THE "NATIONAL SECURITY" OF NATIONS: PRESIDENT TRUMP'S PRETEXTUAL TARIFF RATIONALE AND HOW TO OVERCOME IT

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I. INTRODUCTION

President Donald J. Trump, both during his candidacy and time in office, has been a vocal advocate for the use of tariffs to effectuate changes in trade policy. He put that advocacy into action on March 8, 2018, when he announced that he would be imposing a twenty-five percent global tariff on imports of steel,[1] and a ten percent global tariff on imports of aluminum.[2] Each proclamation was made in response to a corresponding report published after the completion of a "Section 232 investigation"[3] undertaken by the Secretary of Commerce, in which the Department of Commerce ("Commerce") assessed the manner and extent to which the importation of steel and aluminum potentially threatened to impair national security. These tariffs were structured to target *global* imports and subjected all foreign steel and aluminum producers to economic pressure, regardless of whether they operated in allied or adversarial countries.[4]

The findings in the Section 232 reports, particularly regarding steel imports, did demonstrate legitimate concerns about the United States' relative weakness in terms of domestic production, which in turn could impact U.S. capabilities to manufacture arms or use domestic steel to rebuild critical infrastructure. However, Finding D(1) states that "China alone [is] able to produce as much steel as the rest of the world combined."[5] This allows one to deduce that China is the primary threat to American industry's capacity to sustain an active steel manufacturing industry.

Despite this fact, the Trump administration decided to impose a global tariff on all steel imports that, without a subsequent grant of exemption, would directly impact allied and non-allied countries alike. Why would the administration operate in such a way, implicating allied nations as national security threats and applying a blanket

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[1] Adjusting Imports of Steel into the United States, 83 Fed. Reg. 11625, 11626 (Mar. 8, 2018) [hereinafter Proclamation 9705].

[2] Adjusting Imports of Aluminum into the United States, 83 Fed. Reg. 11619, 11620 (Mar. 8, 2018) [hereinafter Proclamation 9704].

[3] "Section 232 investigation" refers to an investigative process first enumerated in the Trade Expansion Act of 1962. The procedure, history, and invocation of Section 232 investigations will be discussed later in this note.

[4] *See* Proclamation 9705, *supra* note 1; *see also* Proclamation 9704, *supra* note 2.

[5] U.S. DEP'T OF COMMERCE, BUREAU OF INDUS. & SEC., THE EFFECT OF IMPORTS OF STEEL ON THE NATIONAL SECURITY: AN INVESTIGATION CONDUCTED UNDER SECTION 232 OF THE TRADE EXPANSION ACT OF 1962, AS AMENDED 52 (2018) [hereinafter STEEL REPORT].

penalty on all countries, even though every foreign nation's effect on our domestic industry is not directly proportional?

The president's words and platforms during and following his campaign indicate that he seeks to use protectionist trade-policy as leverage to challenge foreign economies and re-negotiate existing trade deals. However, the ability to regulate commerce with foreign nations and impose taxes upon imported goods are both constitutionally enumerated powers granted to Congress.[6] Furthermore, the World Trade Organization and its free-trade structure (promulgated in the 1995 General Agreement on Trade and Tariffs (G.A.T.T.)) binds its members—of which the United States is one—from imposing barriers to trade.

As a result, the evidence suggests that the Trump Administration relied upon section 232 of the Trade Expansion Act—which gives the president the statutory authority to impose otherwise punitive trade barriers in response to imports which pose a threat to national security—as a means to circumvent Congress and the G.A.T.T., and to leverage foreign nations into re-negotiating their trade policy. This pre-textual reliance on the statute is ethically dubious at best and presents serious concerns about the power of the executive and the stability of the existing international economic system.

Part II of this note will present the historical contexts of the law's adoption and use, spanning from the promulgation of the Trade Expansion Act of 1962 to President Trump's proclamations imposing tariffs on steel and aluminum. Part III will address candidate and President Trump's stances on trade policy and demonstrate the divide between his national security rationale in theory and application. Part IV will present the historical and legal framework regarding the president's authority to impose tariffs. It will also analyze cases that have directly challenged President Trump's reliance on the statute to date, ultimately presenting the conclusion that court challenges are an untenable mechanism for ensuring restraint on the part of the president.

