19-1727

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

AMERICAN INSTITUTE FOR INTERNATIONAL STEEL, INC., SIM-TEX, LP, KURT ORBAN PARTNERS, LLC,

Plaintiffs - Appellants

v.

UNITED STATES, KEVIN K. MCALEENAN, Commissioner of U.S. Customs and Border Protection,

Defendants - Appellees

Appeal from the United States Court of International Trade in case no. 1-18-CV-00152, before a Three-Judge Panel consisting of Judge Claire R. Kelly, Judge Jennifer Choe-Groves, and Judge Gary S. Katzman.

CORRECTED BRIEF OF PLAINTIFFS-APPELLANTS AMERICAN INSTITUTE FOR INTERNATIONAL STEEL, INC., and SIM-TEX, LP, KURT ORBAN PARTNERS, LLC.

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August 23, 2019

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FORM 9. Certificate of Interest **Form 9**
Rev. 10/17

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

American Inst. for Int'l Steel **v.** United States

Case No. 19-1727

CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ■ (appellant) ☐ (respondent) ☐ (appellee) ☐ (amicus) ☐ (name of party)

American Institute for International Steel, Inc., SIM-TEX, LP, and Kurt Orban Partners, LLC

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
American Institute for International Steel, Inc.	American Institute for International Steel, Inc.	N/A
SIM-TEX, LP	SIM-TEX, LP	N/A
Kurt Orban Partners, LLC	Kurt Orban Partners, LLC	N/A

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court **(and who have not or will not enter an appearance in this case)** are:

Morris, Manning and Martin, LLP: Donald B. Cameron, Julie C. Mendoza, R. Will Planert, Brady W. Mills.

George Washington University Law School: Steve Charnovitz and Alan Morrison

Vanderbilt University Law School: Timothy L. Meyer

Law Offices of Gary N. Horlick: Gary N. Horlick

FORM 9. Certificate of Interest **Form 9**
Rev. 10/17

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. *See* Fed. Cir. R. 47. 4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary).

N/A

8/9/2019
Date

/s/ Donald B. Cameron
Signature of counsel

Please Note: All questions must be answered

Donald B. Cameron
Printed name of counsel

cc: _____

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I. STATEMENT OF RELATED CASES

Pursuant to Federal Circuit Rule 47.5(a), appellants are not aware of any other appeal in or from the same civil action or proceeding in the lower court that was previously before this or any other appellate court. Pursuant to Federal Circuit Rule 47.5(b), appellants are also unaware of any case pending before the U.S. Court of International Trade ("CIT") that will be directly affected by this Court's decision in this case.

II. INTRODUCTION

This case presents a facial challenge to section 232 of the Trade Expansion Act of 1962, as amended, 19 U.S.C. § 1862,[1] and its use to impose more than $4.7 billion of tariffs on steel products. Appellants allege that section 232 unconstitutionally delegates legislative power to the President in violation of Article I, Section 1 of the U.S. Constitution and principles of separation of powers. A three-judge panel of the Court of International Trade held that it was bound by the decision in *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976), which reversed a statutory holding by the D.C. Circuit that license fees were not an authorized remedy under section 232. In that context, the Supreme Court held that construing section 232 to authorize the use of license fees would not result in an unconstitutionally broad delegation.

[1] The full text of section 232 is provided in the Addendum.

Appellants ask this Court to rule that *Algonquin* is distinguishable because the delegation issue presented there was vastly different from the facial challenge to section 232 made by appellants here. On the merits, they ask the Court to hold that the lack of any legislative boundaries in section 232 enables the President to do whatever he chooses regarding tariffs, quotas, or other restrictions on imports and, therefore, it is an unconstitutional delegation of legislative power.

III. STATEMENT OF JURISDICTION

Appellants appeal from the final judgment of the CIT, which had jurisdiction under 28 U.S.C. § 1581(i)(2) & (4). Pursuant to 28 U.S.C. § 255, a panel of three judges was convened to hear this constitutional challenge. On March 25, 2019, the CIT entered a final judgment granting the motion of appellees for judgment on the pleadings and disposing of all claims in the case. Appx1. That day, appellants filed their notice of appeal to this Court pursuant to 28 U.S.C. § 1295(a)(5).

IV. STATEMENT OF ISSUES

1. Did the Court of International Trade erroneously conclude that *Algonquin* controls the outcome of this action?

2. Is section 232 facially unconstitutional on the ground that it does not impose any boundaries or limits on the President's powers under it and therefore constitutes an improper delegation of legislative authority and violates the principles of separation of powers established by the Constitution?

V. RELEVANT CONSTITUTIONAL & STATUTORY PROVISIONS

Section 232 of the Trade Expansion Act of 1962, as amended, 19 U.S.C. § 1862 ("section 232"), is set forth in full in the Addendum to this brief.

VI. STATEMENT OF THE CASE

On March 8, 2018, relying on section 232, the President imposed a 25% tariff on all imported steel products. Appx3058-3064. Appellants are an association of importers and users of imported steel products, and other entities and individuals who are adversely affected by that tariff. In the CIT, they argued that section 232 unconstitutionally delegates legislative power to the President and that therefore the tariffs are invalid. Their complaint seeks only declaratory and injunctive relief. If they prevail, some of the members of appellant American Institute for International Steel, Inc. ("AIIS") will have claims for refunds. However, many of the members of AIIS (such as makers of steel products, companies in the supply chain, longshoremen, and employees of AIIS members) also have been and continue to be injured by the reduction in imports caused by the tariffs and have no claim for refunds or other damages and hence their harms are irreparable.

On cross-motions for summary judgment, there were no material facts in dispute and defendants raised no standing or other objections to deciding the merits. The CIT did not rule on appellants' constitutional claim, although two judges noted that section 232 "seem[s] to invite the President to regulate commerce

by way of means reserved for Congress," Appx14, and the third wrote separately that "it is difficult to escape the conclusion that the statute has permitted the transfer of power to the President in violation of the separation of powers." Appx28 (Katzmann, J., dubitante). Nonetheless, the CIT concluded that it was bound by the Supreme Court's decision in *Algonquin*, which rejected a limited nondelegation argument with respect to section 232 and, therefore, granted judgment on the pleadings for defendants.

A. Operation of Section 232

Section 232 was enacted pursuant to the power granted exclusively to Congress in Article I, Section 8 of the Constitution "[t]o lay and collect [t]axes, [d]uties, [i]mposts and [e]xcises" as well as its authority "[t]o regulate [c]ommerce with foreign [n]ations." Section 232(b) directs the Secretary of Commerce (the "Secretary") on the application of any department or agency, the request of an interested party, or on his own initiative, to undertake an investigation to determine the effects of imports of a particular article of commerce on the national security. Addendum1. Within 270 days of initiating the investigation, the Secretary is required to submit a report to the President, which includes his findings on whether that article is "being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security," and his recommendations for action by the President. Addendum2. Under section 232(c),

the President has 90 days to determine whether to concur with the findings of the Secretary, and if he concurs, to "determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of [that] article and its derivatives so that such imports will not threaten to impair the national security." Addendum2.

Although the determination by the Secretary under section 232(b) and the President's action under section 232(c) are tied to "national security," section 232(d) includes an essentially unlimited definition of national security:

> 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.

Addendum3-4 (emphasis added). As a result, section 232(d) effectively allows the President to impose any remedies he chooses to "adjust" imports under section 232(c) if he concludes that any imported article may adversely affect any aspect of the nation's economy.

Section 232 also provides no limit or guidance on which types of import adjustments the President may impose. The President may increase existing tariffs by any amount and may impose unlimited new tariffs on goods that Congress has

previously determined are duty-free. The President may also impose quotas—whether or not there are existing quotas—with no limit on the extent of the reduction from any existing quota or import levels. In addition, the President could choose to impose licensing fees for the subject article, either in lieu of or in addition to any tariff or quota already in place. And for all these changes in the law, the President may select the duration of each such change—or make the duration indefinite—and he may do so with no advance notice or delay in implementation.

Under section 232(c), the President has an unlimited range of other choices in determining what adjustments to imports he wishes to make, with no guidance from Congress as to how to make them. For example, there is no guidance in section 232 as to whether or when the President should treat imports from various foreign countries on a nondiscriminatory basis, nor any guidance on whether or when to exempt some countries, or some segments of an industry, from an otherwise applicable tariff or quota. Similarly, although the imported articles subject to a section 232 investigation may vary widely in their uses, quality, specifications, availability in the United States, and thus in their relation to national security—as they do for imported steel—the President is permitted to disregard those differences, or take them into account, in his unfettered discretion.

There is also no requirement that the President must, or must not, take into account adverse consequences on downstream industries and U.S. consumers from a proposed tariff or other adjustment, nor is there any guidance as to how to do so if he chooses to take into account some or all such consequences. Those consequences include: (1) raising the prices of domestic products made using the imported article; (2) causing American workers to lose their jobs or work fewer hours; (3) favoring imported finished products that contain or are produced from the imported article and that can be sold at lower prices in the United States because the tariff does not apply to them; or (4) reducing foreign markets for U.S. exports as a result of higher domestic input prices or retaliatory foreign tariffs, as foreign countries have imposed here. The President is, in effect, empowered to make the kinds of distributional and policy choices that the Constitution assigns to Congress.

Section 232 also lacks procedural protections that might limit the unbridled discretion that it confers on the President. Although the President may order a remedy under section 232 only if he concurs with a finding by the Secretary that imports of the subject article may threaten to impair the national security, the President is not bound by any findings of the Secretary, and he is not required to base his decision on the Secretary's report or on the information provided to the Secretary through any public hearing or submission of public comments.

The President is also not required to provide an opportunity for the public to comment on the remedy he is considering, and the Secretary's request for comments in this case did not identify any specific options that he or the President were considering. Nor is the President required to explain his decision in light of what he or prior presidents have done under section 232 involving the same articles.

Section 232 does not provide for judicial review of orders by the President, and because the President is not an agency under 5 U.S.C. § 551(1), judicial review is not available under the Administrative Procedure Act, 5 U.S.C. § 706. Furthermore, the Department of Justice, on behalf of the United States, has taken the position in another proceeding, with which appellants agree, that once

> the President received the report that constitutes the single precondition for his exercise of discretion under Section 232(c), concurred in its findings, and took the action to adjust imports that was appropriate "in the judgment of the President." 19 U.S.C. § 1862(c). [The] decision to take action was the President's to make, and his exercise of discretion is not subject to challenge [in court].

Appx54, Defs.' Mot. to Dismiss at 16–17, *Severstal Export GMBH, et al. v. United States*, 2018 WL 1779351 (CIT 2018); *id.* at 19 ("the President's exercise of discretion pursuant to Section 232 is nonjusticiable").

B. The President's 25% Tariff

On April 19, 2017, the Secretary opened an investigation into the impact of steel imports under section 232. As part of that investigation, the Secretary held a

public hearing on May 24, 2017, and provided for the submission of written statements by interested persons. On January 11, 2018, the Secretary sent the President a report entitled "The Effect of Imports of Steel on the National Security" (hereinafter, the "Steel Report"). Appx366-628. The Steel Report recommended a range of alternative actions, including global tariffs, each of which had the stated objective of maintaining 80% capacity utilization for the U.S. steel industry, but with no explanation as to how a particular trade barrier would accomplish that result. Appx428-431.

As a statute purporting to be based on national security concerns, section 232(b) requires the Secretary to consult with the Defense Department, but the President is not bound by what that Department recommends, nor even required to take it into consideration. In this case, the Secretary of Defense concluded that his Department "does not believe that the findings in the reports impact the ability of DoD programs to acquire the steel or aluminum necessary to meet national defense requirements." Appx3056.

Despite this response from the Defense Department, the President issued Proclamation 9705 on March 8, 2018, Appx3058-3064, which imposed the 25% tariff at issue in this on all imported steel articles from all countries except Canada and Mexico, effective March 23, 2018. On March 22, 2018, the President amended Proclamation 9705 to temporarily exempt the EU, Korea, Brazil and

Argentina as well as Canada and Mexico pending the outcome of negotiations. Proclamation 9711, Appx3073-3078. The President subsequently amended these Proclamations with the result that the 25% duties were imposed on Canada, Mexico and the EU, effective June 1, 2018 while steel quotas were imposed on steel imported from Korea in lieu of the duty. Proclamation 9740, Appx3079-3102. Subsequently, quotas were also imposed in lieu of 232 duties on imports from Brazil and Argentina. Proclamation 9759, Appx3103-3124. Australian imports are not subject to either the 25% tariff or quotas, whereas the imports from all other countries, including Canada, Mexico, and the EU, were subject to the 25% tariff. Then, on August 10, 2018, President Trump issued Proclamation 9772, Appx3138-3142, which doubled the tariff on steel imported from Turkey—and no other country. Eventually, the President rescinded the double tariffs on Turkish steel imports and also set aside the tariffs for Mexico and Canada. Proclamation 9886, 84 Fed. Reg. 23,421 (May 21, 2019).[2]

The 25% tariffs imposed under section 232 are not based on any showing of illegal trade practices by steel producers in the less-favored countries. Those

[2]To date, the President has applied section 232 only to imports of steel and aluminum, but on May 23, 2018, the Secretary commenced an investigation into whether imports of automobiles, including automotive parts, threaten to impair the national security. The investigation has concluded with a positive (but still secret) finding of impairment, with which the President has concurred, but has withheld imposing adjustments to those imports for a period of six months. Proclamation 9888, 84 Fed. Reg. 23,433 (May 21, 2019).

practices are already the basis of separate remedial tariffs on narrowly defined products from certain countries issued under the antidumping and countervailing duty laws of the United States. As of January 11, 2018, for the steel industry alone, there were 164 such orders in effect, and there were an additional 20 publicly announced investigations underway. Appx616-619. Thus, the tariffs at issue here are in addition to any duties already imposed on imports of particular steel articles under these trade remedy statutes.

C. Proceedings Below

The complaint was filed on June 27, 2018, along with a motion under 28 U.S.C. § 255 to designate a three-judge panel of the CIT to hear and determine the constitutional issues presented by appellants. Appx47-48. Appellant AIIS is a non-profit membership corporation that brought this action on behalf of its 120 members. AIIS's members, who include appellants Sim-Tex, LP ("Sim-Tex") and Kurt Orban Partners, LLC ("Orban"), have various business connections with the imported steel products that are subject to the 25% tariff challenged in this action. They include companies that use imported steel in the manufacture of their own products, traders in steel, importers, exporters, freight forwarders, stevedores, shippers, railroads, port authorities, unions, and other logistics companies, all of which have been and will continue to be adversely affected by the 25% tariffs and quotas on imported steel products. Together, AIIS's members handle, import,

ship, transport, or store approximately 80% of all imported basic steel products in the United States. Appx165. Appellants' motion for summary judgment included a Statement of Undisputed Facts, Appx157-160, which appellees did not dispute. A three-judge panel heard oral argument on December 19, 2018, and issued its decision on March 25, 2019.

