STEEL STANDING: WHAT’S NEXT FOR SECTION 232?

Kayla Scott*

This note considers possible legal challenges to the original Section 232 steel order and recommends different actions for alleviating the problem of broad executive power delegated by Congress in Section 232. Parts I and II provide an introduction and background to Section 232. Part III analyzes the constitutionality of Section 232 under both the Court’s current jurisprudence of the nondelegation doctrine and potential changes to the doctrine suggested by the dissent in Gundy. Part IV assesses potential challenges to the steel order under the theory that the President acted outside of the scope of his authority conferred by the statute. Part V assesses whether the action is consistent with global trade rules and what the potential effects of a WTO violation are under domestic law. Lastly, because of the weakness of the legal arguments against Section 232 and the steel order, Part VI provides recommendations for how Congress, as opposed to the courts, might deal with the problems posed by Section 232.

I. INTRODUCTION ............................................................................................ 380
II. BACKGROUND ............................................................................................. 384
   A. The Development of Section 232 ........................................................ 384
   B. How Section 232 Investigations Work ................................................ 386
   C. Previous Use of 232............................................................................. 387
   D. Current Steel Order ............................................................................. 388
III. UNCONSTITUTIONAL DELEGATION OF POWER? .............................. 392
   A. Unfavorable Precedent ........................................................................ 395
   B. Separation of Powers as a Driver for Nondelegation .......................... 398
   C. Separation of Powers and Trade Policy ............................................... 400
   D. Section 232 and Separation of Powers ................................................ 407
IV. EXCEEDING STATUTORY AUTHORITY? .............................................. 410
   A. Attempted Challenges to Statutory Authority ..................................... 411
   B. Availability and Scope of Review ....................................................... 412
   C. Standard of Review ............................................................................. 416

Copyright © 2020 Kayla Scott

* Candidate for Juris Doctorate and Master of Laws in International and Comparative Law at Duke University School of Law, expected 2020. Thank you to Professor Ernest Young for his guidance and thoughtful comments. Thank you to DJCIL staff for their comments and review.
I. INTRODUCTION

In March 2018, President Trump imposed tariffs on steel and aluminum products under Section 232 of the Trade Expansion Act of 1962, as amended (19 U.S.C. § 1862) (“Section 232”). Section 232 allows the president to take actions to adjust imports that threaten to impair the national security. The President imposed these tariffs citing national security concerns over the ability of the U.S. steel industry to remain viable long-term, so that the U.S. military can continue to source domestic steel. The actual strength and authenticity of these national security concerns have been questioned. Many are suspicious that the tariffs were driven by domestic industry and purely economic interests and that the claimed national security concerns are mere pretext.

Following these tariffs, the American Institute for International Steel (AIIS) sued the government in the Court of International Trade (CIT), challenging the constitutionality of the delegation of power to the president under Section 232. On March 25, 2019, the CIT held that the statute was not an unconstitutional delegation, finding itself bound by Supreme Court

3. See Brinkley, supra note 2; Lester & Zhu, supra note 2.
However, the CIT also expressed concern over the wide breadth of action and discretion available under the statute. AIIS appealed the decision to the Court of Appeals for the Federal Circuit, and the court affirmed the CIT’s ruling in an unpublished opinion. AIIS has petitioned for certiorari with the Supreme Court. Other cases filed at the CIT have attacked the steel orders directly (rather than the statute on its face) by claiming that specific actions lacked a sufficient national security nexus, were made for reasons other than national security, or violated procedural requirements in the statute, and, therefore, were outside of the authority delegated to the President by Congress. At the World Trade Organization (WTO), many nations have filed complaints against the United States for violating the United States’ WTO obligations in its imposition of tariffs under Section 232.

Other Section 232 investigations underway include imports of automobiles, uranium, and titanium sponge. According to the President,
the Department of Commerce concluded that foreign auto imports pose a national security threat. The administration has not made the report public, despite congressional action directing the President to release the report. The President decided not to impose national security tariffs on uranium ore, but did establish a working group to review the domestic industry. No decisions have yet been made regarding titanium sponge.

The increased use of Section 232 has led to more market uncertainty than other trade remedy laws because of the fewer procedural protections and the comparative ease of implementing this type of action. The use of Section 232 has also increased tensions internationally, as evidenced by the many complaints filed against the United States at the WTO. Statements by the President indicating the potential for using Section 232 tariffs on automobiles as a negotiating tool for more favorable concessions in trade agreements have supported international skepticism that the United States is not acting in good faith over national security concerns. The imposition of unilateral tariffs, the declaration of trade wars, and the blocking of Appellate Body members at the WTO, which has left the Appellate Body effectively disabled, have cast serious doubts as to the longevity of the global trade regime and the United States’ position in that regime.
Section 232 is not the only statute and trade is not the only substantive area where Congress has conferred powers to the President with shockingly broad discretion and little oversight. For example, in the immigration context, broad congressional delegations and the “plenary” power doctrine, which restrains the courts’ review, have resulted in enormous authority by the executive over immigration.21 The National Emergencies Act (NEA)22 also delegates broad power to the executive. President Trump threatened to use the NEA to fund a wall along the U.S.–Mexico border in the name of “national security” after Congress failed to budget for such a wall.23 The International Emergency Economic Powers Act (IEEPA) also confers emergency economic powers to the President.24 President Trump threatened to use IEEPA to impose tariffs on Mexico if Mexico did not take action to stop immigration from Mexico into the United States.25 By a recent count, there are 123 statutes that delegate powers to the President in the case of a presidential declaration of a “national emergency.”26 These are just a few examples of why broad delegations of statutory authority to the President matter and greatly affect the distribution of powers within the government.

I will analyze possible legal challenges to the original Section 232 steel order (not subsequent amendments) and recommend different actions for alleviating the problem of broad executive power delegated by Section 232.27 Part II provides background on the establishment of Section 232, the previous investigations and orders implemented under Section 232, and the current steel orders. Part III analyzes the constitutionality of Section 232 under the nondelegation doctrine. Part IV assesses potential challenges to the steel order under the theory that the President acted outside of the scope of enforcement...
his authority conferred by the statute. Part V assesses whether the action is consistent with global trade rules and what the potential effects of a WTO violation are under domestic law. Lastly, because of the weakness of the legal arguments against Section 232 generally and this steel order specifically, Part VI provides recommendations for how Congress, as opposed to the courts, might deal with the problems posed by Section 232.

II. BACKGROUND

A. The Development of Section 232

National security justifications for violations of trade commitments or as a basis for trade policy are not new. Even the original GATT agreement contains an exception for what would otherwise be treaty violations for essential national security interests. In U.S. domestic law, national security exceptions to tariff rates were initially addressed in the Trade Agreements Extension Act of 1954 (TAEA). In the TAEA, the President’s authority to enter into trade agreements to decrease duties was conditional. In any new agreements, the President would have to negotiate for the ability to withdraw any duty decreases if he found that domestic production’s capability of meeting projected national defense requirements was threatened. This provision essentially required any new trade agreements to have a “national defense requirements” exception.

The TAEA was amended in 1955 to add the ability to restrict imports in addition to removing or limiting a favorable duty, if such articles threatened to impair the national security. In 1958, the TAEA was further amended by adding factors for officials to consider when making national security judgments. In the aftermath of the Korean War and in the wake of rising Cold War tensions, the importance and awareness of military readiness

---


30. Id. § 2 (“No action shall be taken pursuant . . . to decrease the duty of any article if the President find that such reduction would threaten domestic production needed for projected national defense requirements.”).


32. Trade Agreements Extension Act of 1958, Pub. L. No. 85-686, 72 Stat. 673 (1958) (adding factors to be considered, such as the “close relation of the economic welfare of the Nation to our national security”).
increased. The legislative history of the amendment indicates this power was meant to serve as a stopgap to maintaining U.S. military dominance.

The Trade Expansion Act of 1962 (TEA) reaffirmed these preceding laws in Section 232. Section 232 provides that if the President concurs with the Secretary of Commerce that “an article is being imported into the U.S. in such quantities or under such circumstances as to threaten to impair the national security” the President shall “determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security.” The language of Section 232 has largely remained the same, except for changes to the process for recommendation of action to the President and who can weigh in on the debate. The statute has also been amended to specifically address oil imports. Section 232 of the TEA is the authority President Trump has invoked for the recent steel tariffs.

The history of the national security exception shows that, since the 1955 amendments, the national security exception is broader than merely ensuring national defense requirements. The House Report to the 1955 amendment indicates that Congress wanted to ensure that the United States could preserve its essential security sectors. Additionally, the 1958 amendment adding as a factor the relationship between the economy and national security in assessing threats to national security shows that domestic economic health is a legitimate consideration. However, this history is not conclusive as to what the scope of “threaten to impair the national security” is or how imminent the threat to impair the national security should be to justify action taken under the statute.

34. H. R. REP. NO. 84-50, at 2095 (1955) (declaring “the world is divided into two armed camps” and that it was important to “preserve essential security sectors”). Also, much of the testimony came from domestic industry complaining they were being weakened by competition and were needed for national security. However, the testimony of the Secretary of Defense emphasized the need for strong economic relationships with our allies to dissuade them from falling behind the iron curtain. Id. at 2077.
37. Thornton, supra note 33.
38. Id.
40. H. R. REP. NO. 84-50 at 2095 (1955) (declaring “the world is divided into two armed camps” and that the amendment was important to “preserve essential security sectors”).
B. How Section 232 Investigations Work

A Section 232 investigation can be initiated in three ways: (1) upon request of the head of any department or agency, (2) upon application of an interested party, or (3) upon the Secretary of Commerce’s (Secretary) own motion.41 Once requested in writing, the Secretary “shall immediately initiate an appropriate investigation to determine the effects on the national security of imports” of the product of interest.42 The Secretary must also immediately notify the Secretary of Defense of the investigation.43 During the course of the investigation, the Department of Commerce (Commerce) must consult with the Secretary of Defense regarding “methodological and policy questions,” seek information and advice from appropriate officers of the United States, and if appropriate, hold public hearings or afford interested parties an opportunity to present relevant advice and information after reasonable notice.44 The Secretary may also request from the Secretary of Defense an assessment of defense requirements for materials under investigation.45

No later than 270 days after the initiation of an investigation, the Secretary shall submit a report of his findings to the President with respect to the effect of importation of said articles on the national security and make a recommendation based on such findings.46 The Bureau of Industry and Security (BIS) at Commerce conducts the investigation in accordance with the regulations codified in 15 C.F.R. § 705.

Within ninety days of receiving a report where the Secretary has found that imports under current quantities and circumstances threaten to impair the national security, the President must: (1) determine whether he agrees with the Secretary’s finding, and (2) in the event of agreement, the President must determine the nature and duration of the action needed to adjust imports so they will not threaten to impair the national security.47 Once the President decides he agrees with the Secretary and will take action, he must do so within fifteen days.48 Within thirty days of his determination, the President shall submit to Congress a written statement of the reasons why the President has decided to take or has refused to take action.49

42. Id. § 1862(b)(1)(A).
43. Id. § 1862(b)(1)(B).
44. Id. § 1862(b)(2)(A).
45. Id. § 1862(b)(2)(B).
46. Id. § 1862(b)(3)(A).
47. Id. § 1862(c)(1)(A).
48. Id. § 1862(c)(1)(B).
49. Id. § 1862(c)(2).
C. Previous Use of 232

Prior to the current administration, twenty-six investigations have been initiated under Section 232.\textsuperscript{50} Of those initiated investigations, only eight determined the import threatened to impair the national security, and in only five of those cases did the President decide to take action.\textsuperscript{51} In all of these cases, the product identified was related to petroleum or crude oil.\textsuperscript{52} Action taken under 19 U.S.C. § 1862(f), the part of Section 232 which deals with oil imports, is subject to a congressional disapproval resolution.\textsuperscript{53} This part of the statute was added after a controversy in 1980 where Congress was upset over the President’s remedies on petroleum products.\textsuperscript{54}

The most recent investigation by Commerce was not the first Section 232 investigation conducted on steel products. On February 1, 2001, Commerce initiated an investigation into iron ore and semi-finished steel,\textsuperscript{55} similar to the current imports under investigation, “steel mill articles.”\textsuperscript{56} Commerce concluded this investigation on October 29, 2001, and did not recommend President George W. Bush take any action.\textsuperscript{57}

In its report to the President, Commerce found it necessary to resolve three questions in determining whether a particular import threatens to impair the national security: (1) what constitutes “national security” (2) what effects should be considered, and (3) at what point do the imported products “threaten to impair” the national security?\textsuperscript{58} Commerce chose to read these questions of scope as broadly as they thought the statute allowed.\textsuperscript{59} Commerce decided that both national defense requirements and “the general security and welfare of certain industries . . . that are critical to the minimum operations of the economy and government” are included in the term

\textsuperscript{50} FEFER, supra note 15, at 1.
\textsuperscript{51} Id. at 2.
\textsuperscript{52} Id. Two of these determinations were a part of the Mandatory Oil Import Program outside of the Section 232 Scheme, and another determination was held illegal by a federal court, resulting in only two instances where Section 232 investigations truly resulted in action. Id.
\textsuperscript{53} 19 U.S.C. § 1862(f). This resolution could be vetoed by the President, unless the resolution was supported by more than two-thirds of each house.
\textsuperscript{54} FEFER, supra note 15, at 1.
\textsuperscript{56} Proclamation No. 9705, 83 Fed. Reg. 11,625 (Mar. 15, 2018).
\textsuperscript{59} See id. at 7 (“[O]n each of a series of issues related to the scope . . . the Department has interpreted the requirements of Section 232 in the manner most likely to result in a positive finding.”).
“national security” for this investigation.60 Commerce did recognize that in some cases only including national defense requirements in national security may be appropriate. Commerce also considered all of the factors listed in 19 U.S.C. § 1862(d) for the “effects” of imports, such as projected defense requirements; capacity of the domestic industry; existing and anticipated resources; growth requirements for such industries; and the quantity, character, and use of the imported goods.61 To meet the “threaten to impair” threshold, Commerce thought the imports must either lead to U.S. dependence on unsafe or unreliable imports, or fundamentally threaten the ability of U.S. domestic industries to satisfy security needs.62

The Secretary found iron important to U.S. national security since those materials are needed for certain uses by the Department of Defense (DOD) and by industries critical to the minimum operations of the U.S. economy. Because these “critical” amounts were low and did not require dependence on unreliable foreign sources or shrink the domestic industry to a size unable to support defense requirements, the Secretary did not recommend action.63

This decision accounted for increased military needs in the wake of the September 11 terrorist attacks.64

D. Current Steel Order

On April 19, 2017, Wilbur Ross, the Secretary of Commerce, initiated an investigation under Section 232 to determine the effects of steel imports on the national security.65 Secretary Ross notified then-Secretary of Defense, James Mattis, of the investigation.66 The following day, the President requested an expeditious investigation and that Commerce include recommendations for specific actions if the imports were found to threaten to impair the national security.67 Commerce requested public comments, and a public hearing was held on May 24, 2017.68 The panel at the hearing included representatives from the public sector; foreign and domestic

60. Id. at 5.
61. Id. at 6.
62. Id. at 7.
63. Id. at 1.
64. Id. at 2.
government; and the private sector, including domestic producers, importers, and foreign producers. Commerce also held discussions with other departments and agencies, such as the Department of State, the Department of the Treasury, the Department of the Interior/U.S. Geological Survey, the Department of Homeland Security/U.S. Customs and Border Protection, the International Trade Commission (ITC), and the Office of the United States Trade Representative.

Commerce released the results of its investigation on January 11, 2018. The report claims to adopt the statutory interpretation analysis used in the 2001 Steel Report. However, Commerce adopted a construction of the statute that was even broader than the 2001 Steel Report determined was possible. Specifically, for the “threaten to impair” analysis, Commerce disagreed with the 2001 determination that threats to the viability of critical industry must be “fundamental” to threaten to impair the national security.

As for the findings, the Secretary determined that steel is important to national security because of its use in defense and critical infrastructure systems, like transportation, water, electricity, and other power generation systems. The Secretary concluded that the current quantity of imports adversely impacted the economic viability of the domestic steel industry, which in turn seriously weakens our internal economy. The Secretary found that domestic steel production capacity was essential for the national security of the United States, as confirmed by Congress’s statement that “the security of the United States is dependent on the ability of the domestic industrial base to supply materials and services.”

