2019-1727

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 No. 18-cv-00152, Judges Jennifer Choe-Groves, Gary S. Katzmann, Claire R. Kelly

---

BRIEF OF DEFENDANTS-APPELLEES

JOSEPH H. HUNT
Assistant Attorney General

JEANNE E. DAVIDSON
Director

TARA K. HOGAN
Assistant Director
Commercial Litigation Branch
Civil Division
U.S. Department of Justice
P.O. Box 480, Ben Franklin Station
Washington, D.C. 20044
Tele: (202) 616-2228

Attorneys for Defendant-Appellee

September 18, 2019

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

OTHER AUTHORITIES

STATEMENT PURSUANT TO RULE 47.5

Counsel for defendant-appellees is not aware of any other appeal in or from the same civil action or proceeding that previously was before this Court or any other appellate court under the same or similar title. Counsel is not aware of any cases pending in the United States Court of International Trade that may be directly affected by this Court's decision in this appeal.

Counsel is not aware of any other case pending in this or any other court that may directly affect or be directly affected by this Court's decision in this appeal.

STATEMENT OF THE ISSUE

Whether Section 232 of the Trade Expansion Act of 1962, which empowers the President to take action to adjust imports that threaten to impair the national security, impermissibly delegates legislative power to the President.

STATEMENT OF THE CASE SETTING FORTH RELEVANT FACTS

I. Section 232 of The Trade Expansion Act of 1962

Section 232 of the Trade Expansion Act of 1962 establishes a procedure under which the President may "adjust the imports" of articles in order to protect "national security." 19 U.S.C. § 1862(c)(1)(A)(ii). This procedure begins with an investigation conducted by the Secretary of Commerce (Secretary) "to determine the effects on the national security of imports of [an] article." 19 U.S.C. § 1862(b)(1)(A). In the course of the investigation, the Secretary must (1) consult with the Secretary of Defense on "methodological and policy questions," (2)

consult with other "appropriate officers of the United States," and (3) if "appropriate," hold "public hearings" or otherwise afford interested parties an opportunity "to present information and advice." 19 U.S.C. § 1862(b)(2)(A). After the investigation, the Secretary must submit to the President a report containing his findings "with respect to the effect of the importation of such article . . . upon the national security," as well as his "recommendations" for presidential "action or inaction." *Id*. § 1862(b)(3).

If the Secretary's report contains "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," the President must "determine whether [he] concurs with the finding of the Secretary." 19 U.S.C. § 1862(c)(1)(A)(i). "If the President concurs," he must "determine"—and then "implement"—"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) and 1862(c)(2).

Congress has identified a series of factors that the President and Secretary must consider when acting under Section 232. Those factors include: (1) the "domestic production needed for projected national defense requirements," (2) "the capacity of domestic industries to meet such requirements," (3) "existing and anticipated availabilities of the human resources, products, raw materials, and other

supplies and services essential to the national defense," (4) "the requirements of growth of such industries and such supplies and services including the investment, exploration, and development necessary to assure such growth," and (5) "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." 19 U.S.C. § 1862(d).

Congress also directed the President and Secretary to "recognize the close relation of the economic welfare of the Nation to our national security." *Id*. More specifically, the President and Secretary must consider "the impact of foreign competition on the economic welfare of individual domestic industries," as well as "any substantial unemployment, decrease in revenues of government, loss of skills or investments, or other serious effects resulting from the displacement of any domestic products by excessive imports." *Id*.

II. Pursuant To His Section 232 Authority, The President Determines That Steel Imports Threaten To Impair National Security And Adjusts Imports

In April 2017, the Secretary initiated an investigation to determine the effect of imports of steel on the national security. The Secretary found that the present quantities and circumstances of steel imports "threaten to impair the national security" of the United States. Appx375. He found that these imports are "weakening our internal economy" and undermining our "ability to meet national

security production requirements in a national emergency." Appx419. The Secretary recommended that the President "take immediate action" to address this threat "by adjusting the level of these imports through quotas or tariffs." Appx376.

The President concurred in the Secretary's finding that "steel articles are being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security." *Proclamation 9705 of March 8, 2018, Adjusting Imports of Steel Into the United States*, 83 Fed. Reg. 11,625, 11,627 (Mar. 15, 2018); Appx3060. To address that threat to the national security, the President issued a proclamation imposing a 25 percent tariff on imports of steel articles. Appx3061.