Finally, Part V will give context regarding current legislative proposals and suggest a policy prescription which provides a legislative check on the president to ensure that the use of the National Security Clause comports with traditional and constitutional norms regarding trade law, and does not allow a president to pretextually

[6] *See*, *e.g.*, U.S. CONST. art I, § 8.

usurp power otherwise constitutionally granted to Congress. While Congress was not necessarily wrong to carve out this limited delegation of tariff authority to the president, specifically in an area of presumed executive expertise, President Trump's actions have illustrated the need for the legislative branch to exercise a modicum of oversight where it was not previously necessary.

II. HISTORICAL RELIANCE ON SECTION 232 INVESTIGATIONS

A. Initial Passage of the Trade Expansion Act

The legal authority that President Trump relies upon to impose these tariffs is 19 U.S.C. §1862, or the "National Security Clause" of the Trade Expansion Act of 1962.[7] The act was passed in the heat of the Cold War, an era in which the U.S. was concerned about other countries turning to communism and implementing protectionist economic policies. The act was meant to open markets to create greater international prosperity by lowering barriers to international trade.[8] In his remarks at the signing of the act, President John F. Kennedy said, "[t]his act recognizes, fully and completely, that we cannot protect our economy by stagnating behind tariff walls, but that the best protection possible is a mutual lowering of tariff barriers among friendly nations so that all may benefit from a free flow of goods."[9] Demonstrating a shifting preference for an economically integrated globe, President Kennedy proclaimed:

> We will use the specific authorities designed to widen markets for the raw materials and manufactures of the less developed nations whose economic growth is so important to us all and to strengthen our efforts to end discriminatory and preferential arrangements which in the long run can only make everyone poorer and the free world less united.[10]

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[7] 19 U.S.C. § 1862 (2018).

[8] John F. Kennedy, *Remarks Upon Signing the Trade Expansion Act (Oct. 11, 1962),* THE AMERICAN PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/remarks-upon-signing-the-trade-expansion-act (last visited Feb. 3, 2019); *see also* Audiotape: Remarks Upon Signing the Trade Expansion Act (Oct. 11, 1962) (on file with the John F. Kennedy Presidential Library and Museum), https://www.jfklibrary.org/Asset-Viewer/Archives/JFKWHA-136-002.aspx (last visited Feb. 3, 2019).

[9] Kennedy, *supra* note 8.

[10] *Id.*

In perhaps the most striking language demonstrating President Kennedy's association between economic prosperity and national security, he said that "[a] vital expanding economy in the free world is a strong counter to the threat of the world Communist movement. This act is, therefore, an important new weapon to advance the cause of freedom."[11] While free trade was the apparent "new weapon" that would ensure economic and diplomatic stability throughout the world, the act carved out a punitive exception that allowed the president to wield an age-old stick to bring non-participatory nations into the fold: tariffs.

B. Operation of Section 232: The National Security Clause

Codified as 19 U.S.C. 1862(b), the National Security Clause allows the president, the head of any department or head of any agency, or an entity involved in a specific industry, to request a formal investigation by the Commerce Department regarding the national security importance of specific imported articles.[12] The Secretary of Commerce must immediately notify the Department of Defense when a formal investigation is requested.[13] The Secretary of Commerce will then consult with the Secretary of Defense about methodology and policy questions, seek information and advice from appropriate officers of the U.S., and, if appropriate and after reasonable notice, hold public hearings.[14] The Secretary of Commerce then has two hundred and seventy days from the date the investigation is initiated to give the president a report on the findings.[15] The report will provide an in-depth analysis on the import of specific articles and their possible effect(s) on national security.[16] Based upon these findings, the report will give recommendations for either action or inaction.[17] The Secretary of Commerce is also obligated to "prescribe such procedural regulations as may be necessary to carry out" their obligations under § 1862.[18]

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[11] *Id.*
[12] 19 U.S.C. § 1862(b)(1)(A) (2018).
[13] *Id.* § 1862(b)(1)(B).
[14] *Id.* § 1862(b)(2)(A).
[15] *Id.* § 1862(b)(3)(A).
[16] *Id.* § 1862(b)(3)(A).
[17] *Id.* § 1862(b)(3)(A).
[18] 19 U.S.C. § 1862(b)(4) (2018).