The Secretary first recommended either a global quota at sixty-three percent of current imports, applied on a country and steel specific basis, or a global tariff of twenty-four percent to achieve eighty percent production

71. Id. at 1.
72. Id.
73. See U.S. DEP’T OF COMMERCE BUREAU OF EXPORT ADMIN., supra note 58, at 7 (“[O]n each of a series of issues related to the scope . . . the Department has interpreted the requirements of Section 232 in the manner most likely to result in a positive finding.”).
74. U.S. DEP’T OF COMMERCE BUREAU OF INDUS. & SEC., supra note 70, at 14 n.15 (dropping “fundamentally” from the threat to critical industry viability under the threaten to impair analysis).
75. Id. at 2.
76. Id. at 4.
77. Id.
78. Id. at 2.
79. Id. at n.5 (quoting 15 U.S.C. § 4502(a)).
capacity utilization of the domestic industry.\textsuperscript{80} As a second alternative, the Secretary recommended applying a fifty-three percent tariff on Brazil, South Korea, Russia, Turkey, India, Vietnam, China, Thailand, South Africa, Egypt, Malaysia, and Costa Rica and limiting other countries’ imports to their 2017 levels.\textsuperscript{81} This alternative would achieve an eighty percent domestic capacity utilization while only placing tariffs on steel from nations where less than four percent of U.S. steel is exported, potentially decreasing the risk of retaliation on U.S. steel exports.\textsuperscript{82} Lastly, the Secretary recommended an exclusions appeals process for products lacking comparable domestic production and for specific national security based considerations.\textsuperscript{83}

In a memorandum to Commerce after the release of the report, the Secretary of Defense agreed with Commerce’s determination that unfair trade practices pose a risk to national security by eroding the United States’ innovation and manufacturing industrial base.\textsuperscript{84} However, Secretary Mattis also reminded Commerce that the U.S. military requirements for steel only amount to three percent of U.S. production and that the findings in the report would not impact the ability of the DOD to supply its defense programs.\textsuperscript{85} The Secretary of Defense expressed security concerns with the solutions recommended by Commerce, namely from potential negative impacts among key allies.\textsuperscript{86} Rather than a global quota or tariff, the DOD recommended targeted tariffs and cooperation with trade partners to work on addressing the underlying issues of market distortion through unfair trade practices, namely Chinese transshipment, overproduction, and circumvention of tariffs.\textsuperscript{87} Overall, the Secretary of Defense seemed concerned that our actions would alienate our allies.\textsuperscript{88}

The 2018 Report listed several changes in the steel market since 2001 that explain the different result from the 2001 investigation. These include that the 2018 investigation is on steel rather than iron ore and semi-finished steel, the increased level of global excess capacity, the increased level of

\begin{itemize}
\item \textsuperscript{80} Id. at 7–8.
\item \textsuperscript{81} Id. at 8.
\item \textsuperscript{82} Id. at 8–9.
\item \textsuperscript{83} Id. at 9.
\item \textsuperscript{84} Memorandum from the Sec’y of Defense to the Sec’y of Commerce on Response to Steel and Aluminum Policy Recommendations (Feb. 22, 2018) (on file with author).
\item \textsuperscript{85} Id.
\item \textsuperscript{86} Id.
\item \textsuperscript{87} Id.
\item \textsuperscript{88} See id. (“This is an important opportunity to set clear expectations domestically regarding competitiveness and rebuild economic strength at home . . . [i]t is critical we reinforce to our key allies that these actions are focused on correcting Chinese [actions] . . . not the bilateral U.S. relationship.”).}
\end{itemize}
imports, the reduction in basic oxygen furnace facilities, and the potential plant closures’ effect on necessary capacity for a national emergency. Notably, Commerce identified consumption in critical industries had increased from 33.68 million short tons in 1997 to roughly 59 million short tons in 2007. The definition of critical industry sectors also changed between the two reports. Total domestic production of steel has remained fairly stagnant. While there have been changes between 2001 and 2018, a factor that is heavily focused on in the 2018 Report, capacity utilization, has not changed significantly from what Commerce was considering in 2001. This seems especially relevant since the threat to viability of the domestic industry is the main justification for a national security concern. Whether conditions are sufficiently different to justify the complete change in outcome between the 2001 and the 2018 investigations is debatable.

On March 8, 2018, the President issued a proclamation imposing a twenty-five percent duty on U.S. imports of steel products with opportunity to apply for country and product specific exemptions. Several changes to the order’s applicability were made through temporary exclusions. By June 2018, the twenty-five percent tariff applied to all nations, except for Argentina, Brazil, and South Korea, who negotiated quota agreements. The President temporarily increased the tariff rate to fifty percent against steel.

89. U.S. DEP’T OF COMMERCE BUREAU OF INDUS. & SEC., supra note 70, at 5.
90. Id. at 27 (54 million metric tons).
91. Compare id., at app. I (2018) (listing sixteen “broad” sectors like “energy”) with U.S. DEP’T OF COMMERCE BUREAU OF EXPORT ADMIN., supra note 58, at 16–17 (listing twenty-eight “narrower” industries like “crude petroleum and natural gas” and “electric services”). The breakdown of contributions to critical structure steel demand by sector is not provided in the 2018 Report making a comparison difficult.
92. Production of raw steel was 112.2 million net tons (roughly 102 million metric tons) in 2000, U.S. DEP’T OF COMMERCE BUREAU OF EXPORT ADMIN., supra note 58, at 19, and 114.3 million metric tons (126 million short tons) from 2006-2016 according to the OECD, U.S. DEP’T OF COMMERCE BUREAU OF INDUS. & SEC., supra note 70, at 41.
93. The Department seemed unconcerned with a capacity utilization rate ranging from 72.2%–73.8% in 2001, even though capacity levels had been higher in 2000 (91.6% the first half of the year and 79.9% the second half of the year). Id. at 17, 19. See also U.S. DEP’T OF COMMERCE BUREAU OF EXPORT ADMIN., supra note 58, at 17, 19 (recommending the President not take action under section 232, notwithstanding, capacity utilization ranging between 72.2% percent and 73.8% percent). The average capacity utilization rate from 2011-2016 was seventy-four percent and the projected rate for 2017 was 72.3%. Id. at 7. The Department determined that a capacity utilization rate of eighty percent was needed for sustained health. Id. at 4.
94. The domestic industry asserts and the Department concurred that a capacity utilization rate of eighty percent is needed for sustained health. Id. at 4, 47.
96. FEFER, supra note 33, at 7.
97. Id. at 8.
imports from Turkey. 98 Australia has also been excluded from the twenty-five percent tariff, but without any alternative agreement. 99 The President announced in early December 2019 that he would reimpose the Section 232 steel tariffs against Brazil and Argentina because of currency manipulation. 100 However, no notice has been posted in the federal register indicating the adjustment. Canada and Mexico have also been exempted from the Section 232 tariffs. 101 According to Congressional Research Service, U.S. Customs and Border Protection has collected $4.7 billion dollars from the steel tariff as of March 28, 2019. 102 Due to fears of circumvention, the President has extended the Section 232 tariffs to derivative articles of steel (and aluminum), effective February 8, 2020. 103

The expansive reading of the statute and the differing results from the 2001 report have only furthered suspicions that the determination is either contrary to law or an abuse of discretion. However, Commerce did give reasons for the differing conclusions between the two investigations. Furthermore, the legislative history and language of the statute, as discussed in Part II.A, do not clearly require a narrow interpretation or shed significant light on the meaning of “threaten to impair the national security.”

III. UNCONSTITUTIONAL DELEGATION OF POWER?

Under current jurisprudence, Section 232 is unlikely to violate the nondelegation doctrine. Rooted in separation of powers principles and as an Article I, § 1 limit, 104 the Supreme Court has determined that Congress cannot abdicate its legislative power. 105 However, this does not deny Congress “flexibility and practicality” in obtaining assistance from the other branches. 106 A delegation is permissible where Congress lays down an “intelligible principle,” or legal standard, to which the delegated action must conform. 107

The Court has not struck down a statute for violation of the

---

99. FEFER, supra note 33, at 12.
100. Mount Tariff Erupts Again, supra note 2.
102. FEFER, supra note 33, at 12.
106. Id. at 530.
nondelegation doctrine since 1935.\textsuperscript{108} There are two cases where the Court deemed legislation unconstitutional under the doctrine. These cases are \textit{Panama Refining Co.}, where the statutory grant had no guidance whatsoever, and \textit{A.L.A. Schechter Poultry Corp.}, where the delegation of authority had little guidance, was partially abdicated to private corporations, and was broad enough in scope to regulate the entire economy.\textsuperscript{109} The Court has upheld extremely broad statutory grants since 1935,\textsuperscript{110} leading many scholars to deem the nondelegation doctrine “dead.”\textsuperscript{111} But the concerns behind the nondelegation doctrine have been reborn and enforced in other forms, such as through increased procedural and rationalization requirements of agencies\textsuperscript{112} and canons of statutory construction.\textsuperscript{113}

The Supreme Court most recently addressed the nondelegation doctrine in \textit{Gundy v. United States}.\textsuperscript{114} Gundy challenged the constitutionality of § 20913(d) of the Sex Offender Registration and Notification Act (SORNA), which provides that:

The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter . . . and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with [registration requirements].\textsuperscript{115}

Gundy argued that authorizing the Attorney General “to specify the applicability” of SORNA’s requirements is an unconstitutional delegation of legislative power.\textsuperscript{116}

The plurality opinion, written by Justice Kagan and joined by Justices Sotomayor, Ginsburg, and Breyer, affirmed the need of an intelligible principle.\textsuperscript{117} The plurality agreed with Gundy that if SORNA “grants to the

\begin{itemize}
\item \textsuperscript{108} A.L.A. Schechter Poultry Corp., 295 U.S. at 495; see generally Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).
\item \textsuperscript{109} Whitman v. Am. Trucking Ass’ns, 531 U.S. 457, 474 (2001).
\item \textsuperscript{110} See, e.g., National Broadcasting Co. v. United States, 319 U.S. 190, 225–26 (1943) (upholding a delegation to regulate broadcasting licensing “as public interest, convenience, or necessity require”).
\item \textsuperscript{112} Id. at 413; see generally Administrative Procedure Act, 5 U.S.C. § 550 et seq. (2018).
\item \textsuperscript{113} See generally Cass R. Sunstein, \textit{Nondelegation Canons}, 67 U. CHI. L.R. 315 (2000). This point is explored further in infra, Part IV.
\item \textsuperscript{114} 139 S. Ct. 2116, 2120 (2019).
\item \textsuperscript{115} Id. at 2122.
\item \textsuperscript{116} Id.
\item \textsuperscript{117} Id. at 2123.
Attorney General plenary power to determine SORNA’s applicability . . .
and to change her policy for any reason at any time” that there would be a
nondelegation question. However, the plurality disagreed with Gundy’s
reading of SORNA. The plurality interpreted the meaning of the statute, in
light of the text, context, purpose, and history, “to require the Attorney
General to apply SORNA to all pre-Act offenders as soon as feasible” and
providing that the “Attorney General’s discretion extends only to
considering and addressing feasibility issues.” In its nondelegation
analysis, the plurality assessed whether Congress made clear its general
policy and the boundary of the delegee’s authority, acknowledging that these
standards are not demanding. The plurality determined that Congress’s
policy was for the Attorney General to require pre-Act offenders to register
“as soon as feasible” and that discretion was limited to feasibility issues that
were administrative and transitional in nature. The plurality thought that
if this delegation was unconstitutional, “then most of Government is
unconstitutional.”

Justice Gorsuch, joined by Chief Justice Roberts and Justice Thomas in
dissent, found that § 20913(d) does delegate legislative authority to the
Attorney General in violation of the Constitution. The dissent believes the
majority “reimagines the terms of the statute.” The dissent argued SORNA
grants vast authority to the Attorney General, essentially giving him “free
rein” to fashion rules for nearly all existing sex offenders. Looking at the
history of nondelegation, the dissent determined that the courts incorrectly
strayed from a more traditional separation-of-powers analysis to the
“intelligible principle misadventure.” Rather than look for an intelligible
principle, the dissent would allow delegations where: (1) “Congress makes
the policy decisions regulating private conduct” and allows another branch
to “fill up the details,” (2) Congress conditions the application of a rule
governing private conduct on executive fact-finding, or (3) Congress
assigns the other branches “non-legislative responsibilities” where “the

---

118. Id.
119. Id. at 2123–24.
120. Id. at 2129.
121. Id. at 2129–30.
122. Id. at 2130.
123. Id. at 2131.
124. Id. at 2132 (claiming SORNA does not require the AG to register pre-Act offenders within a
certain time frame, or even at all, which allows the AG to impose some but not all of the requirements,
and permits the AG to change his mind at any given time).
125. Id. at 2141.
126. Id. at 2136.
127. Id.
discretion is to be exercised over matters already within the scope of the executive branch.” 128 The dissent argued that the intelligible principle test is unbounded from constitutional principles and has already required corrections such as the major questions doctrine and void for vagueness. 129 The Justices hoped that the Court would pick up the issue again and provide more meaningful limits to keep delegations from “running riot.” 130

In a brief concurrence, Justice Alito affirmed the constitutionality of § 20913(d), claiming that under the Court’s current approach “it would be freakish to single out the provision at issue here for special treatment.” 131 Justice Alito stated that, if the majority of the Court were willing, he would support an effort “to reconsider the approach we have taken” to the nondelegation doctrine. 132 Justice Kavanaugh has indicated his willingness to reassess the Court’s approach to delegation. 133 Writing separately in a denial of a petition for writ of certiorari, Justice Kavanaugh recalled Justice Rehnquist opining that major national policy decisions should be made via congressional legislation, not delegations to the Executive Branch. With Justices Alito and Kavanaugh, there would be enough members of the Court willing to reconsider the current intelligible principle test for delegation challenges.

A. Unfavorable Precedent

The CIT’s recent decision in American Institute for International Steel is unsurprising under current precedent. 134 The AIS filed a lawsuit at the CIT seeking declaratory and injunctive relief against enforcement of Section 232 on the grounds that the section delegates legislative authority in violation of separation of powers. 135 Section 232 was enacted under Congress’s “[p]ower to lay and collect [t]axes, [d]uties, [i]mposts, and [e]xcises” and “[t]o regulate [c]ommerce with foreign [n]ations.” 136 AIS argues that there is no meaningful intelligible principle reining in this delegation of legislative power. 137 The only restraint in the statute is a determination of “national security,” which is not defined. Additionally, 19 U.S.C. § 1862(d) provides

128. Id. at 2137. For example, Congress delegating procedural rule making power to the courts or foreign affairs powers to the President.
129. Id. at 2141–42.
130. Id. at 2148.
131. Id. at 2151.
132. Id.
135. Complaint at 1, Am. Inst. for Int’l Steel, 376 F. Supp. 3d 1335 (No. 18-00152).
136. U.S. CONST. art. I, § 8, cl 1, 2.
137. Complaint, supra note 135, at 7.
limitless considerations—essentially anything in the national economy affected by imports—for determining whether the national security has been threatened.\textsuperscript{138} Not only is the definition of national security broad, but so are the remedial actions available to the President.\textsuperscript{139} As evidenced by the current steel order, the “national security interest” need only be remote, not imminent, to justify significant action that affects large swaths of the economy (assuming, of course, the orders are valid under the statute).\textsuperscript{140}

The Court has upheld delegations of power with vague, malleable “limiting” principles that are not far off from Section 232.\textsuperscript{141} But in these cases, the “width” of the power was more limited.\textsuperscript{142} The Supreme Court has given some weight to the scope, as opposed to the depth, of delegations of power.\textsuperscript{143} Because the scope of industries subjected to Section 232 is numerous and imports make up a substantial part of the economy, the Court might have reason to require a narrower delegation.\textsuperscript{144} Having a large swath of the economy subjected to nearly unfettered discretion by the President is, under separation of powers principles, problematic.\textsuperscript{145} The Court has not

\textsuperscript{138.} Id. at 5.
\textsuperscript{139.} Id. at 5–6.
\textsuperscript{141.} Whitman v. Am. Trucking Ass’ns, 531 U.S. 457, 472 (2001) (determining that setting nationwide air-quality standards limiting pollution to the level required “to protect the public health” as an adequate intelligible principle); Yakus v. United States, 321 U.S. 414, 420, 423–26 (1994) (upholding a wartime conferral of agency power to fix prices of commodities at a level that “will be generally fair and equitable and will effectuate [the purposes of the] Act”).
\textsuperscript{143.} A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 539 (1935) (“[T]his authority relates to a host of different trades and industries, thus extending the President’s discretion to . . . the vast array of commercial and industrial activities throughout the country. Such a sweeping delegation of legislative power finds no support in the decisions upon which the government especially relies.”)
\textsuperscript{145.} “But Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry.” A.L.A. Schechter Poultry Corp., 295 U.S. at 537–38 (citing Pan. Ref. Co. v. Ryan, 239 U.S. 388 (1915)).
outright said that this is a determinative factor of the nondelegation doctrine, and the authority conferred here has less of an impact than the National Industrial Recovery Act did in *A.L.A. Schechter*, a delegation the Court did strike down.