In the proclamation and subsequent amendments, the President established exemptions from the tariffs for certain countries, in recognition of both agreements reached with those countries and special relationships. Appx3080-3083; 3104-3107. The President also delegated to the Secretary the authority to grant exclusions to the tariffs when certain conditions are met. Appx3066-3072. The President also established an increased tariff for steel articles imported from Turkey, which was subsequently returned to a 25% tariff rate. *Proclamation 9777 of August 29, 2018, Adjusting Imports of Steel into the United States*, 83 Fed. Reg. 45,025 (Sept. 4, 2018); *Proclamation 9886 of May 16, 2019, Adjusting Imports of Steel into the United States*, 84 Fed. Reg. 23,421 (May 21, 2019).

III. The Court of International Trade Sustains Section 232 As A Constitutional Delegation Of Authority

Plaintiffs allege that they are a steel-related trade association and two importers of steel articles. Appx48-49. Plaintiffs filed suit in the Court of International Trade, claiming that Section 232 violates the Constitution because it delegates legislative power to the President. Appx47. The Chief Judge granted petitioners' request to designate a three-judge panel to hear the matter, pursuant to 28 U.S.C. § 255. Appx44.

The Court of International Trade granted the defendants' motion for judgment on the pleadings. Appx2-16. The court explained that, although Congress may not delegate its legislative powers to the executive, a grant of authority to the executive does not amount to a delegation of legislative power if Congress sets out an "intelligible principle" to which the executive must conform. Appx6-7 (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

The court further explained that, in *Federal Energy Administration v. Algonquin SNG Inc.*, 426 U.S. 548 (1976), the Supreme Court had occasion to review Section 232. Appx7. The court determined that Section 232 "easily" satisfied the intelligible-principle test, because "it establishe[d] clear preconditions to Presidential action," including "a finding by the Secretary . . . 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." Appx7 (quoting *Algonquin*, 426 U.S. at 559).

The court rejected plaintiffs' argument that the court was not bound by *Algonquin*. Appx7-9. The court recounted Algonquin's procedural history and concluded that the Supreme Court "squarely confronted the nondelegation challenge in response to the arguments put forth by parties in their briefs." Appx9.

The court also rejected plaintiffs' contention that the court was not bound by *Algonquin* because of a change in the "legal landscape of judicial review of presidential decisions." Appx9. The plaintiffs argued that, at the time of *Algonquin*, presidential action under Section 232 was subject to judicial review, but that subsequent decisions, namely *Franklin v. Massachusetts*, 505 U.S. 788 (1992) and *Dalton v. Specter*, 511 U.S. 462 (1994) demonstrated that such judicial review was now unavailable. Appx9-13. The court disagreed, explaining that the scope of judicial review of presidential action under Section 232 was the same both "before and after *Algonquin*": courts could review presidential action "for being unconstitutional or in excess of statutorily granted authority," but not for "abuse of discretion." Appx11.

In a separate *dubitante* opinion, Judge Katzmann agreed that the Court of International Trade was bound by *Algonquin* to grant judgment in the Government' favor. Appx16-29. Judge Katzmann, however, questioned *Algonquin*'s

correctness, and suggested that the President's recent actions under Section 232 might justify "revisit[ing]" that case. Appx29.

Plaintiffs appealed to this Court and also filed a petition for a writ of certiorari before judgment. The Supreme Court denied the petition on June 24, 2019. 139 S. Ct. 2748 (2019).

SUMMARY OF ARGUMENT

The legal question presented in this appeal – whether Section 232 is a permissible delegation of legislative authority – has been answered by *Algonquin*. The Supreme Court concluded that Section 232 "easily fulfills the intelligible principle standard." 426 U.S. at 559. The substance and scope of the delegation has remained unchanged since 1976. Far from being a "barrier to reaching the merits," Applnt. Br. at 17, *Algonquin* resolves the merits of this appeal.

Appellants boldly declare that *Algonquin* is neither binding nor helpful, but none of their reasons free this Court to disregard authority of the Supreme Court. *Algonquin* cannot be disregarded merely because the Court's constitutional holding arose within consideration of a different application of the statute, because the dispute involved different facts, or because the parties spent proportionally more pages of briefing on a different legal question. Nor does the Supreme Court's recent decision in *Gundy v. United States*, 139 S. Ct. 2116 (2019), in any way call into question the validity of *Algonquin*.

Even if this Court were not bound by *Algonquin*, it remains exceedingly persuasive authority. The Supreme Court has upheld "without deviation, Congress' ability to delegate power under broad standards." *Mistretta v. United States*, 488 U.S. 361, 373 (1989). Section 232 contains intelligible principles, including general policy guidance. Section 232 delineates the respective roles and duties of the Secretary and the President, and it establishes deadlines, and boundaries for actions taken pursuant to the delegated authority. Appellants' repeated assertions that the President's authority to act is "unbounded" or "unbridled" fails to directly confront the statute itself, which cabins the President's authority in concrete, meaningful ways.