Appellees' principal argument was that the Supreme Court's decision in *Algonquin* is controlling on the delegation question. Appellants argued that *Algonquin* is distinguishable on two grounds. First, the petitioners to the Supreme Court in *Algonquin*, who were government agencies and officials, confined the question presented to a statutory question based on the narrow factual circumstances underlying the plaintiffs' challenge in that case. In response, the *Algonquin* plaintiffs did not present the Court with a facial or even a direct delegation challenge to section 232. Instead, they argued that the "adjustment" to imports permitted by the law extended only to the imposition of quotas and did not permit the President to impose the import licensing fees at issue there.

The *Algonquin* plaintiffs buttressed their narrow statutory claim with the argument that to construe section 232 to permit the imposition of licensing fees would render the statute unconstitutional as an undue delegation of legislative power. It was in that narrow context that the Supreme Court considered the constitutional delegation issue with respect to section 232. The Court concluded

that interpreting the statute to permit the President to impose licensing fees did not constitute a violation of the nondelegation doctrine under the "intelligible principle" standard laid down in *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). *Algonquin*, 426 U.S. at 559. The Court then proceeded to decide the statutory construction issue presented by the plaintiffs and found in favor of the Government.

Second, it is now undisputed that any substantive challenge to a President's exercise of discretion under section 232 would be precluded by the post-*Algonquin* decisions in *Franklin v. Massachusetts,* 505 U.S. 788 (1992), and *Dalton v. Specter,* 511 U.S. 462 (1994). That preclusion of any meaningful judicial review, on top of the unbounded powers to pick whatever remedy the President prefers, removed the final check to guard against this unlimited delegation by Congress, which was available in *Algonquin*.

On the merits, appellants pointed to the fact that section 232(d) expanded the national security trigger for invoking section 232(c) to include *any* significant impact on the national economy or any segment thereof, as well as the unlimited choices of remedies if the requisite injury from imports was found. The heart of appellants' claim was that section 232 contained no "boundaries," as required by *Yakus v. United States,* 321 U.S. 414, 423 (1944). This lack of congressionally imposed limits on the exercise of the President's power under section 232 is

evidenced by the fact that appellees were unable to identify *any* action regarding imports that the President could not take under section 232. In that respect, appellants argued, section 232 is like the law at issue in *United States v. Lopez*, 514 U.S. 549 (1995), where the Court rejected the Government's Commerce Clause argument because the Government could not identify any actual or hypothetical federal law that could not be upheld on the theory that it offered.

The CIT did not accept the *Algonquin* distinctions proposed by appellants. Instead, it concluded that it was "bound by Algonquin." Appx8, Appx11, Appx29. Although the court differed from appellants on whether the status of judicial review today differs from what it was at the time of Algonquin, Appx9-11, the court agreed that "the broad guideposts of subsections (c) and (d) of section 232 bestow flexibility on the President and seem to invite the President to regulate commerce by way of means reserved for Congress, leaving very few tools beyond his reach." Appx13-14. Moreover, the court agreed that the scope of judicial review under section 232 is constitutionally problematic: "the President could invoke the statute to act in a manner constitutionally reserved for Congress but not objectively outside the President's statutory authority, and the scope of review would preclude the uncovering of such a truth." Appx15. Nevertheless, the court held that "such concerns are beyond this court's power to address, given the Supreme Court's decision in *Algonquin*." *Id*.

Judge Katzmann filed an opinion dubitante. Appx16-29. He did not disagree to the point of dissent on whether the panel had the authority under *Algonquin* to reach the merits of appellants' constitutional claim, but he expressed grave concerns about the breadth of the delegation here, concluding, "[i]f the delegation permitted by section 232, as now revealed, does not constitute excessive delegation in violation of the Constitution, what would?" Appx29.

D. The Petition for Certiorari Before Judgment

After they filed their notice of appeal, appellants filed a petition for a writ of certiorari before judgment under 28 U.S.C. § 1254(1), 28 U.S.C. § 2101(e), and Rule 11 of the Supreme Court. *American Institute for International Steel v. United States,* No. 18-1317. The United States opposed. It argued that appellants' claim was barred by *Algonquin*, that the petition was premature, and that the outcome in another delegation case pending in the Court, *Gundy v. United States,* No. 17-6086, might offer guidance.

The Court affirmed *Gundy* on June 20th, by a vote of 5-3. *Gundy v. United States*, 139 S. Ct. 2116 (2019). Justice Kagan wrote the plurality opinion, and Justice Gorsuch wrote the dissent for himself, Chief Justice Roberts, and Justice Thomas. Justice Kavanaugh did not participate. Justice Alito provided the fifth vote to affirm. Although he did not agree with the plurality on either the statutory or constitutional issue, *id.* at 2131, Justice Alito indicated that in a case more

properly presenting the delegation issue with a full complement of Justices, he might re-consider the application of that doctrine. *Id.* at 2130-31. Four days later, the Court denied review of appellants' petition.

VII. SUMMARY OF ARGUMENT

1. *Algonquin* is not a barrier to reaching the merits of this delegation challenge. To be sure, section 232 was at issue in *Algonquin*, and the unsuccessful challenge there did include a delegation argument. However, the context in which the delegation issue was raised there was very different from this case. Before the Court in *Algonquin* was the narrow question whether interpreting section 232 to authorize the remedy of imposing licensing fees would render the statute unconstitutional as an excessive delegation. The Court was not called upon to consider the sort of boundless exercise of power by the President over imports that is presented in this case. Accordingly, the CIT erred in concluding that *Algonquin* controls of the outcome of this litigation.

The plaintiffs in *Algonquin* objected only to the type of section 232 remedy that was imposed, not to anything else. Those plaintiffs agreed that the statute allowed the President to set quotas, but not to require licensing fees. In an effort to sustain that statutory argument, the plaintiffs contended that, to construe section 232 to allow licensing fees, would create an undue delegation of legislative power, and so the statute should be read more restrictively. In that context, the Supreme

Court found no delegation problem with section 232 and, addressing the merits, agreed with the Government that section 232 permitted the imposition of licensing fees as well as quotas.

By contrast here, appellants have mounted a facial challenge to the operation of section 232, arguing that its lack of boundaries undermines its entire legitimacy, such that the President has no constitutional authority to use section 232 to impose tariffs or any other remedy even if he concludes that imports may threaten the national security or, as in this case, one industry within our annual $20 trillion economy.

The Supreme Court's decision in *Gundy* demonstrates an additional reason why *Algonquin* does not bind this Court. In contrast to *Algonquin*, the *Gundy* plurality first carefully reviewed the entire statute at issue and concluded that it did not give the Attorney General broad powers, but limited his discretion to create exceptions only where fuller implementation would not be "feasible." *Gundy*, 139 S. Ct. at 2121, 2128. It was only as so construed that the plurality had to face the delegation issue, which it found "easy" to resolve in favor of sustaining it because feasibility determinations are a classic form of delegations that do not offend Article I. By contrast, the *Algonquin* court addressed the delegation question first, rather than focusing on whether, if section 232 was read to allow licensing fees and quotas, that limited choice of remedies would create a delegation problem.

2. Section 232 violates the prohibition on delegation of legislative authority because it contains no boundaries that cabin the discretion of the President in adjusting imports into this country. On the front end, section 232(b) allows him to impose remedies whenever imports "may threaten to affect the national security." National security is a capacious term on its own, but Congress has multiplied its reach by including any import that affects the national economy or any segment thereof. On top of this open-ended trigger, there are no boundaries on what remedies the President may choose if he decides that imports of steel products may create such a threat. He may impose tariffs or quotas or licensing fees or embargoes, or any combination of them. Moreover, there are no limits or even ranges of increases in the level of tariffs or quotas, and he may impose them on products that were not previously subject to any restrictions. He need not treat all countries the same, as exemplified by his doubling of the tariffs from Turkey alone, and he may treat all imports of a product such as steel the same, even though the Secretary has created 177 different categories for tariff purposes. Or he could treat them differently because Congress has simply not spoken on that matter. Finally, although there are very significant adverse impacts of these tariffs on many segments of the economy, the President is free to disregard them – or take them into account – whatever he chooses. In short, Congress gave the President a

"blank check," *Gundy*, 139 S. Ct. at 2144 (Gorsuch, J. dissenting), and he has filled it in to his liking, with no court having the power to question any of his decisions.

The Government has relied on the "intelligible principle" rationale first stated in *Hampton* to sustain section 232. But just as Justice Gorsuch observed in *Gundy*, the Government's version of the intelligible principle test in this case "divorc[es] a passing comment from its context, ignoring all that came before and after, and treating an isolated phrase as if it were controlling." *Gundy*, 139 S. Ct. at 2139. Justice Gorsuch also pointed out that the tariff adjustment at issue in *Hampton* could only be based on a factual finding that the cost of production of a given import was higher in the United States than in the primary competing country, *id.* at 2139, which is light years from the trigger in section 232 of a threat to impair our national security or economic well being, including that of any industry. An even greater contrast between this case and *Hampton* is evident from comparing what the President was permitted to do there – increase existing tarriffs by no more than 50% – to what section 232 allows: the President may impose tariffs in any amount, with no caps or formulas to follow. Furthermore, unlike under section 232, judicial review was available to assure that the required statutory determinations were followed there. Accordingly, when assessing whether Congress has provided an "intelligible principle" to confine the person or agency to which the authority to act has been assigned, it is essential to keep in

mind the narrow statute that formed the basis of that principle when passing on the delegation allowed by section 232.

Appellants recognize, as did the plurality in *Gundy*, that the modern administrative state could not function without giving agencies substantial authority to implement legislative directions, and they do not believe that striking down section 232 would have a significant impact beyond the statute itself. That is because the Government has been unable to identify *any* action that the President could take with regard to imports that would be forbidden by section 232, let alone that a court could set aside because there is no judicial review of what the President did here. That statement cannot be made with respect to any statute that has been upheld against a delegation challenge. In this respect section 232 is like the statute that was struck down in *Lopez,* which relied on the Commerce Clause to make it a federal crime for a person to possess a gun within 1000 feet of a school. Part of the Court's rationale for concluding that Congress had gone too far was that neither the Government nor the dissent could point to any limits if its theory were accepted. *Id*. at 564. That same fundamental defect of lack of boundaries applies to section 232, but not to the other statutes relied on by appellees to sustain section 232. For that reason, section 232 is an outlier and may be struck down without fear of crippling the administrative state.

VIII. ARGUMENT

A. Standard of Review

This Court reviews decisions of the CIT *de novo*. *Global Commodity Group LLC v. United States*, 709 F.3d 1134, 1138 (Fed. Cir. 2013); *Walgreen Co. v. United States*, 620 F.3d 1350, 1354 (Fed. Cir. 2010).

B. *Algonquin* Does Not Control the Outcome of This Case

The CIT concluded that this case was controlled by the Supreme Court's decision in *Algonquin.* Appellants agree that the validity of claims of excessive delegation must be assessed based on the specifics of the statute at issue and that *Algonquin* ruled on a delegation claim regarding section 232. However, because the claim there was fundamentally different from the claim being made in this case, *Algonquin* does not decide this delegation claim.

To begin, the claim of the *Algonquin* plaintiffs was quite limited: they only objected to the type of adjustment to oil imports that had been imposed by the President. They raised no claim that oil imports did not threaten the national security under section 232, nor would such a claim been availing because, as the D.C. Circuit noted, the primary use of section 232 since it was enacted in 1955 was to place various restrictions on oil imports. *Algonquin SNG, Inc. v. Federal Energy Administration*, 518 F.2d 1051, 1052-54 (D.C. Cir. 1975). Rather, their principal claim was that section 232 limited the remedies to quotas and did not permit the use of licensing fees (a fixed charge, based on each barrel of oil

imported) and presumably not to tariffs (a percentage charge, based on the price per barrel), although the order at issue did not utilize tariffs as was done here.

As part of their statutory argument, the *Algonquin* plaintiffs contended that, if section 232 were read broadly to permit the use of licensing fees, that would raise a delegation problem. Therefore, it urged that section 232's remedial provision should be read narrowly in order to avoid having to decide the constitutional issue. Because the Court of Appeals agreed with the plaintiffs on the statutory issue, it did not discuss the delegation argument.

The Government then petitioned for certiorari solely on this question:

> Whether Section 232(b) of the Trade Expansion Act of 1962 authorizes the President-upon a finding that oil is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security-to adjust the imports of oil by imposing a system of license fees on such imports.[3]

Brief for Federal Energy Administration, *Algonquin,* 426 U.S. 548, 1976 WL 181331 at 2. In its merits brief the Government focused almost exclusively on the statutory interpretation issue. Finally, on page 52, in footnote 38, it addressed the delegation issue as follows:

> Nor is there any need "to read the Act narrowly to avoid constitutional problems" (*National Cable Television Ass'n v. United States*, 415 U.S. 336, 342). In the area of foreign affairs and national security, where the President requires sufficient flexibility to adapt quickly to changing conditions, broad delegations of authority are both common

[3] As the CIT noted, Appx7 n4, what was section 232(b) in 1976 is now section 232(c), but the substance of the law remains unchanged.

> and constitutionally permissible. *See, e.g., United States v. Curtiss-Wright Corp*., 299 U.S. 304, 319-322; *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp*., 333 U.S. 103, 109; *Lichter v. United States*, 334 U.S. 742.

Id. at 58, n. 38.

The plaintiffs, for their part, had only a slightly more extended delegation argument, devoting less than five pages (41-46) of their 97-page brief to this issue. Fully half of that discussion focused on the constitutional avoidance doctrine, not on the strength of the delegation argument itself. Its principal reliance was on a case from the predecessor of this Court – *Star-Kist Foods, Inc. v. United States*, 275 F.2d 472 (C.C.P.A. 1959), which did *not* find an unconstitutional delegation – and it included some general discussion of the delegation doctrine, including a mention of the "intelligible principle." *Id.* at 44. It noted that section 232 contains "no guidance as to the rate of tax or method of determining a tax to be imposed," *id.* at 45, but did not object to the level of the licensing fees or suggest that imposing them had a greater impact than would a comparable restriction imposed through quotas. Significantly, plaintiffs did not seek to rely on or distinguish any of this Court's delegation cases, but instead pointed to a number of statutes with narrower delegations and one case – *United States v. Yoshida International*, 526 F.2d 560 (C.C.P.A. 1975) – which also upheld the statute there. *Id.* at n. 52.

The Government devoted half of its 8-page reply brief to the delegation issue. It began by pointing out the underlying error in plaintiffs' delegation argument which, if accepted, would mean that "neither a quota *nor* a fee could properly be imposed by the President." Reply Brief at 1-2 (emphasis in original). For further support, the Government relied on *Hampton* and *American Power & Light Co. v. Securities & Exchange Commission*, 329 U.S. 90 (1946), as well as the three cases cited in its opening brief. Reply Brief at 2-4.

The Supreme Court agreed with the Government and ruled that the President could impose licensing fees under section 232. *Algonquin*, 426 U.S. at 571. Justice Marshall, writing for the Court, rejected plaintiffs' suggestion that it should construe the remedial portion of section 232 narrowly in order to avoid having to decide a serious delegation question: "Even if 232(b) is read to authorize the imposition of a license fee system, the standards that it provides the President in its implementation are clearly sufficient to meet any delegation doctrine attack." *Id.* at 559. After briefly reviewing *Hampton* and *American Power & Light* and the "intelligible principle" on which they rely, the Court concluded that section 232(b) "easily fulfills that test." *Id.* That was because, observed the Court, "the leeway that the statute gives the President in deciding what action to take in the event the preconditions are fulfilled is far from unbounded." *Id.* Based on its reading of section 232 as requiring that the President must consider the factors set forth in the

statute, the Court stated that "we see no looming problem of improper delegation that should affect our reading of section 232(b)." *Id.* at 560 (footnote omitted).