Other than the general lack of stringent enforcement of the intelligible principle requirement, AIIS has fought an uphill battle to distinguish *Federal Energy Administration v. Algonquin SNG Inc.*, where the Supreme Court stated that Section 232’s standards are “clearly sufficient to meet any delegation doctrine attack.”\(^{146}\) *Algonquin* involved a challenge to the President implementing license fees for oil imports. The crux of the challenge was that non-direct import controls (pretty much any control other than quotas) were beyond the scope of the statute.\(^{147}\) Among other arguments, the respondents contended that reading the statute to allow for any remedy would invoke a serious question of an unconstitutional delegation.\(^{148}\) The Court thought that the limitations provided were sufficient to absolve any question of delegation. There is a precondition for action (“article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security”) and a limit on the size of the remedy (the President could “act only to the extent ‘he deems necessary to adjust the imports of such article and its derivatives so that such imports will not threaten to impair the national security’”).\(^{149}\)

AIIS tries to distinguish *Algonquin* on several grounds. First, AIIS argues the ruling on the issue of nondelegation was mere dicta, since the case was ultimately decided on the theory that the statute permitted such licensing fees.\(^{150}\) The CIT rejected this argument because the Court addressed the issue square on.\(^{151}\) Second, AIIS argues that the availability of judicial review has been drastically reduced since the time the case was decided.\(^{152}\) The CIT also rejected this argument saying that courts both before and after *Algonquin* have ruled that decisions committed to presidential discretion are unreviewable outside of challenges to unconstitutionality or acting in excess of statutorily granted authority.\(^{153}\) The CIT did express concern that the courts would not be able to determine if the motivating reason for a


\(^{147}\) *Id.* at 556.

\(^{148}\) *Id.* at 558–59.

\(^{149}\) *Id.* at 559.


\(^{153}\) *Am. Inst. for Int’l Steel*, 376 F. Supp. 3d at 1341–42.
President’s use of this statute would be national security, but that the decision in *Algonquin* made alleviating such concerns outside of a lower court’s power.154

B. Separation of Powers as a Driver for Nondelegation

The *Gundy* dissent’s critique of the insufficiency of the intelligible principle doctrine is neither new nor unique.155 Judge Katzman in *AIIS* filed a separate opinion to express his reservations about the nondelegation doctrine.156 There have also been several academic articles written on possible alternatives to the intelligible principle doctrine.157

The Court could unify its delegation jurisprudence with its typical separation of powers jurisprudence. There is no clear test for determining a violation of separation of powers, and the approach towards making such determinations has vacillated between “formalist” and “functionalist” approaches.

A formalist separation of powers approach to delegation would probably create a result similar to the *Gundy* dissent. The courts would need to characterize legislative power. The *Gundy* dissent saw “legislative power” as the “power to adopt generally applicable rules of conduct governing future actions by private persons.”160 Congress would need to “make[] the policy

---

154. *Id.* at 1344–45.
155. See Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1232–33 (1994) (“For those of us for whom the written Constitution (as validly amended) is the only Constitution, the seemingly irrevocable entrenchment of the post-New Deal structure of national governance raises serious doubts about the utility of constitutional discourse.”).
158. Formalism favors bright-line rules, the constitutional text, and emphasizes separation of powers. Formalist claims tend to argue either one branch is exercising another’s power or that a branch is violating constitutional requirements for that action. William Eskridge, Jr., *Relationship Between Formalism and Functionalism in Separation of Powers*, 22 Harv. J.L. & Pub. Pol’y 21, 21–22 (1998). See also Clinton v. New York, 524 U.S. 417 (1998) (determining the President was exercising legislative power); Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919 (1983) (deciding Congress did not meet all of the preconditions necessary for action that was, in effect, legislation).
159. Functionalism emphasizes constitutional policy, constitutional practice, pragmatic values, balancing tests, and the checks and balances aspect of a multi-branch government. Eskridge, *supra* note 158 at 21–22. A functionalist approach focuses more on whether action by one branch is aggrandizing power, encroaching on another branch’s power, or diluting the power of another branch. See, e.g., Morrison v. Olson, 487 U.S. 654 (1988); *Chadha*, 462 U.S. at 967 (J. White, dissenting); *Youngstown Sheet & Tube v. Sawyer* (Steel Seizures), 343 U.S. 579, 634 (1952) (J. Jackson, concurrence).
decisions when regulating private conduct,” but could allow another branch to “fill up the details” and “make certain alterations and additions,” especially on issues of lesser interest.161 Likewise, Congress could make legislative acts conditional on certain factual findings made by the executive. Congress would make the major policy decision of what and when action should be regulated, only leaving to the executive to find whether certain facts exist warranting the application of such laws.162 The Gundy dissent also recognized that there are some overlapping powers between the branches. In cases where another branch already poses some independent power, congressional statutes conferring wide discretion on that branch on that matter would not pose a separation of powers problem.163 Therefore, Congress’s statutory delegations of discretion regarding foreign affairs or commander in chief powers to the executive would not be quite as problematic as delegations regarding Congress’s interstate commerce powers.

A functionalist approach would likely focus on how certain delegations would upset the balance of power between the branches rather than create general categories of permissible delegations. The underlying reasons of why legislative power was housed in the Congress, such as a desire for protecting liberty, deliberation, and minority rights and maintaining stability and fair notice,164 are crucial factors for assessing whether a delegation is permissible. When not subject to procedural protections such as notice and comment or judicial review, wide delegations of authority to a single party branch could result in a lack of deliberation, stability, and fair notice and threaten minority rights and interests.

Nevertheless, changing the intelligible principle test could have many negative effects. For example, a number of congressional delegations valid under the relaxed intelligible principle test would not survive a stricter nondelegation analysis. As long acknowledged by the Court, Congress often relies on the executive branch to carry out the functions of modern government.165 By prohibiting some of these delegations, such a decision could upset many of the current powers held by administrative agencies or the President.

161. Id. at 2136 (internal quotation marks omitted).
162. Id.
163. Id. at 2137.
164. Id. at 2134–35.
165. See, e.g., J.W. Hampton v. United States, 276 U.S. 394, 406 (1928) (“Congress has found it frequently necessary to use officers of the executive branch . . . .”); Mistretta v. United States, 488 U.S. 361, 372 (1989) (“[O]ur jurisprudence 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.”).
Another potential negative effect to strengthening delegation analysis would be that such a decision could threaten the Court’s legitimacy. The few times the Court has struck down statutes delegating power was during the *Lochner*-era.\(^\text{166}\) Counter-majoritarian concerns and a fear that the Court is reading too much into the Article I vesting clause may counsel against changing the Court’s analysis. The Court may fear that it lacks political capital to dismantle the practice of vast delegations, a practice that Congress may not let go of easily.\(^\text{167}\) The Court might also hesitate to expend political capital on policing voluntary abdications of power, as is the case with nondelegation, as opposed to forceful aggrandizement or encroachment of power, if its capital is so limited.

On the other hand, the Court’s legitimacy may also be undermined by its current nondelegation jurisprudence. This is especially true if the rationale for virtually abandoning the nondelegation principle is not based on the Constitution. Some claim the Court’s abandonment is based on a belief “that the modern administrative state could not function if Congress were actually required to make a significant percentage of the fundamental policy decisions.”\(^\text{168}\) If this is the Court’s true rationale, then the Court is ignoring the Constitution, despite the Court’s duty to apply the Constitution as the supreme law of the land.\(^\text{169}\) Rather than deciding on the basis of law, the Court would be deciding the issue on the basis of what it deems is good policy.

C. Separation of Powers and Trade Policy

In the trade sphere, academics have argued a need to reorient the current distribution of power between Congress and the Executive. Timothy Meyer and Ganesh Sitaraman, professors of law at Vanderbilt University Law School, have written about the unique relationship between trade law, policy, and separation of powers.\(^\text{170}\) They promote a dual paradigm for thinking of trade powers: the domestic economics paradigm and the foreign affairs paradigm.\(^\text{171}\)

\(^{166}\) *Gundy*, 139 S. Ct. at 2138.

\(^{167}\) Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 CORNELL L. REV. 1, 2 (1994) (“Even if the Court were disposed to order the task of dismantling the federal bureaucracy, it might not have the political capital necessary to realize its objective.”).

\(^{168}\) *Lawson*, supra note 155, at 1241.

\(^{169}\) *See id.* (“When faced with a choice between the Constitution and the structure of modern governance, the Court has had no difficulty making the choice.”).


\(^{171}\) *Id.*
The domestic economics paradigm focuses on trade as an extension of the domestic economy. This idea is supported by the textual commitment of regulating foreign commerce and the laying of duties with Congress in its Article I, § 8 powers. Additionally, the Origination Clause, Article I, §7, that “all bills for raising revenue shall originate in the House of Representatives” suggests Congressional involvement would be needed to raise revenues through duties. Functionally, Congress has been the appropriate body for bargaining over economic policy, since virtually all economic interests are represented in Congress.

The foreign affairs paradigm has similar components to the economics paradigm. Rather than trade being an extension of economic policy, trade is part of the management of relationships with foreign nations and is, therefore, part of the foreign affairs power which is housed in both Articles I and II. Trade agreements with other nations can help build allies, punish those who deviate from foreign policy objectives, and set policies for the ground rules of global trade. Both branches have power over foreign relations, but many scholars argue there has been executive aggrandizement in foreign relations law, at least in areas of concurrent powers, or immense congressional abdication where Congress has delegated power to the President. There are functional benefits to housing foreign relations trade

172. Id. at 590.
173. Id.; see also Rebecca M. Kysar, On the Constitutionality of Tax Treaties, 38 YALE J. INT’L L. 1, 2 (2013).
175. Id. at 597.
176. Id. at 597–98. The extent of the foreign affairs power constitutionally housed in the Executive is up for debate. There are a few express powers, such as the ability to send and receive ambassadors, to negotiate treaties, and the Commander-in-Chief power. But decisions by the Court have indicated the President has further, implied foreign affairs powers. In the realm of diplomacy, the Court has indicated that the President is the conduit for the United States’ “one voice” in foreign relations. See United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) (“In [external affairs] . . . the President alone has the power to speak or listen as a representative of the nation.”); id. (“[The President] makes treaties with the advice and consent of the Senate; but he alone negotiates.”); Am. Ins. Ass’n v. Garamendi, 539 U.S. 396, 424 (2003) (taking issue with a state law that “compromise[s] the very capacity of the President to speak for the Nation with one voice in dealing with other governments”). The need to manage relations with foreign governments is tied to the receiving and sending of ambassadors, the negotiation of treaties power, and the state recognition power. U.S. CONST. art. II, § 3; id. art. II, § 2, cl. 2; Zivotofsky v. Kerry (Zivotofsky II), 576 U.S. 1059 (2015). Congress’s foreign affairs powers include laying and collection of duties, regulating foreign commerce, establishing rules for naturalization, defining and punishing offenses against the law of nations, declaring war, creating rules for capture of vessels, raising and supporting the army and navy, calling forth the militia to repel invasions, etc. U.S. CONST. Art. I, § 8. The Senate also restrains the President’s power to appoint ambassadors and enter into treaties by requiring advice and consent. U.S. CONST. art. II, § 2, cl. 1–2.
powers within the executive. For example, it would be near impossible for Congress to negotiate trade agreements—the (relatively) singular voice of the unitary executive is paramount for negotiating trade deals.\textsuperscript{178} Multiple voices and open negotiations may end up undermining the United States by forcing harsh positions that are politically popular but may alienate negotiating partners.\textsuperscript{179} There is also an argument that trade deals should not be made in secret, since this would be perceived as undemocratic.\textsuperscript{180}

Taking practice as an indicator, Congress exercised primacy over trade policy early in the history of the United States and up until the New Deal Era.\textsuperscript{181} In the late 1800s, Congress set up the Tariff Commission (now the ITC) and delegated authority to the executive to alter a limited number of tariff rates in the McKinley Tariff of 1890.\textsuperscript{182} This delegation was challenged as unconstitutional, but was upheld. The Supreme Court determined that the President was only executing a law passed by Congress, not exercising legislative power himself.\textsuperscript{183} This trend grew as Congress delegated more of the tariff-setting power to the President, subject to specific findings of facts and often limited in the levels of adjustment.\textsuperscript{184} Congress also had negative results in setting tariffs directly, such as with the Smoot-Hawley Tariff of 1930, which was a complete economic disaster.\textsuperscript{185} Since Roosevelt’s presidency, much of the trade power has been placed in the hands of the President by Congress,\textsuperscript{186} though Congress has placed limits on trade agreement negotiation power to keep some control over the process of trade


\textsuperscript{178.} See Claussen, supra note 177, at 319; Meyer, supra note 170, at 598.


\textsuperscript{181.} Meyer, supra note 170, at 596–97.

\textsuperscript{182.} Id. at 594.

\textsuperscript{183.} Id. at 595–96. This delegation was truly limited since it only covered a limited amount of products and the President had clear guidelines of when he could suspend the tariff reduction (only against a particular country if that country changed their tariff rate on the reciprocal U.S. product), and the only aspect of the action not specified by Congress was the duration of the suspension. Marshall Field & Co. v. Clark, 143 U.S. 649, 692–93 (1892).

\textsuperscript{184.} See Meyer, supra note 170, at 599 (discussing the Fordney McCumber Tariff of 1922 which provided for “flexible tariffs,” allowing the President to adjust rates by as much as fifty percent).

\textsuperscript{185.} Id. at 600.

agreements.\footnote{Meyer, supra note 170, at 603–04. For more examples of congressional involvement in fast-track negotiations, see id. at 642–44. For decisions of great importance at the WTO, see id. at 615–16 (noting that this did not include membership accessions which, when an economy like China joins the WTO, have great impact). See also Clausen, supra note 177, at 329–38 (discussing fast-track procedures).}

The rationale for shifting from Congressional to increased Presidential control was rooted in liberalization and Congress’s increased susceptibility to protectionist policies. Meyer and Sitaraman argue that the shift is problematic because it focuses on the outcome of trade policy (liberalization) and not the underlying goals of trade policy (domestic economic objectives or foreign policy objectives).\footnote{Meyer, supra note 170, at 651.} Additionally, the executive dominating the trade sphere to promote liberalization is not compelling since Presidents are also susceptible to strong special interest groups, especially those that dominate swing states.\footnote{Id. at 628 (“[T]he President’s trade policy can be captured by interests just as parochial as those that capture Congress.”); see also Veronique de Rugy, How Special Interests Hide the True Costs of Trade, N.Y. TIMES (Aug. 29, 2018), https://www.nytimes.com/2018/08/29/opinion/tariffs-trump-trade-special-interests.html (discussing steel executives’ “iron grip on the White House”—Secretary of Commerce Ross sat on a steel company’s board and made his wealth buying and selling steel companies, USTR Secretary Robert Lighthizer was the practice group head for Skadden’s International Trade group, and one of their biggest clients was U.S. Steel Corp., and the President’s trade adviser, Peter Navarro, is a mercantilist whose documentary against trade with China was largely funded by Nucor Corporation, one of the largest domestic steel producers); Eric Boehm, Lobbyists Are Making Bank on Trump’s Steel Tariffs, REASON (Feb. 13, 2019), https://reason.com/2019/02/13/lobbyists-are-loving-trumps-steel-tariff/; SCOTT LINCICOME, CATO INSTITUTE, FREE TRADE BULLETIN NO. 72, at 9 (2018), https://www.cato.org/publications/free-trade-bulletin/protectionist-moment-wasnt-american-views-trade-globalization (“Protectionist policies emanating from the United States government today are most likely a response . . . to discrete interest group lobbying (e.g., the U.S. steel industry) or influential segments of the U.S. voting population (e.g., steelworkers in Pennsylvania.”).}

Despite the international character of trade policy, Meyer and Sitaraman argue that justifications for foreign affairs exceptionalism, or “the view that the federal government’s foreign affairs powers are subject to a different, and generally more relaxed, set of constitutional restraints than those that govern its domestic powers,”\footnote{Curtis A. Bradley, Foreign Relations Law and the Purported Shift Away from “Exceptionalism,” 128 HARV. L. REV. F. 294, 295 (2015).} are not as strong in the trade context.\footnote{The Court has used exceptionalism in trade cases when there are conflicts between the national and state governments, viewing such cases as foreign affairs cases. See Ernest A. Young, Dual Federalism, Concurrent Jurisdiction and the Foreign Affairs Exception, 69 GEO. WASH. L. R. 139, 140–41 (2001) (discussing Crosby v. Nat’l Foreign Trade Council, 530 U.S. 363 (2000) and United States v. Locke, 529 U.S. 89 (2000)).} Large domestic economic interests exist that the constitutional design contemplated belonging to Congress, beholden to local
constituencies, not the executive. Also, the main justifications for foreign affairs exceptionalism for the executive—secrecy and speed—are less critical in the trade sphere. Economic agreements neither need to be nor should be secret, and foreign economic issues are no different from domestic economic issues regarding the need for quick action.

