*; *see also* Theodore W. Graske, The Law Governing War Contract Claims § 67, at 101–02 (1945) (describing how contracts could be renegotiated after signing).

[74] After Title II expired at the end of World War II, Congress reactivated Title II in 1951 and extended it five additional times until it expired in June 1958. Donald O. Jansen, *Public Law 85-804 and Extraordinary Contractual Relief*, 55 Geo. L.J. 959, 961, 964 (1967). On the other hand, renegotiation was terminated at the end of 1945, revived in a limited fashion from 1948 until the end of 1950, and then fully reinstituted with the Renegotiation Act of

The federal government used Title II and the Renegotiation Acts differently in practice. Downward renegotiations during this time were conducted under the Renegotiation Acts, and upward revisions were conducted under Title II.[75] Early on, the government amended about 22 contracts per year under Title II.[76] From 1951 through 1978, the government averaged 170 renegotiation determinations per year under the Renegotiation Act.[77] Downward renegotiation was successful in lowering defense costs. The method returned at least $11.8 billion to the treasury, or one out of every eighty-two contracting dollars.[78] Renegotiation was also efficient. For every dollar returned

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1951. HISTORY AND BRIEF OUTLINE OF RENEGOTIATION, *supra* note 62, at 1. Congress extended the Renegotiation Act of 1951 thirteen separate times until it let the Renegotiation Board expire in 1979. *Renegotiation Board Demise*, CQ ALMANAC 1979 (1980), https://library.cqpress.com/cqalmanac/cqal79-1185222 [https://perma.cc/7267-9Q5M]; *Senate Vote Means End of Renegotiation Board*, N.Y. TIMES (Apr. 3, 1979) https://www.nytimes.com/1979/04/03/archives/senate-vote-means-end-of-renegotiation-board.html [https://perma.cc/B6X5-QYMC].

75 *See, e.g.*, Lowry, *supra* note 69, at 395 (describing renegotiation as tool of enforcement, and the First War Powers Act as a tool to "grant relief"). This Note will use the term "Renegotiation Acts" to refer to the series of statutes and provisions in effect from 1942 until 1979 that authorized renegotiation.

76 *See* S. REP. NO. 82-1498, at 4 (1952) (listing 21 approved "[a]mendments without consideration" totaling $8.2 million between February 21, 1951, and January 31, 1952). By the 1980s—well after the passage of Public Law 85-804—the government was using indemnification clauses over fifty times per year. *See* Patrick E. Tolan, Jr., *Environmental Liability Under Public Law 85–804: Keeping the Ordinary Out of Extraordinary Contractual Relief*, 32 PUB. CONT. L.J. 215, 220 & n.23 (2003) (noting 536 usages between 1980 and 1989). However, the reporting requirement exception in 50 U.S.C. § 1433(a) and the 1998 repeal of 50 U.S.C. § 1434 make it difficult to determine the scale and frequency of Public Law 85-804's usage today. On Congress's recent attempt to expand Public Law 85-804 relief, see Scott A. Freling, Evan R. Sherwood & Paul Rowley, *Congress Offers Greater Hope for Defense Contractors Battling Inflation; Actual Relief Is Still Not Clear*, COVINGTON & BURLING (Dec. 16, 2022), https://www.insidegovernmentcontracts.com/2022/12/congress-offers-greater-hope-for-defense-contractors-battling-inflation-actual-relief-is-still-not-clear [https://perma.cc/ZDR6-6QJJ].

77 *See* U.S. RENEGOT. BD., TWENTY-THIRD ANNUAL REPORT OF THE RENEGOTIATION BOARD 13 (1978) (noting 4,756 determinations over 28 years).

78 *See infra* Appendix, Table 3; Appendix, Table 2 (noting the total amount of sales that qualified for renegotiation was $967.9 billion). To put this amount in perspective, the $3.1 billion in net renegotiation recoveries between fiscal years 1942 and 1946 nearly covered the combined cost of the Manhattan Project and the B-29 bomber program. *See* HISTORY AND BRIEF OUTLINE OF RENEGOTIATION, *supra* note 62, at 9; Mark R. Wilson, *"Taking a Nickel Out of the Cash Register": Statutory Renegotiation of Military Contracts and the Politics of Profit Control in the United States During World War II*, 28 L. & HIST. REV. 343, 346 (2010). The scope of renegotiation was so pervasive that even the Biden family company contracts were renegotiated during World War II. *See* Adam Entous, *The Untold History of the Biden Family*, NEW YORKER (Aug. 15, 2022), https://www.newyorker.com/magazine/2022/08/22/the-untold-history-of-the-biden-family [https://perma.cc/L3MF-6PAS] (describing how a business owned by President Biden's family was asked to return two-thirds of their profits to the government, which led to Biden's parents "[losing] everything they had built" (internal quotations omitted)).

through renegotiation, the renegotiation program cost one cent to administer.[79] The Renegotiation Acts even spawned new forms of presidential administration—such as the five-member Renegotiation Board—and greater procedural protections for contractors.[80] Yet the Senate and the defense industry eventually soured on the Renegotiation Board, and Congress let it expire in 1979.[81]

B. The Historical Role of the Executive Branch in Procurement

Interpreting Public Law 85-804 depends on more than just the history of downward revisions. It also depends on where defense contracting falls within the constitutional separation of powers. As seen in this Part, Congress has long ceded discretion in defense contracting to the executive branch despite its constitutional duty to support and maintain the armed forces.

A major lesson of the Revolutionary War was "the futility of *legislative* military control."[82] This futility was seen across the "three M's" of the military: money, men, and materiel.[83] Even after the Second Continental Congress authorized the Continental Army in 1775,[84] the armed forces struggled to acquire enough of all three. By 1787 Congress was "broke,"[85] and the Continental Army was never able to maintain even half the manpower the Continental Congress had authorized.[86] These struggles were especially apparent when contracting for materiel. Duties were poorly defined, overlapping, or both,[87] and this

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79 *See infra* Appendix, Table 4 (noting that renegotiation only cost the government $144.5 million to administer); *infra* Appendix, Table 3.

80 The Renegotiation Acts also adjusted the scope of renegotiation and authorized judicial redeterminations, among other changes. *See, e.g.*, Dennis S. Aronowitz, Admin. Conf. of the U.S., Report of the Committee on Claims Adjudications in Support of Recommendation No. 22 at 665, 665–68 (1970).

81 *See Renegotiation Board Demise*, *supra* note 74. Industry opposition to renegotiation built throughout the 1970s. *Compare* H. Rep. No. 92-758, at 9 (1971) ("[I]t seems that almost none of the large defense contractors . . . were affected by renegotiation in 1970."), *with Senate Vote Means End of Renegotiation Board*, *supra* note 74 (describing defense industry alarm in 1979 at a new focus on the profits of large defense contractors).

82 Charles C. Thach, Jr., The Creation of the Presidency 1775–1789 at 52–53 (1922) (emphasis added).

83 *See generally* Robert N. Katayama, *Emergency Procurement Powers*, 2 Pub. Cont. L.J. 236, 237 (1969) (describing the "three M's").

84 1 United States Army Logistics, 1775–1992: An Anthology 63 (Charles R. Shrader ed., 1997).

85 Balogh, *supra* note 47, at 63 (using the term "broke"); *see also* Risch, *supra* note 46, at 87–88 (discussing how the Treasury was previously "without funds" in 1779).

86 Balogh, *supra* note 47, at 60.

87 For the offices of the Quartermaster General and the Commissary General, "no attempt was made to describe their duties at all." Thach, *supra* note 82, at 58. Military procurement was fragmented among a complex network of agencies and congressional committees,

ad hoc structure—not quite legislative and not quite executive—led to cost and quality problems. As one historian wrote, there were "ample opportunities for price gouging and shoddy workmanship, which far too many British North Americans had taken advantage of."[88] These difficulties—across money, men, and materiel—raised significant questions of which war powers would be enshrined in law, and which branch (the legislature, the executive, or the judiciary) would exercise them.

At the Constitutional Convention, the Founders divided war powers between Congress and the President. The power to declare war was left to Congress,[89] while the duty to take care that the laws are faithfully executed was left to the President.[90] Congress had the power to "raise and support Armies" and "provide and maintain a Navy,"[91] while the President was designated as "Commander in Chief."[92]

But how did this system of separation of powers allocate the power to *contract*? The power to contract is constitutionally implied, not enumerated.[93] Although Congress was tasked with the power of the purse and supporting the military,[94] Congress quickly began delegating war powers after the Constitution's ratification. In its seventh-ever statute, Congress created an entire agency—led by the Secretary of War—to "perform and execute such duties as shall from time to time be enjoined on, or entrusted to him by the President of the United States."[95] One of these duties was procuring food and clothing for the troops, for which both the Department of War and the Treasury Department were

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including: "the commissary general and his deputies, the clothier general, the commissaries of forage, the commissaries of hides, special committees of Congress to purchase certain bills of goods . . . [and even] state agencies doing business with continental funds." *Id.* at 61.

88 Balogh, *supra* note 47, at 64. Even the commander-in-chief of the Continental Army, George Washington, was alarmed. As the revolutionary spirit faded in 1783, Washington lamented, "[W]ho will grudge to yield a very little of his property to support the common interest of Society, and insure the protection of Government?" David B. Robertson, The Original Compromise: What the Constitution's Framers Were Really Thinking 5 (2013); *see also* Robert Braucher, *The Renegotiation Act of 1951*, 66 Harv. L. Rev. 270, 272 (1952) ("George Washington raged against the man who could 'build his greatness upon his country's ruin.'").

89 U.S. Const. art. I, § 8, cl. 11.

90 U.S. Const. art. II, § 3 ("[H]e shall take Care that the Laws be faithfully executed . . . .").

91 U.S. Const. art. I, § 8, cl. 12, 13.

92 U.S. Const. art. II, § 2, cl. 1.

93 *See* Charles S. Collier, *Constitutionality of Statutory Renegotiation*, 10 Law & Contemp. Probs., 1943, at 353, 354 ("The power to enter into contracts is indeed not mentioned specifically in the Constitution as a power granted to the Government of the United States.").

94 *See* U.S. Const. art. I, § 9, cl. 7; *id.* art. I, § 8, cl. 12, 13.

95 Act of Aug. 7, 1789, ch. 7, 1 Stat. 49, 50.

initially responsible.[96] This structure would undergo several legislative revisions in the ensuing decade.[97]

The executive branch has continued to innovate and procure within congressional design over the past two centuries. As seen in the congressionally suggested and executive-led Commission on Ordnance Contracts,[98] or the congressionally established and executive-operated Renegotiation Board,[99] or even the executive-managed FAR and DFARS regulations,[100] Congress structures the procurement system while leaving it to the executive branch to manage day-to-day.[101] In this way, the executive branch is inherently limited in contracting matters unless so authorized by Congress.[102] But the passage of Public Law 85-804 arguably authorizes downward revisions.