In light of the Supreme Court's rejection of the delegation argument in *Algonquin,* and especially its use of "clearly sufficient," "far from unbounded," and "easily fulfills," it is understandable that the CIT believed it was bound by *Algonquin.* Understandable, yes, but correct, no. That is because in the law "Context matters." *See e.g., Grutter v. Bollinger,* 539 U.S. 306, 327 (2003); *King v. Burwell,* 135 S. Ct. 2480, 2489, 2409, 2492 (2015); *id.* at 2497 ("Context always matters. Let us not forget, however, *why* context matters: It is a tool for understanding the terms of the law, not an excuse for rewriting them") (Scalia, J., dissenting). And it matters here because the context in which this delegation challenges arises is vastly different from that in *Algonquin* and the "looming problem of improper delegation," which the Court found lacking there, is front and center here.

This case resembles *Algonquin* mainly because both involve section 232, but the constitutional arguments in *Algonquin* and plaintiffs' claims in this case are significantly different. In *Algonquin, "*[a]ll parties to this case agree[d] that section 232(b) authorizes the President to adjust the imports of petroleum and petroleum products by imposing quotas on such imports," *Algonquin*, 426 U.S. at

551, whereas here appellants are arguing just the opposite: the President may not constitutionally apply section 232 at all. Moreover, the *Algonquin* plaintiffs' delegation argument was one of constitutional avoidance: the Court should construe the remedial provision in section 232 to limit the President's options to quotas because the contrary reading would raise a delegation question, whereas here appellants bring a facial challenge to the constitutionality of section 232.

Furthermore, neither before, during, nor after *Algonquin*, did any President ever use section 232 to impose tariffs on a particular product or an entire industry based on his own "judgment" that imports "may threaten to impair" our economy, and that, as a remedy, tariffs or other protections may be ordered to protect a domestic industry. Given the narrow set of circumstances in which section 232 had been used prior to *Algonquin,* 518 F.2d at 1052-53, there is no way that the *Algonquin* Court could have envisioned the use to which section 232 was put in this case and how its lack of boundaries would enable the President to do what he did here.

In Point C.2., *infra,* appellants demonstrate that the lack of meaningful judicial review is a significant part of the reason why section 232 is unconstitutional. However, after rejecting the delegation argument, the *Algonquin* Court found against plaintiffs on their statutory claim that the President was required to use quotas instead of licensing fees as a remedy under section 232.

Algonquin, 426 U.S. at 562. Appellants differ with the Government (and the CIT) as to whether the law on judicial review of decisions by the President involving section 232 has changed since *Algonquin* was decided in 1976. But there is no doubt that if a plaintiff who paid these tariffs on imported steel alleged, for example, the lack of a connection between steel imports and national security, or objected to the levels of tariffs imposed on different imports or from different countries, or to the exclusion of some countries, but not others, from the tariffs, appellees would take the position that all of those determinations are matters committed to the discretion of the President and hence are outside the province of any federal court. Whatever the law may have been in 1976 regarding the reviewability of the President's decisions under section 232, the fact is that each of the courts in *Algonquin* decided all of the plaintiffs' claims on the merits, and the Government never made a non-reviewability argument of the kind that defendants make now in section 232 cases.[4]

The Supreme Court's recent decision in another delegation case, *Gundy*, provides an additional reason why this Court should not read *Algonquin* as the CIT did. As in *Algonquin,* there were both statutory and delegation issues, and the plurality was quite clear as to the order in which the issues should be decided:

[4] In addition to their statutory claim, the plaintiffs in *Algonquin* raised procedural and environmental impact statement claims, which were rejected in the district court, but not passed on thereafter. *See* Appendix to *Algonquin*, 518 F.2d 1051 at 1067-69.

> a nondelegation inquiry always begins (and often almost ends) with statutory interpretation. The constitutional question is whether Congress has supplied an intelligible principle to guide the delegee's use of discretion. So the answer requires construing the challenged statute to figure out what task it delegates and what instructions it provides.

Id. at 2123. Once the *Gundy* plurality decided that the discretion of the Attorney General was limited to excusing compliance with the statutory requirements only for reasons of "feasibility," the plurality concluded that the delegation "easily passes muster." *Id* at 2129*; id.* at 2121 (limiting discretion to feasibility, "easily passes constitutional muster"); *id.* at 2129 (answer to delegation question is "easy"). On the other hand, the plurality observed that, if the statute were read in the open-ended way that the dissenters said it did (which is how both appellants and the Government read section 232), "we would face a nondelegation question." *Id.* at 2123.

The dissent, while differing markedly on how to read that statute, did not suggest that it was proper to do the delegation analysis before deciding what the statute said because, as the plurality observed, "once a court interprets the statute, it may find that the constitutional question all but answers itself." *Id.* at 2123. Thus, if the Court in *Algonquin* had first decided that Congress had authorized both licensing fees and quotas, the delegation issue would have been decided just as "easily" as in *Gundy*, and that ruling would have had no impact on this very different challenge.

But because the *Algonquin* Court, contra to *Gundy*, addressed the constitutional issue first, extra care must be taken not to divorce the discussion of the delegation doctrine from the statutory interpretation to which it applies Specifically, the Court's statement that the standards provided in section 232 are "clearly sufficient to meet any delegation doctrine attack" must be read in light of the narrow statutory issue before the Court regarding the use of license fees, a point that the Court drives home in the concluding paragraph:

> A final word is in order. Our holding today is a limited one. As respondents themselves acknowledge, a license fee as much as a quota has its initial and direct impact on imports, albeit on their price as opposed to their quantity. Brief for Respondents 26. As a consequence, our conclusion here, fully supported by the relevant legislative history, that the imposition of a license fee is authorized by § 232(b) 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. Aside from its importance as a universal reminder that the holdings of cases are limited to the issues and facts presented, that statement makes clear what the holding was – license fees, like quotas are lawful under section 232, and granting the president authority to impose such fees does not violate the nondelegation doctrine. The Court never considered the vastly broader statutory authority exercised by the President in the steel tariffs. Moreover, the warning that the President's powers under section 232 are not unlimited can only have meaning if the courts can police what he does, and it is

now clear that the courts do not have that power, which further undermines the applicability of *Algonquin* to this case.

Accordingly, the correct reading of *Algonquin* is that the delegation discussion must be limited to the statutory construction context in which it arose.

C. Because Section 232 Contains No Boundaries That Confine the President's Discretion in a Meaningful Way, It Is Unconstitutional

The Supreme Court's recent decision in *Gundy* makes clear that, in deciding whether a statute violates the delegation doctrine, the first step is to decide what the statute before the Court – here section 232 – means. An important corollary is that decisions in other delegation cases are helpful only to the extent that the statutes at issue in those other cases present similar delegation issues to those in this case. Accordingly, appellants will first examine the statute in the delegation case from which the "intelligible principle" is taken, which also involved the power to adjust tariffs, *Hampton, supra,* and compare it to what section 232 permits. After that, they will examine tariff cases from this Court, as well as Supreme Court decisions relied on by appellees, to show that nothing in them supports the delegation here.

To begin, unlike *Gundy* in which the parties (and the Justices) were sharply divided over whether the statute at issue there contains a very broad or quite narrow grant of discretionary power, both sides here, joined by the CIT, agree that

section 232 grants the President very wide discretion, which he has fully utilized here. To support its argument that section 232 contains meaningful standards, the Government argues that the law requires the President to find that an "'article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security'" and that he may act "only to the extent 'he deems necessary to adjust the imports . . . so that such imports will not threaten to impair the national security.'" US Cert Opp. at 11, *quoting Algonquin* at 429. The quoted terms from *Algonquin* are from section 232: whether they supply meaningful boundaries is the constitutional question, which can only be answered after the breadth of the statute is examined. On that question, the Government has never disagreed with the way that appellants have described what section 232 allows and what the President did to limit steel imports in this case.

1. Hampton and the "Intelligible Principle"

The statute at issue in *Hampton* was section 315 of title 3 of the Tariff Act of September 21, 1922, and is set forth at 276 U.S. at 401. Section 315 could only be used to "equalize the . . . differences in costs of production in the United States and the principal competing country" for the product at issue, and the remedy was limited to increasing existing duties, by no more than 50%, to offset the production cost advantages of the other country. *Id.* at 401. The *Hampton* litigation began in

the Court of Customs Appeals, which described what the President had to do before imposing additional tariffs:

> the President must, of course, ascertain three subsidiary facts: (*a*) What the principal competing country is; (*b*) what the cost of production is in the United States; and (*c*) what the cost of production is in the principal competing country. Second, he must find what amount of decrease or increase of rate is necessary to equalize such difference. When he has made these findings of fact, the mandatory duty is laid upon him by the statute to make proclamation accordingly; in this respect, the law gives him no discretion.

Hampton, Jr., & Co. v. United States, 14 U.S. Cust. App. 350, 362 (1927). Thus, on the front end – the trigger for the operation of section 315 –a comparison of the production costs in the United States and in its principal competitor for a specific product (there, barium oxide) was made to determine whether those costs were unequal, and if so, by how much. Once that factual determination was made, the President could only increase existing tariffs, by up to 50%, there from four to six cents per pound. Two other aspects of section 315 are significant as compared to section 232. The President had no discretion not to increase the tariffs if he found that the costs of production between the two countries were unequal, in contrast to the discretion he has under section 232 to accept or disregard the recommendations of the Secretary. And, for a remedy, the President could not impose tariffs on a product that was previously not subject to tariffs, and he could not use quotas or licensing fees to achieve the same end.

The statute had two other protections against the exercise of unlimited discretion by the President. First, an independent agency, the United States Tariff Commission, had to make the necessary findings regarding the comparative costs of production and in doing so had to give interested parties an opportunity to adduce evidence and to be heard. *Hampton,* 276 U.S. at 405. Second, in the Court of Customs Appeals, the importer claimed that, because the decisions of the President were not subject to judicial review, he could do whatever he pleased, which made the statute unconstitutional. *Hampton, Jr., & Co*, 14 U.S. Cust. App. at 367. The appeals court rejected the absence of judicial review premise because it "would be to give to the act of the President a peculiar sanctity and inviolability not attaching to the acts of other officials of the Government performing similar fact-finding duties; and this we are neither called upon to do nor justified by the law in doing." *Id.* at 369.

Given the statutory limits and the protections afforded under section 315, the Court sensibly observed that, while "[i]t may be that it is difficult to fix with exactness this difference [in production costs], but the difference which is sought in the statute is perfectly clear and perfectly intelligible." *Hampton,* 276 U.S. at 404. On this basis, the conclusion in *Hampton* that section 315 contained an "intelligible principle" is not an invitation to the courts to sustain a statute against a delegation challenge if they can find some overarching principle that can be said to

be the basis for the statute. Rather it must be understood to mean that statutes like section 315, with defined triggers (unequal costs of production) and narrow choices of remedies (no more than a doubling of an existing tariff), with a full administrative proceeding before an agency and full judicial review of the President's final determination, will be upheld against a delegation challenge.

Before turning to why section 232 does not come close to satisfying the conditions present in *Hampton,* it may be useful to understand why the courts must guard against unbridled delegations like that in section 232. In that regard, the discussion in the dissent in *Gundy*, with which the plurality did not disagree, explaining the importance of having the courts carefully scrutinize claims of excessive delegation of legislative power, is enlightening. *Gundy* at 2133-35. Among the overlapping goals that Justice Gorsuch identified, which support enforcing the obligation of Congress not to delegate the legislative function, are to serve as "bulwarks of liberty" (*id.* at 2134), "to promote deliberation" (*id.*), "to promote fair notice and the rule of law, ensuring the people would be subject to a relatively stable and predictable set of rules" (*id.*), and to "ensure that the lines of accountability would be clear." *Id.* at 2135. He recognized that permitting excessive delegations "would risk [laws] becoming nothing more than the will of the current President." *Id.* He further observed that

> The framers knew, too, that the job of keeping the legislative power confined to the legislative branch couldn't be trusted to self-policing

> by Congress; often enough, legislators will face rational incentives to pass problems to the executive branch. Besides, enforcing the separation of powers isn't about protecting institutional prerogatives or governmental turf. It's about respecting the people's sovereign choice to vest the legislative power in Congress alone. And it's about safeguarding a structure designed to protect their liberties, minority rights, fair notice, and the rule of law.

Id. It was for this reason that the courts must exercise their judicial independence "to call foul when the constitutional lines are crossed." *Id.*

2. The President's Unbounded Discretion under Section 232 Violates Principles of Separation of Powers

Under section 232(c), the President is free to act if he concurs in the finding of his own Secretary of Commerce that a product "is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security . . . ." National security is a broad term on its own, but Congress has vastly expanded it beyond its ordinary meaning in section 232(d):

> 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.

Addendum3-4 (emphasis added). The result is that national security in section 232 includes the impact of potentially any imported product on the economic welfare of any domestic industry. The President is expressly authorized to consider *any*

"other factors" he wishes, without any guidance or limit on what those factors might be. In this case, the President concurred in the national security determination even though his own Defense Department "does not believe that the findings" in the Secretary's reports "impact the ability of DoD programs to acquire the steel and aluminum necessary to meet national defense requirements." Appx3056. Thus, as defined in section 232(d), "national security" is a far cry from the principle of production cost equalization sustained in *Hampton*, or the principle of feasible implementation of Congressionally-prescribed registration requirements that the plurality found necessary to sustain the statute in *Gundy*.[5]

Even if the "national security" trigger in section 232 contained some boundaries, which it does not, the remedies authorized by section 232(c) constitute an excessive delegation of legislative power because the President has unfettered discretion to "determine the nature and duration of the action [*i.e.* trade barriers] that, in the judgment of the President, must be taken to adjust the imports of [steel] and its derivatives so that such imports will not threaten to impair the national security." As this case illustrates, section 232 contains no guidance on the kind,

[5] During oral argument in the CIT, Judge Kelly asked whether the President could impose an embargo on the importation of peanut butter under section 232 and whether that could be challenged in court. In a series of exchanges with both counsel, Appx3286, Appx3295-3296, Appx3306, Appx3313, counsel for the Government did not answer the question of whether such an order would be lawful, but was firm that "in terms of can the Court look behind the President's national security determination, that's not subject to judicial review, and it has never been that case." Appx3296.

amount, or duration of the action the President may take, with his imagination as the only limit.

The President's orders here are unmoored from any statutory limits under section 232. The President began by imposing a 25% tariff on all imported steel products, with temporary exemptions pending negotiations with selected suppliers. In the case of Canada, Mexico and the EU, he rescinded those exemptions. He imposed quotas of varying quantities for Korea, Brazil and Argentina without any showing that the alternatives were equivalent or that any differences in treatment had any justification under the statute. Subsequently, the President terminated duties on Canada and Mexico in order to eliminate the retaliation from both countries that was in place and in order to pass the United States-Mexico-Canada Agreement.[6] The President did not need to have any specific justification for the 25% tariff (which included products not previously subject to any tariff), and when he decided to double the tariff on steel imports from Turkey in August 2018, and then rescinded that order in May 2019, he did them both because he chose to do so, with nothing in section 232 requiring that he provide a legitimate basis for his decision. *Compare Department of Commerce v. New York,* 139 S. Ct. 2551, 2575 (2019) (setting aside determination because of "the disconnect between the decision made and the explanation given").