The typical argument for why the President is in the best situation for dictating international trade policy is that he can represent utilitarian national interests in opening trade, since trade liberalization increases total economic wealth. However, this conventional wisdom has proven misguided in the Trump presidency. The arguable capture of the White House by the steel industry is even more concerning than it would be if a congressional committee or a few members of Congress were captured. In Congress, the competing special interests of downstream producers, other policy priorities, and the constitutional requirements of bicameralism and presentment would more likely impede benefits for domestic steel producers at the expense of American consumers.

Additionally, tariff policy is not just international policy since tariffs have significant domestic economic effects and can result in strong reactions domestically. For example, in 1828, Congress passed a high tariff that infuriated southern states, as southerners thought the tariff hurt the cotton industry, increased the costs of finished goods, and benefitted the northern states at the expense of the southern states. The “Tariff of Abominations,” as it was known in the South, led to the nullification crisis where South Carolina asserted a state could nullify federal law within its borders if it believed the federal government’s exercise of such powers was unconstitutional. Fortunately, Congress was able to pass a compromise bill

193. Id. at 630–32. An emergency/non-emergency or crisis/non-crisis distinction that applies equally to domestic and international economic action makes more sense. Id. at 630.
194. Id. at 633.
195. See de Rugy, supra note 189 (discussing steel executives’ “iron grip on the White House”—Secretary of Commerce Ross sat on a steel company’s board and made his wealth buying and selling steel companies, USTR Secretary Robert Lighthizer was the practice group head for Skadden’s International Trade group, and one of their big clients was U.S. Steel Corp., and the President’s trade adviser, Peter Navarro, is a mercantilist whose documentary against trade with China was largely funded by Nucor Corporation, one of the largest domestic steel producers); Boehm, supra note 189; Lincicome, supra note 189, at 9 (“Protectionist policies emanating from the United States government today are most likely a response . . . to discrete interest group lobbying (e.g., the U.S. steel industry) or influential segments of the U.S. voting population (e.g., steelworkers in Pennsylvania).”).
197. Id. at 6.
that led to South Carolina backing down. The nullification crisis demonstrates just how important tariff policy is—it can spur a constitutional crisis. And in this case, South Carolina and other southerners were infuriated by a tariff set by Congress, where there is greater deliberation and inclusion of all constituencies. Tariffs that favor certain industries over others set by the executive risk evoking even stronger reactions, since losing deliberation and inclusion would heighten feelings of inequity.

Major economic policy decisions should be made by Congress. President Trump has shown himself capable of making major economic policy decisions on his own by the declaration of “trade wars.” Because the President can back up his “trade war” policies with unilateral or near unilateral acts, his declarations have significant consequences on the national economy without the need for further congressional involvement. The more deliberative process of Congress, or even a more restrained process in an agency, would prove beneficial over the quickly-implementable decisions of the President.

The main benefits to congressional action are responsiveness and deliberation. Before her appointment to the Supreme Court, Justice Kagan argued that discretionary delegations made to the President directly should, “assuming all else is equal, [present] less, rather than more, severe difficulties” than those made to agency officials; the President is more democratically responsive and the benefits of legislative reflectiveness are lost once a delegation occurs. Justice Kagan’s democratic responsiveness argument underestimates the democratic control over agency heads and by extension agencies. Agency heads:

who work for the President want to act consistently with his goals, priorities, and views. If he favors a certain course of action, his

200. For example, threatening the use of IEEPA and Section 232.
202. Antidumping and countervailing duties (a form of trade remedies) require a more deliberative process that involves investigations at the ITC, an independent agency, and the Department of Commerce and are subject to judicial review. VIVIAN C. JONES, CONG. RESEARCH SERV., RL32371, TRADE REMEDIES: A PRIMER 5–21 (2012). By comparison, the President through Section 232 has been able to largely bypass these formalities as the only prerequisite is an affirmative finding by the Secretary of Commerce, and Secretary Ross was involved in the domestic steel industry. See supra note 200.
subordinates are likely to agree to do as he wishes, and they do so voluntarily and generally without hesitation; and if there is any hesitation, it will probably be brief.\textsuperscript{204}

Hesitation will be brief because those who do not wish to act according to the President’s policies will either resign, be asked to resign, or be removed. Turnover can ensure accountability to the President and by extension the American people who voted him to power. The Trump Administration has seen a lot of turnover, suggesting that the President has not hesitated in ensuring his agency heads are either on board or gone.\textsuperscript{205} In addition to democratic accountability, the Administrative Procedure Act (APA)\textsuperscript{206} and the Office of Information and Regulatory Affairs (OIRA) review\textsuperscript{207} require agencies undergo extensive deliberation through public comment, interagency review, White House review, and judicial review. While not the exact character of legislative deliberation, these requirements are more stringent than those that are placed on presidential action, at least as required by Section 232. If Congress were to repeal the APA and its procedural requirements, then Justice Kagan would be correct that delegations to the President would be, in theory, no more problematic, if not less problematic, than delegations to the agencies.

Further, the negotiation of trade agreements now include many subjects outside of the trade in goods, including services, which “threaten longstanding and core state police powers.”\textsuperscript{208} Because of this federalism issue, state political representation in Congress, namely through the Senate, is an important mechanism for ensuring all states’ concerns are taken into account in trade policy. The President does answer to state interests to an extent\textsuperscript{209} but the representation might favor swing states as opposed to the interests of all states, since these are the constituencies seen as the deciders of elections.\textsuperscript{210} Congress on the other hand not only has local connection to

\begin{footnotesize}
\begin{itemize}
\item[206.] Administrative Procedure Act, 5 U.S.C. § 55 (2006). The APA requires agencies to go through public comment, places an arbitrary and capricious limitation, and provides for judicial review of final agency rulemaking. \textit{Id.}
\item[207.] OIRA is an institution within the Office of Management and Budget, that serves as an information aggregator and allows for greater White House oversight. Sunstein, \textit{supra} note 204, at 1875. “Significant” regulatory actions, which are those with high impact on the economy or those that raise novel issues of law or policy, are submitted to OIRA for approval. \textit{Id.} at 1850–51.
\item[208.] Meyer, \textit{supra} note 170, at 642.
\item[210.] Brookings Creative Lab, \textit{Elections 101: Why Are Swing States Important}, YOUTUBE (Sept. 21, 2016), https://www.youtube/watch?v=IhiY8ZaKDh0; William A. Galston, \textit{The States that Will Decide}
the states, but the Senate was created to represent the interests of all states equally. Therefore, Congress is better suited to represent all state interests than the President.

With these concerns over legislative character, deliberation, process, and federalism, there are both formalist and functionalist reasons for limiting Congressional delegations of power to the Executive. A formalist view would be that the text of the Constitution supports Congress as the ultimate locus of economic regulation and of control over foreign commerce and duties. Because the power lies with Congress, the regulation of such activity should be regarded as legislative. Congress delegating too much discretion and major policy making over trade law to the executive would impermissibly delegate a legislative power. A functionalist view would not allow Congress to delegate power to an extent that would upset the balance of power between Congress and the Executive. Each delegation would need to be assessed individually to ensure that the President is not able to unilaterally dictate economic policy, aggrandize his own power against Congress, or exclude state representation in the trade policies that affect them.

D. Section 232 and Separation of Powers

Even with a separation of powers approach to nondelegation, Section 232 does not clearly violate separation of powers. Under the Gundy dissent’s formalist approach, statutes which merely require executive fact-finding before taking effect are permissible. Section 232 requires that Commerce determine whether an “article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security.” The President must concur with Commerce and then “determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security.” Congress also listed factors to be considered in 19 U.S.C. § 1862(d) when assessing impairment to the national security, which arguably supports the contention that Congress made the policy decision of what was to be considered as “threatening to impair the national security.” Much of this part

---

212. U.S. CONST. art. I, § 8, cl. 3.
214. Id.
of Section 232 seems to be executive fact-finding that “activates” the statute, which would be permissible under the second category of the Gundy dissent.

Congress does not provide much guidance on what actions are appropriate to take after a determination that certain imports threaten the national security. Unlike other tariff delegations upheld by the Court,\textsuperscript{215} this statute does not specify how the private action (imports) is to be regulated.\textsuperscript{216} This portion of the statute may run afoul of the “legislative” power as described in the Gundy dissent. The only limitation on the President is that (1) the action, in the opinion of the President, adjusts imports “so that such imports will not threaten to impair the national security”\textsuperscript{217} and (2) that the President must implement such action within fifteen days of making a determination that imports of an article did threaten to impair the national security.\textsuperscript{218} These limits do not leave the Executive to just “fill in the details.” Not only does the President decide when some general triggering event occurs (that imports are threatening to impair the national security),\textsuperscript{219} but he also creates the entire scheme of regulation of private conduct in response to the event. He decides the nature, against whom and how much, and the duration of the remedial action. The combination of the general factual determination and the broad remedy decision allows the President to act in a legislative way.

A complication under the Gundy dissent is whether Section 232 falls within the third category of “shared” powers between the President and Congress. Section 232 is not solely aimed at domestic economic or trade policy. While the possible mechanisms for relief are trade policy, the underlying concern is “national security.” There are textual commitments regarding national security for both Congress and the Executive.\textsuperscript{220} Under

\textsuperscript{215} See, e.g., Marshall Field & Co. v. Clark, 143 U.S. 649, 680 (1892) (only allowing suspension of a free trade provision, not the authority to impose any action deemed necessary).

\textsuperscript{216} The analysis and review of the legislative history of Section 232 in Algonquin suggests broad discretion in the “remedy” chosen. The Court does pull back its broad remedy analysis at the end of the opinion by assuring that the decision “in no way compels the further conclusion that any action the President might take, as long as it has even a remote impact on imports, is also so authorized.” FEA v. Algonquin SNG, Inc., 426 U.S. 548, 571 (1976).

\textsuperscript{217} In Algonquin, the Court reads the statute to limit the President’s remedial action to only the extent “he deems necessary to adjust the imports of such article and its derivatives so that such imports will not threaten to impair the national security.” Algonquin, 426 U.S. at 559. This is not the language in the current version of the statute. The President shall “determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security.” 19 U.S.C. § 1862(c)(1)(A).

\textsuperscript{218} Id. § 1862(c)(1)(B).

\textsuperscript{219} The courts could interpret such language more narrowly to avoid a potential delegation problem by, for example, reading in an imminence requirement and giving teeth to “necessary.” See discussion in supra Section IV.

\textsuperscript{220} U.S. CONST. art. I, § 8, cls. 11–16 (congressional power to declare war; raise and support armies;
Justice Gorsuch’s third category, where Congress shares powers with another branch, Congress may be able to delegate more discretion to another branch without running afoul of separation of powers. This is not a Commander-in-Chief power, but it does concern national security where Congress has delegated much authority to the Executive. The pattern of delegation may lend credence to the idea that national security falls under a shared constitutional power or that there is an established norm of executive power being appropriate for national security issues.

Under a functional separation of powers analysis, it is also unclear whether Section 232 runs afoul of the Constitution. Section 232 does give a vast amount of power to the Executive, but there are some procedural protections built into the statute. Commerce must consult with the Secretary of Defense, seek information and advice from appropriate officers of the United States, and, if appropriate, hold a public hearing or otherwise afford interest parties an opportunity to present information and advice. For the President to act, Commerce must make an affirmative finding. Congress provides specific factors for Commerce and for the President to consider in their determinations of whether imports may threaten to impair the national security. Lastly, the President must report his reasons to Congress.

However, Commerce is not required to hold a public hearing or to meaningfully respond to comments made by the public like an agency would if it was subject to notice and comment requirements. There is no provision for judicial review. While the President cannot act without a positive
finding by Commerce, Commerce is appointed by the President, as part of his Cabinet, and is subject to removal by the President. Therefore, if the President wants to act under Section 232, there is a lot of pressure on Commerce to find that imports threaten to impair the national security. The only way to undo an “unfavorable” action under Section 232 would be for Congress to override the President’s action with new legislation, which is not an easy feat and is subject to the President’s veto. This overall lack of procedural protection threatens liberty interests and widespread, inclusive deliberation, which should cut against the permissibility of the delegation under a functional analysis.

There are legitimate structural reasons to delegate trade authority to the Executive in the national security sphere. For one, the Executive can act quicker and more discretely than Congress, which is useful in the arena of national security and national defense. Secondly, the Executive has more knowledge about issues of national security. There may be certain facts that are not publicly-available that indicate a security threat. The release of such information, or the specifics of that information, may cause a security threat. But the broad range of non-security factors the President can consider cuts against the structural argument allowing for the delegation. For example, Congress directs the President and the Secretary to consider the general health of an industry or the weakening of our internal economy, not just the ability to meet national security requirements. This broad analysis about the economy and the impacts of imports is the type of analysis Congress is best suited for, where nearly all voices of the economy are represented.

A nondelegation challenge to Section 232 would certainly fail under the Court’s current intelligible principle test. Even if the Supreme Court did change its approach to nondelegation, a nondelegation challenge to Section 232 would not be a sure win since this delegation is partially based on executive findings of fact and national security.

IV. EXCEEDING STATUTORY AUTHORITY?

Another potential issue with the steel order is whether the President has exceeded the statutory authority conveyed to him by Section 232 in issuing the steel order. The statute provides Commerce shall investigate “to

---

227. The timing requirements in Section 232 prompt action and do not require a wait time.

228. 19 U.S.C. § 1862(d) (“In the administration of this section, the Secretary and the President shall further recognize the close relation of the economic welfare of the Nation to our national security, and shall take into consideration the impact of foreign competition on the economic welfare of individual domestic industries; and any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports shall be considered, without excluding other factors, in determining whether such weakening of our internal economy may impair the national security.”).
determine the effects on the national security of imports of the article.\textsuperscript{229} The Secretary must then report the results and advise the President if such an “article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security.”\textsuperscript{230} “[I]f the President concurs [with the Secretary], [he shall] determine the nature and duration of the action that, in the judgment of the President, must be taken . . . so that such imports will not threaten to impair the national security.”\textsuperscript{231} If the courts can exercise judicial review here, there are still further issues of what can be reviewed and what is the appropriate standard of review.

A. Attempted Challenges to Statutory Authority

In April 2018, the CIT denied a motion for a preliminary injunction by Severstal Export challenging the President’s steel order issued under Section 232.\textsuperscript{232} The Plaintiff tried to frame the challenge as one where the President misapprehended his statutory authority, but the arguments made largely questioned the true motives of the President in using Section 232. The Plaintiff argued the steel order was a negotiating tool, not an action the President thought was necessary to protect potential impairment to national security.\textsuperscript{233}

This assertion of intent relied on unofficial statements regarding Section 232 steel tariffs to support the Plaintiff’s claim.\textsuperscript{234} In \textit{Trump v. Hawaii}, the Court dismissed the persuasiveness of unofficial statements purporting impermissible rationales in undermining the official and permissible rationales the government provided in its official order.\textsuperscript{235} Because the government only needed to satisfy rational basis review, the same level of review required in this case, the Court was unwilling to strike down a measure that was “facially neutral.”\textsuperscript{236} Although \textit{Trump v. Hawaii} was in the immigration context, where there are specific deferential doctrines at play,

\begin{itemize}
  \item 229. 19 U.S.C. § 1862(b)(1)(A).
  \item 230. \textit{Id.} § 1862(b)(3)(A).
  \item 231. \textit{Id.} § 1862(c)(1)(A) (emphasis added).
  \item 233. \textit{Id.} at *9.
  \item 234. \textit{Id.} at *10.
  \item 235. Plaintiffs cited tweets and statements made on the campaign trail, \textit{Trump v. Hawaii}, 585 U.S. \_\_, 138 S. Ct. 2392, 2417 (2018). The Court said it “may consider plaintiffs’ extrinsic evidence but will uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.” \textit{Id.} at 2420. The Proclamation at issue in the case was “expressly premised on legitimate purposes.” \textit{Id.} at 2421.
  \item 236. \textit{Id.} at 2423.
\end{itemize}
the Court also stressed the national security aspect of the case for not looking at motivations behind a seemingly bona fide measure. The *Severstal* case was voluntarily dismissed, with prejudice, after preliminary injunctive relief was denied.