III
The Text of Public Law 85-804 Permits Downward Revisions of Defense Contracts

Public Law 85-804 is historically understood to indemnify contractors under emergency conditions and provide them with upward revisions.[103] Yet the text of the statute confers vast powers to the President to modify defense contracts *downwards* as well. This Part seeks to answer one question: If the President invoked Public Law 85-804 today to recoup profits from a company like TransDigm, would a

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[96] *See* Janet A. McDonnell, *A History of Defense Contract Administration*, Def. Cont. Mgmt. Agency (Mar. 5, 2020), https://www.dcma.mil/News/Article-View/Article/2100501/a-history-of-defense-contract-administration [https://perma.cc/L6Z2-RDFF].

[97] In 1792, Congress transferred all military procurement to the Treasury Department. *Id.* In 1795, recognizing the strain on existing staff, Congress created a special Office of Purveyor of Public Supplies within the Treasury Department to handle procurement. *Id.*; *see also* Frederick P. Schmitt, *The Founding of the Supply Corps*, *in* Navy Supply Corps Newsl., Feb. 1970, *reprinted in* Navy Supply Corps Newsl. (Dep't of the Navy, Mechanicsburg, Pa.), Winter 2020, at 17–18. Congress once again changed course in 1798, and authorized the Departments of War and Navy to procure their own supplies, while allowing the Treasury's Office of Purveyor of Public Supplies to continue executing non-subsistence contracts. McDonnell, *supra* note 96. Congress finally reestablished the ability of the Department of War to manage procurement in 1812. *Id.*; Brandes, *supra* note 41, at 59–60. One explanation for all these changes is that the mid-1790s Department of War was small by modern standards: The agency only had a secretary, two clerks, one servant, and around three thousand troops. *See* Balogh, *supra* note 47, at 151.

[98] *See supra* Section II.A.3.

[99] *See supra* Section II.A.5.

[100] *See supra* Section I.B.

[101] *See supra* note 97 and accompanying text.

[102] *See* U.S. Gov't Accountability Off., GAO-16-464SP, Principles of Federal Appropriations Law §§ 1.A, 2.C.1 (4th ed. 2016).

[103] *See* Act of Aug. 28, 1958, Pub. L. No. 85-804, §§ 1–5, 72 Stat. 972, 972–73; *Presidential Power: Public Law 85-804 (50 U.S.C. §§ 1431-35)*, *supra* note 15 and accompanying text.

plain reading of the statute's text and implementing regulations support that use?

A. Statutory Text: A Plain Reading

As Justice Neil Gorsuch wrote, "[W]hen the meaning of the statute's terms is plain, our job is at an end."[104] Public Law 85-804 says an authorized department can "enter into contracts or into amendments or modifications of contracts heretofore or hereafter made . . . without regard to other provisions of law relating to the making, performance, amendment, or modification of contracts, whenever [the President] deems that such action would facilitate the national defense."[105] However, the statute defines neither "amendment" nor "modification." Contemporary sources defined "amendment" as an "addition to or change . . . as will effect an improvement," and "amend" as "to make better by change."[106] "Modification" was defined as a "change,"[107] while "modify" was defined as to "alter," "reduce," or "make more moderate or less sweeping."[108]

These broad definitions—on their face encompassing both upward and downward revisions—seem to be unambiguous and consistent with similar contexts. For example, in 1862 the Commission on Ordnance Contracts used the term "modification" when describing downward revisions on a gun contract.[109] Under the Emergency Shipping Fund Act of 1917, the Court of Claims interpreted the President's authority to "modify" contracts to further the war effort through the term's "plain, well-understood meaning," because "in [the court's] view the language is not ambiguous."[110] Even the Renegotiation Act of 1951 defined a downward renegotiation as a "modification."[111] The FAR also states

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104 Bostock v. Clayton County, Georgia, 140 S. Ct. 1731, 1749 (2020).

105 *See* 50 U.S.C. § 1431(a); *see infra* Appendix, Table 1.

106 *Amendment*, Ballentine's Law Dictionary (2d ed. 1948); *Amend*, Black's Law Dictionary (3d ed. 1933); *see also Amendment*, Black's Law Dictionary (3d ed. 1933) ("an improvement of some principal writing").

107 *Modification*, Black's Law Dictionary (3d ed. 1933).

108 *Modify*, Black's Law Dictionary (3d ed. 1933); *Modify*, The Practical Standard Dictionary of the English Language (1941). As noted by Black's Law Dictionary, "'[m]odification' is not exactly synonymous with 'amendment,' for the . . . latter word imports an amelioration of the thing . . . without involving the idea of any change in substance or essence." *Modification*, Black's Law Dictionary (3d ed. 1933).

109 *See* Commission on Ordnance Contracts Report, *supra* note 53, at 206.

110 Meyer Scale & Hardware Co. v. United States, 57 Ct. Cl. 26, 41 (Jan. 9, 1922); *see also* Act of June 15, 1917, Pub. L. No. 65-23, ch. 29, 40 Stat. 182 ("The President is hereby authorized and empowered, within the limits of the amounts herein authorized . . . To modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material.").

111 *See* Renegotiation Act of 1951, Pub. L. No. 82-9, § 203, 65 Stat. 7, 25 (1951).

that a contract modification is "*any* written change in the terms of a contract,"[112] and recognizes the possibility of unilateral modifications.[113] These commonsense interpretations of "modify" and related terms are also seen in fields beyond national defense, like environmental law.[114] Even if the text of Public Law 85-804 seems ambiguous in regards to downward revisions, "the fact that a statute has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity; instead, it simply demonstrates the breadth of a legislative command."[115]

Lastly, courts may look "to the broader structure of the [statute] to determine the meaning" of specific language.[116] The definitions above—laden with subjective and relative terms—raise a key question: for whose benefit should these "better" and "less sweeping" changes be judged? The statute is explicit, and states that the President should act "for the protection of the *Government*."[117] The statute clearly prioritizes the government's interests and saving taxpayer money is a legitimate public interest.[118]

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112 FAR 2.101 (2022) (emphasis added).

113 *See* FAR 43.103(b) (2022).

114 *See, e.g.*, Wis. Elec. Power Co. v. Reilly, 893 F.2d 901, 908 (7th Cir. 1990) (defining "modification" broadly in the context of 42 U.S.C. § 7411(a)(4)). *But see* Env't Def. v. Duke Energy Corp., 549 U.S. 561, 583 (2007) (Thomas, J., concurring) ("When Congress repeats the same word in a different statutory context, it is possible that Congress might have intended the context to alter the meaning of the word.").

115 Bostock v. Clayton County, Georgia, 140 S. Ct. 1731, 1749 (2020) (quotation marks and punctuation omitted). Two other prominent cases that contemplated the definitions of "modify" or "modification" are *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218 (1994) and *Biden v. Nebraska*, 143 S. Ct. 2335 (2023). In *MCI*, the Supreme Court held that the executive branch's ability to "modify" a statutory requirement did not permit the executive branch to *eliminate* that statutory requirement. *MCI*, 114 S. Ct. at 2232. In *Biden*, the Supreme Court held that the executive branch could not expand student debt relief from "a few narrowly delineated situations specified by Congress" to "nearly every borrower in the country." *Biden*, 143 S. Ct. at 2369. The term "modify" as used in Public Law 85-804 is distinguishable in two crucial respects. First, in contrast to *MCI* and *Biden*, "modify" refers to modifying contracts, not modifying a statutory scheme. *MCI*, 512 U.S. at 231; *Biden*, 143 S. Ct. at 2369–70. Second, in contrast to *Biden*, Congress did not specify limited situations under which Public Law 85-804 could be used—rather, Congress specified limited situations under which Public Law 85-804 could *not* be used. *See* 50 U.S.C. § 1432. As seen in Section III.B, the executive branch's use of its "modify" power in downward revisions would not violate any statutory limitations in Public Law 85-804.

116 King v. Burwell, 576 U.S. 473, 492 (2015).

117 50 U.S.C. § 1431(a) (emphasis added).

118 *See, e.g.*, Mil-Tech Sys., Inc. v. United States, 6 Cl. Ct. 26, 33 (Aug. 3, 1984) ("A principal objective served by the procurement process is the public's interest in conserving government funds."); *see also* Charles W. Steadman, *A Further Legal Inquiry into Renegotiation: II*, 43 Mich. L. Rev. 235, 250 (1944) (describing the reduction of both inflation and war costs as legitimate government aims).

B. Potential Limitations in the Statute

Any use of Public Law 85-804 must respect five statutory limits to its use. First, the President can only use this authority during a national emergency and for six months afterwards.[119] Second, the President can only use this authority after finding that "such action would facilitate the national defense."[120] Third, the President can only authorize departments and agencies connected with the "national defense" to modify contracts under this authority.[121] Fourth, the law cannot be used to obligate more than $500,000 without agency or committee approval.[122] And fifth, the law lists six actions that are expressly prohibited.[123]

Modifying contracts downward under Public Law 85-804 would not violate any of these statutory limitations. The powers in the statute are authorized by a still-active national emergency declared by President Harry Truman in 1950, and the statute is exempted from the re-declaration requirements of the National Emergencies Act.[124] Additionally, making a finding that an action would "facilitate the national defense" requires little more than a simple, written declaration.[125] The Defense Department is already authorized to make these modifications,[126] and a downward revision would never obligate any money, let alone more than the approval limit. Finally, compliance with the six prohibited actions is straightforward when the initial contract

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119 50 U.S.C. § 1435.

120 *Id.* § 1431(a).

121 *Id.*

122 *Id.*

123 *Id.* § 1432; *see infra* Appendix, Table 1.

124 The emergency authorized by Proclamation No. 2914—as cited in Executive Order 10,789—is still in effect. *See Presidential Power: Public Law 85-804 (50 U.S.C. §§ 1431-35)*, *supra* note 15; Proclamation No. 2914, 15 Fed. Reg. 9029 (Dec. 16, 1950) ("I summon . . . our businessmen to make a mighty production effort to meet the defense requirements of the Nation and to this end to eliminate all waste and inefficiency and to subordinate all lesser interests to the common good."); Exec. Order No. 10,789, 23 Fed. Reg. 8897 (Nov. 14, 1958) (citing "the existing national emergency declared by Proclamation No. 2914 of December 16, 1950" as the President's authority for the executive order); National Emergencies Act § 502(a)(6), 50 U.S.C. § 1651(a)(4). However, emergency power reform efforts could complicate the use of Public Law 85-804. *See* Bob Bauer & Jack Goldsmith, *The Lessons of the Electoral Count Reform Act: Next Steps in Reform*, Lawfare (Jan. 31, 2023), https://www.lawfareblog.com/lessons-electoral-count-reform-act-next-steps-reform [https://perma.cc/UDT7-USDB].