Although the *Algonquin* court did not find the case to be a close one, the President's coexistent constitutional foreign affairs and national security responsibilities further compel the conclusion that Congress did not enact an unconstitutional statute. Finally, even were the scope of judicial review of Executive actions undertaken under Section 232 relevant to the assess the nondelegation challenge, which it is not, appellants' challenge still fails.

ARGUMENT

I. Standard of Review

This Court reviews questions of law, including the determination of the constitutionality of a statute, *de novo*. *Princess Cruises, Inc. v. United States*, 201 F.3d 1352, 1357 (Fed. Cir. 2000); *Demko v. United States*, 216 F.3d 1349, 1352 (Fed. Cir. 2000) (reviewing, *de novo*, whether statute was a constitutional delegation of authority).

II. *Algonquin* Is Binding Precedent, Holding That Section 232's Delegation Is Permissible

The Supreme Court has considered the constitutionality of Section 232 and concluded that "the standards that [Section 232] provides the President in its implementation are clearly sufficient to meet *any* delegation doctrine attack." *Algonquin*, 426 U.S. at 559 (emphasis added). *Algonquin*'s holding that Section 232 is a constitutional delegation of authority is unambiguous and directly on point. Appellants ask this Court to simply ignore this controlling authority, Applnt. Br. at 21-30, but the Court should instead affirm the trial court's judgment.

Algonquin involved a challenge to the President's imposition of a license fee scheme on imports of petroleum and petroleum products and the claim that imposition of the fees was "beyond the President's *constitutional* and statutory authority." 426 U.S. at 556 (emphasis added). The Supreme Court held that Section 232 sets forth an intelligible principle and thus complies with the

Constitution. 426 U.S. at 558-560. In that case, President Ford had invoked Section 232 to establish license fees for certain imports of petroleum. *Id*. at 556. In the course of upholding the license fees, the Court rejected the contention that Section 232 raised "a serious question of unconstitutional delegation of legislative power," holding instead that the statute "easily fulfills" the intelligible principle requirement. *Id*. at 559.

The Court observed that Section 232 "establishes clear preconditions to Presidential action," including a finding by the Secretary 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*. The Court explained that the statute "[a]rticulates a series of factors to be considered by the President in exercising his authority." Far from finding that the statute offers the President "unbridled discretion," as appellants assert, the Court concluded that "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"; "[t]he 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.'" For these reasons, the Court "s[aw] no looming problem of improper delegation." *Id*. at 560.

Appellants ask this Court to limit the Supreme Court's holding that Section 232 is constitutional to the "context" of the parties' dispute in *Algonquin*. Applnt. Br. at 16; Basrai Farms Amic. Br. at 8-10. The Court must deny this request for two reasons. First, appellants have brought a facial challenge to the statute. *See* Applnt. Br. at 1; 17; Appx112; Appx3230; Appx3269. "A facial challenge is really just a claim that the law or policy at issue is unconstitutional in all its applications." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1127 (2019). Thus, even if the Court in *Algonquin* had upheld only a single application of Section 232, that decision would preclude any contention that Section 232 "is unconstitutional in all its applications." *Id*.

Indeed, "[i]n a delegation challenge, the constitutional question is whether *the statute* has delegated legislative power to the agency." *Whitman v. Am. Trucking Assns*, 531 U.S. 457, 472 (2001) (emphasis added). The *Algonquin* court answered that question by identifying the limits contained in the statute, not by examining the particular facts of the statute's application. 426 U.S. at 559. Any differences in the Executive's *application* of the statute are irrelevant to appellants' facial challenge to the statute. *See* Applnt. Br. at 26.

Second, the Supreme Court has cautioned against the very action urged by appellants: "confus[ing] the factual contours of [a Supreme Court decision] for its unmistakable holding." *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd*., 460

U.S. 533, 534-35 (1983). "When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996). Even if the parties raised different *arguments*, Applnt. Br. at 25, the Court unambiguously *held* that Section 232 is a constitutional delegation of legislative power.

This Court's obligation to follow the Supreme Court's interpretation of law applies even when the statement is *dictum*. *Ins. Co. of the West v. United States,* 243 F.3d 1367, 1372 (Fed. Cir. 2001); *Stone Container Corp. v. United States*, 229 F.3d 1345, 1350 (Fed. Cir. 2000) (declining to disregard Supreme Court's "explicit and carefully considered" statement). This obligation has particular force when the issue is one of constitutionality, because a lower court should not "accept that in resolving constitutional issues . . . the Supreme Court proclaims the law lightly." *Faucher v. Federal Election Com.*, 928 F.2d 468, 470 (1st Cir. 1991).

