Keith Jarrett

Jarrett is likely to challenge the export ban on nondelegation doctrine grounds. This challenge is likely to fail.

Here, in section 201 of the MAAA Act, Congress has delegated to the Board the power to impose an export ban by making an endangerment finding.

Article I, section 1 of the Constitution vests the Congress with "all legislative powers herein granted." Congress may not constitutionally delegate the power to legislate to any other institution, whether inside the executive branch, *Panama Refining*, or outside the government altogether, *Schechter Poultry*. Though American statesmen have taken different views from the beginning on what constitutes an impermissible delegation of legislative power, *see Post Roads Debate*, the modern test is the intelligible principle test. A statutory delegation is constitutional so long as Congress "lays down by legislative act an intelligible principle to which the person or body authorized to exercised the delegated authority is directed to conform." *Gundy*, quoting *J.W. Hampton*.

Section 201 will survive a nondelegation challenge. Congress had made the essential policy choice: in the event that the U.S.'s global position is endangered, an export ban should be imposed. Far from giving the board a "blank check" to impose an export ban when the board itself sees fit, Congress has retained to itself the key policy choice. Even if the Court were to adopt Justice Gorsuch's much more restrictive approach to nondelegation challenges, as outlined in his *Gundy* dissent, the statute would survive. According to Justice Gorsuch, the three circumstances in which Congressional delegations are permissible are where (1) Congress leaves another branch to "fill up the details"; (2) where it makes the application of a rule hinge on executive fact-finding; and (3) where Congress has assigned the other branches certain non-legislative responsibilities. This is a case of the second of these three: executive fact-finding (the endangerment finding) is a trigger for a policy chosen by Congress.

Jarrett will also likely challenge the vesting of the appointment of the Board members in the Secretary of Commerce. That challenge may well succeed.

Article II, section 2 provides that the President shall nominate, and with the advice and consent of the Senate, appoint "Officers of the United States," but that Congress may by law vest the appointment of "such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." The Secretary of Commerce is a head of Department, so the appointment of Board members by the Secretary is consistent with the Constitution only if Board members are inferior, as opposed to "principal, officers.

In *Morrison v. Olson*, the Supreme Court determined that the Independent Counsel (IC) was an inferior officer looking at the features of that office as a whole. Specifically, the Court noted four factors: (1) the removability of the IC by the Attorney General (for cause); (2) the limited duties of the office; (3) the limited jurisdiction of the office; and (4) the limited tenure of the office. Subsequent caselaw has emphasized, as Justice Scalia's *Morrison* dissent did, the presence or absence of a superior in determining whether an officer is principle or inferior: inferior officers are those whose work is directed and supervised at some level by principal officers. The Court has also recently concluded that officials with authority to render a final decision on behalf of the United States are principal officers. *Arthrex*.

If the Court continues to follow the *Morrison* factors, it may well be that the Board members are inferior officers and are validly appointed. They serve for limited, 5-year terms and have positions with very limited (if important) responsibilities. If on the other hand the Court follows either the *Edmonds* or *Arthrex* approach, it is likely the Board members are principal officers, and thus are unconstitutionally appointed: they do not appear to have superiors in any meaningful sense, and they make a final decision on behalf of the government as to whether there will be an export ban or not.

Jarrett is also likely to object to the removal restriction, which will be addressed immediately below.

Bill Evans

Bill Evans will argue that his removal by President Purim violated the statutory provision that vests a for-cause removal power in the Secretary of Commerce. Plainly his removal did violate the statute. But the President will argue (as Keith Jarrett will too) that the removal restriction is unconstitutional. This argument may succeed.