[6] Proclamation 9894, 84 Fed. Reg. 23,987 (May 19, 2019).

Second, the articles subject to import adjustment under section 232 will often vary in uses, quality, specifications, availability in the United States. and relation to national security. "Steel" encompasses a broad class of products ranging from flat-rolled steel to pipes and tubes, and from carbon steel alloy to stainless. The Secretary himself identified five main categories of imported steel products, comprised of 177 sub-categories. Appx391-392. The submissions to the Secretary identified substantial additional differences among steel products that would bear directly on the likely impact of their importation on the national security and the economy generally, yet section 232 offers no guidance on how the President should handle such variations or even how to define an "article." The President chose to disregard all of these differences because he could and because he was neither required to treat all imported steel products identically nor forbidden from doing so. More importantly, Congress did not include any guidance as to how to choose which differences to disregard or which ones he must/may treat separately. Despite the obvious fact that most broad categories of imported products that might threaten to impair our national security will have important differences, Congress said not one word in section 232 as to whether the President must, may, or must not treat them the same when acting under section 232.

In section 3 of Proclamation 9705, Appx3058-3064, the President directed the Secretary to create an administrative exclusion process, which he did. That did not, however, solve the delegation problem. As the Supreme Court made clear in *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457, 473 (2001): "Whether the statute delegates legislative power is a question for the courts, and an agency's voluntary self-denial has no bearing upon the answer." Moreover, the massive exclusion system—with its approximately 23,000 pending applications—not only highlights the limitless range of actions available to the President under section 232, but is also a recognition of the need to treat different products differently, but with no guidance from Congress on how to do so.

Third, section 232 does not provide the President with any guidance on whether and under what circumstances he should treat all imports of a given product the same, regardless of country of origin, or whether and under what circumstances he may or must treat some of them differently. If national security in section 232 were limited to national defense, as traditionally understood, that might provide some limits. In that case, "national security" might suggest that the President should take into account the geographic proximity of countries supplying the imports, or the fact that a country is a close ally, and therefore that supplies would likely continue when needed most. But because of section 232(d)'s inclusion of *any* product that has an impact of any kind on our economy, the

President may treat countries differently for any reason, for no reason, or for a reason that may have nothing to do "national security"—such as the President's personal relation with the leader of the exporting country, or to use as a bargaining chip over a wholly unrelated matter.

Fourth, tariffs, quotas, or any other actions the President may take regarding imports have adverse consequences on many segments of our economy, far beyond the increased price that buyers will have to pay for the imported product. Section 232 provides no guidance as to how or whether the President should take these inevitable consequences into account when deciding on an action under section 232(c). The most significant of these harms to others are set forth *supra* at 12-13, and while some may be unique to imported steel, most of these consequences are based on fundamental principles of supply and demand that Congress encounters whenever it drafts economic legislation. Nonetheless, section 232 does not contain so much as a hint as to how the President is to resolve the tradeoffs between the benefits to the protected domestic industry, versus the harms to the many parts of the economy adversely affected by import protection, when deciding what "action . . . must be taken to adjust the imports of [steel] and its derivatives so that such imports will not threaten to impair the national security." In short, the choices under section 232 are entirely up to the President, which is its constitutional downfall.

The unbridled substantive discretion that the President has under section 232 is not cabined in any way by procedural safeguards that would apply in most administrative proceedings. On the front end, the public could only submit their views on the general issue of tariffs or quotas on steel imports, but with no opportunity to comment on the specifics of any of the President's Proclamations before they were issued. Nor was the President's decision circumscribed by the submissions to the Secretary or his recommendations, and he was free of any obligation to respond to the principal objections made to the Secretary. Finally, even though the 25% tariff is surely having a major economic impact on our economy, no one was required to prepare an environmental impact statement or a cost benefit analysis under Executive Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993), or make any kind of rigorous analysis of the positive and negative effects of a proposed tariff or quota.

Last, and in addition to these multiple failures of Congress to provide some boundaries for the unbounded discretion of the President under section 232(c), there is no provision in section 232 for the judicial review of the President's decisions under it. Moreover, since the 1990s, the APA has not been available as an avenue for judicial review of the President's actions. In both *Franklin v. Massachusetts,* 505 U.S. 788 (1992), and *Dalton,* plaintiffs sought APA review of decisions made by the President under other statutes. The Court, however, refused

to consider the merits of those claims, although it did consider a constitutional claim in *Franklin*. *Franklin*, 505 U.S. at 796, 806; *Dalton*, 511 U.S. at 476. Rather, under the relevant statutes, only the final decision of the President can be challenged, *see Franklin*, 505 U.S. at 779, and because the President is not an agency under the APA, his actions are also not subject to judicial review for claims that his discretionary decisions failed to comply with the APA and the applicable substantive statutes. *Franklin*, 505 U.S. at 801; *Dalton*, 511 U.S. at 476. *See also supra* at 8, citing Defs.' Mot. to Dismiss at 19, *Severstal Export GMBH, et al. v. United States*, No. 18-00057 (CIT 2018), 2018 WL 1779351 ("the President's exercise of discretion pursuant to Section 232 is nonjusticiable").

To be sure, no Supreme Court decision has held that the availability of judicial review is a requirement of a constitutionally valid delegation, perhaps because it has been available, and in most cases been exercised, in all of the delegation cases in this Court since *Hampton*. *See Whitman* 531 U.S. at 479–480. However, the Court has emphasized that the absence of judicial review and other procedural protections heightens nondelegation concerns. *See Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 218–219 (1989) (reaffirming "our longstanding principle that so long as Congress provides an administrative agency with standards guiding its actions such that a court could *'ascertain whether the will of Congress has been obeyed,' no delegation of legislative authority trenching*

on the principle of separation of powers has occurred" (quoting *Mistretta v. United States,* 488 U.S. 361, 379 (1989) (emphasis added))). As then-Justice Rehnquist said in his concurring opinion in *Indus. Union Dep't AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 686 (1980), the intelligible principle requirement "ensures that courts . . . reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards." *See also Amalgamated Meat Cutters & Butcher Workmen of N. Am., AFL-CIO v. Connally,* 337 F. Supp. 737, 759–60 (D.D.C. 1971) (Leventhal, J., for three-judge panel) (emphasizing importance of judicial review in context of nondelegation claims as providing "some measure against which to judge the official action that has been challenged") (quoting *Arizona v. California*, 373 U.S. 546, 626 (1963)); *American Power & Light Co. v. SEC,* 329 U.S. 90, 105 (1946) ("Private rights are protected by access to the courts to test the application of the policy in light of these legislative declarations").

The failure of Congress to provide any judicial review of the President's compliance with section 232 removes even the theoretical possibility that a court could find an intelligible principle guiding or limiting the President's choices. That absence underscores the total transfer of legislative power from Congress to the Executive "so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed." *Yakus,* 321 U.S. at 426.

The absence of a judicial review provision applicable to section 232 is relevant for another reason. A provision for judicial review strongly implies that Congress has included standards or limits, which it expects the courts to enforce. Conversely, when Congress does not provide for judicial review, it suggests that there will be no role for the courts because there are no standards or limits to enforce, which is the case here. In short, instead of a judicial check, section 232 is "a blank check for the President" which this Court has been understandably reluctant to uphold. 139 S. Ct. at 2144 (Gorsuch, J., dissenting) (Congress may not issue "blank check to write a code of conduct governing private conduct of half-a million people"); *cf*. *Lopez*, 514 U.S. at 602 (Commerce Clause is not a "blank check" for Congress) (Thomas, J., concurring).

To be clear, appellants do not argue that either the absence of judicial review or the lack of other procedural protections on their own result in a violation of separation of powers. Rather, their position is that the availability of judicial review and/or other procedural protections provide some assurances that it is the will of Congress, not the President, that is the basis of the challenged action. Because the final protection against presidential arbitrary action—the ability of injured parties such as appellants to seek redress from Article III judges—is foreclosed under section 232, the President is free to do what he did here. He may unilaterally decide whether to impose trade barriers, which ones to utilize, at what

levels, for what duration, applicable to what products, which countries should receive exemptions, and whether to ignore the inevitable adverse consequences from imposing the selected barrier. By allowing such limitless discretion, Congress violated the nondelegation doctrine and created an administrative scheme that is inconsistent with the separation of powers and the checks and balances embedded in our Constitution.

3. The Relevant Authorities Support the Unconstitutionality of Section 232

No court has set aside a federal statute on delegation grounds since the Supreme Court did so almost 85 years ago in *Panama Refining Company v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). As noted above, three Justices would have done so in *Gundy*, and a fourth expressed his willingness to re-consider the application of the doctrine in an appropriate case. On the other hand, the Court had not set aside a federal statute that relied on the Commerce Clause in almost 60 years when it did so in *Lopez*, 514 U.S. 549 (1995), where the Court made the connection between the limits under federalism at issue there and those under separation of powers at issue here:

> Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.

Lopez, 514 U.S. at 552 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

The question in delegation cases is whether the statute at issue has granted too much authority to the Executive Branch, which means that the cases which are most relevant are those involving the statute at issue or statutes that are quite similar to it. Appellants have shown above that *Algonquin* is not helpful with respect to this challenge, and that *Hampton*, which upheld another tariff statute, supports appellants because the contrast between the narrow delegations of both the trigger and the remedy there and the capacious grant of power under section 232 could hardly be greater. *See also Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 297 (1933), where an increase in the rate of duty on sodium nitrite was permitted, but only "to equalize the differences in the costs of production in the United States and the principal competing country . . . ."

The test that appellants ask this Court to apply is quite simple and is taken from *American Power & Light Co. v. SEC.* There the Court concluded that it is "constitutionally sufficient if Congress clearly delineates the general policy… and the boundaries of this delegated authority." *American Power & Light Co*, 329 U.S. at 105. Because there are no boundaries in section 232 – the President can declare any import a threat to national security and may choose any measure, in any quantity he prefers, to reduce that threat, section 232 cannot stand. As we now show, no statute in the cases relied on by appellees here or in *Algonquin* comes close to the delegation in section 232.

Prior to *Hampton,* the Court rejected a delegation challenge in another trade case, *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892), which had both a far narrower trigger and a much more limited remedy than does section 232. The statute at issue there (quoted at 680) was limited to countries than produced any of five enumerated products which were admitted to the United States duty-free. If such country imposed "duties or other exactions upon the agricultural or other products of the United States," and the President concluded those duties were "reciprocally unequal and unreasonable," the only remedy was to suspend the duty-free status of those products. Moreover, the statute gave the President no discretion: if he made the requisite findings, he had to re-impose the suspended duties. *Id*. at 693.

Nor does *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), assist defendants. Congress approved a Joint Resolution setting forth the terms of an embargo of arms, and the President signed the exact resolution as dictated by Congress on the same day that the law was enacted. Because his only option was to concur in the findings in the resolution and order the embargo, the delegation holding there does nothing to support section 232.

Other cases relied on by appellees do not involve trade statutes and are readily distinguishable because the laws have either or both narrower triggers and much reduced choices of remedies – in addition to all having full judicial review.

For example, in *Opp Cotton Mills, Inc. v. Adm'r of Wage & Hour Div. of Dep't of Labor*, 312 U.S. 126 (1941), increases in the minimum wage could be authorized, but they could not go beyond 40 cents an hour, from the existing base of 30 cents an hour. In *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), the law at issue applied only to radio stations engaged in "chain broadcasting," a term that Congress had expressly defined and directed the FCC to regulate. *Id.* at 193, n.1. While Congress told the FCC to regulate as "required in the 'public interest, convenience, or necessity'" *id.* at 194, the law was enacted against a background of thirty years of radio regulation which Congress revisited on a regular basis. Moreover, there was a full administrative proceeding and the challengers' many claims on the merits were fully adjudicated.

The statute at issue in *Yakus*, 321 U.S. at 420, was a temporary World War II law that was designed "to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents." The administrator was to base his determinations on prices in the first half of October 1941 and was to permit only such increases as are "fair and equitable" based on other criteria in the statute. *Id.* at 421, 422. The Court upheld the statute where there were extensive administrative proceedings and full judicial review. The delegation issue arose in an unusual posture: if Congress had frozen all prices, there would have been no delegation claim. But if the claim had been upheld, the Court might well have

severed the unconstitutional "fair and equitable" standard for increases and concluded that Congress would have preferred no increases to no price controls.

The more recent delegation cases involve situations in which agencies were directed to engage in extensive regulation outside the trade area. *American Power & Light Co. v. SEC, supra,* involved a challenge to the ultimate standard to be applied under a very detailed statute designed to limit the power of public utility holding companies, after an extensive administrative proceeding, followed by full merits review. The statute, which was quoted by the Court of Appeals in note 1, *American Power & Light Co. v. Securities & Exchange Commission*, 141 F.2d 606 (1st Cir. 1944), recited the problems that led to its enactment and the goals that were assigned to the SEC in its implementation. Plaintiffs' delegation argument focused on the operative phrase requiring the SEC to "ensure that the corporate structure or continued existence of any company in a particular holding company system does not 'unduly or unnecessarily complicate the structure' or 'unfairly or inequitably distribute voting power among security holders.'" *American Power & Light Co.*, 329 U.S. at 104, quoting statute. The Court rejected that argument:

> Even standing alone, standards in terms of unduly complicated corporate structures and inequitable distributions of voting power cannot be said to be utterly without meaning, especially to those familiar with corporate realities. But these standards need not be tested in isolation. They derive much meaningful content from the purpose of the Act, its factual background, and the statutory context in which they appear.

Id.

At issue in *Mistretta v. United States*, 488 U.S. 361 (1989), were the guidelines designed to increase uniformity in sentencing for those convicted of a given crime and by comparison with those convicted of similar crimes. The challenge was that Congress had not made what Justice Scalia in his dissent characterized as "the decisions [that] . . . . are far from technical, but are heavily laden (or ought to be) with value judgments and policy assessments." *Mistretta*, 488 U.S. at 414 (Scalia, J., dissenting). The majority did not disagree that "Congress has delegated significant discretion to the Commission to draw judgments from its analysis of existing sentencing practice and alternative sentencing models," *id.* at 379, but nonetheless upheld the delegation because of the extensive directions included in the statute and summarized at 374-77. The Court will judge for itself whether the directions Congress provided in that statute are as open-ended as are the remedies under section 232, but one fact is indisputable: the trigger for the guidelines is a conviction for a federal crime, for which there is a statutory maximum, in contrast to the determination of an impairment to the national or economic security, which triggers section 232 that has no limits.[7]

[7] The objection in *Touby v. United States,* 500 U.S. 160, 163 (1991), was to the Attorney General's authority to temporarily schedule drugs under the Controlled Substances Act, 21 U.S.C. § 801 et seq., when doing so was "necessary to avoid an

Whitman is the Court's most recent pre-*Gundy* discussion of the nondelegation doctrine. Because of the fundamental differences between the portion of the Clean Air Act, 42 U.S.C § 7401 *et seq.* (CAA), at issue there and section 232, there is nothing in Justice Scalia's opinion that undermines plaintiffs' claim here. The objection raised in *Whitman* was that the EPA was required to, but had not, factored in costs in the rule it finally issued, and like the plaintiffs in *Algonquin*, the private parties raised the delegation claim as a means to achieve the desired statutory construction.