125 For examples of recent presidential findings under Public Law 85-804, see Authorizing the Exercise of Authority Under Public Law 85-804, 85 Fed. Reg. 21,735 (Apr. 10, 2020) ("I deem that the authorization provided in this memorandum and actions taken pursuant to that authorization would facilitate the national defense."), and Authorizing the Exercise of Authority Under Public Law 85-804, 79 Fed. Reg. 68,757 (Nov. 18, 2014) ("I deem that the authorization provided in this memorandum and actions taken pursuant to that authorization would facilitate the national defense.").

126 FAR 50.101-1(b) (2022).

already exists and the contract price is being reduced.[127] Notably, all six of these prohibited actions evince a congressional concern for higher payments to contractors, not lower payments.

Of course, the government should not go too far with downward revisions. If downward revisions cause contractors to withdraw from the defense market, then the supply of defense goods would decrease, which might increase prices and the cost to taxpayers. Thus, the text of Public Law 85-804 permits downward revisions within reason and insofar as the government's interests are upheld.

C. Potential Limitations in Current Regulations

The existing regulations in the FAR and DFARS that correspond to Public Law 85-804 have two main sections: one on "contract adjustments"[128] and one on "residual powers."[129] The contract adjustments section only contemplates upward revisions upon contractor request.[130] This Section also describes how the government can protect contractor interests.[131]

But this does not mean upward revisions are the only type of revision encompassed by the regulations. Downward revisions by the government can find support through the regulations' residual powers.[132] These residual powers include "all authority" under the statute, aside from those powers that authorize upward revisions and advance payments.[133] However, to clarify the scope of these residual

127 Modifying a contract downwards would not change the contract type, let alone require the use of a cost-plus-a-percentage-of-cost contract. *See* 50 U.S.C. § 1432(a). After the repeal of a key profit control provision of the Vinson-Trammel Act in 1994, the Author is unaware of any existing profit limitation laws for defense contractors, so there would be no profit limitation law to violate. *See id.* § 1432(b); *see also* Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 2102, 108 Stat. 3243, 3309 (repealing the authority for contract profit controls during emergency periods). Modifying a contract downwards couldn't violate competitive bidding laws because competitive bidding laws apply before a contract is active, and generally not after the contract is first signed. *See* 50 U.S.C. § 1432(c). Modifying a contract downwards would not necessitate any waivers of any payments from the contractor to the government—but rather would *require* payments from the contractor or foregoing future payments from the government. *See id.* § 1432(d). Modifying a contract downwards could not increase the contract price. *See id.* § 1432(e). Modifying a contract downwards would not formalize "an informal commitment," as the contract would already be in existence. *See id.* § 1432(f).

128 FAR 50.103 (2022); DFARS 250.103 (2022).

129 FAR 50.104 (2022); DFARS 250.104 (2022).

130 *See* FAR 50.103-2(a), 50.103-3(a) (2022); DFARS 250.103 (2022).

131 *See, e.g.*, FAR 50.103-2 (2022).

132 The Author is unaware of any other authority that would authorize downward revisions, which fulfills the requirement of FAR 50.101-2(a)(2) (2022) ("The authority conferred by Pub. L. 85-804 may not . . . [b]e relied upon when other adequate legal authority exists within the agency.").

133 *See* FAR 50.104 (2022).

powers, the President should amend the regulations to explicitly authorize downward revisions under Public Law 85-804.[134] This and other regulatory changes are explored more in Part V.

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This Part has focused on demonstrating how Public Law 85-804 and its regulations confer broad powers to the President to modify defense contracts downwards. The text of Public Law 85-804 encompasses both upward and downward revisions on its face. This interpretation is consistent with prior contexts—such as the Commission on Ordnance Contracts[135]—and the statute's requirement to act in the federal government's interest, such as by conserving taxpayer funds. Additionally, conducting downward revisions under Public Law 85-804 would not violate any of the six statutory limits to its use. Finally, with one small change, the residual powers in Public Law 85-804's regulations could support downward revisions. Despite this textual support for downward revisions, a court might have additional interpretive concerns.

IV
Additional Judicial Concerns

At least four additional concerns exist in interpreting Public Law 85-804 to authorize downward revisions to defense contract prices. First, courts might conclude that executive practice under Public Law 85-804 should control its interpretation. Second, courts may be more willing to consider the nondelegation doctrine, especially when analyzing the implied constitutional power to contract. Third, courts may invoke the major questions doctrine when reviewing executive action that impacts millions of dollars in contracts. Fourth, contractors would likely challenge downward revisions under the Fifth Amendment, even though this argument was rejected decades ago in *Lichter v. United States*.[136] Ultimately, the authority to conduct downward revisions should survive these challenges.

A. Executive Practice and Legislative History

A court might conclude that Public Law 85-804 only permits upward revisions. As discussed in Section II.A.5, there was a consistent executive practice of revising downward under the Renegotiation Acts and revising upward under Title II. And the committee report for Public

134 *See infra* note 213 and accompanying text.
135 *See supra* Section III.A.
136 334 U.S. 742, 774–89 (1948).

Law 85-804 stated that "[t]he purpose of [Public Law 85-804] is to enact into permanent law, with certain exceptions, the authority contained in title II, First War Powers Act, 1941."[137] Yet Public Law 85-804 arguably authorizes downward revisions despite executive practice under Title II.

A more comprehensive analysis of Public Law 85-804's power should consider three points. First, the original legislative history is more ambiguous as to the full extent and direction of Title II's power than currently understood. Several prominent senators emphasized the "far-reaching power" and "blanket authority" that the text of Title II would delegate to the President.[138] Not only was the scope of this power acknowledged, but the evolving debates evinced a bidirectional understanding of Title II's power. When the chairman of the committee considering an extension of Title II was asked in 1951—just days *after* the Renegotiation Act of 1948 had expired—whether an extension of Title II would permit both upward renegotiation "to work out justice" and downward renegotiation to address "inordinate profits," he answered affirmatively.[139] Whether because of these stated understandings or despite them, Congress preserved the key wording of Title II in its extensions.[140]

Second, it does not follow that the expiration of the Renegotiation Board in 1979 is a prohibition on downward revisions under Public Law 85-804. The Renegotiation Board was simply the agency through which excess defense profits were eliminated.[141] Congress's decision to

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137 H.R. Rep. No. 85-2232, at 2 (1958); *see also* Jansen, *supra* note 74, at 960 ("Title II, First War Powers Act of 1941, is the genesis of the current [Public Law 85-804].").

138 87 Cong. Rec. 9839 (1941) (statement of Sen. Robert A. Taft) ("[T]his is a broad and far-reaching power, I think broader than we realize."); *id.* at 9842 (statement of Sen. Arthur Vandenberg) ("[T]hat is a complete, blanket authority to the President of the United States to authorize any department to do any-think [sic] it pleases in respect to war contracts."); *see also id.* at 9840 (statement of Sen. Alben W. Barkley) ("I should say that the provision does delegate complete authority over the contractual relation as to the thing contracted for."). The bill appears to have not been subject to a roll call vote, and thus the Author cannot find a record of whether these congressmen voted for the bill.

139 John Sparkman, *The Administration of Title II, First War Powers Act, 1941*, 14 U. Pitt. L. Rev. 303, 307–09 (1953) (recounting the exchange of Representative Daniel Reed and Representative Emanuel Celler, chairman of the House Judiciary Committee). The Renegotiation Act of 1948 expired at end of 1950, History and Brief Outline of Renegotiation, *supra* note 62, at 9, which means that this Title II debate on January 2, 1951, was occurring when the Renegotiation Act was not in effect. *See* 96 Cong. Rec. 17122, 17124 (1951). Congress reactivated Title II on January 12, 1951, Jansen, *supra* note 74, at 964, while the Renegotiation Act of 1951 did not pass until March 23, 1951, Renegotiation Act of 1951, Pub. L. No. 82-9, 65 Stat. 7. For a timeline of when Title II and the Renegotiation Acts were in effect, see *supra* note 74.

140 *See* Jansen, *supra* note 74, at 964 (describing the minor substitution of "national defense" for "prosecution of the war").

141 *See* Renegotiation Act of 1951, Pub. L. No. 82-9, § 107, 65 Stat. 7, 19.

let the Renegotiation Board expire accomplished just that: eliminating the Renegotiation Board. That decision abolished the administrative agency, procedures, and safeguards for "the elimination of excessive profits,"[142] but did nothing to the power to "enter into . . . modifications of contracts."[143] Since the expiration of the Renegotiation Board did not repeal Public Law 85-804, the Renegotiation Board's expiration theoretically made it *easier* for the President to conduct downward revisions without bureaucratic hurdles.

Third, downward revisions are a means, not an end. Even if the Renegotiation Board's expiration foreclosed eliminating excess profits as an explicit objective, downward revisions are still a means by which the objectives of Title II and Public Law 85-804 can be achieved. The two main objectives in the separate committee reports for Title II and Public Law 85-804 are (1) speeding up war procurement and (2) facilitating small business participation in defense contracting.[144] While the reports clearly contemplate upward revisions, business logic illustrates the ability of downward revisions to also satisfy these two objectives. First, downward revisions can incentivize speedy procurement. Contractors are likely to expedite operations if the government promises to lower the profits of slower contractors.[145] This incentive is even greater the more a contractor's revenues are dependent upon government contracts.[146] When the U.S. government is your only domestic customer, and regulates who you can sell to abroad, there is an incentive to

142 *Id.* § 101.

143 50 U.S.C. § 1431(a).

144 *See* H.R. Rep. No. 77-1507, at 2 (1941); S. Rep. No. 77-911, at 1–2 (1941); H. Rep. No. 85-2232, at 8 (1958).

145 This dynamic—of a dominant buyer forcing concessions from suppliers—occurs every day in the private sector. *See, e.g.*, Kim Souza, *Walmart Demands All Suppliers Comply with 98% On-Time In-Full Shipment Rule*, Talk Bus. & Pol. (Sept. 3, 2020, 4:32 PM), https://talkbusiness.net/2020/09/walmart-demands-all-suppliers-comply-with-98-on-time-in-full-shipment-rule [https://perma.cc/5UPN-Z38K] (noting how Walmart will reduce payments by three percent if suppliers don't complete ninety-eight percent of their shipments on-time and in-full).