Once the report is issued, the president has ninety days to determine if he agrees with the secretary, and if so, determine what action must be taken to adjust the imports so that they will no longer threaten national security.[19] The president then has fifteen days from the date of determination to implement the action.[20] Then, within thirty days of his determination, the president must submit a report to Congress explaining his decision.[21]

Subsection 1862(d) of the National Security Clause mandates that the president and Secretary of Commerce "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 . . . ."[22] This section also sets forth that "[t]he 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 . . . ."[23] This text is critical for the current administration's justification for imposing tariffs on aluminum and steel because it implicitly calls upon the Department of Commerce and the president to compile the research in a manner that disregards the realities of existing defense treaties.[24]

C. Investigations Prior to President Trump

Prior to the Steel and Aluminum investigations initiated by the Trump Administration, the Department of Commerce (or its prior equivalent) had conducted twenty-six Section 232 investigations since the statute's codification in 1962.[25] Of those twenty-six investigations,

[19] *Id.* § 1862(c)(1)(A).
[20] *Id.* § 1862(c)(1)(B).
[21] *Id.* § 1862(c)(2).
[22] *Id.* § 1862(d).
[23] *Id*. § 1862(d).
[24] 19 U.S.C. § 1862(d) (2018) (by directing the president and Department of Commerce to recognize the relationship between a healthy domestic economy and national security in the manner set forth in the latter portion of § 1862(d), a published report is not clearly required to take into account the aid or military assistance that would be required by NATO or other multilateral defense treaties).
[25] RACHEL F. FEFER ET AL., CONG. RES. SERV., R45249: SECTION 232 INVESTIGATIONS: OVERVIEW AND ISSUES FOR CONGRESS 1, 3 (Version 19, Sept. 11, 2018).

the Department of Commerce terminated one prior to completion.[26] Of the twenty-five remaining investigations, it was determined that sixteen of the targeted imports did not pose a threat to national security, while nine of the targeted imports did threaten to impair national security and were accompanied by official recommendations.[27] Of the nine imports that Commerce determined to threaten or impair national security concerns, eight were investigations of crude oil, petroleum products, or a combination of the two.[28] The one non-petroleum import that was determined to pose a threat to national security was "Metal-cutting and Metal Forming Machine Tools."[29]

The presidents who received final reports that determined the investigated import posed a threat to national security took official action based on report recommendations in five cases, though none of the actions taken involved the implementation of tariffs.[30] In 1973, an investigation into general petroleum imports led to a transition from the existing quota system to the implementation of a license fee.[31] In 1975 and 1978, petroleum import investigations resulted in the implementation of a supplemental fee and a conservation fee, respectively.[32] Embargoes were twice placed on petroleum: the first on petroleum from Iran in 1979, and the second on petroleum from Libya in 1982.[33] In the case of the 1983 investigation into metal-cutting and metal forming machine tools, President Reagan decided to defer an official decision on the Section 232 recommendation, and instead pursued voluntary restraint agreements with foreign suppliers.[34]

D. President Trump's Section 232 Investigations

On April 19, 2017, Secretary of Commerce Wilbur Ross ("Secretary Ross") initiated a Section 232 investigation into the potential national security threat that the importation of steel posed to

[26] *Id.* at 3.
[27] *Id.*
[28] *Id.*
[29] *Id.* at 4.
[30] *Id.* at 3.
[31] FEFER ET AL., *supra* note 25, at 3.
[32] *Id.* at app. B (the conservation fee implemented in 1978 was later found to be illegal by a District Court and was subsequently blocked).
[33] *Id.* at 3.
[34] *Id*. at 4.

the United States.[35] One week later, on April 26, Secretary Ross initiated a second Section 232 investigation into the importation of aluminum goods.[36] Each investigation was officially announced in the public register and was granted a public comment period of forty-one[37] and fifty-two days,[38] respectively, each culminating with a public hearing.[39] Secretary Ross has also initiated two additional Section 232 investigations, one into imports of "automobiles, including SUVs, vans and light trucks, and auto parts," as well as one into "uranium ore and products."[40] At this time, there has yet to be an official report issued in either investigation.

The report on steel imports was published on January 11, 2018, and the report on aluminum imports was published on January 17, 2018.[41] According to the official reports published by the Department of Commerce, each investigation utilized the statutory analysis of a 2001 Bush administration Section 232 investigation into "[i]ron ore and finished steel"[42] to define the terms "national defense" and "national security."[43] In each case, the Secretary relied on the 2001

[35] STEEL REPORT, *supra* note 5.

[36] U.S. DEP'T OF COMMERCE, BUREAU OF INDUS. & SEC., THE EFFECT OF IMPORTS OF ALUMINUM ON THE NATIONAL SECURITY: AN INVESTIGATION CONDUCTED UNDER SECTION 232 OF THE TRADE EXPANSION ACT OF 1962, AS AMENDED (2018) [hereinafter ALUMINUM REPORT].