This is how the *Whitman* Court described the delegation argument:

> Section 109(b)(1) of the CAA instructs the EPA to set "ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on [the] criteria [documents of § 108] and allowing an adequate margin of safety, are requisite to protect the public health." The Court of Appeals held that this section … "lack[ed] any determinate criteria for drawing lines. It has failed to state intelligibly how much is too much."

Whitman, 531 U.S. at 472 (alterations in original) (citations omitted). That claim of improper delegation would be comparable to a claim here that Congress failed only in its duty to tell the President how much of a tariff increase was allowed. As the Court further explained:

> Section 109(b)(1) of the CAA, which to repeat we interpret as requiring the EPA to set air quality standards at the level that is

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imminent hazard to the public safety," principally because there was no immediate judicial review of that determination, not because of any open-ended statutory standard.

> "requisite"—that is, not lower or higher than is necessary—to protect the public health with an adequate margin of safety, fits comfortably within the scope of discretion permitted by our precedent.

Id. at 475-76.

Nothing in *Whitman* rejecting a delegation claim limited to one determination left to the EPA suggests that the Court would be willing to tolerate a law like section 232 that leaves wide open all of the significant questions that must be answered in determining how to respond to threats that imports of steel may impair the national security as broadly encompassed by section 232(d). Moreover, this case plainly falls on the "substantial" side of the line that the Court drew when it ruled that Congress "must provide substantial guidance on setting air standards that affect the entire national economy," but that far less guidance is necessary when the Executive determines relatively minor matters, like the definition of "country elevators." *Id.* at 475.[8]

Three other cases point up related constitutional concerns that support appellants' claim here. In *Clinton v. City of New York*, 524 U.S. 417 (1998), the Court struck down the Line Item Veto Act, which gave the President what the Court concluded were the equivalent of lawmaking powers. The Court concluded

[8] There was no claim in *Whitman* that the substances subject to the EPA's rules were uncertain, and hence that Congress had failed to define the triggering facts with reasonable precision, as is the problem with the all-inclusiveness that Congress has employed to determine national security in section 232.

that the Act did for the President what section 232 does here: transfer to him the authority to make law and not just implement it.

The other relevant Supreme Court rulings are *United States v. Davis*, 139 S. Ct. 2319 (2019), and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). In a series of opinions, the Court had found the residual clauses in a number of criminal sentencing statutes unconstitutional on the ground that they were void for vagueness, and it reached the same conclusion in the criminal statute at issue in *Davis* and the immigration law in *Dimaya*. The *Dimaya* Court's concerns are relevant here: the vagueness doctrine is "a corollary of the separation of powers—requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not." *Dimaya*, 138 S. Ct. at 1212. In his concurring opinion, Justice Gorsuch added that upholding vague statutes would allow Congress to abdicate its responsibility to make the law when "[i]t is for the people, through their elected representatives, to choose the rules that will govern their future conduct." *Id.* at 1227 (Gorsuch, J., concurring); *see also Davis*, 139 S. Ct. at 2325. And, although he dissented in *Dimaya*, Justice Thomas made the same connection between the two legal doctrines: "perhaps the vagueness doctrine is really a way to enforce the separation of powers—specifically, the doctrine of nondelegation. See Chapman & McConnell, *Due Process as Separation of Powers*, 121 Yale L. J. 1672, 1806 (2012) ('Vague statutes have the effect of

delegating lawmaking authority to the executive')." *Id.* at 1248 (Thomas, J., dissenting). That same congressional abdication is present in section 232, except that the lawmaking power is transferred to the President, rather than to the courts.

Appellees have relied on three trade decisions from this Court (or its predecessor) to sustain section 232, but the statutes in those cases are not comparable to section 232. *Star-Kist Foods* involved a protest by a U.S. company that an importer had paid too little duty because the President had reduced it under a statute that the protester argued contained an improper delegation. The statute, which is set forth in note 2, 275 F.2d at 474, applied only after the President had reached agreement with another country to reduce duties paid to it by American exporters in order to lessen trade barriers for them. In addition, as the Court observed, "because Congress cannot abdicate its legislative function and confer carte blanche authority on the President, it must circumscribe that power in some manner," *id.* at 480, which it did by limiting any reduction to 50%, unlike the open-ended increases permitted by section 232. Moreover, the President could not take items off the duty list or add new ones to it.

The delegation at issue in *Yoshida International, Inc.* could be invoked only in a time of war or if the President declared a national emergency, and was upheld because it provided "the flexibility required to meet problems surrounding a national emergency with the success desired by Congress." The objection was that

the statute allowed the President to regulate imports, but did not expressly provide for the imposition of duties, which he had set at 10%. 526 F.2d at 575. The Court rejected that construction, as the Supreme Court was to do a year later for section 232 in *Algonquin*, and found no further delegation problem in those circumstances because any increase could not exceed the levels in the existing tariff schedules, and increases were limited to articles for which there had been prior tariff concessions. *Id.* at 577.

Finally, in *Florsheim Shoe Co. v. United States*, 744 F.2d 787, 795 (Fed. Cir. 1984), the President's authority was "limited—although he may withdraw preferential treatment entirely, he may not adjust rates of duty." The power applied only to withdrawing preferences for developing countries that were direct competitors. The President was also required to consider eight factors listed in the statute, and he was forbidden from adjusting rates: he had to keep the preferences or remove them, and he had to do so on a product by product and country by country basis.

***

The viability of an unconstitutional delegation argument does not depend on broad statements of legal conclusions in judicial opinions, but on the specifics of the statute being challenged and the basis of that challenge. No case of which appellants are aware has upheld a delegation in a statute comparable to section

232, in which Congress abdicated its responsibility to establish boundaries for both the trigger finding and the available remedies. Moreover, there is neither any judicial review nor are there any other vital procedural protections to assure that the President obeys the expressed will of Congress. For all these reasons, section 232 violates the prohibition against granting legislative powers to the President and the system of separation of powers and checks and balances in the Constitution.

IX. CONCLUSION

For the foregoing reasons, the judgment of the Court of International Trade should be reversed, and the case remanded with directions that the Court enter judgment for the plaintiffs (a) declaring that section 232 is unconstitutional and that the steel tariffs and quotas imposed pursuant to it are unlawful, and (b) enjoining their further use.

Respectfully submitted,

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August 9, 2019

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ADDENDUM OF REQUIRED DOCUMENTS AND RELEVANT STATUTES

CONTENTS

UNITED STATES COURT OF INTERNATIONAL TRADE

AMERICAN INSTITUTE FOR INTERNATIONAL STEEL, INC., SIM-TEX, LP, and KURT ORBAN PARTNERS, LLC,

Plaintiffs,

v.

UNITED STATES and KEVIN K. MCALEENAN, Commissioner, United States Customs and Border Protection,

Defendants.

Before: Claire R. Kelly, Jennifer Choe-Groves & Gary S. Katzmann, Judges

Court No. 18-00152

JUDGMENT

Upon consideration of Plaintiffs, American Institute for International Steel, Inc., Sim-Tex LP, and Kurt Orban Partners, LLC's motion for summary judgment and Defendants, United States and Kevin K. McAleenan's motion for judgment on the pleadings, and all other papers filed in this action, and in accordance with the opinions issued on this date, it is

ORDERED that Plaintiffs' motion is denied; it is further

ORDERED that Defendants' motion is granted; and it is further

ORDERED that judgment is entered for Defendants.

/s/ Claire R. Kelly
Claire R. Kelly, Judge

/s/ Jennifer Choe-Groves
Jennifer Choe-Groves, Judge

/s/ Gary S. Katzmann
Gary S. Katzmann, Judge

Dated: March 25, 2019
New York, New York

Slip Op. 19-37

UNITED STATES COURT OF INTERNATIONAL TRADE

AMERICAN INSTITUTE FOR INTERNATIONAL STEEL, INC., SIM-TEX, LP, and KURT ORBAN PARTNERS, LLC, **Plaintiffs,** **v.** **UNITED STATES and KEVIN K. MCALEENAN, Commissioner, United States Customs and Border Protection,** **Defendants.**	**Before: Claire R. Kelly, Jennifer Choe-Groves & Gary S. Katzmann, Judges** **Court No. 18-00152**

OPINION

[Denying Plaintiffs' motion for summary judgment seeking a declaration that section 232 of the Trade Expansion Act of 1962 contains an impermissible delegation of legislative authority and granting Defendants' motion for judgment on the pleadings. Judge Katzmann files a separate dubitante opinion.]

Dated: March 25, 2019

Alan B. Morrison, George Washington University Law School, Donald Bertrand Cameron and Rudi Will Planert, Morris, Manning & Martin, LLP, of Washington, DC, and Gary N. Horlick, Law Offices of Gary N. Horlick, of Washington, DC argued for plaintiffs, American Institute for International Steel, Inc. a/k/a AIIS, Sim-Tex, LP, and Kurt Orban Partners, LLC. With them on the brief were Steve Charnovitz, George Washington University Law School, Julie Clark Mendoza and Brady Warfield Mills, Morris, Manning & Martin, LLP, of Washington, DC, and Timothy Lanier Meyer, Vanderbilt University Law School.

Tara Kathleen Hogan, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, and Jeanne E. Davidson, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendants. With them on the brief were Joshua E. Kurland and Stephen C. Tosini, Attorneys, and Joseph H. Hunt, Assistant Attorney General.

Kelly, Judge: Before the court are American Institute for International Steel, Inc., Sim-Tex LP, and Kurt Orban Partners, LLC's ("Plaintiffs") motion for summary judgment and Defendants' motion for judgment on the pleadings, and their respective supporting memoranda. See [Plaintiffs'] Mot. Summary J. & Mem. Supp., July 19, 2018, ECF No. 20 ("Pls.' Br."); Defs.' Mot. J. Pleadings & Opp'n Pls.' Mot. Summary J., Sept. 14, 2018, ECF No. 26 ("Defs.' Opp'n Br."). Plaintiffs seek declaratory and injunctive relief against enforcement of section 232 of the Trade Expansion Act of 1962, as amended 19 U.S.C. § 1862 (2012)[1] ("section 232"), on the grounds that, on its face, it constitutes an improper delegation of legislative authority in violation of Article I, Section 1 of the U.S. Constitution and the doctrine of separation of powers.[2] See Pls.' Br. at 16–42; see also U.S. Const. art. I, § 1. Defendants argue that Plaintiffs' claim is foreclosed by Fed. Energy Admin. v. Algonquin SNG Inc., where the Supreme Court stated that section 232's standards are "clearly sufficient to meet any delegation doctrine attack." Defs.' Opp'n Br. at 13 (quoting Fed. Energy Admin. v. Algonquin SNG Inc., 426 U.S. 548, 559 (1976)).[3] Alternatively, Defendants argue that the statutory scheme "amply satisfies the nondelegation doctrine." Id. at 14.

[1] Further citations to the Trade Expansion Act of 1962, as amended, are to the relevant provisions of the United States Code, 2012 edition.

[2] Basrai Farms appears as amicus curiae in this action and filed a brief in support of Plaintiffs' position and in opposition to Defendants' position. See generally Br. Basrai Farms Opp'n Defs.' Mot. J. Pleadings & Supp. Pls.' Mot. Summary J., Oct. 5, 2018, ECF No. 39.

[3] American Iron and Steel Institute ("AISI") and Steel Manufacturers Association ("SMA") appear as amici curiae in this action and filed a brief in opposition to Plaintiffs' position. See generally Br. Amici Curiae [AISI] & [SMA] Opp'n Pls.' Mot. Summary J., Sept. 14, 2018, ECF No. 30.

BACKGROUND

Section 232 authorizes the Secretary of Commerce to commence an investigation "to determine the effects on the national security of imports" of any article. 19 U.S.C. § 1862(b)(1)(A). The Secretary of Commerce must "provide notice to the Secretary of Defense" of the investigation's commencement and, in the course of the investigation, "consult with the Secretary of Defense regarding the methodological and policy questions raised[.]" 19 U.S.C. § 1862(b)(1)(B); 19 U.S.C. § 1862(b)(2)(A)(i). The Secretary of Commerce must also "(ii) seek information and advice from, and consult with, appropriate officers of the United States, and (iii) if it is appropriate and after reasonable notice, hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to such investigation." 19 U.S.C. § 1862(b)(2)(A)(ii)–(iii). The Secretary of Defense shall also, if requested by the Secretary of Commerce, provide to the Secretary of Commerce "an assessment of the defense requirements of any article that is the subject of an investigation conducted under this section." 19 U.S.C. § 1862(b)(2)(B).

Upon the investigation's completion or within the timeline provided, the Secretary of Commerce must provide the President with a report of the investigation's findings, advise on a course of action, and if the Secretary determines that the article under investigation "is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security," advise the President of the threat. 19 U.S.C. § 1862(b)(3)(A).

After receiving the Secretary of Commerce's report, if the President concurs with the finding that a threat exists, 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." 19 U.S.C. § 1862(c)(1)(A)(ii).

Additionally,

> By no later than the date that is 30 days after the date on which the President makes any determinations under paragraph (1), the President shall submit to the Congress a written statement of the reasons why the President has decided to take action, or refused to take action, under paragraph (1).

19 U.S.C. § 1862(c)(2).

Finally, section (d) lists the following factors that the Secretary and the President should consider when acting pursuant to the statute:

> (d) Domestic production for national defense; impact of foreign competition on economic welfare of domestic industries
>
> For the purposes of this section, the Secretary and the President shall, in the light of the requirements of national security and without excluding other relevant factors, give consideration to domestic production needed for projected national defense requirements, the capacity of domestic industries to meet such requirements, existing and anticipated availabilities of the human resources, products, raw materials, and other supplies and services essential to the national defense, 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. 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.

19 U.S.C. § 1862(d).

JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction under 28 U.S.C. § 1581(i)(2),(4) (2012). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." USCIT R. 56(a). "Judgment on the pleadings is appropriate where there are no material facts in dispute and the party is entitled to judgment as a matter of law." Forest Labs, Inc. v. United States, 476 F.3d 877, 881 (Fed. Cir. 2007) (citation omitted). Plaintiffs challenge the constitutionality of section 232. Compl. ¶ 11, June 27, 2018, ECF No. 10; Pls.' Br. at 3, 16–42. The issue of a statute's constitutionality is a question of law appropriate for summary disposition, which the court reviews "completely and independently." See, e.g., Demko v. United States, 216 F.3d 1049, 1052 (Fed. Cir. 2000).

DISCUSSION

Article I, Section I of the U.S. Constitution provides that "all legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, § 1. The Supreme Court established the standard by which delegations are to be judged in J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928), explaining that "[i]f Congress shall lay down by legislative act an intelligible principle to which the person

or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."