146 *See generally* Michael E. Porter, *How Competitive Forces Shape Strategy*, Harv. Bus. Rev. (Mar.–Apr. 1979), https://hbr.org/1979/03/how-competitive-forces-shape-strategy [https://perma.cc/J5JG-8W6A] ("A buyer group is powerful if: It is concentrated or purchases in large volumes."). For a list comparing the dependency of various defense contractors on arms sales, see Alexandra Marksteiner, Lucie Béraud-Sudreau, Nan Tian, Diego Lopes da Silva & Alexandra Kuimova, SIPRI, The SIPRI Top 100 Arms-Producing and Military Services Companies, 2020 at 9 (2021), https://www.sipri.org/sites/default/files/2021-12/fs_2112_top_100_2020.pdf [https://perma.cc/EMX3-FHK2] (calculating that some companies, such as Lockheed Martin, depend on government military sales for almost ninety percent of their total sales).

acquiesce to lower profits.[147] Second, the strategic use of different revisions (upward or downward) for different contractors can promote small business participation. For small businesses, upward revisions can encourage market participation, and provide additional capital to drive innovation. For large contractors, downward revisions might incentivize a streamlining of their cost structures in order to accommodate the revisions, thus leaving more of the defense budget for future spending with small businesses. Incentivizing these two improvements—increased innovation and decreased costs—in the market segments with the highest potential for each[148] will improve the ability of both small and large contractors to receive government business, thus fulfilling the legislative objectives behind Public Law 85-804.

B. Nondelegation Doctrine

The nondelegation doctrine is justified by separation-of-powers concepts,[149] and downward revisions under Public Law 85-804 would likely raise a separation-of-powers question. The Constitution does not explicitly enumerate a power to contract,[150] yet in practice Congress frequently delegates its contracting authority to the executive branch.[151] According to the preeminent government contract scholars Ralph Nash and John Cibinic, "[t]he authority of the executive to use contracts in carrying out authorized programs is likewise generally assumed in the absence of express statutory prohibitions or limitations."[152] When analyzing the propriety of legislative delegations, the Court traditionally employs the "intelligible principle" test. However, if the

147 For an overview of U.S. regulation of defense articles, see Ian F. Fergusson & Paul K. Kerr, Cong. Rsch. Serv., R41916, The U.S. Export Control System and the Export Control Reform Initiative 1–8 (2020).

148 *See, e.g.*, Clayton M. Christensen, The Innovator's Dilemma: When New Technologies Cause Great Firms to Fail 176 (2016) (describing how it is difficult for established companies in established, high-end markets to innovate "in low-end markets" with a "cost structure [that] is tailored to compete in high-end markets").

149 *See, e.g.*, Ilan Wurman, *Nondelegation at the Founding*, 130 Yale L.J. 1490, 1526 (2021) (concluding that the Founding generation would "likely have understood . . . that Congress could not delegate its legislative power"); Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 487 (2001) (Thomas, J., concurring) ("I would be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers.").

150 *See supra* notes 89–94 and accompanying text.

151 1 Ralph C. Nash, Jr. & John Cibinic, Jr., Federal Procurement Law 3 (3rd ed. 1977) ("Although the executive branch performs the vast majority of the contracting functions of the Government, it is the legislative branch which is granted the majority of powers. This separation of powers is, of course, part of the system of checks and balances which is inherent in our constitutional principles.").

152 *Id.* at 5.

power sufficiently relates to foreign affairs, the Court may deprioritize nondelegation scrutiny. The outcome of the nondelegation analysis might turn on which framework is used.

1. Intelligible Principle Test

According to the traditional test, a power has been properly delegated when Congress provides an "intelligible principle."[153] This rule "seeks to enforce the understanding that Congress . . . may delegate no more than the authority to make policies and rules that implement its statutes."[154] When applying the intelligible principle test, the Supreme Court "has been driven by a practical understanding that in our increasingly complex society . . . Congress simply cannot do its job absent an ability to delegate power under broad general directives."[155] The Supreme Court has failed to find an intelligible principle on only two occasions.[156]

Public Law 85-804 could satisfy the intelligible principle test based on *Lichter v. United States*. In *Lichter*, several individuals and companies subject to renegotiation during World War II challenged the legality of the Renegotiation Act.[157] The Court found that the administrative practices, legislative purposes, and context surrounding the Renegotiation Act "establish[ed] a sufficient meaning" for the term "excessive profits."[158]

Yet revising contractor profits under Public Law 85-804 is distinguishable from *Lichter*. While the government action in *Lichter* is identical to downward revisions under Public Law 85-804, the standards are different. The Court upheld downward revisions under the Renegotiation Act when there were "excessive profits,"[159] whereas Public Law 85-804 would authorize downward revisions "whenever [the President] deems that such action would facilitate the national defense."[160] Under this reading, Public Law 85-804 doesn't provide

153 *Whitman*, 531 U.S. at 472. *See generally* J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle . . . such legislative action is not a forbidden delegation of legislative power.").

154 Loving v. United States, 517 U.S. 748, 771 (1996).

155 Mistretta v. United States, 488 U.S. 361, 372 (1989).

156 *See* Andy Kriha, Susan G. Lafferty & Alexander S. Holtan, *U.S. Supreme Court Agrees to Hear Nondelegation Case*, Holland & Knight (July 5, 2023), https://www.hklaw.com/en/insights/publications/2023/07/us-supreme-court-agrees-to-hear-nondelegation-case [https://perma.cc/V6FW-YURW] ("The nondelegation doctrine was last used to strike down two laws in 1935.").

157 Lichter v. United States, 334 U.S. 742, 746–47 (1948).

158 *Id.* at 783–87.

159 *Id.* at 789.

160 50 U.S.C. § 1431(a).

a standard for a downward revision—it only identifies who has the discretion to authorize a revision.

Nevertheless, the intelligible principle test has been broadly construed in the past, and the Supreme Court has yet to change it. As a result, concluding that downward revisions under Public Law 85-804 lack an intelligible principle feels unwarranted for now.

2. Foreign Affairs-Related Delegations

Additionally, the current Court has signaled a willingness to exempt foreign affairs-related delegations from nondelegation scrutiny.[161] According to one scholar, the theory is that "statutes giving the executive broad discretion in military and foreign relations are not *really* delegations of legislative authority."[162] And, as noted by one circuit court, the Supreme Court "has repeatedly underscored that the intelligible principle standard is relaxed for delegations in fields in which the Executive has traditionally wielded its own power."[163]

The leading case in this circumstance is *United States v. Curtiss-Wright Export Corporation*. In *Curtiss-Wright*, an American weapons manufacturer was indicted on conspiracy to sell machine guns to Bolivia, in violation of a congressional joint resolution and an executive proclamation.[164] The Court found that the joint resolution was not an invalid delegation of legislative power based on, among other reasons, the executive's unique role in foreign affairs and a practice of legislative delegations in foreign affairs.[165]

This foreign affairs exemption might encompass Public Law 85-804. On one hand, while the standard in *Curtiss-Wright* is almost identical to the standard in Public Law 85-804, the contexts are different. The joint resolution in *Curtiss-Wright* authorized the President to take a defined

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161 *See* Gundy v. United States, 139 S. Ct. 2116, 2137 (2019) (Gorsuch, J., dissenting) ("[W]hen a congressional statute confers wide discretion to the executive, no separation-of-powers problem may arise if 'the discretion is to be exercised over matters already within the scope of executive power.'"); Note, *Nondelegation's Unprincipled Foreign Affairs Exceptionalism*, 134 HARV. L. REV. 1132, 1137–38 (2021) ("[W]hat Justices Gorsuch and Thomas have offered so far suggests a categorical subject matter approach to nondelegation under which a delegation receives diminished scrutiny solely by virtue of its connection to foreign affairs."). Certain members of the Court have also expressed hesitancy to second-guess the degree of policy judgment left to the executive by Congress in times of war and emergency—exactly the circumstances in which to use Public Law 85-804. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 415–16 (1989) (Scalia, J., dissenting).

162 Kevin Arlyck, *Delegation, Administration, and Improvisation*, 97 NOTRE DAME L. REV. 243, 287 (2021).

163 *In re* Nat'l Sec. Agency Telecomms. Recs. Litig., 671 F.3d 881, 897 (9th Cir. 2011).

164 United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 311 (1936).

165 *See id.* at 315–29.

action after making a general finding, just like in Public Law 85-804.[166] But *Curtiss-Wright* concerned a domestic business making sales to a foreign government, whereas downward revisions under Public Law 85-804 would concern domestic businesses making sales to the U.S. government. On the other hand, the executive traditionally manages defense procurement,[167] defense procurement is a key tool in foreign affairs policy (such as through the Foreign Military Sales program), and Public Law 85-804 addresses defense procurement policy.[168] The foreign affairs exemption thus presents a conundrum. While defense contracting implicates Congress's *enumerated powers*—such as commerce and supporting armies—foreign affairs is a *subject matter* largely within the remit of the executive branch. Exempting Public Law 85-804 from nondelegation scrutiny because of its subject matter connection to foreign affairs would represent a significant shift away from the separation-of-powers concerns that now animate the nondelegation doctrine.[169]

Yet declining to find a foreign affairs exception here would be even more concerning. The key language in Public Law 85-804 concerns presidential factfinding in national defense,[170] and the president's ability to make national security findings is a core element of the Take Care Clause.[171] To challenge that ability would be a rebuke of presidential power and recent precedent, including in areas as disparate as covert action, immigration, and public health. Under 50 U.S.C. § 3093, the

166 *Compare id.* at 312 ("[I]f the President *finds* that the prohibition of the sale of arms and munitions of war in the United States . . . may contribute to the reestablishment of peace . . . it shall be unlawful to sell . . . ." (emphasis added)), *with* 50 U.S.C. § 1431(a) ("The President may authorize any department or agency . . . to enter into contracts or into amendments or modifications of contracts heretofore or hereafter made . . . whenever [the president] *deems* that such action would facilitate the national defense." (emphasis added)).

167 *See supra* Section II.B.

168 *See, e.g.*, *Fiscal Year 2022 U.S. Arms Transfers and Defense Trade Fact Sheet*, U.S. Dep't of State, Bureau of Political-Military Affs. (Jan. 25, 2023), https://www.state.gov/fiscal-year-2022-u-s-arms-transfers-and-defense-trade [https://perma.cc/Z2ZG-WZVX] ("Arms transfers and defense trade are important tools of U.S. foreign policy with potential long-term implications for regional and global security.").

169 *See Nondelegation's Unprincipled Foreign Affairs Exceptionalism*, *supra* note 161, at 1155–56 ("A theory that turns on a statute's mere relationship to foreign affairs regardless of the power being exercised runs afoul of a formalist's strict commitment to the principle of enumerated powers.").

170 *See* 50 U.S.C. § 1431(a) ("[W]henever [the president] deems that such action would facilitate the national defense.").