Of course, the Supreme Court's conclusion that Section 232 was constitutional was not *obiter dictum*. The "parties in *Algonquin* argued the nondelegation issue, and the District Court for the District of Columbia and Supreme Court squarely addressed it." Appx8. The parties challenging the licensing scheme argued that the Court must construe Section 232 narrowly (*i.e.*, not to authorize the licensing scheme) in order to avoid "a serious question of unconstitutional delegation of legislative power." *Algonquin*, 426 U.S. at 559.

The Court "reject[ed]" the argument that a narrow reading was necessary to save the statute, because "the standards that it provides the President in its implementation are clearly sufficient to meet any delegation doctrine attack." *Id*. The length of the parties' briefing or the efficiency with which the Supreme Court disposed of the nondelegation argument offers no latitude to disregard precedent. *See* Applnt. Br. at 21-26.

Appellants further contend that the Supreme Court intended *Algonquin*'s holding to be limited. Applnt Br. at 29. The language they cite, however, only confirms the constitutional holding. In upholding the import licensing scheme as a permissible application of the statute, the Court emphasized the identifiable and enforceable boundaries of the statutory delegation, cautioning that not all "action[s] the President might take" would be authorized by the statute. *Algonquin*, 426 U.S. at 571.

Finally, *Gundy v. United States* is not a basis to disregard *Algonquin*. Applnt. Br. at 27-29. *Gundy* did not overturn *Algonquin* or any decisions upon which *Algonquin* relied. Appellants submit that *Gundy* reveals an analytical error in *Algonquin*. Even if true, this Court must follow *Algonquin*: "If a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of

overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

In any event, *Gundy* reveals no analytical error in *Algonquin*. Appellants suggest that the *Algonquin* court erred by considering the constitutional question before a question of statutory interpretation. Applnt. Br. at 28 (citing *Gundy*, 139 S. Ct. at 2123). This argument reveals a shallow reading of both opinions. *Gundy* explained that a reviewing court should examine the statute "to figure out what task it delegates and what instructions it provides." *Gundy*, 139 S. Ct. at 2123.

This examination was conducted in *Algonquin*: the Court identified Section 232's "clear preconditions" for presidential action, the limits on the kinds of actions the President may take, and observed the "specific factors to be considered" by the President. *Algonquin*, 426 U.S. at 559-60. That is, the Court first examined the text of the statute to confirm its constitutionality. The Court was guided by *J.W. Hampton* and *American Power & Light*, the same decisions relied upon in *Gundy*'s articulation of the test for nondelegation review. *Gundy*, 139 S. Ct. at 2123-2134; *Algonquin*, 426 U.S. at 560-61. Having satisfied itself that the delegation offered an intelligible principle, the Court proceeded to the next question: whether the import licensing scheme exceeded the identified bounds of the President's lawfully delegated authority to "adjust imports." 426 U.S. at 561-571. This approach is entirely consistent with *Gundy*.

To be sure, *Algonquin* recognized the possibility that the Executive could take actions that exceed the scope of Section 232. *See* Applnt. Br. at 29; *Algonquin*, 426 U.S. at 571. But appellants did not bring that challenge.[1] Instead, they claim that Section 232 *itself* is an unconstitutional delegation. Appx66. That question has conclusively been resolved by *Algonquin*. This Court must affirm the trial court's judgment.

III. Section 232 Does Not Impermissibly Delegate Legislative Power To The President

Even if this Court were starting on a clean slate, the Court should still affirm the judgment because Section 232 easily satisfies the requirements of the nondelegation doctrine. Appellants hyperbolically offer that there is no statute even comparable to Section 232. Even if this were true, as we explain, Congress has supplied the "intelligible principle" necessary to sustain the statute. Appellants' argument requires that the Court gloss over the statute's limits and disregard the consistent body of "intelligible principle" jurisprudence.

[1] Amicus Cato Institute suggests that the Court of International Trade "ducked its duty" to conduct judicial review of the President's decision-making. Cato Inst. Amic. Br. at 5-6. In fact, the court appropriately reviewed the constitutional question presented (which did not require consideration of the President's application of the statute) and refrained from offering advisory opinions on matters not presented. Amici may not expand the issues of the appeal beyond those presented by the appellant in its opening brief. *Amoco Oil Co. v. United States*, 234 F.3d 1374, 1378 (Fed. Cir. 2000).