[37] STEEL REPORT, *supra* note 5, at 18-19.

[38] ALUMINUM REPORT, *supra* note 36, at 18-19.

[39] STEEL REPORT, *supra* note 5, at 19; *see also* ALUMINUM REPORT, *supra* note 36, at 19.

[40] FEFER ET AL., *supra* note 25, at 4. On July 12, 2019, President Trump released the "Memorandum on the Effect of Uranium Imports on the National Security and Establishment of the United States Nuclear Fuel Working Group," in which the President did not concur with the Secretary's findings that Uranium imports threatened to impar the national security of the United States. MEMORANDUM ON THE EFFECT OF URANIUM IMPORTS ON THE NATIONAL SECURITY AND ESTABLISHMENT OF THE UNITED STATES NUCLEAR FUEL WORKING GROUP, WHITE HOUSE (July 12, 2019), https://www.whitehouse.gov/presidential-actions/memorandum-effect-uranium-imports-national-security-establishment-united-states-nuclear-fuel-working-group/.

[41] STEEL REPORT, *supra* note 5; *see also* ALUMINUM REPORT, *supra* note 36.

[42] Though it was overseen during the first term of George W. Bush's administration, the 2001 investigation into iron ore and finished steel imports was initiated by Congressional Representatives James Oberstar and Bart Stupak. It was the most recent 232 investigation prior to President Trump's into steel and aluminum. The final report did not conclude that the imports posed a threat to national security and no action was taken as a result of that investigation. *See* FEFER ET AL., *supra* note 25, at 33.

[43] STEEL REPORT, *supra* note 5, at 13-14; *see also* ALUMINUM REPORT, *supra* note 36, at 12-13.

investigation's determination "that 'national security' for the purposes of Section 232 includes the 'general security and welfare of certain industries, beyond those necessary to satisfy national defense requirements, which are critical to minimum operations of the economy and government.'"[44]

With that frame in mind, the investigations resulted in the conclusion that steel and aluminum were imported goods that are both essential to U.S. national security,[45] and that current comparative export to import levels of both goods pose a potential threat to the national security of the United States.[46] In the case of steel imports, the Department of Commerce first found that national security included projected national defense requirements for the Department of Defense, as well as critical infrastructure sectors (such as transportation systems, the electrical power grid, water systems, and energy generation systems), and that domestic steel production—which depends on healthy and competitive U.S. industry—is essential for fulfilling our national security needs.[47] In its second finding, the Department of Commerce determined that current import quantities adversely impact the "economic welfare of the U.S. Steel industry."[48] Specifically, the report cited that steel imports nearly outnumbered exports four-to-one, and that the price of steel imports was substantially lower than that of U.S. exports.[49]

The report's third finding stated that excessive steel imports displace the role of domestic steel producers and "has the serious effect of weakening our internal economy."[50] Similarly, the report's fourth finding stated that a global excess steel capacity contributes to the weakening of the United States' domestic economy.[51] The report concluded that the current circumstances regarding the United States' importation of steel results in a "weakening of our internal economy and threaten[s] to impair the national security as defined in Section

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[44] STEEL REPORT, *supra* note 5, at 13-14; *see also* ALUMINUM REPORT, *supra* note 36, at 12-13.

[45] *See* STEEL REPORT, *supra* note 5, at 17; *see also* ALUMINUM REPORT, *supra* note 36, at 16-17.

[46] *See* STEEL REPORT, *supra* note 5, at 17; *see also* ALUMINUM REPORT, *supra* note 36, at 16-17.

[47] STEEL REPORT, *supra* note 5, at 2-3.

[48] *Id.*

[49] *Id.*

[50] *Id.* at 3-4.

[51] *Id.* at 4.

232."[52] The Secretary further sought to distinguish the current investigation from the 2001 investigation by stating that the current investigation was broader in scope, and that circumstances in the global steel markets had since changed (excess capacity, increased import levels, and the impact potential domestic plant closures), thus meriting the determination that action should be taken under Section 232.[53]

Three of the four findings within the Aluminum report are substantively the same, specifically that aluminum is also essential to U.S. National Security, that the present quantity of import adversely impacts the economic welfare of the U.S. aluminum industry, and that global excess capacity contributes to the weakening of the domestic aluminum industry and economy as a whole.[54] The Aluminum report posited an additional finding that "[t]he U.S. Government does not maintain any strategic stockpile of bauxite, alumina, aluminum ingots, billets or any semi-finished aluminum products such [sic] aluminum plate."[55] Both reports document general decreases in the domestic output and exports of American steel and aluminum goods, which serve as the foundational support for the proposition that comparatively weaker domestic markets diminish total output capacity and leaves the United States vulnerable to shortages in the case of a national emergency.