Since 1935 no act has been struck down as lacking an intelligible principle. See Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). The Supreme Court has upheld delegations of authority as sufficient to guide the executive branch where they contained standards such as: regulating broadcast licensing as "public interest, convenience, or necessity" require, National Broadcasting Co. v. United States, 319 U.S. 190, 225–26 (1943); ensuring that a company's existence in a holding company does not "unduly or unnecessarily complicate the structure" or "unfairly or inequitably distribute voting power among security holders[,]" American Power & Light Co. v. SEC, 329 U.S. 90, 104–05 (1946); and setting nationwide air-quality standards limiting pollution to the level required "to protect the public health." Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 472 (2001). Most importantly for the challenge here, in Algonquin, the Supreme Court found that section 232 "easily" met the intelligible principle standard because

> [i]t establishes clear preconditions to Presidential action[,] —[i]nter alia, a finding by the Secretary of the Treasury that an "article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security." Moreover, the leeway that the statute gives the President in deciding what action to take in the event the preconditions are fulfilled is far from unbounded. The President can 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." And §232(c),[4] [a]rticulates a series of specific factors to be

[4] Section 232 has been amended since the Supreme Court issued Algonquin. Under the current law, section 232(d) mirrors what was previously section 232(c) and section 232(c) enumerates the President's authority, as was previously codified in section 232(b). Section 232, substantively, remains the same in relevant part.

> considered by the President in exercising his authority under § 232(b). In light of these factors and our recognition that "(n)ecessity . . . fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules . . . ," we see no looming problem of improper delegation.

Algonquin, 426 U.S. at 559–60 (citation and footnote omitted). This court is bound by Algonquin.

Plaintiffs argue unpersuasively that Algonquin does not control because the plaintiffs in Algonquin "did not bring a facial challenge to the constitutionality of section 232," but rather challenged the President's statutory authority to impose a specific kind of remedy and argued for a narrow statutory construction to avoid a nondelegation problem. See Pls.' Br. at 31–33; Resp. Mem. Supp. Pls.' Opp'n Defs.' Mot. J. Pleadings & Reply Mem. Supp. Pls.' Mot. Summary J. at 4–7, Oct. 5, 2018, ECF No. 33 (Pls.' Reply Br."). This argument fails to carry the day, given that the parties in Algonquin argued the nondelegation issue, and the District Court for the District of Columbia and Supreme Court squarely addressed it. The district court ruled that section 232 is "a valid delegation of authority by Congress to the President and confers upon him the power to impose import license fees on oil imports once he determines the fact of threatened impairment of the national security." Algonquin SNG, Inc. v. Fed. Energy Admin., 518 F.2d 1051, 1063 (D.C. Cir. 1975) (Robb, J., dissenting) (attaching, in the Appendix, the U.S. District Court for the District of Columbia's opinion and order in this action stating that one thrust of the challenge is whether the proclamation at issue "is an unconstitutional delegation by Congress of legislative power"). Reversing the District Court, the U.S. Court of Appeals for the District of Columbia found that the President's license fee program was not

authorized by the statute, see id. at 1055, 1062. Thereafter, the Supreme Court squarely confronted the nondelegation challenge in response to the arguments put forth by parties in their briefs. Algonquin, 426 U.S. at 559–60.

Plaintiffs also argue that Algonquin does not control because, since its issuance, "the legal landscape of judicial review of presidential decisions involving implementation of federal statutes has changed markedly[.]" See Pls.' Br. at 29–30. Specifically, Plaintiffs argue that the Supreme Court's decisions explaining that the President is not an agency and therefore not subject to review under the Administrative Procedure Act ("APA") undercut Algonquin's relevance. See id. at 29–31 (citing Franklin v. Massachusetts, 505 U.S. 788 (1992); Dalton v. Specter, 511 U.S. 462 (1994)). Thus, Plaintiffs premise their quest to overcome Algonquin on their view that the Supreme Court and all parties in Algonquin assumed a more searching standard of judicial review, see id. at 29–30, and that without the availability of such review, the standards articulated in section 232 must be considered anew to ascertain whether they meet the intelligible principle standard. See id. at 30–33, 42.

Plaintiffs' premise cannot withstand scrutiny. Dalton and Franklin did not change "the legal landscape of judicial review" with respect to section 232. See Pls.' Br. at 29–30. Indeed, no court before or after Algonquin held that the President was subject to the APA. See 1 Kenneth Culp Davis, Administrative Law Treatise § 1.2 at 8 (2d ed. 1978); 1 Kristin E. Hickman & Richard J. Pierce, Jr., Administrative Law Treatise § 1.2.4 at 15 (6th ed. 2019); see also Franklin, 505 U.S. at 796, 800–01 (holding, definitively, that the

President is not subject to review under the APA).[5] More importantly for purposes of this case, the APA did not expand judicial review to include review of matters committed to presidential discretion. The Attorney General's Manual on the Administrative Procedure Act, considered an authoritative interpretation of the APA and entitled to deference, see Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 546 (1978), makes clear that presidential determinations committed to the President's discretion by an enabling statute are not subject to review for rationality, findings of fact, or abuse of discretion. See U.S. Dep't of Justice, Att'y Gen.'s Manual on the APA at 94–95 (1947) ("Manual") (noting, for example, that United States v. George S. Bush & Co., 310 U.S. 371 (1940), held that the President's actions under section 336(c) of the Tariff Act of 1930 were unreviewable because the statute left the determination to the President "if in his judgment" action was necessary); see also Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO v. Connally, 337 F. Supp. 737, 760 (D.D.C. 1971) (Leventhal, J., for three-judge panel) (noting the rare occasions when Congress commits matters to executive discretion to avoid judicial review for errors of law and abuse of discretion). In fact, Dalton acknowledged that prior decisions similarly found that matters committed to presidential discretion could not be reviewed for abuse of that discretion. Dalton, 511 U.S. at 474 (quoting Dakota Cent. Tel. Co. v. S.D. ex rel. Payne, 250 U.S.

[5] Courts had suggested, without deciding the question, that the APA applied to the President. See Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO v. Connally, 337 F. Supp. 737, 761 (D.D.C. 1971) (Leventhal, J., for three-judge panel) (noting scholars who believed the President was an agency under the APA); DeRieux v. Five Smiths, Inc., 499 F.2d 1321, 1332 & n.13 (Temp. Emer. Ct. App. 1974) (relying on Amalgamated Meat Cutters to review an executive order and stating that the court's analysis assumed, for the sake of argument, "that the President is an agency within the meaning of the APA.").

163, 184 (1919), for the proposition that "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'"). Thus, prior to Dalton, and at the time of Algonquin, there was no judicial review of matters that Congress had committed to presidential discretion—such as those the President makes under section 232—for rationality, findings of fact, or abuse of discretion. See George S. Bush & Co., 310 U.S. at 379–80; 19 U.S.C. § 1862(c)(1)(A)(ii).[6] Instead, both before and after Algonquin, courts assessed presidential determinations committed to presidential discretion pursuant to nonstatutory review for being unconstitutional or in excess of statutorily granted authority.[7]

[6] Plaintiffs, perhaps unintentionally, touch upon this idea in their reply brief, stating that "even if there w[as] an express provision for judicial review, the courts would be assigned an impossible task." Pls.' Reply Br. at 20. Indeed, the task would be impossible not because Dalton and Franklin changed the legal landscape for judicial review of presidential action, but because section 232 commits requisite determinations to the President's discretion. See 19 U.S.C. § 1862(c). Judicial review was as much of an "impossible task" in Algonquin as it is here; neither Dalton nor Franklin made it any more or less practicable. The delegation of decision-making authority in section 232 existed at the time of Algonquin and the Supreme Court nonetheless found that it "easily fulfills" the nondelegation test. Algonquin, 426 U.S. at 559. This court is thus bound by Algonquin.

[7] In addition to establishing judicial power to review the constitutionality of statutes, Marbury v. Madison, 5 U.S. 137 (1803), demonstrated that courts can review the President's power under a statute and determine whether the President acted in excess of such statutory powers. This latter form of review has been described as nonstatutory review and is to be contrasted with the type of judicial review provided for by a specific statute, such as the APA. See Jonathan R. Siegel, Suing the President: Nonstatutory Review Revisited, 97 Colum. L. Rev. 1612, 1613–14 (1997) (discussing nonstatutory review). For example, in United States v. Yoshida International, Inc., 526 F.2d 560 (C.C.P.A. 1975), the Court of Customs and Patent Appeals ("CCPA") addressed whether Presidential Proclamation 4074 was within the President's delegated authority. Proclamation 4074 declared, inter alia, a national emergency related to the country's economic position, and assessed a supplemental duty of 10% on all dutiable products. Yoshida International, 526 F.2d at 567–68. Further, the proclamation authorized the President to, at any

(footnote continued)

Here, determinations pursuant to section 232 are committed to presidential discretion. See 19 U.S.C. § 1862(c). Section 232 empowers the President to either concur or not in the Secretary's finding as to whether an article under investigation constitutes a threat to national security and to "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)(i)–(ii). The President's determination of whether to concur is not qualified by any language or standard, establishing that it is left to his discretion. Accordingly, the President's determination as to the form of remedial action is a matter "in the judgment of the President[.]" 19 U.S.C. § 1862(c)(1)(A)(ii). By committing the determinations of whether to concur with the Secretary and what remedial action to take, if any, to the judgment of the President, Congress precluded an inquiry for rationality, fact finding, or abuse of discretion. See Manual at 94–96; George S. Bush &

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time, modify or terminate, in whole or in part, any proclamation made under his authority. Id. at 568. The CCPA held that although neither the Tariff Act of 1930 nor the Trade Expansion Act of 1962 authorized the proclamation, its adoption fell within the powers granted to the President under the Trading with the Enemy Act, i.e., to regulate or prohibit importation of goods during periods of war or national emergency. Id. at 576. The court reviewed the action not under the APA or any statute conferring judicial review but sought to answer the question of whether Proclamation 4074 was an ultra vires presidential act. Id. at 583.

Likewise, U.S. Cane Sugar Refiners' Ass'n v. Block, 683 F.2d 399 (C.C.P.A. 1982), addressed whether the President acted within his delegated authority in issuing Proclamation 4941, which limited entry of sugar to a specific quantity between May 11, 1982, and June 30, 1982, and then to an amount as set by the Secretary of Agriculture. Under section 201(a) of the Trade Expansion Act of 1962, the President could proclaim additional import restrictions as deemed appropriate to carry out a trade agreement entered pursuant to section 201 between June 30, 1962, and July 1,1967. Id. at 401. The CCPA upheld the President's action, holding that the Geneva Protocol of the General Agreement on Tariffs and Trade, which the President invoked in the proclamation, is a trade agreement for purposes of section 201, and thus the President's act was authorized by statute. Id. at 402, 404. Such reviews of presidential action demonstrate the availability of nonstatutory review separate and distinct from review under the APA.

Co., 310 U.S. at 379–80. Notwithstanding Dalton and Franklin, because the statutory language here commits determinations to the President's discretion, the review available for presidential action has always been limited to constitutionality and action beyond statutory authority. Thus, there has been no change in the legal landscape since Algonquin as far as section 232 is concerned.

Nonetheless, Plaintiffs ask the court to consider the broad authority given to the President that triggers executive action, i.e., the "essentially unlimited definition of national security," as well as the "limitless grant of discretionary remedial powers," as indicative that the statute does not have an intelligible principle. See Pls.' Br. at 5–6, 19–20; see also 19 U.S.C. § 1862(c)–(d). Plaintiffs emphasize the expansive options available to the President to confront what he deems a national security issue. See Pls.' Br. at 6, 19–20. Plaintiffs argue the President is only limited by his imagination, see id. at 20, and that the President could take any number of actions under the statute, including

> imposing tariffs on goods that are currently duty-free and increasing tariffs above those currently existing under the law for the subject article—with no limit on the level of the tariff. Thus, section 232 permits the President to impose tariffs—taxes—in unlimited amounts and of unlimited duration on any imported articles—or, as in the case with the steel tariff, on an entire class of imported articles. The President may also impose quotas—whether or not there are existing quotas—and with no limit on how much a reduction from an existing quota (or present or historical level of imports) there can be for the subject article. In addition, the President could choose to impose licensing fees for the subject article, either in lieu of or in addition to any tariff or quota already in place. Conversely, the President may also reduce an existing tariff or increase a quota, whenever he concludes that such a reduction or increase is in the interest of national security, as elastically defined. And for all these changes in the law, the President may select the duration of each such change without any limits on his choice, and he may make any changes with no advance notice or delay in implementation.

Pls.' Br. at 6.[8] Admittedly, the broad guideposts of subsections (c) and (d) of section 232 bestow flexibility on the President and seem to invite the President to regulate commerce by way of means reserved for Congress, leaving very few tools beyond his reach. See 19 U.S.C. § 1862(c) (providing 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."), and 19 U.S.C. § 1862(d) (providing that the President shall take into consideration "the close relation of the economic welfare of the Nation to our national

[8] Plaintiffs emphasize the range of actions available to the President under section 232 and reference specific acts that he has taken. See Pls.' Br. at 12, 19–20; Pls.' Reply Br. at 5–6, 12–13. For example, on March 8, 2018, the President issued Proclamation 9705 imposing a 25% tariff on all imported steel articles, other than those imported from Canada and Mexico. See Proclamation 9705 of March 8, 2018, 83 Fed. Reg. 11,625 (Mar. 15, 2018). The President also enacted Proclamation 9704 under section 232, which imposed a tariff of 10% on aluminum articles, other than those imported from Canada and Mexico. See Proclamation 9704 of March 8, 2018, 83 Fed. Reg. 11,619 (Mar. 15, 2018). Subsequently, the President issued several amendments to Proclamation 9705 under section 232, providing for various country-based exemptions from the steel tariff. See Proclamation 9711 of March 22, 2018, 83 Fed. Reg. 13,361 (Mar. 28, 2018) (exempting, in addition to Canada and Mexico, the following countries from the steel tariff: the Commonwealth of Australia ("Australia"), the Argentine Republic ("Argentina"), the Republic of South Korea ("Korea"), the Federative Republic of Brazil ("Brazil"), and the European Union ("EU") on behalf of its member countries); Proclamation 9740 of April 30, 2018, 83 Fed. Reg. 20,683 (May 7, 2018) (announcing an agreement with Korea to impose a quota on Korean imports of steel articles into the United States, extending the temporary exemption from the steel tariff for Argentina, Australia, and Brazil, and extending the temporary exemption for Canada, Mexico, and the EU); Proclamation 9759 of May 31, 2018, 83 Fed. Reg. 25,857 (June 5, 2018) (announcing agreements to exempt on a long-term basis Argentina, Australia, and Brazil from the steel tariff announced in Proclamation 9705). Plaintiffs also note the President is not required to apply his chosen remedy to imports from all countries but can pick and choose a remedy. See Pls.' Br. at 7, 19–20. Such discretion was recently demonstrated, Plaintiffs note, when the President doubled the tariff on steel imports from Turkey with no national security justification beyond that which is applicable to steel imports from other countries. See Proclamation 9772 of August 10, 2018, 83 Fed. Reg. 40,429 (Aug. 15, 2018) (raising the steel tariff to 50% for Turkey); see also Pls.' Reply Br. at 12 (reproducing the proclamation as Exhibit 15 to Supp. Mem. Supp. Pls.' Mot. Summary J., Aug. 16, 2018, ECF No. 24).

security, . . . 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 . . . , without excluding other factors, in determining whether such weakening of our internal economy may impair the national security.").