A. Congress Has Supplied Intelligible Principles By Defining The General Policy, Specifying Factors To Be Considered, And Setting Boundaries For Action

The Supreme Court has long held that, although Congress may not delegate legislative power, it may confer discretion on the Executive to implement and enforce federal law so long as it provides an "intelligible principle." *J.W. Hampton*, 276 U.S. at 409. The "intelligible principle" standard is "not demanding." *Gundy*, 139 S. Ct. at 2129. Indeed, on only two occasions has the Supreme Court found a statute not to meet this standard, both of which provided no guidance to the Executive.

The Court has "deemed it 'constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.'" *Mistretta*, 488 U.S. at 372-73 (citing *Am. Power & Light Co. v. Secs. & Exch. Comm'n*, 329 U.S. 90, 105 (1946)). The parties agree on this standard. Applnt. Br. at 46.

Section 232 satisfies the intelligible principle test. Section 232 contains a "clearly delineate[d] general policy": to avert the impairment of national security by adjusting imports of any articles that are found to impair, or threaten to impair, national security. The legislative history of the predecessor statute explained that it was "designed to give the President unquestioned authority" to take action "whenever danger to our national security results from a weakening of segments of

the economy through injury to any industry, whether vital to the direct defense or a part of the economy providing employment and sustenance to individuals or localities." S. REP. NO. 85-1838, 85th Cong. 2d (1958) at 5-6. The statute identifies the officials who are to apply the general policy. The Secretary conducts an investigation, reports findings, and offers the President a recommendation. 19 U.S.C. §§ 1862(b)(1)(A); (b)(3)(A). The President, in turn, is charged with determining whether he agrees with the Secretary's findings and taking action. 19 U.S.C. § 1862(c)(1)(A). Appellants do not dispute that Section 232 satisfies these first two criteria.

Third, the statute delineates boundaries of the President's delegated authority. By directing that the President may only act at the conclusion of the Secretary's investigation and only if he concurs with the Secretary's affirmative finding, 19 U.S.C. § 1862(c)(1)(A)(ii), the statute establishes "clear preconditions to Presidential action." *Algonquin*, 426 U.S. at 559. Far from permitting the President to "choose any measure," Applnt. Br. at 46, the statute only authorizes the President to "adjust imports" of the article found to be impairing or threatening to impair the national security and only such action "so that such imports will not threaten to impair the national security." 19 U.S.C. § 1862(c)(1)(A)(ii); *see* 19 U.S.C. § 1862(c)(3)(A) ("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").

Although appellants correctly observe that "articles subject to import adjustment … will often vary in uses, quality, [and] specifications…," Applnt. Br. at 38, this does not mean that the statute lacks an intelligible principle to which the President must conform. The President is authorized to act upon only the "article and its derivatives" that have been subject to the investigation and found to be impairing national security.

The statute further articulates several specific factors to guide the President in his decision-making. 19 U.S.C. § 1862(d). That the statute does not limit the President's consideration to these factors does not render the delegation boundless. *See* Applnt. Br. at 35. The Supreme Court rejected an identical argument in *Opp Cotton Mills, Inc. v. Administrator*, 312 U.S. 126 (1941). *Opp* involved a challenge to a statute that directed the Department of Labor to consider specified criteria and other "relevant factors" in setting minimum wage rates. 312 U.S. at 136-37. The Court rejected a challenge to the statute on the basis that it did not "prescribe the relative weight to be given to the specified factors or the other unnamed "'relevant factors.'" *Id.* at 143. The Court explained that "'other relevant factors' are those which are relevant to or have a bearing on the statutory

objective," and that Congress could not be expected to identify, in advance, all potentially relevant factors and the weight to be accorded each of them. *Id*. at 145.

Appellants largely ignore these procedural and substantive boundaries. First, confusing the facts of *J.W. Hampton* for its holding, they construct a test that would require a statute to contain a "narrow choices of remedies . . . and a 'full administrative proceeding before an agency and full judicial review,'" Applnt. Br. at 34, before passing constitutional muster.[2] This is, quite simply, not the law. The Supreme Court has upheld "without deviation, Congress' ability to delegate power under broad standards." *Mistretta*, 488 U.S. at 373.