171 *See, e.g.*, Shalev Roisman, *Presidential Factfinding*, 72 Vand. L. Rev. 825, 855 (2019) ("It follows, then, that when the Constitution or a statute requires the President to find certain facts as a predicate to exercising power, then such factfinding is part of the 'execution' of the Law that must be done 'faithfully.'"); *see also* Martin v. Mott, 25 U.S. (12 Wheat.) 19, 31–32 (1827) ("Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts.").

President cannot authorize covert action unless they "determine[] such an action is necessary to support identifiable foreign policy objectives of the United States and is important to the national security of the United States."[172] Such a finding has been a predicate to many critical covert operations, such as the 2011 raid that killed Osama bin Laden.[173] In *Trump v. Hawaii*, the Court held that the President has the statutory authority to suspend the entry of foreign nationals into the United States "[w]henever the President finds that the entry . . . would be detrimental to the interests of the United States."[174] And during the early years of the COVID-19 pandemic, the President found that ventilators were "a scarce and critical material essential to the national defense," and facilitated the supply of ventilator parts to manufacturers.[175] These and other exercises of presidential factfinding would be on less certain legal ground if downward revisions under Public Law 85-804 were invalidated by the nondelegation doctrine.

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In summary, by prohibiting downward revisions under the intelligible principle test (rather than the ascendant separation-of-powers approach), the Court might breathe life into administrative law statutes that failed the separation-of-powers approach to nondelegation yet might have satisfied the intelligible principle test.[176] By declining to find a foreign affairs exemption for Public Law 85-804, the Court would be infringing on rarely disputed Article II powers to make national security findings. Whether the Court would conclude that Congress did or did not authorize downward revisions under Public Law 85-804 is unclear.[177] Yet what is clear is that applying the nondelegation doctrine

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172 50 U.S.C. § 3093(a).

173 Robert Chesney, *Targeting al-Baghdadi and Selective Notification to Congress: Assessing the Issues*, Lawfare (Oct. 27, 2019, 9:02 PM), https://www.lawfaremedia.org/article/targeting-al-baghdadi-and-selective-notification-congress-assessing-issues [https://perma.cc/49RE-HXNU] ("[T]he bin Laden raid was described publicly, after the fact, as a Title 50 covert action rather than as TMA.").

174 Trump v. Hawaii, 585 U.S. 667, 684 (2018); 8 U.S.C. § 1182(f).

175 Memorandum on Order Under the Defense Production Act Regarding the Purchase of Ventilators, Nat'l Archives (Apr. 2, 2020), https://trumpwhitehouse.archives.gov/presidential-actions/memorandum-order-defense-production-act-regarding-purchase-ventilators [https://perma.cc/GS5A-F666]; 50 U.S.C. § 4511(b).

176 *See Nondelegation's Unprincipled Foreign Affairs Exceptionalism*, *supra* note 161, at 1134–36. For example, in West Virginia v. EPA, 597 U.S. 697 (2022), the statutory command to identify the "best system" for reducing emissions might have been a sufficiently intelligible principle had the case been decided on those grounds.

177 Justice Gorsuch's dissent in *Gundy* poses a quandary for downward revisions under Public Law 85-804. On one hand, Justice Gorsuch cites *Lichter* as an example of the Court's

to Public Law 85-804—under either approach—could have significant consequences in other areas of the law.

C. Major Questions Doctrine

Related to nondelegation concerns is what has come to be known as the "major questions doctrine,"[178] and downward revisions under Public Law 85-804 might constitute a major question. Previously seen as a threshold question in cases concerning *Chevron* deference,[179] the major questions doctrine has recently developed into a clear statement rule.[180] The link between the major questions doctrine and a clear statement rule was tentatively established in *Utility Air Regulatory Group v. EPA*, and all but confirmed in *West Virginia v. EPA*.[181] In *Utility Air Regulatory Group v. EPA*, the Court outlined its major questions theory when it said that it "expect[s] Congress to speak clearly if [Congress] wishes to assign to an agency decisions of vast 'economic and political significance.'"[182] This requirement thus appears to have two steps in the analysis: First determine if there is a major question and, if so, determine whether Congress provided a clear statement.

1. Is There a Major Question?

In his concurrence in *West Virginia v. EPA*, Justice Gorsuch outlined several considerations for what constitutes a major question. These considerations include—but are not limited to—the political significance, public debate, prior congressional deliberation, economic

excesses with the intelligible principle test. Gundy v. United States, 139 S. Ct. 2116, 2139 n.60 (2019) (Gorsuch, J., dissenting). On the other hand, Justice Gorsuch seems to support statutes where Congress leaves "the executive the responsibility to find facts and fill up details," just as Public Law 85-804 does. *Id.* at 2139. Justice Gorsuch seems to believe that the Court may authorize "laws that specif[y] rules governing private conduct but condition[] the application of those rules on fact-finding—a practice that is . . . long associated with the executive function." *Id.* at 2140.

178 *See* Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 Admin. L. Rev. 475, 489 (2021) ("[T]he strong version of the major questions doctrine is unambiguously connected with the nondelegation doctrine.").

179 Note, *Major Questions Objections*, 129 Harv. L. Rev. 2191, 2205 (2016); Mila Sohoni, *The Major Questions Quartet*, 136 Harv. L. Rev. 262, 275, 281 (2022).

180 *See* Sohoni, *supra* note 179, at 264, 275–76 ("The new major questions doctrine is not a carve out from *Chevron* deference . . . . It is instead a clear statement rule that requires an express statutory statement to allow an agency to exercise major regulatory power.").

181 *See id.* at 270–74, 282 ("[The Court] enunciated a clear statement rule—the new major questions doctrine."). *See generally* Util. Air Regul. Grp. v. EPA, 573 U.S. 302 (2014); West Virginia v. EPA, 597 U.S. 697 (2022).

182 *Util. Air Regul. Grp.*, 573 U.S. at 324; *see also* Sohoni, *supra* note 179, at 270–71.

impact, spending effect, and intrusion on state powers that the question entails.[183]

There is some uncertainty whether downward revisions under Public Law 85-804 would be a major question based on Justice Gorsuch's concurrence. First, there is little to no political significance or public discussion about renegotiating defense contracts today, aside from occasional committee hearings asking for refunds.[184] While other key renegotiation statutes expired and were repealed decades ago, Congress has foregone deliberation and repeatedly let the broad language of Public Law 85-804 remain codified. Second, it's unclear whether downward revisions would amount to "a significant portion of the American economy" or "billions of dollars in spending."[185] The "significant portion" language derives from *FDA v. Brown & Williamson Tobacco Corp.*, a case where the FDA potentially had "the authority to ban cigarettes and smokeless tobacco entirely."[186] Unlike banning all revenues for all tobacco companies from all customers, downward revisions under Public Law 85-804 would affect a portion of profits for select defense contractors from a single customer (the U.S. government). Downward revisions under Public Law 85-804 are not even the most extreme action the U.S. government could take. For example, the government has the power to suspend and debar all business with a contractor, including for nebulous reasons like a "lack of business integrity."[187] On the other hand, the "billions of dollars in spending" language derives from *King v. Burwell*,[188] and focuses on the impact on government spending. There would be no increase in government spending because downward revisions under Public Law 85-804 would decrease government spending. Even if this threshold were to include spending incurred by private businesses, the $21 million at issue in TransDigm's contracts would fall an order of magnitude short of "billions." Third and finally, federal defense contracting is well outside

183 *See West Virginia*, 597 U.S. at 742–45 (Gorsuch, J., concurring); Sohoni, *supra* note 179, at 288 (describing the "smorgasbord" of considerations that Gorsuch detailed in *West Virginia v. EPA*).

184 *See, e.g.*, *2022 TransDigm Hearing*, *supra* note 2, at 12; *2019 TransDigm Hearing*, *supra* note 3, at 47–48; *see also* Letter from Sen. Bernard Sanders, Sen. Charles E. Grassley, Sen. Elizabeth Warren, Sen. Mike Braun & Sen. Ron Wyden to Lloyd J. Austin III, Sec'y, Dep't of Def. 2 (May 24, 2023) (on file with author) (asking the Secretary of Defense to investigate price gouging in military contracts).

185 *West Virginia*, 597 U.S. at 743–45 (Gorsuch, J., concurring).

186 529 U.S. 120, 123 (2000).

187 *See* FAR 9.406-2 (2022).

188 576 U.S. 473, 485–86 (2015).

the constitutional powers of the states.[189] Thus, while arguments exist to the contrary, downward revisions are probably not a major question.

2. *Is There a Clear Statement?*

Even if a major question was found to exist, downward revisions under Public Law 85-804 might satisfy the clear statement rule. Recent major questions cases have seemed to focus on the mismatch between the official claiming the power and the power claimed. This is not the head of workplace safety regulating public health policy,[190] or the head of public health regulating housing policy[191]—this is the commander-in-chief of the military regulating military procurement policy. As noted by one scholar, the Department of War was initially "placed squarely within the executive branch" and "secretaries were subjected explicitly to presidential directions," in contrast to other departments less closely aligned with the president.[192] As a result, Public Law 85-804 feels far from an "unlikely" delegation or an "elephants in mouseholes" statute,[193] but rather a logical design for the defense contracting power. In downward revisions under Public Law 85-804, the connection between the official claiming the power and the power claimed is more evident.

Yet in practice, the major questions doctrine places a heavy burden against administrative agencies and novel interpretations, and its infrequent invocation usually invalidates agency action.[194] There might be a greater likelihood that downward revisions under Public Law 85-804 are subject to major questions scrutiny, as the major questions doctrine provides courts with ample discretion to invalidate agency action without making "a full-dress constitutional nondelegation holding."[195] But a broad grant of power is not automatically an ambiguous grant of

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189 *See supra* Section II.B.

190 Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 595 U.S. 109 (2022) (per curiam).

191 Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485 (2021) (per curiam).

192 Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 Wm. & Mary L. Rev. 211, 239–42 (1989); *see also* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1, 27–30 (1994) (comparing the organizational designs of agencies like the Department of Foreign Affairs, Department of War, Treasury Department, Department of the Navy, and the Post Office).

193 *Nat'l Fed'n of Indep. Bus.*, 595 U.S. at 125 (citations omitted).

194 *See* Sohoni, *supra* note 179, at 275; *Major Questions Objections*, *supra* note 179, at 2202, 2209 (concluding that the major questions doctrine "usually operates against the agency" but noting *King v. Burwell* as an exception); *see also* Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 Va. L. Rev. 1009, 1013 n.11 (2023).