In another case at the CIT, importers are challenging the President’s decision to double the Section 232 tariffs on Turkey. Plaintiffs accuse the President of exceeding statutory authority as well as violating the Fifth Amendment’s guarantees of due process and equal protection. Additionally, there is a potential procedural issue, since the specific increase in tariffs on Turkey was taken more than fifteen days after the President concurred with Commerce’s report to the President, as required by the statute. It is unclear whether this deadline applies only to the initial action or to all actions taken under Section 232. This procedural argument could also be applied to the President’s recent extension of the tariffs to derivative steel parts. The CIT denied the government’s motion to dismiss, stating that

>> based on the facts alleged, Plaintiff’s argument that the President failed to follow the procedure set forth in the statute and, further, that singling out importers from Turkey violated the equal protection guarantees under the U.S. Constitution, support its claim for a refund.

The case is still pending.

B. Availability and Scope of Review

Neither the TEA nor the APA provide judicial review for actions taken under Section 232. The APA does not apply because the President is not subject to the APA and he issued the steel order. Secondly, Commerce’s report and recommendation are not reviewable under the APA because neither are “final” agency actions. To be a final action, there must be a direct legal effect, not just a “tentative” effect.

---

237. *Id.* at 2419 (citing Kleindienst v. Mandel, 480 U.S. 753, 756–57 (1972)).
244. 5 U.S.C. § 704.
245. *Franklin*, 505 U.S. at 796–97. In *Franklin*, the Secretary issued a report regarding the census for purposes of Congressional apportionment. Nothing in the report took effect without presidential
The lack of a statutory basis for review does not prohibit all judicial review. "[I]t is a widely shared premise that, absent a congressional ouster of judicial review, judicial review is available to assess whether federal officials acted within the scope of their statutory powers," since acting beyond statutory authority would be unconstitutional.\textsuperscript{246} If the President acted outside of the scope of his conferred authority in an area where he has no independent powers, he acted unconstitutionally.\textsuperscript{247} If the act is unconstitutional, the courts can enjoin government officials in enforcing the unconstitutional action.\textsuperscript{248}

It is possible that the courts cannot review the steel order due to judicial review being unavailable. Where a statute commits a decision to the discretion of the President, the availability of review of that discretion is questionable.\textsuperscript{249} Specter v. Dalton dealt with this issue of challenging the discretion of a statutorily-delegated decision. Congress passed the Defense Base Closure and Realignment Act, which required that the Secretary of Defense make recommendations about base closures and gave the President the ability to approve or disapprove the Commission’s recommendations.\textsuperscript{250}

In reviewing the validity of the President’s approval, the court determined that:

\begin{quote}
Where a claim ‘concerns not a want of [presidential] power, but a mere excess or abuse of discretion in exerting a power given, it is clear that it involves considerations which are beyond the reach of judicial power. This must be since, as this court has often pointed out, the judicial may not invade the legislative or executive departments so as to correct alleged mistakes or wrongs arising from asserted abuse of discretion.’\textsuperscript{251}
\end{quote}

\textsuperscript{246}. Kevin M. Stack, The Reviewability of the President’s Statutory Powers, 62 VAND. L. REV. 1171, 1176 (2009).
\textsuperscript{247}. See Larry Alexander & Evan Tsen Lee, Is There Such A Thing As Extraconstitutionality?: The Puzzling Case of Dalton v. Specter, 27 ARIZ. ST. L.J. 845, 854 (1995) (“Every act that exceeds [legislatively delegated, non-independent] statutory authority is necessarily unconstitutional... because it violates the limited powers principle.”); id. at 859 (“[T]he Specter Court supported its distinction between acts ‘beyond all statutory authority’ and acts ‘merely in excess of statutory authority’ by citing Larson v. Domestic & Foreign Commerce Corp. ... The problem is that the distinction [by dicta] made no more sense in Larson than it does in Specter.”).
\textsuperscript{248}. See ex parte Young, 209 U.S. 123 (1908); Franklin, 505 U.S. at 828–29 (“Review of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President’s directive.”).
\textsuperscript{249}. Dalton v. Specter, 511 U.S. 462, 474 (1994) (“So the claim raised here is a statutory one: The President is said to have violated the terms of the 1990 Act by accepting procedurally flawed recommendations. The exception identified in Franklin for review of constitutional claims thus does not apply in this case ... But longstanding authority holds that such review is not available when the statute in question commits the decision to the discretion of the President.”).
\textsuperscript{250}. Id. at 465.
\textsuperscript{251}. Id. at 474 (quoting Dakota Cent. Tel. Co. v. South Dakota ex rel. Payne, 250 U.S. 163, 184
Because the “statute vested complete discretion in the President,” Congress must have “intended that the President’s approval or disapproval be free from judicial review” and the Court must respect Congress’s wishes.252 The Court was probably correct that judicial review in this instance was inappropriate because Congress “chose not to constrain the President’s authority with any statutory criteria.”253 By delegating unconstrained power, there would be no standard to which a court could evaluate the President’s compliance with the statute.

A much broader proposition than contemplated by the facts in Dalton is that “judicial review is not available as to whether the President’s exercise of authority exceeded the bounds granted.”254 Recently in Trump v. Hawaii, the government challenged the ability of the Court to address the merits of Plaintiff’s “statutory” claims.255 The Government relied on the doctrine of consular nonreviewability, not Dalton, in challenging review.256 Like Section 232, the Immigration and Nationality Act (INA) also grants the President broad discretion.257 In Trump v. Hawaii, the Court admitted the justiciability issue presented “a difficult question,” but because the INA did not “expressly strip[] the Court of jurisdiction over plaintiffs’ claims,” the Court chose to “assume without deciding that the plaintiffs’ statutory claims were reviewable, notwithstanding consular nonreviewability or any other statutory nonreviewability issue.”258 While the Court did not decide the issue, its opinion suggests that the Court would be willing to review statutory claims given there is no express, or perhaps implied, bar by Congress. This would square with Dalton if the unbounded discretion is read as an “express” or “clear” bar to review.

The discretion given to the President under Section 232 is not completely unbounded, though it is quite broad. In Algonquin, the plaintiffs challenged the imposition of license fees on oil imports as impermissible under the statute.259 The Court disagreed with the plaintiffs as to the tools

253. Stack, supra note 246, at 1195.
254. Id. at 1197.
255. Trump v. Hawaii, 138 S. Ct. 2392, 2407 (2018). The Court referred to the claims that the President violated the statute as “statutory” claims, not “constitutional” claims.
256. Id. (arguing that “exclusion of aliens is a ‘fundamental act of sovereignty’ by the political branches,” “not within the province of any court,” and that this idea is confirmed by Congress “authoriz[ing] judicial review only for aliens physically present in the United States”).
257. Id. at 2408.
258. Id. at 2407.
available, but determined the President’s remedy was limited “to the extent ‘he deems necessary to adjust the imports of such article and its derivatives so that such imports will not threaten to impair the national security.’” The Supreme Court identified limits on the discretion given to the President: (1) that the remedy probably can only impact imports directly (not remotely) and (2) the remedy should be to ensure imports will not threaten to impair the national security. Congress also provided specific time limits in the implementation of Section 232, which suggests Congress intended for some limits. In Algonquin, the Court did not question the availability of judicial review for the claim that the President exceeded his statutory authority.

There are some cases supporting the idea that determination of facts and the motives underlying decisions committed to discretion are not reviewable. In older cases, the Court held that:

Where Congress has authorized a public officer to take some specified legislative action when in his judgment that action is necessary or appropriate to carry out the policy of Congress, the judgment of the officer as to the existence of the facts calling for that action is not subject to review. For the judiciary to probe the reasoning which underlies this Proclamation would amount to a clear invasion of the legislative and executive domains.

Dalton cites George S. Bush & Co. as support for review being unavailable in that case. But as discussed, there were no standards to assess the President’s decision-making in Dalton. The Federal Circuit, the circuit court that typically hears international trade disputes after appeal from the CIT, has likewise cited in many cases that “[t]he President’s findings of fact and the motivations for his action are not subject to review.”

260. See id. at 561 (noting that § 232(b)’s language “seems clearly to grant [the President] a measure of discretion in determining the method to be used to adjust imports”). The District Court of D.C. did think there was a limit to remedial powers being on imports themselves, not domestic products. Indep. Gasoline Marketers Council, Inc. v. Duncan, 492 F. Supp. 614, 618 (D.D.C. 1980). This conclusion comports with the Supreme Court’s language at the end of the Algonquin decision that made clear that the Court’s decision “in no way compels the further conclusion that any action the President might take, as long as it has even a remote impact on imports, is also so authorized.” Algonquin, 426 U.S. at 571.

261. Algonquin, 426 U.S. at 559 (emphasis added).

262. Id. at 571.

263. Id. at 559. See also Transpacific Steel LLC v. United States, No. 19-00009 (Ct. Int’l Trade Nov. 15, 2019) (stating that the statute “cabins the President’s power [substantively] by requiring the action to eliminate threats to national security caused by imports”).


Academics argue that “judicial review should extend to all issues necessary to determine whether the President has acted within the scope of his statutory powers, regardless of whether those issues are classified as issues of law, fact, or law-to-fact application” as a branch of ultra vires review. The Court should be able to review issues that are not committed to the unbounded discretion of the President. “[I]n the judgment of the President” does confer discretion, but he is still limited to taking action that “adjust[s] the imports” and that will ensure the imports “will not threaten to impair the national security,” suggesting bounds to his discretion. The issue here is that availability of review and the merits begin to blend because both ask questions about the discretion given to the President.

Success on the merits depends on whether there is a limit on the decisions of the President under Section 232 and whether he acted outside of those limits. Availability of review under Dalton turns on whether the decision is fully discretionary and meant to be shielded from judicial review or is subject to certain standards and open to judicial review. Therefore, a court would need to interpret the statute before being able to determine whether Dalton prohibits review.

C. Standard of Review

There is no consensus on the standard of review courts should apply when reviewing Presidential actions. Courts have applied different standards of review in different substantive areas. Deference usually depends on whether the question relates to presidential fact-finding, motivations, or legal interpretations.

As to fact-finding, the level of deference given by the court could depend on the competency of the courts, the statutory language, and the level of mixed fact and policy in making a determination. The courts have been particularly deferential in areas such as immigration, national security, and foreign affairs, where the President is seen to have particular expertise compared to the judiciary. Additionally, facts that are hard to separate out

267. Stack, supra note 246, at 1177 (emphasis added).


269. The Second Circuit has said that “we see no reason why Executive fact-finding must be totally insulated from judicial review,” but instead wanted the inquiry to focus on whether the area of fact-finding was one where the courts are incompetent. DaCosta v. Laird, 471 F.2d 1146, 1155 (2d Cir. 1973).

from policy judgments would likely receive greater deference.  

For example, in *Trump v. Hawaii*, the Court determined that the underlying statute (INA) did not clearly require the President to “explain [his] finding with sufficient detail to enable judicial review,” showing the statute itself indicates the appropriate review of the facts by the courts. Additionally, the Court recognized “plaintiffs’ request for a searching inquiry into the persuasiveness of the President’s justifications is inconsistent with . . . the deference traditionally accorded the President in this sphere.”

The Court went on to further recognize that in the national security context, the President is “not required to conclusively link all of the pieces in the puzzle before [courts] grant weight to [his] empirical conclusions.”

Even in these spheres of greater deference, the Court has reduced the level of deference based on competing values and concerns. For example, in *Hamdi v. Rumsfeld*, where there was a habeas challenge to a U.S. citizen’s detention, the Court posited that when individual liberty is at stake, “[a]ny process in which the Executive’s factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged . . . to demonstrate otherwise falls constitutionally short.”

The stakes in this case are much lower than in *Hamdi*, so the courts would likely take less issue in deferring to the executive on factual determinations. At minimum, the President arguably has an obligation to be honest and engage in a reasonable inquiry in finding facts. This requirement is supported by the Court’s emphasis on the twelve-page report and the multi-agency review process in *Trump v. Hawaii*. However, an obligation of honesty and reasonability may be hard to police.

As for motivation, the Supreme Court recently declined to “look behind” the President’s exercise of discretion in his admission of aliens authority when there was a facially legitimate reason for his decision. The Court did not explicitly extend this principle to all areas of the law, but the

---


272. *Trump v. Hawaii*, 138 S. Ct. at 2409 (comparing to Webster v. Doe, 486 U.S. 592, 600 (1988) where a statute that authorized the CIA Director to terminate an employee when the director deemed the “termination necessary or advisable in the interests of the United States” and the Court thought this foreclosed “any meaningful judicial standard of review”).

273. *Id.*

274. *Id.* (citing Holder v. Humanitarian Law Project, 561 U.S. 1, 35 (2010)).


276. See Roisman, *supra* note 271, at 852 (grounding this argument in “conventional sources of constitutional interpretation, including the text of the Constitution, its structural features, Supreme Court precedent, and past branch practice”).

277. 138 S. Ct. at 2421.

278. *Id.* at 2419.
motivating fear that statements regarding either illegal or extra-legal reasons for action might undermine the President’s ability to act on a certain issue indefinitely exists no matter the area of law.

The Supreme Court’s jurisprudence suggests that the President is unlikely to receive deference in his interpretation of statutes. For example, in *Trump v. Hawaii*, the Court looked to the plain meaning of the text to determine the President’s statutory authority, not the government’s interpretation of the statute.279 Likewise, in *Algonquin*, the Court did its own statutory analysis of the range of actions contemplated by the statute, even with Section 232’s discretionary language.280 The Court has given “great weight deference” to the President in interpreting treaties, but that is due to the Executive’s special knowledge of such agreements and the potential international ramifications of treaty interpretation.281 Some academics have suggested applying *Chevron* deference to the President in his interpretations of law in the foreign affairs and national security spheres.282 An issue with expanding the level of deference given to the President is that, unlike agencies, there are no APA protections. Because he already receives deference regarding factual determinations and rationales in this sphere, extending deference to the President’s interpretation of the law would place too much power in the hands of the President.

The Federal Circuit has followed a very deferential position towards the President in trade controversies, seemingly regarding matters of law. Specifically, the Federal Circuit has held that “[f]or a court to interpose, there has to be a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority.”283 While this is not necessarily deference to the Executive’s reading of the statute, the Federal Circuit seems to be willing to read the statutory authority as broadly as possible to encompass the President’s actions. No other circuits seem to have the “clear misconstruction” standard.

Based on the cases and rationales surrounding deference, it is unlikely

279. *Id.* at 2410 (“In short, the language of § 1182(f) is clear, and the Proclamation does not exceed any textual limit on the President’s authority.”).


that a challenge to the facts found by the Department of Commerce and relied on by the President or the background motives unrelated to national security will be strong enough to overcome the courts’ deferential review.284 What would be within the scope of review is the meaning of the statutory language and what standards the President had to follow. The line between questions of law, fact, and policy is not always clear, but the role of the courts is strongest where there is a question of law.

D. Definition of “Threaten to Impair the National Security”

The only Supreme Court case interpreting the language in Section 232 is Algonquin.285 In Algonquin, the plaintiffs challenged President Ford’s imposition of license fees on oil imports as impermissible under the statute.286 Specifically, plaintiffs thought that “adjust” in the statute meant only direct, quantitative restrictions on imports, i.e. quotas. The Court disagreed with the plaintiffs and thought that the remedial power of the President under the statute could include license fees and tariffs to adjust imports.287 However, the Court noted that the President’s remedy decision was limited because the President could “act only to the extent ‘he deems necessary to adjust the imports of such article and its derivatives so that such imports will not threaten to impair the national security.’”288 Based on its analysis of the legislative history, the Court determined that “national security” is narrower than the “national interest,” as the term “national interest” was passed by the Senate but deleted by the Conference Committee when passing the TEA of 1962.289 The Court did not have occasion to further define “threaten to impair the national security” and mainly limited its

284. Even where judicial review is deferential, there are several benefits to its availability. Stack, supra note 246, at 1208 (“Judicial review provides occasion for aggrieved parties to monitor the President’s action and as a result forces disclosure of the basis for the President’s actions to Congress and other political constituencies. Further, the prospect of review, even if deferential, provides incentives for the President (and his lawyers) to provide a reasoned explanation for the conclusions he reaches. The need to produce some explanation to which the courts may defer has a transparency-enforcing effect. It also avoids the signal that the President is beyond the reach of the courts. And because this would merely be a default presumption of reviewability, it could be ousted by Congress under particular statutes.”).