Each report offered two "alternatives" outlining recommended action, though the first alternative in each report contains two possible courses of action. The first course of action recommended was the application of either global quotas or global tariffs on both goods.[56] In the case of steel imports, Commerce suggested that imposing either a sixty-three percent global quota or a twenty-four percent tariff on all steel imports would enable an eighty-percent capacity utilization rate at 2017 demand levels (satisfying report's threshold for necessary domestic capacity in regards to security).[57] The second alternative presented in the Steel report was the imposition of a fifty-three percent tariff on steel imports exclusively from Brazil, South Korea, Russia,

[52] STEEL REPORT, *supra* note 5, at 5 (internal quotation marks omitted).

[53] *See id.* at 5.

[54] *See* STEEL REPORT, *supra* note 5, at 2-5; *see also* ALUMINUM REPORT, *supra* note 36, at 2-5.

[55] ALUMINUM REPORT, *supra* note 36, at 2.

[56] *See* STEEL REPORT, *supra* note 5, at 6-9; *see also* ALUMINUM REPORT, *supra* note 36, at 6-8.

[57] *See* STEEL REPORT, *supra* note 5, at 7.

Turkey, India, Vietnam, China, Thailand, South Africa, Egypt, Malaysia, and Costa Rica, which would be projected to increase domestic production enough to achieve an eighty percent capacity utilization at 2017 demand levels.[58]

In the Aluminum Report, the first alternative recommended either a global quota of eighty-six-point-seven percent, or a seven-point-seven percent global tariff on aluminum imports in order to bring total domestic production to approximately eighty percent of U.S. primary aluminum production capacity.[59] The second alternative recommended that the president impose a nearly twenty-four percent tariff on aluminum products exclusively from China, Hong Kong, Russia, Venezuela, and Vietnam in order to boost U.S. production to at least eighty percent of production capacity.[60] Included in the recommendation sections of both reports were propositions for granting either exemptions or exclusions from any action taken in response to the reports.[61]

In both cases, Commerce stated that individual countries could be exempted by granting them one-hundred percent of their prior imports in 2017 (or in the case of aluminum a potentially complete exemption), "based on an overriding economic or security interest of the United States."[62] Each exemption determination would be made at the outset of taking action, and a final adjustment would be made to any tariff or quota ultimately placed upon the remaining countries.[63] In the case of steel tariffs or quotas, adjustment would be necessary to offset the effect of exempted import tonnage and to ensure U.S. steel capacity utilization of eighty percent.[64] In the case of aluminum, the ultimate goal would be to allow domestic production to return to 2012 production and import penetration levels.[65]

The recommendations regarding an exclusion process are nearly identical, but for the final sentences of each clause which

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[58] *Id.* at 60.

[59] *See* ALUMINUM REPORT, *supra* note 36, at 6.

[60] *Id.* at 8-9.

[61] *See* STEEL REPORT, *supra* note 5, at 60-61; *see also* ALUMINUM REPORT, *supra* note 36, at 8-9.

[62] *See* STEEL REPORT, *supra* note 5, at 60; *see also* ALUMINUM REPORT, *supra* note 36, at 109.

[63] *See* STEEL REPORT, *supra* note 5, at 60-61; *see also* ALUMINUM REPORT, *supra* note 36, at 109.

[64] *See* STEEL REPORT, *supra* note 5, at 61.

[65] ALUMINUM REPORT, *supra* note 36, at 109.

include the specific targets for each industry.[66] Exclusions would be specifically reserved for "affected U.S. parties," and would be determined based on a demonstrated "(1) lack of sufficient U.S. production capacity of comparable products; or (2) specific national security based considerations."[67] The appeal process would be led by the Department of Commerce, in coordination with the Department of Defense, and with any other appropriate agencies.[68]