195 Sohoni, *supra* note 179, at 267, 265–66, 292 ("[A] sufficiently robust major questions doctrine greatly reduces the need to formally revive the nondelegation doctrine.").

power, and the precedent of court interference in matters of national security could have a chilling effect on decisive executive action.[196]

D. Fifth Amendment Claims

A contractor subject to downward revisions under Public Law 85-804 is likely to make a Fifth Amendment claim. The contractor might argue that profits are private property under the Fifth Amendment, and that downward revisions constitute a taking without due process of law. Under the Fifth Amendment, the government cannot take private property unless it is for a public use and "just compensation" is provided.[197] Moreover, the government cannot deprive any person of "life, liberty, or property, without due process of law."[198] The Fifth Amendment provides a crucial limiting principle for downward revisions: If the government revised a contract's price below the contractor's cost, then a taking would likely occur and the contractor would be entitled to compensation for the difference.[199] Under certain circumstances, the Fifth Amendment even requires the government to provide a contractor with a just and reasonable profit.[200]

The Supreme Court soundly rejected a similar Fifth Amendment challenge in *Lichter v. United States*, the seminal defense contract renegotiation precedent. The Court held that the recoupment of excess profits was not "the requisitioning or condemnation of private property for public use" or "a deprivation of . . . property without due process of law."[201] Rather, the Court found the recovery of excess profits to be "in the nature of the regulation."[202] The Court's conclusion on the Fifth

196 *See* West Virginia v. EPA, 597 U.S. 697, 759–60 (2022) (Kagan, J., dissenting) ("And contra the majority, a broad term is not the same thing as a 'vague' one. A broad term is comprehensive, extensive, wide-ranging; a 'vague' term is unclear, ambiguous, hazy." (citations omitted)); Massachusetts v. EPA, 549 U.S. 497, 560 (2007) (Scalia, J., dissenting) ("This is a straightforward administrative-law case, in which Congress has passed a malleable statute giving broad discretion, not to [the courts] but to an executive agency."); Timothy Meyer & Ganesh Sitaraman, *The National Security Consequences of the Major Questions Doctrine*, 122 Mich. L. Rev. 55, 78–81 (2023) (exploring consequences of the major questions doctrine for executive initiatives around sanctions and international trade).

197 U.S. Const. amend. V.

198 *Id.*

199 *See, e.g.*, Tenoco Oil Co. v. Dep't of Consumer Affairs, 876 F.2d 1013, 1020–21 (1st Cir. 1989) (analyzing just compensation in the utility industry context, and discussing how "the takings clause prevents . . . price controls capping prices below just and reasonable levels"); United States v. John J. Felin & Co., 334 U.S. 624, 652–53 (1948) (Jackson, J., dissenting) (discussing the relevance of costs in a takings analysis when there is "no true market price").

200 *See, e.g.*, Pantex Pressing Mach. Inc. v. United States, 108 Ct. Cl. 735, 752 (June 2, 1947) (discussing the need for "a fair mark-up for profit and other expenses").

201 Lichter v. United States, 334 U.S. 742, 787–88 (1948).

202 *Id.* at 787.

Amendment challenge—while brief—appears to be grounded in the legislative purposes of the Renegotiation Acts and in comparison to the practice of conscription. When the government's options were to leave war contracts alone, renegotiate war contracts, or take full control of factories, renegotiation was seen as a well-considered middle ground.[203] Additionally, the Court justified its due process decision by comparing renegotiation with conscription. As Justice Harold Hitz Burton, who experienced heavy combat as an infantry lieutenant in World War I,[204] wrote:

> The conscription of manpower is a more vital interference with the life, liberty and property of the individual than is the conscription of his property or his profits . . . . For his hazardous, full-time service in the armed forces a soldier is paid whatever the Government deems to be a fair but modest compensation. Comparatively speaking, the manufacturer of war goods undergoes no such hazard to his personal safety as does a front-line solider and yet the Renegotiation Act gives him far better assurance of a reasonable return for his wartime services than the Selective Service Act and all its related legislation give to the men in the armed forces. The constitutionality of the conscription of manpower for military service is beyond question. The constitutional power of Congress to support the armed forces with equipment and supplies is no less clear and sweeping. It is valid, a fortiori.[205]

But precedent isn't always binding. As noted decades ago by Ralph Nash and John Cibinic, there is a "constant tension that exists between the idea that the Government deserves special treatment since it acts in the public interest and the idea that the Government must be treated like any other contracting party in order to protect those with whom it deals."[206] Current case law finds remedies for potential contractual breaches in contract law and not in constitutional law, but that could change.[207] Contractors might invoke novel property, common-law,

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[203] *See id.* ("One of the primary purposes of the renegotiation . . . was the avoidance of requisitioning or condemnation proceedings leading to governmental ownership and operation of the plants producing war materials.").

[204] *Harold H. Burton Is Dead at 76; High Court Justice for 13 Years*, N.Y. Times (Oct. 29, 1964), https://www.nytimes.com/1964/10/29/archives/harold-h-burton-is-dead-at-76-high-court-justice-for-13-years.html [https://perma.cc/NJD2-W3AS].

[205] *Lichter*, 334 U.S. at 756 (Burton, J.); *see also* Steadman, *supra* note 118, at 251 ("[T]he subordination of private rights to the public benefit has often been held to be within the power of the legislatures under both the Fifth and the Fourteenth Amendments.").

[206] 1 Nash & Cibinic, *supra* note 151, at 1–2.

[207] *Compare* Piszel v. United States, 833 F.3d 1366, 1376 (Fed. Cir. 2016) (quoting Hughes Commc'ns Galaxy, Inc. v. United States, 271 F.3d 1060, 1070 (Fed. Cir. 2001) (stating that "remedies arise from the contracts themselves, rather than from the constitutional protection of private property rights")), *with* Norman v. Balt. & Ohio R.R., Co., 294 U.S. 240, 307–08

and due process arguments to protect profits in defense contracts. Yet the government might respond with compelling arguments on which level of compensation is "just" and which market value is "fair" for companies with profit margins in the thousands of percentage points like TransDigm. These more detailed arguments are outside the scope of this Note.

V
Proposed Regulatory Protections for Contractors Under Public Law 85-804

As Justice Antonin Scalia wrote in *Whitman*, "We have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute."[208] Although constitutional and statutory law plausibly authorize downward revisions, current regulations could be clarified to permit them, and a broader interpretation of Public Law 85-804 would benefit from new regulatory constraints.[209] As a practical matter, regulations that directly address downward revisions might allay some contractor concerns, provide contracting officers with more guidance, and preempt some court-imposed due process protections—all things that make downward revisions more likely to succeed.

These new regulations would consist of at least four provisions. First, a new clause should be inserted into every new defense contract. This clause would give the contractor notice that the United States may withhold any excessive profits from amounts otherwise due to the contractor,[210] and bind them to such determinations.

Second, a "Revision Board" should be established in the mold of the Renegotiation Board. This regulation would dissolve the existing "contract adjustment boards" in each military branch[211] in favor of one Revision Board to make all downward revisions for the entire Defense

(1935) ("Contracts may create rights of property, but, when contracts deal with a subject-matter which lies within the control of the Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.").

208 Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001).

209 The Court has generally given great latitude to the government in selecting procedures for its own contracts. *See* Van Brocklin v. Tennessee, 117 U.S. 151, 154 (1886) (noting that the United States "as incident to the general right of sovereignty have the capacity, within the sphere of their constitutional powers, and through the instrumentality of the proper department, to enter into contracts and take bonds, not prohibited by law, and appropriate to the just exercise of those powers, although not expressly directed or authorized to do so by any legislative act").

210 *See, e.g.*, Renegotiation Act of 1951, Pub. L. No. 82-9, § 104, 65 Stat. 7, 11.

211 *See* FAR 50.102-2 (2022); DFARS 250.102-2 (2022).

Department. The regulation would fix the number of members at seven to prevent ties in voting and could prioritize diverse professional experiences among the members. For example, it could require every member—and no more than two members—to have expertise as one of the following: accountant, management consultant, hardware engineer, investor, military contracting officer, lawyer, and software engineer. To further limit any nondelegation concerns, the President could use funds for White House staff to make these hires, and the President could overrule decisions by the Revision Board. Any profits recovered would be deposited in the Treasury.[212]

Third, the regulations should identify who revises which contracts and whether any exceptions are permitted. The wording of FAR 50 and DFARS 250 should be amended to explicitly clarify that the government can unilaterally modify contracts, and not just upon contractor request.[213] Instead of revising individual contracts, defense contractors—and their subcontractors—would have their annual business revised in aggregate.[214] Finally, the regulations could exempt certain entities from downward revisions, such as any contractor with aggregate government business under $1 million per year, or any sovereign entity, public utility, or non-profit organization.[215]

Fourth, the regulations should outline the criteria used to make excessive profit determinations. These factors could include: the "reasonableness of costs and profits" considering production volume, past costs, manufacturing complexity, and available technology; the contractual risk assumed; the contractor's market capitalization; the "nature and extent of contribution to the defense effort"; and "[s]uch other factors the consideration of which the public interest and fair and equitable dealing may require."[216] When other factors are considered, the Revision Board should update the regulations accordingly.

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212 *See* 31 U.S.C. § 3302(b).

213 In particular, the language in FAR 50.103, 50.102-3(c) (2022), and DFARS 250.103 (2022) should be clarified. While FAR 50.102-3(c) appears to be more concerned with the timing of amendments or modifications rather than which party can initiate them, removing the clause "unless the contractor submits a request" would permit the government to unilaterally initiate contract modifications. These changes don't seem to violate the listed limitations to the residual powers located in FAR 50.104-1, 50.102-3 (2022).

214 *See, e.g.*, Renegotiation Act of 1951, Pub. L. No. 82-9, § 105(a), 65 Stat. 7, 12 ("The Board shall exercise its powers with respect to the aggregate of the amounts received or accrued during the fiscal year.").

215 *See, e.g.*, *id.* §§ 105(f), 106(a)(1), 106(a)(4), 106(a)(5).

216 *See, e.g.*, *id.* § 103(e)(1)–(6). Regarding "contractual risk assumed," Justice Hugo Black noted that "[e]ven in the case of lump sum contracts with the government, it is generally recognized that the real risk of loss is negligible." United States v. Bethlehem Steel Corp., 315 U.S. 289, 293 & n.2 (1942).

These will not be the only procedural protections for contractors. Large contract disputes are often heard and resolved by the U.S. Court of Federal Claims or an administrative contract appeals board in accordance with the Contract Disputes Act.[217] These administrative tribunals include the Armed Services Board of Contract Appeals and the Civilian Board of Contract Appeals, depending on the original contracting agency.[218] While the plain language of Public Law 85-804—"without regard to other provisions of law"—seems to preclude the effects of the Contract Disputes Act, an analysis of the jurisdictional overlap between the proposed Revision Board and existing administrative tribunals is beyond the scope of this Note.[219]

Conclusion

Taken together, the text and history of Public Law 85-804 indicate support for a statutorily-granted executive power to *reduce* the amount paid on existing defense contracts. American governments have modified defense contracts in wartime for centuries, and the broad language of Public Law 85-804 remains on the books as an heir to this forgotten history of downward revisions. Ignoring the plain meaning of Public Law 85-804 would selectively disregard Supreme Court guidance on textual analysis and legislative history,[220] and obscure the full, considered potential of Public Law 85-804. Finally, despite the Renegotiation Board's expiration, there are plausible and prudential reasons for why the president's constitutional imperatives in defense contracting might outweigh competing interpretive concerns.