286. Id. at 556.

287. See id. at 561 (noting that § 232(b)’s language “seems clearly to grant [the President] a measure of discretion in determining the method to be used to adjust imports”). The District Court of D.C. did think there was a limit that remedial powers be against imports, not domestic products. Indep. Gasoline Marketers Council, Inc. v. Duncan, 492 F. Supp. 614, 618 (D.D.C. 1980). This conclusion comport with the Supreme Court’s language at the end of the Algonquin decision that made clear that the Court’s decision “in no way compels the further conclusion that any action the President might take, as long as it has even a remote impact on imports, is also so authorized.” Algonquin, 462 U.S. at 571.

288. Algonquin, 426 U.S. at 559.

289. Id. at 568–69.
Section 232 limits the extent of the President’s action to actions he deems necessary to adjust imports “so that such imports will not threaten to impair the national security.” Determining this standard’s meaning is critical to understanding the scope of authority conferred. The statute arguably does not give the President full discretion in determining the meaning of this standard. Section 1862(c)(1)(A)(ii) provides that:

“If the President concurs [with Commerce’s recommendation], he shall determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security.”

While “in the judgment” commits discretion to the President, this phrase does not modify the entire provision. “[I]n the judgment of the President” at the beginning or end of the sentence would modify the entire provision, making the meaning of “threaten to impair the national security” unreviewable. Placing the discretionary commitment in the middle of the clause suggests Congress only meant to commit the determination of the nature and duration of the act that needed to be taken to the President. This interpretation fits the Algonquin Court’s review of what “adjusts the imports” means and its determination that “threaten to impair the national security” is a standard more limited than the “national interest.”

National security is not defined in the statute. Congress often delegates authority to the President based on “national security,” but rarely defines the term. Courts also rarely try to posit the meaning of national security. In one case, the Court defined “national security” in a law that allowed the government to fire employees in certain agencies if it was “in the interest of the national security of the United States.” In that case, the Court defined the term fairly narrowly to “comprehend only those activities of the Government that are directly concerned with the protection of the Nation from internal subversion or foreign aggression, and not those which contribute to the strength of the Nation only through their impact on the general welfare.”

Where national security is defined in statutes, the term has been defined fairly broadly. Section 232 does provide a list of factors

290. *Id.* at 559.
294. *Id.* at 1198.
296. *Id.* at 544.
relevant to the determination of whether imports are “threatening to impair the national security.” These factors include economic ones, which does indicate that a reading of “threaten to impair the national security” means more than the national defense needs to defend an imminent armed attack. 298

The Department of Commerce in its investigation into iron ore under Section 232 in 2001 considered several definitions of “threaten to impair the national security.” 299 Commerce first tried to ascertain the meaning of national security. Commerce concluded that “national defense” must be a component, and that the term could refer to domestic national defense needs or the ability to project U.S. military capabilities globally, or both. 300 Commerce thought that, in addition to national defense requirements, national security could include the “general security and welfare of certain industries . . . that are critical to the minimum operations of the economy and government.” 301 Given the factors listed in § 1862(d), Congress likely intended the term to include the welfare of critical industries, at least to an extent. The economic considerations listed in the statute were couched in terms such as ability to “meet national security requirements” or weakening of the “internal economy” (not an industry) that “impair[s] the national security.” 302 Also, a Section 232 investigation into oil in 1999 limited its inquiry into DOD requirements when assessing national security needs. 303

The meaning of “threaten to impair” the national security must also be assessed. Commerce in its 2001 iron ore investigation determined imports could reasonably be found to threaten the national security when the United States must rely on unsafe or unreliable imports or is “excessively

---

298. 19 U.S.C. § 1862(d) (2018) (“[G]ive consideration to domestic production needed for projected national defense requirements, the capacity of domestic industries to meet such requirements . . . the requirements of growth of such industries and such supplies and services including the investment, exploration, and development necessary to assure such growth, and the importation of goods in terms of their quantities, availabilities, character, and use as those affect such industries and the capacity of the United States to meet national security requirements . . . the Secretary and the President shall further recognize the close relation of the economic welfare of the Nation to our national security, and shall take into consideration the impact of foreign competition on the economic welfare of individual domestic industries; and any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports shall be considered, without excluding other factors, in determining whether such weakening of our internal economy may impair the national security.”)


300. Id. at 5.

301. Id.

302. 19 U.S.C. § 1862(d) (emphasis added) (suggesting, perhaps, greater importance of a severe weakening of the whole economy, not just a sector of the economy).


dependent” on imports.305 This interpretation was supported by three previous Section 232 investigations.306 Furthermore, Commerce found that “imports can threaten the national security if they fundamentally threaten the viability of U.S. industries and resources needed to produce domestically goods and services necessary to ensure U.S. national security.”307 Key here is excessive dependence on imports and fundamental threats to critical industry viability. If “threaten to impair the national security” included just average reliance on imports and some threat to critical industry, the meaning of “national security” would not be much narrower than “national interest.” In the 2001 report, Commerce recognized it conducted its analysis under the broadest definition,308 “most likely to result in a positive finding.”309

Further support for a narrower reading of “threaten to impair the national security” is the nondelegation canon.310 The nondelegation canon is a companion to the idea of constitutional avoidance— “[w]here Congress has attempted to do something that may intrude on constitutional values . . . courts resist this effort by insisting that Congress make its intent absolutely clear.”311 So, while the nondelegation doctrine is often considered dead, the doctrine may live on through a limiting canon of construction.312

Cass Sunstein has identified three areas where the courts have adopted the nondelegation canon: constitutional concerns, sovereignty issues, and areas of public policy.313 Constitutionally inspired nondelegation canons include the application of constitutional avoidance to agency interpretations of statutes, even where ambiguous (trumping Chevron), limiting interpretation of ambiguous provisions as to preempt state law (even though national preemption is not unconstitutional, but serves federalism principles in the Constitution), and limiting retroactive application of statutes unless its retroactivity was made clear by Congress.314 Sovereignty-inspired nondelegation canons, which are “grounded in widespread understandings about sovereignty,” include application of a presumption against

305. Id. at 7 (emphasis added).
307. Id. (emphasis added).
308. Id. at 5.
309. Id. at 7.
310. See generally Sunstein, supra note 113.
313. Id. at 330.
314. Id. at 331–32.
extraterritoriality for agency interpretations, unfavorable treatment to Native Americans, and waiving sovereign immunity. Nondelegation canons inspired by public policy include limiting agencies ability to interpret: exemptions from taxation, anticompetitive practices, and the ability to make very large expenditures for trivial gains. For Section 232, because of the constitutional concerns regarding this delegation discussed in Part III, a narrower interpretation of “threaten to impair the national security” would invoke the constitutional concerns underlying the nondelegation canon.

In the recent steel report, Commerce adopted a definition of “threaten to impair the national security” similar to the definition used in the 2001 Steel Report, but came to a different conclusion due to changed circumstances in the steel industry. Importantly, Commerce did not agree with the 2001 formulation of “fundamental” threat to the viability of the domestic industry. Commerce did not assess reliance on “excessive” imports, but rather determined that imports were excessive and could lead to reliance on imports for national security needs in the future.

In his proclamation, the President did not give an explicit definition of “threaten to impair the national security.” He said that he concurred in the Secretary’s finding. His reasoning was that the tariff would “ensur[e] economic viability of our domestic steel industry.” Also with a declining steel industry, the United States would need to rely on foreign imports for its security needs, which would be unsafe for the nation. Like the Commerce report, the President did not assess whether steel imports are fundamentally threatening the viability of the domestic steel industry or whether the decline of the steel industry would lead to excessive reliance on foreign imports.

Commerce incorrectly interpreting “threaten to impair the national security” would not necessarily invalidate the President’s imposition of the tariff. The Court of Appeals for the Federal Circuit, in other contexts, has “rejected the contention that the failure of [an agency] to comply with its statutory obligations invalidates presidential action.” In Dalton, the Supreme Court stated that if “nothing in [the relevant statute] requires the President to determine whether the [agency] committed any procedural

315. Id. at 332–33.
316. Id. at 334–35.
318. Id. at 14 n.15.
319. Id. at 4.
321. Id.
322. Id. at 11,627.
violations in making [its] recommendations;” his action is not invalid, especially when the statute does not “prohibit the President from approving recommendations that are procedurally flawed.” Unlike in that case, the issue with Commerce’s determination would be substantive, not just procedural, which might normatively give more pause in ignoring the underlying flaw. This substantive error by Commerce would not necessarily make a difference, unless one can argue that the President’s proclamation suggests he concurs in not just the determination of the Secretary, but in the analysis of the Secretary. Then, the President’s interpretation of the scope of “threaten to impair the national security” would be incorrect, meaning his action does not fit the standard he is required to follow.

If the broad definition of threaten to impair the national security is accepted, then the current order is likely valid and within the scope of authority delegated to the President. But such latitude giving the President near unfettered authority in an area where the founders clearly thought the procedural hurdles of Congress were needed puts the wrong branch in charge. A narrower construction of the scope of authority delegated would mitigate nondelegation concerns.

As a practical matter, the President could just state that the threat to the steel industry is “fundamental” and our future reliance on imports would be “excessive” without much review from the courts, due to the deference given to fact-finding in the national security sphere. But stretching the facts to meet a more stringent legal standard will pose higher political costs. If the President is paying no more than lip service to the statute, this will be more apparent under the narrower construction of “threaten to impair the national security” than the easy-to-meet, broad construction advanced by Commerce in the 2018 Steel Report. A president abusing his discretion and authority conferred by Congress would, presumably, carry a higher risk of upsetting voters because not only will there be concern over the policy outcomes of the decision, but over the abuse of authority via bad faith factual determinations.

V. COMPLIANCE WITH INTERNATIONAL LAW?

The steel orders’ compliance with international law is important in two regards. For one, international law may affect our interpretation of the statute under domestic law. Second, we may just generally be concerned over whether the President’s order violates international trade law. If it does, this could have implications on our relations with other nations, who may have a

324. Id. at 1347 (citing Dalton v. Specter, 511 U.S. 462, 476 (1994)).
325. Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizures), 343 U.S. 579, 867 (1952).
right to retaliate, and for the international trade law system as a whole. The steel orders likely violate WTO trade rules, but the potential for international violations under Section 232 is unlikely to have much effect on the statute’s interpretation as a matter of domestic law.

For states that are a part of the WTO, like the United States, international trade law is largely governed by the WTO treaties. The core agreement is the General Agreement on Tariffs and Trade (“GATT”) 1994. The GATT promotes trade liberalization through a strategy of “channel and bind.” This strategy promotes nations to “channel” trade restrictions into tariffs (since they are more transparent and less market-distorting than other market access barriers) and “bind” those tariff rates by making commitments to not raise tariffs above a certain level provided for in the GATT tariff schedules.

The WTO agreements allow for some deviations from the bound rate. For example, a nation can implement trade remedies (in a manner consistent with the WTO agreements), which allow extra duties to be applied to imports from companies who dump, from countries that provide subsidies, and as a response to an injurious surge of imports. The WTO also provides general exceptions in Article XX, allowing for deviation from commitments when such measures are, for example, in the name of public morals, protecting human, animal or plant life, or protecting exhaustible resources.

An exception provided for in the GATT that has been less-invoked and less-tested until now is Article XXI, which deals with national security exceptions. In the last few years, the WTO has experienced a surge in national security-related cases, including: Ukraine’s complaint against Russia over its transit restrictions, South Korea’s complaint against Japan for its export restrictions on certain chemicals crucial to Korea’s electronics industry; Qatar’s complaints against Saudi Arabia, Bahrain, and the United Arab Emirates over trade in goods, services, and intellectual property rights; India’s notification to the WTO regarding revocation of most-favored nation status for Pakistan; and the seven complaints filed against the United States over its Section 232 steel and aluminum tariffs. Article XXI is the exception that the United States would need to argue for the recent steel

---

326. These are known as anti-dumping duties, countervailing duties, and safeguards.
327. GATT, supra note 28, art. XX(a)–(b), (g). Article XX works as an affirmative defense and bears the burden of (1) proving its measures properly fall into one of the categories of the exception and (2) follow the “chapeau” of Article XX, which requires members apply these measures in a justifiable way. Report of the Appellate Body, United States—Importation Prohibition of Certain Shrimp and Shrimp Products, ¶ 156–60, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998).
328. GATT, supra note 28, art. XXI.
tariffs to be permissible under the GATT.

A. Domestic Legal Affect

International trade law will likely not have an impact on the validity of the Section 232 steel tariffs under domestic law or on the interpretation of Section 232. As for invalidating the orders themselves, treaties are only given direct effect in the United States if they are considered “self-executing”; otherwise, Congress needs to pass specific legislation implementing the treaty. Even then, a treaty is on par with federal statutes under the United States’ hierarchy of law, meaning a statute passed later in time and directly in conflict would likely trump a treaty. The Uruguay Round Agreements Act (URAA) did implement the GATT agreements through legislation, but the URAA gave the GATT agreements weak status. Specifically, Congress said the URAA should not limit any authority conferred under any law of the United States, which would include the steel orders under Section 232.

Courts usually interpret statutes that implicate international law in a way that does not violate international law, unless Congress clearly specified otherwise in the statute. This canon of construction is known as the *Charming Betsy* canon and is based on the assumption that Congress does not intend to violate international law. Normally, this canon might counsel a narrower reading of Section 232 to guarantee the authority it conferred would not exceed those actions permissible under GATT Article XXI. But the language of the URAA cuts against an aggressive application of *Charming Betsy*. In Section 102, Congress specified that the URAA could not override other inconsistent federal laws, whether passed prior or subsequent to the URAA. Nor did Congress want the URAA to “limit any authority conferred under any law of the United States,” which would include Section 232. Nor is the language of Section 232 modeled after Article XXI of the GATT; rather, the language is much broader, suggesting

336. *Id.* § 3512(a)(2)(B).
that Congress did not intend to limit Section 232 to situations permissible under Article XXI.

Further, a domestic court’s interpretation of Article XXI might not even significantly limit Section 232 because of its own interpretation of international law. The WTO panel in Russia—Measures Concerning Traffic in Transit, as explained below, defined Article XXI narrowly enough to seriously question the steel order’s compliance with the GATT (therefore indicating a broad reading of authority under Section 232 would lead to international law violations). But a domestic court need not agree with the WTO panel’s narrow interpretation of Article XXI. Even under the WTO’s own rules, panel decisions are only binding to the parties and measures in front of it. Also, the URAA specifies that any regulation or practice that is found inconsistent by a panel or appellate body report cannot be amended to conform to the decision until the U.S. government has implemented the decision, suggesting resistance to WTO panel determinations even where the United States is a party without approval by one of the political branches. While a WTO panel will not receive deference as to the meaning of Article XXI, the executive branch will receive “great weight deference” by the courts on matters of treaty interpretation. The Office of the United States Trade Representative has claimed that the Section 232 steel tariffs “plainly fall within the legitimate scope of Article XXI.”

Because of the weak status given to WTO rules in the United States’ federal laws and the great weight deference given to the Executive’s interpretation of treaties, international trade law will likely not result in any domestic legal ramifications on the validity of the steel orders or the scope of Section 232. However, under an international law analysis, the current steel orders are likely problematic under Article XXI of the GATT. The

337. See discussion infra Section V.C.
338. See, e.g., Sanchez-Llamas v. Oregon, 548 U.S. 331, 353–54 (2006) (“If treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law ‘is emphatically the province and duty of the judicial department.’”).
339. Legal Effect of Panel and Appellate Body Reports and DSB Recommendations and Rulings, WORLD TRADE ORG. (2004), https://www.wto.org/english/tratop_e/dispu_e/dispu settlement_cbt_e/c7sp1c.htm (“[R]eports of panels and the Appellate Body are not binding precedents for other disputes between the same parties on other matters or different parties on the same matter, even though the same questions of WTO law might arise.”). See also Sanchez-Llamas, 548 U.S. at 355–56 (“Any interpretation of law the ICJ renders in the course of resolving particular disputes is thus not binding precedent even as to the ICJ itself; there is accordingly little reason to think that such interpretations were intended to be controlling on our courts.”).
following subsections will analyze the availability and scope of review of Article XXI claims, the existing panel decision on Article XXI, and the justifications for the steel orders under Article XXI.