To be sure, section 232 regulation plainly unrelated to national security would be, in theory, reviewable as action in excess of the President's section 232 authority. See, e.g., Indep. Gasoline Marketers Council, Inc. v. Duncan, 492 F. Supp. 614, 620 (D.D.C. 1980) (holding that the President's imposition of a gasoline "conservation fee" pursuant to section 232(b) of the Trade Expansion Act was not authorized by the statute). However, identifying the line between regulation of trade in furtherance of national security and an impermissible encroachment into the role of Congress could be elusive in some cases because judicial review would allow neither an inquiry into the President's motives nor a review of his fact-finding. See George S. Bush & Co., 310 U.S. at 379–80; Florsheim Shoe Co. v. U.S., 744 F.2d 787, 796–97 (Fed. Cir. 1984). One might argue that the statute allows for a gray area where the President could invoke the statute to act in a manner constitutionally reserved for Congress but not objectively outside the President's statutory authority, and the scope of review would preclude the uncovering of such a truth. Nevertheless, such concerns are beyond this court's power to address, given the Supreme Court's decision in Algonquin, 426 U.S. at 558–60.

CONCLUSION

For the foregoing reasons, the Plaintiffs' motion for summary judgment is denied, and the Defendants' motion for judgment on the pleadings is granted. Judgment will enter accordingly.

/s/ Claire R. Kelly
Claire R. Kelly, Judge

/s/ Jennifer Choe-Groves
Jennifer Choe-Groves, Judge

Dated: March 25, 2019
New York, New York

Katzmann, Judge, dubitante.[1] Section 232 of the Trade Expansion Act of 1962, as amended in 19 U.S.C. § 1862 (2012) ("section 232"), provides that if the Secretary of

[1] "[E]xpressing the epitome of the common law spirit, there is the opinion entered dubitante – the judge is unhappy about some aspect of the decision rendered, but cannot quite bring himself to record an open dissent." Lon Fuller, Anatomy of the Law 147 (1968). See generally Jason Czarnezki, The Dubitante Opinion, 39 Akron L. Rev. 1 (2006).

The dubitante opinion has a well-established place in American jurisprudence. See, e.g., Radio Corp. of America v. United States, 341 U.S. 412, 421 (1951) (Frankfurter, J., dubitante) ("Since I am not alone in entertaining doubts about this case they had better be stated."); O'Keefe v. Smith, Hinchman & Grylls Associates, 380 U.S. 359, 371–72 (1965) (Douglas, J., dubitante) ("I would not be inclined to reverse a Court of Appeals that disagreed with . . . findings as exotic as we have here."); Kartell v. Blue Shield of Mass., Inc., 592 F.2d 1191, 1195–96 (1st Cir. 1979) (Coffin, C.J., dubitante) ("While I share the court's desire to defer to Massachusetts courts for all the help we can get . . . I confess to some uneasiness about our privilege as an appellate court simply to abstain when the district court has not seen fit to do so . . . I hope the court is correct."); Feldman v. Allegheny Airlines, Inc., 524 F.2d 384, 393 (2d Cir. 1975) (Friendly, J., concurring dubitante) ("Although intuition tells me that the Supreme Court of Connecticut would not sustain the award made here, I cannot prove it. I therefore go along with the majority, although with the gravest doubts."); Wi-LAN, Inc. v. Kilpatrick Townsend & Stockton LLP, 684 F.3d 1364, 1374 (Fed. Cir. 2012) (Reyna, J., dubitante) ("As I cannot prove or disprove our result, I go along with the majority – but with doubt.").

(footnote continued)

Commerce finds that 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 is authorized to "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."

Section 232 was enacted pursuant to the power granted exclusively to Congress by Article I, Section 8 of the Constitution, which provides: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises," as well as "To regulate Commerce with foreign Nations." There is no provision in the Constitution that vests in the President the same "Power To Lay and collect . . . Duties." In short, the power to impose duties is a core legislative function.

The dubitante opinion has also been issued where -- as I do in the case before us now -- a judge considers himself or herself to be constrained or bound by precedent, but wishes to suggest an alternative view. See., e.g., Weaver v. Marine Bank, 683 F.2d 744, 749 (3rd Cir. 1982) (Sloviter, J., dubitante) ("With great deference to my colleagues on the court when the [precedential] decision was rendered, it appears to rest on a misapprehension and misapplication of the Supreme Court's decision."); United States v. Jeffries, 692 F.3d 473, 483 (6th Cir. 2012) (Sutton, J., dubitante) ("Sixth Circuit precedent compels this interpretation of § 875(c) . . . I write separately because I wonder whether our initial decisions in this area (and those of other courts) have read the statute the right way from the outset."); PETA v. U.S. Dept. of Agriculture, 797 F.3d 1087, 1099 (D.C. Cir. 2015) (Millett, J., dubitante) ("If the slate were clean, I would feel obligated to dissent from the majority's standing decision. But I am afraid that the slate has been written upon, and this court's . . . precedent will not let me extricate this case from its grasp."); Brenndoerfer v. U.S. Postal Service, 693 Fed.Appx. 904, 906–07 (Fed. Cir. 2017) (Wallach, J., concurring dubitante) ("Because I am bound by our precedent, I agree with the majority that [Petitioner's] petition must be dismissed for lack of subject matter jurisdiction. However, I reiterate that '[i]t may be time' [to revisit the issue] in 'light of recent Supreme Court precedent.'" (citations omitted)).

On March 18, 2018, after receiving the report of the Secretary of Commerce, the President, invoking section 232, issued two proclamations imposing tariffs of 25% on steel and 10% on aluminum imports effective March 23, 2018,[2] while providing for flexibility with regard to country and product applicability of the tariffs. The new tariffs were to be imposed in addition to duties already in place, including antidumping and countervailing duties under domestic laws designed to preserve fair trade for the American economy.[3] It appears that the March 18, 2018 proclamations were the first presidential actions based on section 232 in more than thirty years.[4]

The question before us may be framed as follows: Does section 232, in violation of the separation of powers, transfer to the President, in his virtually unbridled discretion,

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[2] Proclamation 9704 of March 8, 2018, 83 Fed. Reg. 11,619 (Mar. 15, 2018) amended in Proclamation 9776 of August 29, 2018, 83 Fed. Reg. 45,019 (Sept. 4, 2018) and Proclamation 9705 of March 8, 2018, 83 Fed. Reg. 11,625 (Mar. 15, 2018) amended in Proclamation 9777 of August 29, 2018, 83 Fed. Reg. 45,025 (Sept. 4, 2018).

[3] "Dumping occurs when a foreign company sells a product in the United States at a lower price than what it sells that same product for in its home market. Such a product can be described as being sold below 'fair value.'" Sioux Honey Ass'n v. Hartford Fire Ins. Co., 672 F.3d 1041, 1046 (Fed. Cir. 2012). "[A] countervailable subsidy exists where a foreign government provides a financial contribution which confers a benefit to the recipient." ATC Tires Private Ltd. v. United States, 42 CIT __, __, 322 F. Supp. 3d 1365, 1366–67 (2018). To empower the Department of Commerce ("Commerce") to offset harmful economic distortions caused by countervailable subsidies and dumping, Congress enacted the Tariff Act of 1930. Sioux Honey, 672 F.3d at 1046. Under the Tariff Act's framework, Commerce may investigate potential countervailable subsidies or dumping and, if appropriate, issue orders imposing duties on the merchandise under investigation. 19 U.S.C. §§ 1671, 1673; see also Sioux Honey, 672 F.3d at 1046; ATC Tires, 322 F. Supp. 3d at 1366–67.

[4] The Congressional Research Service has reported in a study that "[p]rior to the [current] Administration, a President arguably last acted under Section 232 in 1986. In that case, Commerce determined that imports of metal-cutting and metal-forming machine tools threatened to impair national security. . . . [T]he President sought voluntary export restraint agreements with leading foreign exporters, and developed domestic programs to revitalize the U.S. industry." Cong. Research Serv., R45249, Section 232 Investigations: Overview and Issues for Congress 4 (2018).

the power to impose taxes and duties that is fundamentally reserved to Congress by the Constitution? My colleagues, relying largely on a 1976 Supreme Court decision, conclude that the statute passes constitutional muster. While acknowledging the binding force of that decision, with the benefit of the fullness of time and the clarifying understanding borne of recent actions, I have grave doubts. I write, respectfully, to set forth my concerns.

It was the genius of the Framers of the Constitution of this Nation, forged from the struggle against tyranny, that they declared the essential importance of the separation of the powers.[5] In The Federalist No. 47, James Madison wrote that "[n]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty than" the separation of powers. The Federalist No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961). "The accumulation of all powers, legislative, executive and judiciary in the same hands . . . must justly be pronounced the very definition of tyranny." Id. Although the Constitution does not have an explicit provision recognizing the separation of powers, the Constitution does identify three distinct types of governmental power -- legislative, executive and judicial -- and, in the Vesting Clauses, commits them to three distinct branches of Government. Those clauses provide that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives," U.S. Const. art. I, § 1; "[t]he executive Power shall be vested in a President of the United States," U.S. Const. art. II, § 1, cl. 1; and "[t]he judicial Power of the United States[] shall be vested in one

[5] See generally M.J.C. Vile, Constitutionalism and the Separation of Powers, 156–175 (1967) (reprinted in 1969); Keith E. Whittington & Jason Iuliano, The Myth of the Nondelegation Doctrine, 165 U. Pa. L. Rev. 379 (2017).

supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish," U.S. Const. art. III, § 1. Insofar as the Constitution departs from a pure separation of powers model and allows some sharing of powers across the branches of government, those exceptions are set out in text. The President is given a share of the legislative power through the prerogative of the presidential veto. U.S. Const. art. I, § 7. The Senate is given a share of the executive power through the right to advise and consent to the appointment of government officers. U.S. Const. art. II, § 2.

A review of Supreme Court jurisprudence, from the early days of the Republic, evinces affirmation of the principle that the separation of powers must be respected and that the legislative power over trade cannot be abdicated or transferred to the Executive. Indeed, the first case raising the question of unconstitutional delegation of legislative power was a trade case, Cargo of the Brig Aurora v. United States, 11 U.S. (7 Cranch) 382, 382–85 (1813). That case involved the condemnation and seizure of cargo of the brig Aurora in the Port of New Orleans, imported from Great Britain in violation of the Non-Intercourse Act of 1809 ("1809 Act"). Ch. 242, 2 Stat. 528 (1809). The 1809 Act, which sought to keep the United States from entanglement in the war between Britain and France by forbidding the importation of goods from either of those nations, had authorized the President to lift the embargo upon his declaration that either of those nations had ceased to violate the neutral commerce of the United States. Id. When the 1809 Act expired, the Non-Intercourse Act of 1810 extended its terms but temporarily suspended its implementation to permit each of the two warring nations an opportunity to renounce her policies against American shipping and to announce respect for American neutrality.

The President was again authorized to lift the embargo upon declaration by proclamation that the nation had "cease[d] to violate the neutral commerce of the United States." Cargo of the Brig Aurora, 11 U.S. at 384. The President issued a proclamation declaring that France had revoked her edicts such that she was now respectful of America's neutral commerce, thus lifting the embargo against France. Id. The President, however, determined that Britain had not modified its offending edicts, and thus the embargo against her remained in place. Id. Counsel for the owner of the cargo contended that Congress had impermissibly "transfer[red] the legislative power to the President" and that Congress could not enact legislation which predicated the revival of an expired law upon a proclamation by the President attesting to facts as articulated by Congress. Id. at 386. In rejecting this argument and upholding the act, the Court ruled that it could "see no sufficient reason[] why the legislature should not exercise it discretion in reviving the act, . . . either expressly or conditionally, as their judgment should direct . . . upon the occurrence of any subsequent combination of events." Id. at 388. In other words, the law was constitutional because the President was acting as a fact-finder, not a lawmaker.

By the time the Supreme Court addressed its next nondelegation challenge in a trade case, Field v. Clark, 143 U.S. 649 (1892), it had previously observed that "[t]he line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details." Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 20 (1825). In the 1892 case, Field, supra, importers brought a suit claiming that duties imposed

pursuant to the Tariff Act of 1890 should be refunded because that act was an unconstitutional delegation of legislative power. The Tariff Act of 1890 provided:

> That with a view to secure reciprocal trade with countries producing [specified] articles . . . whenever, and so often as the [P]resident shall be satisfied that the [G]overnment of any country producing . . . such articles, imposes duties or other exactions upon the agricultural or other products of the United States, which in view of the free introduction of …[such articles] into the United States he may deem to be reciprocally unequal and unreasonable, he shall have the power and it shall be his duty to suspend, by proclamation to that effect, the provisions of this act relating to the free introduction of [such articles] . . . for such time as he shall deem just, and in such case and during such suspension duties shall be levied, collected, and paid upon [such articles] . . . .

Field, 143 U.S. at 697–98. In rejecting the claim that the Tariff Act of 1890 unconstitutionally delegated legislative power to the President, the Court stated:

> That Congress cannot delegate legislative power to the [P]resident is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution. The [A]ct of October 1, 1890, in the particular under consideration, is not inconsistent with that principle. It does not, in any real sense, invest the [P]resident with the power of legislation. . . . Congress itself prescribed, in advance, the duties to be levied, collected and paid . . .while the suspension lasted. Nothing involving the expediency or the just operation of such legislation was left to the determination of the [P]resident. . . . But when he ascertained the fact that duties and exactions, reciprocally unequal and unreasonable, were imposed upon the agricultural or other products of the United States by a country producing and exporting sugar, molasses, coffee, tea or hides, it became his duty to issue a proclamation declaring the suspension, as to that country, which [C]ongress had determined should occur. He had no discretion in the premises except in respect to the duration of the suspension so ordered. But that related only to the enforcement of the policy established by [C]ongress. As the suspension was absolutely required when the [P]resident ascertained the existence of a particular fact, it cannot be said that in ascertaining that fact, and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws.

Id. at 692–93.

The next case adjudicating a challenge to a trade statute on the grounds of unconstitutional delegation of legislative power to the President was J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928). An importer of barium dioxide challenged the tariff assessed on a shipment by virtue of the "flexible tariff provision" of the Tariff Act of 1922, enacted:

> to secure by law the imposition of customs duties on articles of imported merchandise which should equal the difference between the cost of producing in a foreign country the articles in question and laying them down for sale in the United States, and the cost of producing and selling like or similar articles in the United States, so that the duties not only secure revenue, but at the same time enable domestic producers to compete on terms of equality with foreign producers in the markets of the United States.