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217 David H. Carpenter & Kathleen Ann Ruane, Cong. Rsch. Serv., R45322, Selected Legal Tools for Maintaining Government Contractor Accountability 2 (2018).

218 Sarah K. Carpenter, *The Contract Disputes Act: What Every Federal Government Contractor Should Know*, Smith Currie (Jan. 29, 2018), https://www.smithcurrie.com/publications/common-sense-contract-law/contract-disputes-act-every-federal-government-contractor-know [https://perma.cc/V5J3-W7LD].

219 *See* 50 U.S.C. § 1431(a).

220 Legislative history is generally disfavored when interpreting the text of a statute. *See* NLRB v. SW Gen., Inc., 137 S. Ct. 929, 942 (2017) (Roberts, C.J.) ("What Congress ultimately agrees on is the text that it enacts, not the preferences expressed by certain legislators." (citations omitted)); Thompson v. Thompson, 484 U.S. 174, 191–92 (1988) (Scalia, J., concurring) (describing legislative history as a "frail substitute[] for bicameral vote upon the text of a law and its presentment to the President" (citations omitted)); Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2364 (2019) ("Even those of us who sometimes consult legislative history will never allow it to be used to 'muddy' the meaning of 'clear statutory language.'" (citations omitted)); *see also* John F. Manning, *The New Purposivism*, 2011 Sup. Ct. Rev. 113, 114 ("[T]he Court in the last two decades has mostly treated as uncontroversial its duty to adhere strictly to the terms of a clear statutory text, even when doing so produces results that fit poorly with the apparent purposes that inspired the enactment.").

Whether the President can use Public Law 85-804 for downward revisions[221] is a separate question from whether the President should. Retroactive downward revisions would increase financial uncertainty for shareholders, and might encourage businesses to exit the government contracting market.[222] Animus or political considerations could create the potential for abuse or public backlash. Additionally, Public Law 85-804 is no silver bullet for defense procurement. Government procurement needs more cost data, more business expertise, and more effective incentives for on-time and under-budget performance, among other reforms.[223] Yet existing options—like suspension and debarment, or the Defense Production Act, or even antitrust law—do not address the pricing challenge posed by sole-source contractors.[224]

Innovative use of Public Law 85-804 will ultimately require persuasive political arguments on defense spending, the economy,

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221 Justice Robert Jackson's concurrence in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), is also instructive here. Public Law 85-804's existence likely means a President would be at their "maximum" authority when conducting downward revisions under the law. *See id.* at 635. Furthermore, even if presidential power is at its "lowest ebb"—for example, because a new congressional amendment specified that Public Law 85-804 could only be used for upward revisions—the President could arguably contend that downward revisions inhere in the Commander-in-Chief Clause, given the historical practice of downward revisions in wartime without statutory authorization. *See id.* at 637; *see, e.g.*, *supra* Sections II.A.3, II.A.4; *see also* Lichter v. United States, 334 U.S. 742, 780 (1948) (quoting a 1917 speech by the once-and-future Justice Charles Evans Hughes as saying "[t]he power to wage war is the power to wage war successfully").

222 This might be true for contractors where public contracts represent a small amount of their overall business. However, for the largest defense contractors who depend heavily on public contracts, it is unlikely they would exit the government market because the government market is their primary—and sometimes only—market. *See* MARKSTEINER ET AL., *supra* note 146. Regardless, it must be remembered that "[t]he business of the Government requires that people be willing to contract with it." Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1371 (1953).

223 Other reforms include more realistic production planning, more consolidated purchases, more frequent negotiations, better conflict-of-interest regulations for former military personnel employed at defense contractors, and possibly a whistleblower award statute for faulty cost data in defense contracts. These reforms are needed to overcome the asymmetries in bargaining power that Justice Frankfurter identified decades ago: "It is not difficult . . . to appreciate the position of negotiators for the Government in time of war and to realize how much the pressures of war deprive them of equality of bargaining power in situations where bargaining with private contractors is the only practicable means of securing necessary war supplies." United States v. Bethlehem Steel Corp., 315 U.S. 289, 336 (1942) (Frankfurter, J., dissenting).

224 For example, even a defense industry trade group acknowledged as much: "Assertions that TransDigm's actions were facilitated by an inappropriate reliance on a prior commercial item determination, or insufficient access to pricing data, are misdirected. [A proposal to reform commercial item determinations] would not prevent the pricing practices demonstrated by a single company that was a sole-source provider of critical parts." Letter from Acquisition Reform Working Grp. (ARWG) to Sen. James Inhofe, Sen. Jack Reed, Rep. Adam Smith & Rep. Mac Thornberry at 4 (May 6, 2020) (on file with author).

and fairness.[225] These arguments must combat the myth that higher defense spending increases security.[226] Or that TransDigm's profits are commensurate with the value it provides and the risk it assumes, particularly in comparison with soldiers operating military aircraft. Critics might decry government intervention in the defense market, but the government created the market and participation is voluntary. If TransDigm can use its investments to create negotiating leverage, the executive branch should be able to use the law to do the same.

In the words of President Dwight D. Eisenhower, "[p]atriotism means equipped forces."[227] Because war today looks different than the existential crisis of the Civil War or the mass mobilization of World War II, it's easy to forget our military is in conflict zones around the world.[228] But if the United States is to simultaneously fix aging equipment, arm our 1.3 million servicemembers, and supply our allies,[229] there must be a better balance between contractor profitability and government interests. Despite the insulation from *legal* risk that contractors usually enjoy for their products,[230] downward revisions under Public Law 85-804 could create limited *profit* risk for select contractors, and thereby reinvigorate the profit motive for properly equipping our military. Public Law 85-804 reminds us that a fortune built by deprioritizing soldiers' needs and lives is unpatriotic, but one that is within democratic control.[231]

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225 *See, e.g.*, Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1270 (2019) (discussing how political plausibility is often the most relevant constraint in modern statutes that provide the President with wide discretion in national security and foreign affairs).

226 *See supra* notes 16–20 and accompanying text.

227 President Dwight D. Eisenhower, Inaugural Address (Jan. 20, 1953).

228 *See, e.g.*, Tess Bridgeman & Brianna Rosen, *Introduction to Symposium: Still at War – Where and Why the United States Is Fighting the "War on Terror"*, JUST SEC. (Mar. 24, 2022), https://www.justsecurity.org/80800/introduction-to-symposium-still-at-war-where-and-why-the-united-states-is-fighting-the-war-on-terror [https://perma.cc/7EC3-BKQR].

229 *DoD Personnel, Workforce Reports & Publications*, DEF. MANPOWER DATA CTR., https://dwp.dmdc.osd.mil/dwp/app/dod-data-reports/workforce-reports [https://perma.cc/E8TD-WDSF] (calculating over 1.3 million active duty military members as of September 30, 2023).

230 *See, e.g.*, Megan K. Stack, *The Soldiers Came Home Sick. The Government Denied It Was Responsible.*, N.Y. TIMES (Jan. 11, 2022), https://www.nytimes.com/2022/01/11/magazine/military-burn-pits.html [https://perma.cc/BV4B-Q6LL] ("In 2019, the [Supreme Court] let stand a ruling that private contractors were protected by the same immunity that covers the military's battlefield decisions.").

231 On a similar topic, see Note, *Price and Sovereignty*, 135 HARV. L. REV. 755, 776 (2021) ("If nothing else, it would remind Americans that even the most sacred signals of the market are well within their collective control."). Freedom isn't free, but it could be less expensive.

Appendix

Table 1. Full Text of Public Law 85-804, As Amended (50 U.S.C. §§ 1431–1435)

50 U.S.C.	Statutory Text
§ 1431	**(a)** The President may authorize any department or agency of the Government which exercises functions in connection with the national defense, acting in accordance with regulations prescribed by the President for the protection of the Government, to enter into contracts or into amendments or modifications of contracts heretofore or hereafter made and to make advance payments thereon, without regard to other provisions of law relating to the making, performance, amendment, or modification of contracts, whenever he deems that such action would facilitate the national defense. The authority conferred by this section shall not be utilized to obligate the United States in an amount in excess of $500,000 without approval by an official at or above the level of an Assistant Secretary or his Deputy, or an assistant head or his deputy, of such department or agency, or by a Contract Adjustment Board established therein. The authority conferred by this section may not be utilized to obligate the United States in an amount in excess of $150,000,000 unless the Committees on Armed Services of the Senate and the House of Representatives and in addition, the Committee on Transportation and Infrastructure of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate with respect to contracts, or modifications or amendments to contracts, or advance payments proposed to be made under this section by the Secretary of the Department in which the Coast Guard is operating with respect to the acquisition of Coast Guard cutters or aircraft, have been notified in writing of such proposed obligation and 60 days of continuous session of Congress have expired following the date on which such notice was transmitted to such Committees. For purposes of this section, the continuity of a session of Congress is broken only by an adjournment of the Congress sine die at the end of a Congress, and the days on which either House is not in session because of an adjournment of more than 3 days to a day certain, or because of an adjournment sine die other than at the end of a Congress, are excluded in the computation of such 60-day period. **(b) Temporary Authority to Modify Certain Contracts and Options Based on the Impacts of Inflation.—** Only amounts specifically provided by an appropriations Act for the purposes detailed in subsections (c) and (d) of this section may be used by the Secretary of Defense to carry out such subsections. **(c)** **(1)** The Secretary of Defense, acting pursuant to a Presidential authorization under subsection (a) and in accordance with subsection (b)— **(A)** may, notwithstanding subsection (e) of section 1432 of this title, make an amendment or modification to an eligible contract when, due solely to economic inflation, the cost to a prime contractor of performing such eligible contract is greater than the price of such eligible contract; and **(B)** may not request consideration from such prime contractor for such amendment or modification. **(2)** A prime contractor may submit to the Secretary of Defense a request for an amendment or modification to an eligible contract pursuant to subsection (a) when, due solely to economic inflation, the cost to a covered subcontractor of performing an eligible subcontract is greater than the price of such eligible subcontract. Such request shall include a certification that the prime contractor— **(A)** will remit to such covered subcontractor the difference, if any, between the original price of such eligible contract and the price of such eligible contract if the Secretary of Defense makes an amendment or modification pursuant to subsection (a); and **(B)** will not require such covered subcontractor to pay additional consideration or fees related to such amendment or modification.