Although nothing in the Constitution expressly grants the President the power to remove officers of the United States, the Supreme Court has long acknowledged that the President has the constitutional power to remove at least certain officers, even in the face of statutory provisions that seek to provide insulation against at-will removal. In *Myers v. United States*, Chief Justice Taft, drawing extensively on the debates surrounding the Decision of 1789, rooted a presidential power to remove in the vesting and take care clauses of Article II. Taft argued that the power to remove was a necessary incident of the President's executive power. Although the scope of the President's power to remove has waxed and waned over time—a decade after *Myers*, *Humphrey's Executor* limited *Myers* to officers using purely executive power (as opposed to figures performing quasi-adjudicatory and quasi-executive functions), and in *Morrison*, the Supreme Court adopted a functional test that asked whether a particular removal restriction unconstitutionally impeded the President's ability to perform his constitutional role—current doctrine recognizes only limited exceptions to a general presidential right to remove. In *Seila Law*, the Supreme Court recognized only two: Congress may restrict the President's ability to remove at will (1) members of multi-member expert agencies and (2) inferior officers with limited duties and no policymaking or administrative authority.

The Board is a multi-member agency, and it seems to be made up of experts, so it may fit within the first of the *Seila Law* exceptions. Depending on how a court resolves the question about the officers' status, members may also be inferior officers, but they are not carrying out prototypically executive functions such as mail delivery. Note that a pending Supreme Court case asks whether *Humphrey's Executor* should be overturned, so the answer to this question may depend on the resolution of that case.

Cassandra Wilson

Wilson will allege that Congress may not add to the membership qualifications for service in the House. She will prevail on this claim.

Article I section 2 lays out the qualifications for membership in the House: 25 years of age; seven years U.S. citizenship; residency in the state of service. Section 401 of the MAAA Act effectively seeks to add an additional qualification to the constitutional list—not having sold fictivium in violation of an export ban. Congress lacks the power to do so.

In support of its exclusion of Wilson, Congress may point to Article I, section 5, which provides that each House shall be the judge of the qualifications of its own members. They may further argue that the House's judgments on questions of members' qualifications amount to political questions, which courts may not second guess: Article I, section 5 is a "textually demonstrable constitutional commitment of the issue to a co-ordinate political department." *Baker v. Carr*.

This is the same provision and argument that the defendants in *Powell v. McCormack* relied on. It did not work for them, and it will not work for Congress here either. The *Powell* Court insisted that it is for the courts to determine what it means to judge the qualifications of membership. And, the Court continued, that meant determining whether an individual met those qualifications for membership laid down in the Constitution: namely, for House members, the age, citizenship, and residency requirements. A congressional judgment on one of those points might not be subject to judicial review. But what was at stake in the *Powell* case was something different: Congress was in effect imposed a new, extra-constitutional membership requirement. And Congress lacked the power to do so.

The outcome will be the same here. The MAAA Act is effectively seeking to change the Constitution, to add a new membership requirement. This would require a constitutional amendment, rather than an ordinary statute.

Nor can Congress justify Wilson's exclusion as an expulsion from Congress. While Congress does have the power to expel a member by a 2/3 vote, see Article I, section 5, this was not a vote to expel, but a vote to exclude, something that it not provided for in the Constitution. See *Powell*.

J.J. Johnson

Johnson will likely prevail on his claim.

The President seeks to justify the seizure of fictivium on national security grounds. National security is an area of shared competency between the legislative and executive branches.

This case has obvious parallels to *Youngstown Sheet and Tube*, in which President Truman sought to seize steel plants on national security grounds. The Supreme Court rejected Truman's seizure and offered several rationales for doing so. All of these rationales also speak against Purim's action.

Writing for the majority, Justice Black sought authorization for Truman's action in either the Constitution or a statute and found it in neither place. Although national security is an expansive concept, Black found it could not extend so far as to allow the President to seize private property in the U.S. mainland, which is what Purim has done as well. Nor is Truman or Purim "executing" a law: in fact, Congress in both cases chose to deny the President precisely the power he is using.

Justice Frankfurter's concurrence relied heavily on the fact that Congress considered, but chose not to, grant the President the power in question. To permit the President this power, in Frankfurter's view, would be to disrespect Congress's role in national security issues.

To put it in terms of Justice Jackson's concurrence, the President here has taken measures incompatible with the will of Congress, and so his power is at its lowest ebb. Jackson concluded that the President's powers, by themselves, did not extend so far as to the seizure of private property, which is also what is at stake in this case.