Second, appellants offer that Congress could have further constrained the President's authority and describe cases addressing delegations that they claim are more limited than Section 232. Applnt. Br. at 31-32; 37-41; Basrai Farms Amic. Br. at 31. Again, these arguments identify no constitutional flaw, because

[2] Appellants' apparent inspiration for recasting *J.W. Hampton* is the dissenting opinion in *Gundy*. Applnt. Br. at 19 (citing *Gundy*, 139 S. Ct. at 2139 (Gorsuch, J., dissenting)). A dissenting opinion is not the holding of the Court. Nor may this Court infer, from the plurality's silence, agreement with any aspect of the dissenting opinion. Appellants (or certain Justices) may wish to reconsider the nondelegation doctrine, but "this court has no authority to chart a new course in jurisprudence in a field in which precedents have been established by the Supreme Court." *Star-Kist Foods, Inc. v. United States*, 275 F.2d 472, 475 (C.C.P.A. 1959). Similarly, appellants' cause is not furthered by dissenting and concurring opinions in decisions addressing principles of law other than the nondelegation doctrine. *See* Applnt. Br. at 52-54.

Congress is not limited to "that method of executing its policy which involves the least possible delegation of discretion to administrative officers." *Yakus v. United States*, 321 U.S. 414, 425-26 (1944).

Appellants' complaint about the breadth of "national security" is misplaced. Applnt. Br. at 35-36; 39. Appellants confuse national defense for national security, a distinction drawn in the statute itself.[3] In Section 232(d), Congress recognized that "national security" is linked to the health of our national economy. Congress was not required to identify every possible factor that could inform the President's national security determination because "[n]ecessity . . . fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules." *Algonquin*, 426 U.S. at 560 (citing *Am. Power & Light*, 329 U.S. at 105).

The Supreme Court has "over and over upheld even very broad delegations," *Gundy*, 139 S. Ct. at 2129, including delegations that included standards broader than the "national security" standard in Section 232. *E.g., National Broad. Co. v. United States,* 319 U.S. 190, 225-226 (1943) (delegating authority to regulate

[3] Appellants obscure the distinction drawn in Section 1862(d) between national security and national defense by suggesting that the Secretary of Defense did not agree with the Secretary's national security findings. Applnt. Br. at 36. The purpose of the Secretary of Defense's letter was to explain that the country had adequate steel for its national *defense* requirements. Appx3056-37; *see* 19 U.S.C. § 1862(b)(1)(2)(B).

broadcast licensing "as public interest, convenience, or necessity" requires); *Yakus*, 321 U.S. at 420 (delegating authority to set commodity prices that are "fair and equitable" and would "effectuate the purposes of" the Emergency Price Control Act of 1942); *Am. Trucking*, 531 U.S. at 472 (delegating authority to set nationwide air-quality standards limiting pollution to the level required "to protect the public health"). That Congress could have defined "national security" differently, or more narrowly, does not show that Section 232 lacks an "intelligible principle" to guide the President's actions. *See Yakus*, 321 U.S. at 425.

Appellants refer to statutes in which the authority to increase a tariff or duty was capped or could be ascertained by a formula, but guidelines need not "be precise or mathematical formulae to be satisfactory in a constitutional sense." *Star-Kist Foods*, 275 F.2d at 480. The Supreme Court has never required Congress quantify or otherwise predetermine the precise degree of harm or the precise conduct to regulate. *E.g., Touby v. United States*, 500 U.S. 160, 164-67 (1991) (statute not required to decree how "imminent" was too imminent or how "hazardous" was too hazardous). The need to confer flexibility and discretion on the President is evident when the subject matter is national security, an area not suited for precise or constrictive rules and over which the President also possesses independent constitutional authority. To be sure, the statute requires the President to make judgment calls, guided by the Section 1862(d) factors. But the Supreme

Court has "'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'" *Am. Trucking*, 531 U.S. at 474-75 (quotation omitted). Appellants' criticism of the guidance that Congress did provide amounts to a "challenge [to] the wisdom of a legitimate policy judgment made by Congress." *Touby*, 500 U.S. at 168.

United States v. Yoshida International demonstrates how broad a delegation may be and still meet the "intelligible principle" standard. 526 F.2d 560, 581 (C.C.P.A 1975). *Yoshida* addressed the President's authority to act under the Trading With the Enemy Act (TWEA), which was conditioned on either the existence of war or a Presidential declaration of national emergency. 526 F.2d at 573. The statute authorized the President to "prevent" or "prohibit" the importation of "any" property in which "any" foreign country or a national thereof has "any" interest under "any" rule he prescribes, by means of instructions, licenses, "or otherwise." *Id*. To address the economic crisis in 1971, President Nixon declared a period of national emergency and imposed a ten percent import duty under TWEA. Plaintiff, an importer of zippers from Japan, challenged the duty.