B. Availability and Scope of Review of Article XXI under the GATT

The interpretation of Article XXI is sensitive because determinations regarding what is necessary for a nation’s essential security interests is a core sovereignty interest. There is much debate between WTO parties as to whether Article XXI is reviewable and to what extent it can be reviewed. Additionally, unlike other provisions of the GATT, Article XXI(b) contains language that indicates that there is a level of self-judgment when it comes to what constitutes an action necessary for the protection of essential security interests. The text of Article XXI states:

Nothing in this Agreement shall be construed . . .
(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
   (i) relating to fissionable materials or the materials from which they are derived;
   (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; [or]
   (iii) taken in time of war or other emergency in international relations.

Dispute settlement under the GATT changed significantly with the creation of the WTO and the adoption of the Dispute Settlement Understanding (DSU). Members of the WTO can bring a complaint against another member who is allegedly violating its obligations under the agreement and harming a right of the complaining member. If no solution is reached after consultations, the complaining Member can request the establishment of a panel to rule on the alleged violations. The complaining member and respondent include all claims in a terms of reference, which limits the scope of the dispute and the extent of the panel’s jurisdiction under

344. GATT, supra note 28, art. XXI (emphasis added).
Article 7.1 of the DSU.\textsuperscript{347} Nothing in the DSU specifies any special rules or limitations regarding Article XXI.\textsuperscript{348} Panel decisions can be appealed to an Appellate Body panel, which contains three Appellate Body Members. Appellate Body Members are appointed and approved by the WTO member states and serve four-year terms.\textsuperscript{349} While there is no formal stare decisis in WTO dispute settlement, Appellate Body reports are often followed, especially if the reasoning is persuasive, as this enhances security, predictability, and “rule of law.”\textsuperscript{350}

Even though the DSU does not indicate an exception for review of Article XXI, some nations have argued that the language itself prohibits DSU jurisdiction. Russia in particular has argued that panels do not have jurisdiction to hear Article XXI claims because the term “which [the party invoking Article XXI] considers necessary for the protection of its essential security interests” is completely self-judging.\textsuperscript{351} The United States has a similar—though slightly more nuanced—position that while panels technically have “jurisdiction” over an Article XXI claim, the claim is nonjusticiable, and so the panel cannot make a determination as to whether a party has complied with Article XXI.\textsuperscript{352}

The European Union has argued that panels should have extensive review over the validity of invoking Article XXI, that panels should determine whether the measure addresses the particular national security interest specified, and that panels should review whether a sufficient nexus between the interest and the measure exists.\textsuperscript{353} The panel should also determine as a factual matter whether one of the situations listed under Article XXI(b)(i)–(iii) exists.\textsuperscript{354} While a member can indicate its desired level of security protection, a panel should be able to review whether the interests at stake could reasonably be considered an essential security interest.\textsuperscript{355} The panel should also assess whether the measure could plausibly

\textsuperscript{347.} DSU, supra note 345, art. 7.1.
\textsuperscript{348.} See generally id. (referring to Article XXI).
\textsuperscript{349.} Appellate Body Members, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm (last visited Nov. 3, 2019).
\textsuperscript{350.} Legal Effect of Panel and Appellate Body Reports and DSB Recommendations and Rulings, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c7s2p1_e.htm (last visited Nov. 3, 2019).
\textsuperscript{352.} Id. at 37–38 (citing United States Response to Panel Question No. 1, paras. 3, 17–22) (explaining that the United States argues there are no legal standards to apply making a panel recommendation impossible).
\textsuperscript{353.} Id. at 35 (citing European Union’s third-party submission, para. 11).
\textsuperscript{354.} Id. (citing European Union’s third-party submission, para. 14).
\textsuperscript{355.} Id. (citing European Union’s third-party submission, para. 17).
be considered capable of protecting a security interest from threat. While the European Union recognizes the self-judging language, the European Union believes this determination regarding what is “necessary” should still be reviewed for good faith and plausibility. The European Union argues parties invoking the exception should have to explain why they consider the measure necessary. The European Union also wants to invoke the “necessary” test under Article XX to have the panel consider the interests of third parties and possible alternatives.

Many countries have suggested some sort of middle ground. Most nations agree that review needs to be somewhat limited to respect national sovereignty and the need to define one’s own national security interests. However, giving nations unbounded discretion would create a huge loophole that would be open for abuse, contrary to the requirements of good-faith interpretation and the stated requirements of Article XXI.

When interpreting the GATT, the DSU calls for panels and the Appellate Body to interpret the agreements “in accordance with customary rules of interpretation of public international law.” Treaty interpretation under customary international law is governed by the Vienna Convention on the Law of Treaties (VCLT). Articles 31 and 32 of the VCLT lay out treaty interpretation and are often invoked by WTO panels and the Appellate Body when interpreting the WTO agreements. Article 31 provides the general rules of interpretation, which include that a treaty “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Context for these purposes include the surrounding text, the preamble, and annexes of the agreement. Subsequent practice can also be
relevant and taken into account. In the event that an analysis under Article 31 yields an ambiguous or manifestly absurd meaning, or just to confirm what was determined under Article 31, a treaty interpreter may apply Article 32. Article 32 provides for a supplementary means of interpretation where preparatory work of the treaty or the circumstances of its conclusion are examined.

It is unlikely a treaty interpreter would determine that claims under Article XXI are completely unreviewable. Considering the positions of Russia and the United States, for Article XXI to be unreviewable, there would need to be completely self-judging language so that there is no objective standard by which to judge the claim of the responding member. In assessing the exception, one must start with the ordinary language of the treaty. The chapeau of Article XXI provides that the treaty will not be interpreted as prohibiting a member “from taking any action which [the member] considers necessary for the protection of its essential security interest.” “Which it considers” does indicate there is some level of self-judgment; however, this is not the end of Article XXI(b). Following that statement is a list of three situations, one of which needs to be met before invoking Article XXI(b).

Ordinary principles of language indicate that the three situations following the chapeau are not conditioned by the “which it considers” language. For one, the phrases start off with “relating to” or “taken in” and then are followed by situations that contain no qualifying language. In addition to not being modified by “which it considers,” the three situations listed in Article XXI(b)(i)–(iii) are determinable factual situations. The situations listed in Article XXI(b)(i) and XXI(b)(ii) are where the action at issue is “relating to” either (1) fissionable materials or (2) the trafficking in arms or supplying of the military. The third scenario in Article XXI(b)(iii) requires the action be “taken in time of war or other emergency in international relations.”

While there may not be a precise definition of “other emergency in international relations,” this is not the only instance where an international treaty has provided exceptions to general commitments in cases of an “emergency.” For example, the American Convention on Human Rights (ACHR) has a provision that allows for suspensions of human rights protections during “war, public danger, or other emergency that threatens the independence or security of a State Party.” Violations of the ACHR can

365. Id. art. 31, para 3(b).
366. Id. art. 32.
be petitioned to the Inter-American Commission on Human Rights, indicating reviewability when an “emergency” exists. While the example here has no bearing on the meaning of “other emergency in international relations” in the GATT, it does show that similar language in a treaty was not considered so subjective as to preclude the ability to interpret the treaty language.

Looking at the broader context of the agreement, the GATT’s purpose is to promote the security and predictability of mutually advantageous arrangements and the decrease of barriers to trade. These goals would indicate that the treaty did not intentionally create a large loophole to the commitment of reduced barriers to trade. The language of Article XXI(b)(i)-(iii), the DSU Agreement, and the purposes of the GATT indicate that WTO panels and the Appellate Body can review Article XXI and that the conditions for invoking the Article should be reviewable.

Another tougher question would be to what extent the chapeau of Article XXI can be reviewed. The language of the chapeau states that the GATT agreement would not be understood to hinder a member state “from taking any action which it considers necessary for the protection of its essential security interests.” One possibility is that the self-judging aspect of the clause only applies to the determination that a certain action was “necessary.” This would leave open the possibility for a panel to determine whether the measure truly protects a security interest or if that security interest is essential. However, this reading seems somewhat strained. For one, as a textual matter, there is nothing disjunctive in the phrase “necessary for the protection of its essential national security interests” that would indicate “which it considers” only applies to part of the phrase. Second, as a matter of common sense, a nation is in the best position to determine “its essential security interests.” Third, while there is a tension between nations not wanting an international tribunal to judge whether its essential security threats are at issue and not wanting to leave a major loophole in the GATT agreements, the narrowest reading of self-judgment is unlikely where this


370. GATT, supra note 28, art. XXI(b) (emphasis added).

371. This is the argument of the European Union. See Panel Report, supra note 351, ¶ 7.43. (“The European Union argues that the terms ‘which it considers’ in the first part of Article XXI(b) qualify only the term ‘necessary.’”).
balance is struck.

A reading that makes the chapeau of Article XXI largely self-judging would not have to foreclose all review. Under principles of public international law and the VCLT, the idea of *pacta sunt servanda*, or that every treaty must be performed in good faith, is required.\(^{372}\) Since this is a legal obligation of the parties to a treaty, a panel could look to whether a party acted in good faith. Of course, a panel would likely start off with the presumption that the party invoking Article XXI is acting in good faith if it has given reasons for why it considered the action necessary for the protection of an essential security interest.\(^{373}\) But if the complaining party can demonstrably show that the respondent member either did not think the interest was “essential” or if it did not think its action was truly “necessary” to protect that interest, then the panel could determine Article XXI was not properly invoked.

Another possible approach is to have a sliding scale between the severity of the predicate situations in Article XXI(b)(i)–(iii) and whether the invoking member truly thought such action was necessary to protect an essential security interest. The more intense the “emergency” under Article XXI(b)(iii) for example, the more lenient the panel would be in determining whether the responding party met the requirements of the chapeau. This approach would further the goals of the GATT by balancing sovereignty and the ability to protect essential security interests with policing the use of the national security exception as a loophole to compliance with WTO obligations.

Under VCLT Article 32, an analysis of the drafting history of the language that eventually became Article XXI supports the idea that Article XXI was meant to strike a balance. Specifically, striking a balance between the flexibility for nations to make their own security decisions and the need to police the exception from being used to evade WTO commitments. Recently, scholar Mona Pinchis-Paulsen dove into internal U.S. debates during the drafting of the national security exception for the International Trade Organization (ITO), which was supposed to be the “WTO” of its time.\(^{374}\) The U.S. delegation, after internal debate, opposed language that

---


\(^{373}\) In other contexts, panels will “presume” a party’s measure is in compliance with the WTO. See, *e.g.*, Appellate Body Report, *European Communities—Trade Description of Sardines*, ¶ 278, WTO Doc. WT/DS231/AB/R (adopted Oct. 23, 2002) (“We must assume that Members of the WTO will abide by their treaty obligations in good faith, as required by the principle of *pacta sunt servanda* articulated in [the VCLT]. And, always in dispute settlement, every Member of the WTO must assume the good faith of every other Member.”).

\(^{374}\) See Pinchis-Paulsen, *supra* note 329, at 109–116 (setting for the methodology of “analyzing internal U.S. practice during the making of Article XXI”).
entrenched a wholly unilateral interpretation of the national security exception. The language that was negotiated and agreed to in the ITO context was eventually used for the GATT. Review of the meeting transcripts from these negotiations show a similar debate. The parties intended there would be limited circumstances where Article XXI could be invoked, and the security exception would remain subject to the dispute settlement provisions.

C. Russia—Measures Concerning Traffic in Transit Panel Decision

After failed consultations with Russia, Ukraine requested the composition of a panel to decide whether Russia violated its obligation of freedom of transit in enacting multiple restrictions on traffic from Ukraine through Russia to third countries. Russia invoked Article XXI as a defense, saying these measures were necessary for protection of its essential security interests and were made in compliance with Article XXI(b)(iii). Russia also contended that the panel did not have jurisdiction to consider the national security exception.

The panel had to evaluate whether it could review Russia’s defense and, if it could, whether Russia met the requirement of Article XXI(b)(iii). The panel determined that the logical structure of the provision meant that the entire provision could not be self-judging because the three sub-paragraphs qualified the chapeau, not the other way around. Also, the panel thought that the sub-paragraphs were designed to be evaluated objectively. The panel also determined that Article XXI being left to the “unilateral will” of a member was inconsistent with the broad object and purpose of creating stability and security in trade. Surveys sent out to member states regarding the meaning of Article XXI yielded divergent interpretations, meaning there has not been sufficient subsequent practice to solidify an interpretation by

---

375. See id. at 159–63. See id. at 159–63 (showing that the U.S. delegation removed the language “and to relate to” from the security exceptions article which would have provided an ITO member explicit authority to determine unilaterally whether such measure qualified as a circumstance enumerated in the subparagraphs of the provision).
376. Id. at 187.
379. Id.
381. Id. ¶¶ 7.58.
382. Id. ¶ 7.65.
383. Id. ¶ 7.77.
384. Id. ¶ 7.79.
the parties.\textsuperscript{385} The negotiating history of the ITO was also examined.\textsuperscript{386} The panel concluded that the treaty drafters considered that:

a. the matters later reflected in Article XX and Article XXI of the GATT 1947 were considered to have a different character, as evident from their separation into two articles;

b. the “balance” that was struck by the security exceptions was that Members could have “some latitude” to determine what their essential security interests are, and the necessary action to protect those interest, while potential abuse of the exceptions would be curtailed by limiting the circumstances in which the exceptions could be invoked to those specified in the subparagraphs of Article XXI(b); and

c. in the light of this balance, the security exceptions would remain subject to the consultations and dispute settlement provisions set forth elsewhere in the Charter.\textsuperscript{387}

Next, the panel had to determine whether Russia’s measures were “taken in time of war or other emergency in international relations.” Russia attempted to be coy about what emergency it was responding to, but Russia was clearly responding to its conflict with Ukraine over Crimea.\textsuperscript{388} The panel noted that, in determining whether there was an “emergency in international relations,” it would not take into account who was internationally responsible or to characterize the situation other than the terms of its “emergency state.”\textsuperscript{389} The panel looked to how the international community characterized the situation and determined that the Russia-Ukraine issue is a serious armed conflict.\textsuperscript{390} Because the actions taken were subsequent to when the conflict started, the panel was satisfied that the measures were introduced “during the emergency in international relations” for purposes of subparagraph (iii).\textsuperscript{391}

As for the chapeau, the panel determined that a member-state’s determination of “essential security interests,”\textsuperscript{392} given that determination is made in good faith,\textsuperscript{393} and “necessity”\textsuperscript{394} are self-judging. To show good faith for the “essential security interests” determination, the member invoking the defense must “articulate the essential security interests said to arise from the emergency . . . sufficiently enough to demonstrate their veracity.”\textsuperscript{395} What is

\textsuperscript{385} Id. ¶ 7.80.
\textsuperscript{386} Id. at 43–50.
\textsuperscript{387} Id. ¶ 7.98.
\textsuperscript{388} Id. ¶ 7.119.
\textsuperscript{389} Id. ¶ 7.121.
\textsuperscript{390} Id. ¶ 7.122.
\textsuperscript{391} Id. ¶ 7.124.
\textsuperscript{392} Id. ¶ 7.131.
\textsuperscript{393} Id. ¶ 7.132.
\textsuperscript{394} Id. ¶ 7.146.
\textsuperscript{395} Id. ¶ 7.134.
a sufficient explanation will be determined on a case-by-case basis, and the bar will be higher where the “emergency” is less intense.\(^{396}\) The panel itself would “review whether the measures are so remoted from, or unrelated to,” the emergency that it is not plausible that the “measure is for the protection of its essential security interests arising out of the emergency.”\(^{397}\) Ultimately, the panel determined that Russia met the exception, but only barely, since Russia refused to justify their actions responding to the national security threat in anything but hypotheticals.\(^{398}\)

By holding Russia’s actions reviewable, the panel gave some teeth to the WTO agreements by ensuring Article XXI would not provide a non-reviewable loophole to the parties’ obligations. By not assessing Russia’s role and arguably illegal actions under international law in creating the national security situation in the first place, the panel avoided passing judgment on an issue governed outside of the WTO agreements and outside the expertise of the panel. The action the WTO legitimized was not Russia’s invasion of Ukraine, but its imposition of traffic measures.