Table 1. Full Text of Public Law 85-804, As Amended (50 U.S.C. §§ 1431–1435) Continued

50 U.S.C.	Statutory Text
§ 1431 Continued	**(3)** If a prime contractor does not make the request described in paragraph (2), a covered subcontractor may submit to a contracting officer of the Department of Defense a request for an amendment or modification to an eligible subcontract when, due solely to economic inflation, the cost to such covered subcontractor of performing such eligible subcontract is greater than the price of such eligible subcontract. **(d)** Any adjustment or modification made pursuant to subsection (c) to an eligible contract or an eligible subcontract shall— **(1)** be contingent upon the continued performance, as applicable, of such eligible contract or such eligible subcontract; and **(2)** account only for the actual cost of performing such eligible contract or such eligible subcontract, but may account for indirect costs of performance, as the Secretary of Defense determines appropriate. **(e)** The authority under subsections (c) and (d) shall be effective during the period beginning on December 23, 2022, and ending on December 31, 2023. **(f)** In this section: **(1)** The term "covered subcontractor" means a subcontractor who has entered into an eligible subcontract with a prime contractor. **(2)** The term "eligible contract" means a contract awarded to a prime contractor by the Secretary of Defense pursuant to subsection (a). **(3)** The term "eligible subcontract" means a subcontract made under an eligible contract to a covered subcontractor.
§ 1432	Nothing in this chapter shall be construed to constitute authorization hereunder for— **(a)** the use of the cost-plus-a-percentage-of-cost system of contracting; **(b)** any contract in violation of existing law relating to limitation of profits; **(c)** the negotiation of purchases of or contracts for property or services required by law to be procured by formal advertising and competitive bidding; **(d)** the waiver of any bid, payment, performance, or other bond required by law; **(e)** the amendment of a contract negotiated under section 2304(a)(15) of title 10 or under section 252(c)(13) of title 41, to increase the contract price to an amount higher than the lowest rejected bid of any responsible bidder; or **(f)** the formalization of an informal commitment, unless it is found that at the time the commitment was made it was impracticable to use normal procurement procedures.
§ 1433	**(a)** All actions under the authority of this chapter shall be made a matter of public record under regulations prescribed by the President and when deemed by him not to be detrimental to the national security. **(b)** All contracts entered into, amended, or modified pursuant to authority contained in this chapter shall include a clause to the effect that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment, have access to and the right to examine any directly pertinent books, documents, papers, and records of the contractor or any of his subcontractors engaged in the performance of and involving transactions related to such contracts or subcontracts. Under regulations to be prescribed by the President, however, such clause may be omitted from contracts with foreign contractors or foreign subcontractors if the agency head determines, with the concurrence of the Comptroller General of the United States or his designee, that the omission will serve the best interests of the United States. However, the concurrence of the Comptroller General of the United States or his designee is not required for the omission of such clause— **(1)** where the contractor or subcontractor is a foreign government or agency thereof or is precluded by the laws of the country involved from making its books, documents, papers, or records available for examination; and

Table 1. Full Text of Public Law 85-804, As Amended (50 U.S.C. §§ 1431–1435) Continued

50 U.S.C.	Statutory Text
§ **1433 Continued**	**(2)** where the agency head determines, after taking into account the price and availability of the property or services from United States sources, that the public interest would be best served by the omission of the clause. If the clause is omitted based on a determination under clause (2), a written report shall be furnished to the Congress.
§ **1434**	[Repealed]
§ **1435**	This chapter shall be effective only during a national emergency declared by Congress or the President and for six months after the termination thereof or until such earlier time as Congress, by concurrent resolution, may designate.

TABLE 2. TOTAL SALES THAT QUALIFIED FOR RENEGOTIATION (IN BILLIONS OF USD)[232]

Fiscal Year	Renegotiable Sales	Fiscal Year	Renegotiable Sales
1942		**1961**	$25.1
1943		**1962**	$29.3
1944	$190.0	**1963**	$31.2
1945		**1964**	$39.3
1946		**1965**	$34.8
1947	n.a.	**1966**	$31.8
1948	n.a.	**1967**	$33.1
1949	n.a.	**1968**	$38.8
1950	n.a.	**1969**	$48.5
1951	n.a.	**1970**	$48.0
1952	n.a.	**1971**	$51.6
1953	n.a.	**1972**	$31.3
1954	n.a.	**1973**	$28.3
1955	n.a.	**1974**	$40.2
1956	$29.8	**1975**	$21.1
1957	$28.7	**1976**	$24.0
1958	$27.1	**1976 TQ**[233]	$6.4
1959	$27.5	**1977**	$47.8
1960	$28.9	**1978**	$25.3
		Total of All Years	**$967.9 billion**

[232] Based on a combination of available data between fiscal years 1942 and 1946, and between fiscal years 1956 and 1978. HISTORY AND BRIEF OUTLINE OF RENEGOTIATION, *supra* note 62, at 8 (noting $190 billion in renegotiable sales between fiscal years 1942 and 1946). For scattered data on renegotiable sales between fiscal years 1956 and 1978, see U.S. RENEGOT. BD., FIRST ANNUAL REPORT OF THE RENEGOTIATION BOARD 7–8 (1956); U.S. RENEGOT. BD., SECOND ANNUAL REPORT OF THE RENEGOTIATION BOARD 7 (1957); U.S. RENEGOT. BD., THIRD ANNUAL REPORT OF THE RENEGOTIATION BOARD 6 (1958); U.S. RENEGOT. BD., FOURTH ANNUAL REPORT OF THE RENEGOTIATION BOARD 6 (1959); U.S. RENEGOT. BD., FIFTH ANNUAL REPORT OF THE RENEGOTIATION BOARD 6 (1960); U.S. RENEGOT. BD., SEVENTH ANNUAL REPORT OF THE RENEGOTIATION BOARD 6 (1962); U.S. RENEGOT. BD., EIGHTH ANNUAL REPORT OF THE RENEGOTIATION BOARD 7 (1963); U.S. RENEGOT. BD., TENTH ANNUAL REPORT OF THE RENEGOTIATION BOARD 7 (1965); U.S. RENEGOT. BD., TWELFTH ANNUAL REPORT OF THE RENEGOTIATION BOARD 7 (1967); U.S. RENEGOT. BD., FOURTEENTH ANNUAL REPORT OF THE RENEGOTIATION BOARD 8 (1969); U.S. RENEGOT. BD., SIXTEENTH ANNUAL REPORT OF THE RENEGOTIATION BOARD 10 (1971); U.S. RENEGOT. BD., EIGHTEENTH ANNUAL REPORT OF THE RENEGOTIATION BOARD 11 (1973); U.S. RENEGOT. BD., NINETEENTH ANNUAL REPORT OF THE RENEGOTIATION BOARD 10 (1974); U.S. RENEGOT. BD., TWENTIETH ANNUAL REPORT OF THE RENEGOTIATION BOARD 10 (1975); U.S. RENEGOT. BD., TWENTY-FIRST ANNUAL REPORT OF THE RENEGOTIATION BOARD 11 (1976); U.S. RENEGOT. BD., *supra* note 77, at 9.

[233] "TQ" (i.e., "Transition Quarter") refers to a three-month period from July 1, 1976, until September 30, 1976. The Transition Quarter was created when Congress shifted the start of the federal government's fiscal year to later in the calendar year to "give Congress more time to deal with Federal spending issues." *$16.1 Billion Deficit Seen for 'Transition Quarter,'* N.Y. TIMES (Jan. 22, 1976), https://www.nytimes.com/1976/01/22/archives/161-billion-deficit-seen-for-transition-quarter.html [https://perma.cc/G9AF-HDTR].

TABLE 3. GROSS AMOUNT RECOVERED THROUGH RENEGOTIATION (IN MILLIONS OF USD)[234]

Fiscal Year	Gross Recovery	Fiscal Year	Gross Recovery
1942		**1961**	$17.2
1943		**1962**	$7.8
1944	$10,434.6	**1963**	$10.1
1945		**1964**	$24.2
1946		**1965**	$16.1
1947	n.a.	**1966**	$24.5
1948	n.a.	**1967**	$16.0
1949	n.a.	**1968**	$23.1
1950	n.a.	**1969**	$21.4
1951	n.a.	**1970**	$33.5
1952	n.a.	**1971**	$65.2
1953	$20.0	**1972**	$40.2
1954	$119.5	**1973**	$28.0
1955	$167.3	**1974**	$70.2
1956	$152.6	**1975**	$27.7
1957	$151.0	**1976**	$40.1
1958	$112.7	**1976 TQ**	$3.3
1959	$60.8	**1977**	$18.2
1960	$52.7	**1978**	$31.5
		Total of All Years	**$11,789.3 million**

[234] Based on a combination of available data between fiscal years 1942 and 1946, and between fiscal years 1953 and 1978. HISTORY AND BRIEF OUTLINE OF RENEGOTIATION, *supra* note 62, at 9 (noting $10.4 billion in gross recovery between fiscal years 1942 and 1946, and net recovery of $3.1 billion between fiscal years 1942 and 1946); U.S. RENEGOT. BD., *supra* note 77, at 11–12, 18 (noting $1.35 billion in excessive profit determinations between fiscal years 1953 and 1978, and net recovery of $576 million between fiscal years 1953 and 1978).

TABLE 4. TOTAL GOVERNMENT EXPENSES FOR RENEGOTIATION (IN MILLIONS OF USD)[235]

Calendar Year	Total Expenses	Calendar Year	Total Expenses
1942		**1961**	$2.9
1943		**1962**	$2.6
1944	$41.5	**1963**	$2.3
1945		**1964**	$2.5
1946		**1965**	$2.6
1947	n.a.	**1966**	$2.5
1948	n.a.	**1967**	$2.5
1949	n.a.	**1968**	$2.6
1950	n.a.	**1969**	$3.1
1951	n.a.	**1970**	$4.0
1952	$1.6	**1971**	$4.5
1953	$5.1	**1972**	$4.8
1954	$5.1	**1973**	$4.8
1955	$4.4	**1974**	$4.7
1956	$3.9	**1975**	$5.3
1957	$3.5	**1976**	$5.5
1958	$3.0	**1976 TQ**	$1.4
1959	$3.0	**1977**	$5.9
1960	$2.8	**1978**	$6.2
		Total of All Years	**$144.5 million**

235 Based on a combination of available data between calendar years 1942 and 1946, and between calendar years 1952 and 1978. HISTORY AND BRIEF OUTLINE OF RENEGOTIATION, *supra* note 62, at 9 (noting over $41 million in total expenses between calendar years 1942 and 1946); U.S. RENEGOT. BD., *supra* note 77, at 11, 18 (calculating $103 million in total expenses between calendar years 1952 and 1978).