The U.S. Court of Customs and Patent Appeals rejected Yoshida's challenge that TWEA was an unconstitutional delegation of Congress' authority to regulate

foreign commerce. 526 F.2d at 584. The court found that the delegation, while broad, identified the constitutionally necessary boundaries—namely, the preconditions for Presidential action. Further, the delegation was to "regulate importation" through "instructions, licenses, or otherwise", *id*. at 573, a delegation analogous to taking "action . . . to adjust the imports of the article." Appellants distinguish *Yoshida* on the basis that the President's ability to increase the tariff was limited, but the breadth of the delegation and the exercise of judgment required are no different than that presented in Section 232.

Next, appellants wrongly assert that there is no "judicial review [or] any other vital procedural protections to assure that the President obeys the expressed will of Congress." Applnt. Br. at 56.[4] First, the President must report to Congress his reasons for acting or declining to act after receipt of the Secretary's report. 19 U.S.C. § 1862(c)(2). Congress, the branch of Government that knows best whether the President is obeying its will, monitors the President's actions. Reporting requirements have been recognized as procedural boundaries. *E.g*., *Interstate Commerce Comm'n v. Goodrich Transit Co*., 224 U.S. 194, 215 (1912); *Florsheim Shoe Co. v. United States*, 744 F.2d 787, 795 (Fed. Cir. 1984) (observing

[4] Appellants state that the President was not required to prepare an environmental impact statement or a cost benefit analysis under Executive Order 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993). Applnt. Br. at 41. By their terms, the Executive Order and the National Environmental Policy Act apply to agencies, not the President. And neither law is relevant to the nondelegation doctrine.

congressional reporting requirements of Title V of the Trade Act of 1974); *United States v. Bozarov*, 974 F.2d 1037, (9th Cir. 1992) (observing congressional reporting requirements of the Export Administration Act).

Second, determinations under Section 232 are, in fact, subject to judicial review in limited circumstances. Like many statutes, Section 232 does not contain its own judicial review provision. Applnt. Br. at 43. However, non-discretionary Executive actions under the statute are subject to "nonstatutory [judicial] review for being unconstitutional or in excess of statutorily granted authority." Appx11; *Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1346 (Fed. Cir. 2018) ("For a court to interpose, there has to be a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority").

Courts have, in fact, exercised this authority to review determinations under Section 232, further demonstrating that courts are able to glean from the statute enforceable "standards or limits." Applnt. Br. at 44. *E.g., Independent Gasoline Marketers Council, Inc. v. Duncan*, 492 F. Supp. 614, 621 (D.D.C. 1980) (setting aside a conservation tax imposed on all oil, including domestic oil, as beyond Section 232's authorization to adjust imports); *Severstal Exp. GmbH v. United States*, Slip op., 2018 Ct. Intl. Trade LEXIS 38 at *22-24 (2018).

Even an express preclusion of all judicial review does not create a nondelegation problem. The Supreme Court has never held judicial review to be a

requirement for a constitutional delegation, as appellants acknowledge. Applnt. Br. at 42. Because the nondelegation doctrine derives from "the understanding that Congress may not delegate the power to make laws," *Loving v. United States*, 517 U.S. 748, 771 (1996), the only constitutional requirement is that Congress provide an intelligible principle to guide the exercise of the delegated authority. *Am. Trucking*, 531 U.S. at 472. Whether or not a given power is "legislative" or constitutes "the power to make laws" under Article I of our Constitution has nothing to do with whether the exercise of that power is subject to judicial (or any other) review.

Delegations of authority have been upheld as constitutional, even when judicial review was expressly precluded. *See United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 534-44 (1950) (upholding the statutory grant of authority to the President, delegated to the Attorney General, to impose restrictions and prohibitions on persons' entry into and departure from the United States when he determined that the public interest of the United States so required); *Chicago & Southern Airlines v. Watermen*, 333 U.S. 103, 110 (1948) (upholding delegation of authority to President to grant/deny citizens' right to engage in overseas air transportation); *Bozarov*, 974 F.2d at 1044 (upholding delegation of authority to Department of Commerce to identify goods subject to export controls).

While the Supreme Court has, at times, observed that one purpose of the intelligible principle requirement is to facilitate judicial review, none of the cases cited by appellants involved delegations to the President concerning subject matters over which the judiciary has traditionally declined to review. *See Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 218 (1989) (reviewing delegation to the Secretary of Transportation to assess user fees); *Indus. Union Dep't AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607 (1980) (reviewing whether Secretary of Labor complied with statutory requirement to regulate occupational exposure to benzene); *Am. Power & Light*, 329 U.S. at 105 (reviewing delegation to Security and Exchange Commission to regulate corporate structure of companies in a particular holding company).