D. Section 232 Likely Does Not Qualify Under Article XXI

Under the interpretations of Article XXI(b) provided above, it is unlikely the U.S. national security tariffs on steel would survive scrutiny. Many other WTO members also do not think the United States’ actions under Section 232 comply with WTO rules. China, India, the European Union, Canada, Mexico, Norway, Russia, Switzerland, and Turkey have all filed complaints with the WTO,\(^{399}\) and several parties have reserved their third-party rights.\(^{400}\) Panels have been established for all cases.\(^{401}\)

The first step would be to determine whether the United States could

\(^{396}\) Id. ¶ 7.135.

\(^{397}\) Id. ¶ 7.139.

\(^{398}\) Id. ¶¶ 7.148, 7.114.

\(^{399}\) Request for Consultations by Canada, United States—Certain Measures on Steel and Aluminium Products, WTO Doc. WT/DS550/1 (June 1, 2018); Request for Consultations by China, United States—Certain Measures on Steel and Aluminium Products, WTO Doc. WT/DS544/1 (Apr. 5, 2018); Request for Consultations by the European Union, United States—Certain Measures on Steel and Aluminium Products, WTO Doc. WT/DS548/1 (June 1, 2018); Request for Consultations by Mexico, United States—Certain Measures on Steel and Aluminium Products, WTO Doc. WT/DS551/1 (June 5, 2018); Request for Consultations by Norway, United States—Certain Measures on Steel and Aluminium Products, WTO Doc. WT/DS552/1 (June 12, 2018); Request for Consultations by Russia, United States—Certain Measures on Steel and Aluminium Products, WTO Doc. WT/DS554/1 (June 29, 2018); Request for Consultations by Switzerland, United States—Certain Measures on Steel and Aluminium Products, WTO Doc. WT/DS556/1 (July 9, 2018); Request for Consultations by Turkey, United States—Certain Measures on Steel and Aluminium Products, WTO Doc. WT/DS564/1 (Aug. 15, 2018).

\(^{400}\) FEFER, supra note 33, at 1.

\(^{401}\) See, e.g., Constitution of the Panel Established at the Request of Canada, United States—Certain Measures on Steel and Aluminium Products, WTO Doc. WT/DS550/12 (Jan. 25, 2019).
invoke one of the predicate situations provided for in Article XXI(b)(i)–(iii). The recent steel orders do not fall under the first situation relating to fissionable materials. The second condition is “relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment.” “Relating to” would require an ends-means fit between trafficking of goods to supply the military and the measure at issue.

The main issue would be how indirect the supply to the military may be. The steel targeted by the current steel orders is almost entirely for civilian uses, not for supplying the military. This condition sounds like it could qualify for the steel orders, since the purpose of the orders is to have the capacity to supply the United States’ defense needs in the future. Steel might be “indirectly” supplying a military establishment by providing relief to the domestic industry so it can continue its long-term supply, including to the military. When the United States first began drafting a national security exception for an international agreement, the security exception covered measures “relating to the traffic in arms, ammunition and implements of war, and, in exceptional circumstances, all other military supplies.” This formulation is much narrower and would cover actual arms trafficking, such as what International Traffic in Arms Regulations (ITAR) covers, and other military supplies, but only in exceptional circumstances.

While drafting the national security exception, representatives from the military pushed for a more expansive category than this initial proposal, despite concern from State Department officials. A broadening change was approved by the United States in its internal debates to include “such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment.” State Department officials interpreted this language to include “only that portion (meaning specific shipment of specific goods) . . . with the end purpose of actually supplying the military[,] whether going directly to the military or to private hands.” The military representatives wanted to add the words “directly or indirectly” to bring the text into harmony with the then proposed Munitions Control Act. This language was likely to clarify that the provision covered supplies that would

---

402. Pinchis-Paulsen, supra note 329, at 128.
404. Pinchis-Paulsen, supra note 329, at 138.
405. Id. at 142.
406. Id. (citing U.S. Dep’t of State, ECEFP, Meeting Minutes, ECEFP M-23/46, at 6–7 (July 19, 1946)).
407. Id. at 154.
end up supplying the military, even if not being directly shipped to the military or perhaps being used as an input material for a product made to the military.

The drafters thought this language only applied to specific shipments, not the general class of material. So, the United States would be able to prohibit Raytheon from importing steel that was being used to create supplies contracted for by the military, even though that shipment of steel was not going to the military directly. Or more directly, when a private party enters into a government contract, the government could require a company to source only domestic materials. The ability for future military supply rationale here is likely too attenuated to fall under this exception since the actual shipments of steel that are subject to tariffs are not being used to supply the military. This limit makes sense if the United States wanted to avoid situations where countries would limit the trade of numerous dual-use raw materials in the name of national security.

The last situation covered in Article XXI(b)(iii) is measures “taken in time of war or other emergency in international relations[.]” In some sense, the United States is constantly “in [a] time of war” or “other emergency in international relations,” since it fights in so many conflicts. Explaining the view of the U.S. negotiators understanding of emergency, a State Department official explained that “the U.S. had in mind the situation that existed before it entered the Second World War at the end of 1941, where the U.S. government ‘required, for our own protection, to take many measures which would have been prohibited by the Charter.’” 408 This indicates that the measures taken would need some connection to a war or other emergency in international relations. Without such a connection, a nation could always be in wars and violate the WTO agreements. Another telling sign was that the panel in Russia—Measures Concerning Traffic in Transit did not consider Russia “in a state of war,” but rather that it was involved in an “other emergency in international relations” even though Russia is involved, for example, in the Syrian conflict. Because the action was taken in response to the armed hostilities in Ukraine, this was the security issue that the panel considered relevant.

Another relevant issue is how hostile a situation needs to be to qualify as an “other emergency in international relations.” The panel report in Russia—Measures Concerning Traffic in Transit determined “other emergency in international relations” likely means a “situation of armed conflict, or of latent armed conflict, or of a heightened tension or crisis, or of

408. Id. at 170–71 (citing U.N. Economic and Social Council Comm’n A, Verbatim Report on Its Thirty Third Meeting, GATT Doc. E/PC/T/A/PV/33, at 20 (July 24, 1947)).
general instability engulfing or surrounding a state.” This definition comports with the drafting history of the United States’ proposal, which shows a relaxation from “in time of war or imminent threat of war” to “in time of war or other emergency in international relations,” indicating less than a formal war was required to invoke the exception.

The United States is not as geographically close to its conflicts, unlike Russia, who is in an armed conflict over its border with Ukraine, suggesting a less imminent threat. Additionally, the United States’ concerns over its steel production is not based on current conflicts, but rather potential future conflict. “Emergency of international relations” likely refers to current or imminent emergencies, not concern over future conflict. Therefore, the United States is unlikely to fall under Article XXI(b)(iii).

One major difference between the situation in Russia—Measures Concerning Traffic in Transit and the U.S. measures is that the essential security interest, the measure, and the event that qualified for Article XXI(b)(iii) were all related. Because the United States itself never cited “war,” armed conflict, or any impending emergency that was not economic as a reason for enacting the recent steel orders, this lack of connection between all of the components of Article XXI(b) might make the United States’ argument for falling under that exception much weaker.

It is possible that a panel would doubt the chapeau of Article XXI(b) would be met in “good faith.” As its “essential security interests,” the U.S. can argue that a domestic source of steel to supply its military would amount to an interest “relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats.” However, the United States is not in danger of being unable to supply the military with domestic steel, and the United States has long been aggressively using trade remedies to protect the steel industry’s economic interests. This may lead a panel to question whether the United States was making the argument in good faith.

If the WTO did find the United States in violation of the GATT and unable to qualify for the National Security exception, the United States...
would not necessarily have to remove the tariffs. The United States could just compensate the complaining parties or allow for countermeasures to be levied against the United States’ imports.415

VI. RECOMMENDED LEGISLATIVE SOLUTIONS

The best avenue for limiting presidential actions under Section 232 is for Congress to amend Section 232. Congress is institutionally the most competent actor to define the limits around this national security and trade power. Action from Congress would alleviate the need for the courts to implement a stronger delegation doctrine, as discussed in Part III. Congressional action will also keep the courts from defining “threaten to impair the national security,” which does not have an obvious definition. The courts are also not necessarily the right body to define “threaten to impair the national security,” since the definition itself may inherently involve policy determinations.

Because of the strong domestic economic effects tariffs have, there are competence and institutional reasons for why Congress is the better body for making domestic, economic policy decisions.416 Though the executive may be able to act quicker in “emergency situations,” concerns of domestic production capacity and “economic weakening” of industries has not happened so quickly that Congress cannot deal with the issue. Additionally, Congress has acted quickly in certain emergency situations.417 While courts should assume government actors act in good faith, Congress does not need to accept this assumption as fact. The current administration has used Section 232 as a means of leveraging trade negotiations, and many have speculated that national security is not the true driver for action.418 “Gentleman’s agreements” that everyone act in good faith is not sufficient to ensure reasonable exercise of discretion. These broadly-worded statutes are

415. See generally FEFER, supra note 33.

416. See supra Section III.C.


worrisome because they are susceptible to abuse.\(^{419}\)

Suggesting Congressional action as a solution is always problematic because the actual likelihood of Congress being able to act is low,\(^{420}\) especially as polarization increases.\(^{421}\) Due to its many voices and competing interests, Congress passes relatively little legislation.\(^{422}\) But the President’s trade policy and threatened or real action under “national security” statutes are in the headlines. Tariffs were even mentioned in the cold open of Saturday Night Live’s Season 44 finale.\(^{423}\) Several bills have been introduced in Congress concerning Section 232.\(^{424}\) Because of the public attention, there might be enough pressure to get over Congressional gridlock. In this section, I suggest several possible actions for Congress to cabin the discretion and power of the President under Section 232.

One possibility is for Congress to amend Section 232 to add some sort of “legislative veto.” The Supreme Court in \textit{INS v. Chadha} determined that congressional action affecting the legal rights of others must meet bicameralism and presentment.\(^{425}\) There are still uses for legislative vetoes, regardless of bicameralism or presentment issues. For one, even if there is no actual, legal effect, legislative vetoes provide a signal from Congress that may affect how others behave.\(^{426}\) Congress still holds the power of the purse.\(^{426}\)

---


\(^{420}\) Lawrence C. Marshall, “Let Congress Do It”: The Case for An Absolute Rule of Statutory Stare Decisis, 88 \textit{Mich. L. Rev.} 177, 188 (1989) (“[T]he power of congressional leaders is largely a negative power; they often can control the agenda in a manner that effectively kills certain proposed legislation.”).

\(^{421}\) Cynthia R. Farina, \textit{Congressional Polarization: Terminal Constitutional Dysfunction?}, 115 \textit{Columbia L. Rev.} 1689, 1701 (2015) (“Based on the widely used empirical measure, DW-Nominate, congressional polarization has been steadily and consistently increasing since the 1980s.”).


\(^{423}\) Saturday Night Live, \textit{Don’t Stop Me Now Cold Open – SNL}, \textit{YouTube} (May 18, 2019), https://www.youtube.com/watch?v=ejAdjFC28Y (at 0:26 and 2:55) (Alec Baldwin as Donald Trump “[finally having time in the summer to do things like] enjoying all the fantastic new tariffs on China” and Kate McKinnon as Wilbur Ross “Do you guys like tariffs? $100 bucks for a tomato? I’m not sweating it”).

\(^{424}\) \textit{FEFER, supra} note 33.

\(^{425}\) See \textit{INS v. Chadha}, 462 U.S. 919 (1983) (finding the one house legislative veto unconstitutional). While this legislative veto is bicameral, a new law would need to be effectively passed to satisfy the constitutional requirements of new legislation, so the President could veto any Congressional disapproval unless Congress secured a two-thirds vote in each house.

and such a strong statement might signal to the President that program funding important to him might suffer. Another is the poor optics of the President unilaterally acting in an originally legislative area, despite the disapproval of Congress. This scenario would likely hurt the President’s prospects of reelection.

Congress added a mechanism for a congressional disapproval resolution for presidential actions under Section 232 against petroleum or petroleum product imports in 1980.\textsuperscript{427} While this disapproval mechanism was never used,\textsuperscript{428} Congress and the courts did act in other ways that induced President Carter to rescind his actions under Section 232 in regards to petroleum imports in 1980.\textsuperscript{429} The disapproval resolution as written may not be constitutionally enforceable, unless Congress presented such resolution to the President.\textsuperscript{430} Subsequent to this amendment, no Section 232 action against petroleum imports has been implemented, even though several investigations were launched.\textsuperscript{431} If the President knows Congress does not approve of his use of Section 232 to the point that Congress passes a bicameral disapproval resolution, he may be less likely to continue his Section 232 measure.

Another option would be to keep presidential determinations under Section 232 from taking legal effect until Congress acts (or fails to act after a certain time period). This may get around the “legislative veto” limit in Chadha, since Congress would not be overriding “law.” Rather, approval by Congress would be a necessary step in implementing the measure.

Another option would be for Congress to increase procedural hurdles. For example, an independent agency, like the ITC, could launch the investigation of whether there is a situation that “threatens to impair the national security.” The ITC may not be a security expert, but it is an expert on how imports affect the domestic industry.\textsuperscript{432} It regularly releases expert economic reports\textsuperscript{433} and makes domestic injury determinations in anti-legislation “nonetheless may affect behavior”).

\textsuperscript{427} Fefer, supra note 33.

\textsuperscript{428} Id. at 37. A bill a disapproval was introduced, but the Senate indefinitely postponed the bill after it passed the house. Id.

\textsuperscript{429} Through another bill that ended Presidential action and was attached to a bill that raised the public debt ceiling, something Carter desperately needed passed. See id. The courts disapproved of the mechanism President Carter used as it was not only against imports. See Indep. Gasoline Marketers Council, Inc. v. Duncan, 492 F. Supp. 614, 618 (D.D.C. 1980).

\textsuperscript{430} 19 U.S.C. § 1862(f).

\textsuperscript{431} Fefer, supra note 33.


dumping and countervailing duty cases. Because the ITC is an independent agency, it is under less presidential control than an agency like the Department of Commerce, where the secretary can be removed at will. Another option would be for another Department, such as the Department of Defense, to agree to the findings and recommended action by Commerce before the President could act. It makes sense to require both an economic and a defense agency to agree to action under Section 232, since it blends security and economic concerns. This would at least ensure that multiple agencies, hopefully not captured by the same actors, think action under the statute is appropriate.

Congress could allow judicial review of such action, though this may not be meaningful without substantive amendments giving courts better guidelines for review under the statute. Allowing a form of “arbitrary and capricious” review would at least ensure the Department of Commerce considers and responds to all arguments made by the public.

Congress could also amend the substance of Section 232 to ensure it has made the major policy decisions. Congress could define what “threaten to impair the national security” or what “national security” means. However, this task might not be easy or realistic for Congress. It would be hard to agree on a definition that appeases both parties and is still specific enough to evade abusive interpretation. The easiest substantive amendment may be to specify that “threaten to impair the national security” requires some imminence. An issue with the current steel order is that its justifications regarding dependence on foreign imports and complete collapse of the domestic industry seems like a distant problem. Secretary Mattis stated that the U.S. military requirements for steel only amount to three percent of U.S. production and that the findings in the report would not impact the ability of the DOD to supply its defense programs. An imminence issue also supports shifting the power from Congress to the President who can act quicker. If this is a longer-term economic or security issue that does not require immediate action or technical expertise (enacting a tariff does not require much), there is no reason for the President to act over Congress. Congress could still delegate exclusion requests or the more technical issues to the appropriate executive agencies.

Congress could also repeal Section 232 in its entirety, though allowing

---


435. See Memorandum from the Sec’y of Defense, supra note 84.
the President to act in imminent cases where imports “threaten to impair the national security” is not always a normatively bad idea. Especially with the recent experience of a global health pandemic, one might be open to the comparatively more agile actor protecting domestic industries that make, for example, personal protective equipment from imports during or leading up to a potential crisis rather than leaving such action to Congress.

VII. CONCLUSION

Ultimately, the power and discretion given under Section 232 is broad and highlights the importance of separation of powers and structural issues in the United States’ system of government. While the demands of modern government have created a need for Congress to delegate power, Congress should be careful in doing so. Because the executive branch can act quickly, is controlled by a single political party, and is also susceptible to special interests, Congress should either be more detailed in its delegations or provide more procedural protections. With Section 232, there is little meaningful judicial review, the only prerequisite for presidential action is a finding by another executive agency (whose head the President gets to appoint and gets to remove at will), and the authority conferred by the statute is broad. Congress should be concerned about that level of unchecked power. The courts could change their approach to nondelegation claims, but Congress amending these broad statutes is the most democratically-legitimate solution. This would ensure Congress, the most institutionally competent actor and the branch whose delegation is subject to abuse in the first place, solves the problem.