Id. at 404. In that provision, Congress authorized the President to adjust the duties set by the statute if the President determined after investigation that the duty did not "equalize . . . differences in costs of production in the United States and the principal competing country . . . . Provided, [t]hat the total increase or decrease of such rates of duty shall not exceed 50 per centum of the rates specified" by statute. Id. at 401. Noting that the "difference which is sought in the statute is perfectly clear and perfectly intelligible," the Court also observed that it was difficult for Congress to fix the rates in the statute. Id. at 404. Accordingly, the Tariff Commission was assigned to "assist in . . . obtaining needed data and ascertaining the facts justifying readjustments," to "make an investigation and in doing so must give notice to all parties interested and an opportunity to adduce evidence and to be heard." Id. The President would then "proceed to pursue his duties under the [A]ct and reach such conclusion as he might find justified by the investigation[,] and to proclaim the same, if necessary." Id. at 405.

Noting that the Federal Constitution "divide[s] the governmental power into three branches," the Hampton Court stated that "it is a breach of the national fundamental law if Congress gives up its legislative powers and transfers it to the President . . . ." Id. at 406. However, Congress could "invoke the action" of the Executive "in so far as the action invoked shall not be an assumption of the constitutional field of action of [the Legislative] branch." Id. "[I]n determining what it may do in seeking assistance from [the Executive], the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination." Id. Then the Hampton court announced what has come to be known as the "intelligible principle" formulation: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power." Id. at 409. Citing to Field, supra, the Court pointed to the limited and circumscribed nature of the Executive action, concluding the President was:

> not in any real sense invest[ed] . . . with the power of legislation, because nothing involving the expediency or just operation of such legislation was left to the determination of the President; that the legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency.

Id. at 410. The President "was the mere agent of the law-making department." Id. at 411. "What the President was required to do was merely in execution of the act of Congress." Id. at 410–11.

The "intelligible principle" standard is the standard which has since been applied to determine whether there has been an impermissible delegation of legislative power. As my colleagues note, in the years since the "intelligible principle" was announced, and in cases involving numerous statutes, only twice has the Court invalidated a statute because it impermissibly delegated the power vested in the Congress to the Executive. "In the history of the Court we have found the requisite 'intelligible principle' lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'" Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 474 (2001) (citing Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) and A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)). Since 1935, the Court has never invalidated a statute because of impermissible delegation of legislative power to the Executive. This deference "is a reflection of the necessities of modern legislation dealing with complex economic and social problems. . . . Necessity therefore fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules." American Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946).

In the one trade case before the Court since Hampton where it was contended that the statute at issue constituted an unconstitutional delegation of legislative power to the Executive, the statute in question was the one before us now -- section 232. See Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548 (1976). In that case -- after a determination that foreign petroleum was being imported into the United States in such

quantities and at such low costs as to threaten to impair national security by inhibiting the development of domestic production and refinery capacity -- the President imposed license fees upon the exporters in an effort to control imports pursuant to section 232. The Attorney General of the Commonwealth of Massachusetts and others brought suit, primarily making the narrow statutory claim that while section 232 authorized the President to adjust the imports of petroleum and petroleum products by imposing quotas, the remedy that the President sought, import licensing fees, was not authorized by the statute. Id. at 556. They also argued that unless this construction was adopted, the Court would have to reach the constitutional question of whether section 232 was an impermissible delegation of legislative power to the President. Id. at 558–59. The Supreme Court opinion, as my colleagues note, not only decided (in favor the Federal Energy Administration) the statutory question as to whether licenses were permissible, but also reached the constitutional question. Referencing the "intelligible principle," the Court ruled that "[e]ven if § 232(b) is read to authorize the imposition of a license fee system, the standards that it provides the President in its implementation are clearly sufficient to meet any delegation doctrine attack." Id. at 559.

Of course, as a lower court, it behooves us to follow the decision of the highest court. It can also be observed that new developments and the record of history may supplement and inform our understanding of law. Indeed, the Algonquin court concluded with the following:

> Our holding today is a limited one. As respondents themselves acknowledge, a license fee as much as a quota has its initial and direct impact on imports, albeit on their price as opposed to their quantity. As a consequence, our conclusion here, fully supported by the relevant

> legislative history, that the imposition of a license fee is authorized by § 232(b) 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.

Id. at 571 (emphasis in original).

Analyzing the delegation question from the face of the statute, the Algonquin court took note of "clear conditions to Presidential action" that established an intelligible principle restricting presidential action: The Secretary is required to make a finding that "an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security." Id. at 559. "The President can act only to the extent 'he deems necessary to adjust the imports of such article and its derivative so that such imports will not threaten to impair the national security.' And § 232(c) articulates a series of specific factors to be considered by the President in exercising his authority under § 232(b)." Id. at 559. While section 232 states as the Court recited, there is no statutory requirement that the President's actions match the Secretary's report or recommendations. The President is not bound in any way by any recommendations made by the Secretary, and he is not required to base his remedy on the report or the information provided to the Secretary through any public hearing or submission of public comments. There is no rationale provided for how a tariff of 25% was derived in some situations, and 10% in others. There is no guidance provided on the remedies to be undertaken in relation to the expansive definition of "national security" in the statute – a definition so broad that it not only includes national defense but also encompasses the entire national economy. The record reveals, for example, that the

Secretary of Defense stated that "the U.S. military requirements for steel and aluminum each only represent about three percent of U.S. production."[6]

As the preceding review of the trilogy of Aurora, Field, and Hampton evinces, the trade statutes in those cases did not impermissibly transfer the legislative function to the Executive because they provided ascertainable standards to guide the President – standards such that the congressional will had been articulated and was thus capable of effectuation. What we have come to learn is that section 232, however, provides virtually unbridled discretion to the President with respect to the power over trade that is reserved by the Constitution to Congress. Nor does the statute require congressional approval of any presidential actions that fall within its scope.[7] In short, it is difficult to escape the conclusion that the statute has permitted the transfer of power to the President in violation of the separation of powers.

To note these concerns is not to diminish in any way the reality, sanctioned under established constitutional principles, that in the workings of an increasingly complex world, Congress may assign responsibilities to the Executive to carry out and implement its policy. Nor is it to ignore the flexibility that can be allowed the President in the conduct of foreign affairs. See United States v. Curtiss-Wright Export Corp, 299 U.S. 304 (1936). However, that power is also not unbounded, even in times of crisis. See Hamdi v.

[6] Letter from James N. Mattis, Secretary of Defense, to Wilbur L. Ross Jr., Secretary of Commerce (2018), Pl.'s Mot. for Summary J. (July 19, 2018) at Exh. 8, ECF No. 20-7.

[7] Compare the Crude Oil Windfall Profit Tax Act of 1980, creating a joint disapproval resolution provision under which Congress can override presidential actions in the case of adjustments to petroleum or petroleum product imports). The Crude Oil Windfall Profit Tax Act of 1980, § 402, Pub. L. 96-223, 19 U.S.C. § 1962, 94 Stat. 229, repealed by Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107, 1322.

Rumsfeld, 542 U.S. 507, 536 (2004) (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952)).[8]

In the end, I conclude that, as my colleagues hold, we are bound by Algonquin, and thus I am constrained to join the judgment entered today denying the Plaintiffs' motion and granting the Defendants' motion. I respectfully suggest, however, that the fullness of time can inform understanding that may not have been available more than forty years ago. We deal now with real recent actions, not hypothetical ones. Certainly, those actions might provide an empirical basis to revisit assumptions. If the delegation permitted by section 232, as now revealed, does not constitute excessive delegation in violation of the Constitution, what would?

/s/ Gary S. Katzmann
Gary S. Katzmann, Judge

[8] Regarding the interplay between the Constitution and statute, one commentator has observed:

> The Constitution grants Congress the "Power To lay and collect Taxes, Duties, Imposts and Excises" and "To regulate Commerce with foreign Nations." The president has no similar grant of substantive authority over economic policy, international or domestic. Consequently, international trade policy differs substantially from other foreign affairs issues, such as war powers, where the president shares constitutional authority with Congress. Where international trade policy is concerned, the president's authority is almost entirely statutory.

Timothy Meyer, Trade, Redistribution, and the Imperial Presidency, 44 Yale J. Int'l L. Online 16 (2018) (footnotes omitted) available at http://www.yjil.yale.edu/features-symposium-international-trade-in-the-trump-era/.

Yale Journal of International Law

Features Symposium: International Trade in the Trump Era

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The international trade order is in crisis. Since the election of President Donald J. Trump, the United States has initiated—and escalated—a trade war with China, forced the renegotiation of the North American Free Trade Agreement (NAFTA), and threatened to upend the World Trade Organization (WTO) by blocking appointments (and re-appointments) to its Appellate Body. Protectionism is on the rise: reversing a longstanding political consensus, tariffs have once again emerged as a central issue in U.S. international trade policy.

What does this all mean? Where does it lead? Is the established order of international trade—underpinned by the WTO and multilateral trade agreements—on the verge of collapse? Or is it, as John Gerard Ruggie said of the "new protectionism" that arose in the 1970s, simply an indication that the existing order is adapting to new circumstances? The authors in this Features Symposium grapple with these difficult, and consequential, questions.

The Features Symposium is a new venture by *YJIL Online*. Its publication will be accompanied by an in-person event, to be held at Yale Law School, on February 22, 2019.

**** Note: Some of these essays have been previously published on this page in unofficial, non-consecutively paginated form. Please use the official versions provided below.***

Introduction

Kathleen Claussen & David Singh Grewal

The Trump Administration and the Future of the WTO

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Section 232 of the Trade Expansion Act of 1962, as amended, 19 U.S.C. § 1862

Safeguarding National Security

(a) Prohibition on decrease or elimination of duties or other import restrictions if such reduction or elimination would threaten to impair national security

No action shall be taken pursuant to section 1821(a) of this title or pursuant ot section 1351 of this title to decrease or eliminate the duty or other import restriction on any article if the President determines that such reduction or elimination would threaten to impair the national security.

(b) Investigations by Secretary of Commerce to determine effects on national security of imports of articles; consultation with Secretary of Defense and other officials; hearings; assessment of defense requirements; report to President; publication in Federal Register; promulgation of regulations

(1)(A) Upon request of the head of any department or agency, upon application of an interested party, or upon his own motion, the Secretary of Commerce (hereafter in this section referred to as the "Secretary") shall immediately initiate an appropriate investigation to determine the effects on the national security of imports of the article which is the subject of such request, application, or motion.

(B) The Secretary shall immediately provide notice to the Secretary of Defense of any investigation initiated under this section.

(2)(A) In the course of any investigation conducted under this subsection, the Secretary shall—

(i) consult with the Secretary of Defense regarding the methodological and policy questions raised in any investigation initiated under paragraph (1),

(ii) seek information and advice from, and consult with, appropriate officers of the United States, and

(iii) if it is appropriate and after reasonable notice, hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to such investigation.

(B) Upon the request of the Secretary, the Secretary of Defense shall provide the Secretary an assessment of the defense requirements of any article that is the subject of an investigation conducted under this section.

(3)(A) By no later than the date that is 270 days after the date on which an investigation is initiated under paragraph (1) with respect to any article, the Secretary shall submit to the President a report on the findings of such investigation with respect to the effect of the importation of such article in such quantities or under such circumstances upon the national security and, based on such findings, the recommendations of the Secretary for action or inaction under this section. If the Secretary finds that such article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, the Secretary shall so advise the President in such report.

(B) Any portion of the report submitted by the Secretary under subparagraph (A) which does not contain classified information or proprietary information shall be published in the Federal Register.

(4) The Secretary shall prescribe such procedural regulations as may be necessary to carry out the provisions of this subsection.

(c) Adjustment of imports; determination by President; report to Congress; additional actions; publication in Federal Register

(1)(A) Within 90 days after receiving a report submitted under subsection (b)(3)(A) in which the Secretary finds that 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 shall—

(i) determine whether the President concurs with the finding of the Secretary, and

(ii) if the President concurs, 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.

(B) If the President determines under subparagraph (A) to take action to adjust imports of an article and its derivatives, the President shall implement that action by no later than the date that is 15 days after the day on which the President determines to take action under subparagraph (A).

(2) By no later than the date that is 30 days after the date on which the President makes any determinations under paragraph (1), the President shall submit to the Congress a written statement of the reasons why the President has decided to take action, or refused to take action, under paragraph (1). Such statement shall be included in the report published under subsection (e).

(3)(A) If—

(i) the action taken by the President under paragraph (1) is the negotiation of an agreement which limits or restricts the importation into, or the exportation to, the United States of the article that threatens to impair national security, and

(ii) either—

(I) no such agreement is entered into before the date that is 180 days after the date on which the President makes the determination under paragraph (1)(A) to take such action, or

(II) such an agreement that has been entered into is not being carried out or is ineffective in eliminating the threat to the national security posed by imports of such article, the President shall take such other actions as the President deems necessary to adjust the imports of such article so that such imports will not threaten to impair the national security. The President shall publish in the Federal Register notice of any additional actions being taken under this section by reason of this subparagraph.

(B) If—

(i) clauses (i) and (ii) of subparagraph (A) apply, and

(ii) the President determines not to take any additional actions under this subsection, the President shall publish in the Federal Register such determination and the reasons on which such determination is based.

(d) Domestic production for national defense; impact of foreign competition on economic welfare of domestic industries

For the purposes of this section, the Secretary and the President shall, in the light of the requirements of national security and without excluding other relevant factors, give consideration to domestic production needed for projected national defense requirements, the capacity of domestic industries to meet such requirements, existing and anticipated availabilities of the human resources, products, raw materials, and other supplies and services essential to the national defense, 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. 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.

(d) [1]Report by the Secretary of Commerce

(1) Upon the disposition of each request, application, or motion under subsection (b), the Secretary shall submit to the Congress, and publish in the Federal Register, a report on such disposition.

(2) Omitted

(f) [2]Congressional disapproval of Presidential adjustment of imports of petroleum, or petroleum products; disapproval resolution

(1) An action taken by the President under subsection (c) to adjust imports of petroleum, or petroleum products shall cease to have force and effect upon the enactment of a disapproval resolution, provided for in paragraph (2), relating to that action.

(2)(A) This paragraph is enacted by the Congress—

(i) as an exercise of the rulemaking power of the House of Representatives and the Senate, respectively, and as such is deemed a part of the rules of each House, respectively, but applicable only with respect to the procedures to be followed in that House in the case of disapproval resolutions and such procedures supersede other rules only to the extent that they are inconsistent therewith; and

(ii) with the full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner, and to the same extent as any other rule of that House.

(B) For purposes of this subsection, the term "disapproval resolution" means only a joint resolution of either House of Congress the matter after the resolving clause of which is as follows: "That the Congress disapproves the action taken under section 232 of the Trade Expansion Act of 1962 with respect to petroleum imports under _____ dated _____.", the first blank space being filled with the number of the proclamation, Executive order, or other Executive act issued under the authority

[1] So in original. Two subsecs. (d) have been enacted.
[2] So in original. No subsec. (e) has been enacted.

of subsection (c) of such section 232 for purposes of adjusting imports of petroleum or petroleum products and the second blank being filled with the appropriate date.

(C)(i) All disapproval resolutions introduced in the House of Representatives shall be referred to the Committee on Ways and Means and all disapproval resolutions introduced in the Senate shall be referred to the Committee on Finance.

(ii) No amendment to a disapproval resolution shall be in order in either the House of Representatives or the Senate, and no motion to suspend the application of this clause shall be in order in either House nor shall it be in order in either House for the Presiding Officer to entertain a request to suspend the application of this clause by unanimous consent.

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