Appellants and amicus Cato Institute express dissatisfaction with the bar on reviewing the President's fact-finding and exercise of discretion. *See* Cato Inst. Amic. Br. at 10-17. But this distinct constraint, imposed by separation of powers principles as between the Judiciary and the Executive, has never been thought by the Supreme Court to be relevant to the nondelegation doctrine, which speaks to the separation of powers between Congress and the Executive. *E.g.*, *Florsheim Shoe*, 744 F.2d at 796 (sustaining Section 504 of the Tariff Act of 1930 as constitutional delegation of authority while acknowledging that President's exercise of discretion under that statute was non-justiciable); *United States v.*

Curtiss-Wright Corp., 299 U.S. 304, 324 (1936) (observing multiple acts of Congress authorizing action by the President "in respect of subjects affecting foreign relations, which [] leave the exercise of the power to his unrestricted judgment").

B. Any Separation of Powers Concerns Are Less Substantial Because Of The President's Independent Authority Over National Security And Foreign Affairs

Appellants and amici ignore a critical aspect of the nondelegation doctrine: the "same limitations on delegation do not apply 'where the entity exercising the delegated authority itself possesses independent authority over the subject matter.'" *Loving*, 517 U.S. at 773 (citing *United States v. Mazurie*, 419 U.S. 544, 556-557 (1975)). While the Supreme Court did not need to resort to this principle in *Algonquin*, the President's independent constitutional authority over matters of national security and foreign affairs further confirms the constitutionality of Section 232.

This Court's predecessor explained that when a statute deals with national security and foreign affairs, even "a grant to the President which is expansive to the reader's eye should not be hemmed in or 'cabined, cribbed, confined' by anxious judicial blinders." *Yoshida Int'l*, 526 F.2d at 571 (citing *S. Puerto Rico Sugar Co. Trad. Corp. v. United States*, 334 F.2d 622, 632 (Ct. Cl. 1965)).

Thus, a delegation to the Executive that might otherwise be improper if confined to internal affairs may "nevertheless be sustained on the ground that its exclusive aim is to afford a remedy for a hurtful condition within foreign territory." *Curtiss-Wright*, 299 U.S. at 315; *see also Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1438 (9th Cir. 1996) (same) (upholding constitutionality of Congress' delegation of authority to President to renew the Cuban embargo solely upon a determination that it is "in the national interest"). Even the dissent in *Gundy* recognized that "Congress may assign the President broad authority regarding the conduct of foreign affairs or other matters where he enjoys his own inherent Article II powers." *Gundy*, 139 S. Ct. at 2144 (Gorsuch, J., dissenting).

"When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). In recognition of this principle, courts have granted broader deference to delegations of authority to the President in matters involving national security and foreign affairs. "Congress – in giving the Executive authority over matters of foreign affairs – must of necessity paint with a brush broader than that it customarily wields in domestic areas." *Zemel v. Rusk*, 381 U.S. 1, 17 (1965); *see also Clinton v. City of New York*, 524 U.S. 417, 445 (1998) (distinguishing the President's degree of discretion and

freedom from statutory restriction in the realm of foreign affairs and international trade, from the domestic realm).

In exercising his authority under Section 232, the President is unquestionably operating in the realms of national security and foreign trade. National security is a shared prerogative of both Congress and the President. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1861 (2017). The President's independent powers over national security and foreign affairs mean that, even accepting appellants' reading that Section 232 extends to the outer bounds of permissible delegation, Applnt. Br. at 46, all constitutional requirements are satisfied.

CONCLUSION

For these reasons, we respectfully request that this Court affirm the judgment of the United States Court of International Trade.

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

JEANNE E. DAVIDSON
Director

/s/Tara K. Hogan
TARA K. HOGAN
Assistant Director
Commercial Litigation Branch
Civil Division
U.S. Department of Justice
P.O. Box 480, Ben Franklin Station

Washington, D.C. 20044
Tele: (202) 616-2228

September 18, 2019 Attorneys for Defendant-Appellee

CERTIFICATE PURSUANT TO RULE 32(A)(7)(C)

I, Tara K. Hogan, an attorney in the Department of Justice, Civil Division, Commercial Litigation Branch, certify that this brief, which used Times New Roman font with 14 point type, contains 6,251 words (relying upon the Microsoft Word word count feature of the word processing program used to prepare this principal brief) and complies with the type-volume limitation contained in Rule 32(a)(7)(B).

/s/Tara K. Hogan

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 18th day of September, 2019, a copy of the foregoing "RESPONSE BRIEF OF DEFENDANT-APPELLEES" was filed electronically.

__X__ This filing was served electronically to all parties by operation of the Court's electronic filing system.

/s/Tara K. Hogan