Secretary of Defense James M. Mattis submitted a memo to Secretary Ross regarding the steel and aluminum policy recommendations given in each report. In the memo, Secretary Mattis stated that the Department of Defense concurred with the Department of Commerce's conclusion that "the imports of foreign steel and aluminum based on unfair trading practices impair the national security."[69] However, Secretary Mattis, citing findings in both reports that U.S. military requirements for steel and aluminum each only represent about three percent of U.S. steel and aluminum production, stated that the Department of Defense didn't believe the findings in the report impacted the ability of the Department of Defense to "acquire the steel or aluminum necessary to meet national defense requirements."[70] Furthermore, Secretary Mattis expressed concern over the impact of the recommended actions in the reports and indicated that, in his estimation, "targeted tariffs are more preferable than a global quota or global tariff."[71] In the final paragraph of the memo, Secretary Mattis stated:

> This is an opportunity to set clear expectations domestically regarding competitiveness and rebuild economic strength at home while preserving a fair and reciprocal international economic system as outlined in the National Security Strategy. It is critical that we reinforce to our key allies that these actions are focused on correcting Chinese overproduction and countering their attempts to circumvent

[66] *See* STEEL REPORT, *supra* note 5, at 61; *see also* ALUMINUM REPORT, *supra* note 36, at 109.

[67] *See* STEEL REPORT, *supra* note 5, at 61; *see also* ALUMINUM REPORT, *supra* note 36, at 109.

[68] *See* STEEL REPORT, *supra* note 5, at 61; *see also* ALUMINUM REPORT, *supra* note 36, at 109.

[69] *See* JAMES N. MATTIS, MEMORANDUM FOR SECRETARY OF COMMERCE: RESPONSE TO STEEL AND ALUMINUM POLICY RECOMMENDATIONS 1 (2018).

[70] *Id.*

[71] *Id*.

> existing antidumping tariffs – not the bilateral U.S. relationship.[72]

After considering both reports, President Trump issued two proclamations on March 8, 2018, in which he accepted both the findings of the reports, as well as the recommended actions regarding the imposition of global tariffs.[73] President Trump's action differed only slightly from Commerce's recommendation in that he imposed round tariffs of twenty-five percent on steel and ten percent on aluminum.[74]

III. TRUMP, TRADE, AND TARIFFS

A. Candidate and President Trump's Trade Policy

While the specific tariffs imposed by President Trump are clearly derived from the conclusions and recommendations provided in the steel and aluminum reports, his inclination toward challenging foreign economies with tariffs is anything but a recent phenomenon. On June 16, 2015, Donald Trump officially announced his candidacy in a speech at Trump Tower.[75] Early in the speech, then candidate Trump expressed that he was "a free trader" capable of curing the ails of prior administrations' free trade agreements that had been negotiated by "people that are stupid."[76] Several paragraphs later, he offered his solution to the displacement of U.S. jobs by outsourced manufacturing, stating that "every car and every truck and every part manufactured in this plant [in Mexico] that comes across the border, we're going to charge you a 35-percent tax, and that tax is going to be paid simultaneously with the transaction, and that's it."[77] From the first day of his campaign, Donald Trump indicated that he was unafraid to wield protectionist economic policy as a means of negotiating what he saw to be more favorable economic outcomes.

At an April 2016 campaign rally held in Pittsburgh, Pennsylvania, Donald Trump proclaimed "[i]t's steel city, and when

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[72] *Id*. at 2.

[73] *See* Proclamation 9704, *supra* note 2; Proclamation 9705, *supra* note 1.

[74] *See* Proclamation 9704, *supra* note 2; Proclamation 9705, *supra* note 1.

[75] TIME Staff, *Here's Donald Trump's Presidential Announcement Speech*, TIME (June 16, 2015), http://time.com/3923128/donald-trump-announcement-speech/.

[76] *Id.*

[77] *Id.*

I'm president guess what, steel is coming back to Pittsburgh."[78] As a campaign promise to a prominent former steel producing city, then candidate Trump said:

> We're going to go from making the worst trade deals in history, in the history of any country, to having great trade deals, where we bring jobs back, where we bring money back, where we bring factories back, where we bring *your* steel industry back. China is dumping steel all over the united states. Okay, it's killing you . . . we're going to create jobs, so people can pay. We're going to create good jobs too, real jobs, we're going to build United States steel back, we're going to get these coal companies back. They're dying. They're dying."[79]

As a candidate, President Trump seized on a decrease in manufacturing as an economic platform to energize a base comprised of working-class voters. On August 24, 2016, Donald Trump held a rally in Orlando, Florida in which he expounded upon, among other things, his views on trade.[80] After spending nearly a minute speaking about the United States' trade deficit with China, Trump said:

> And I'm going to use every lawful presidential power to remedy the trade disputes including the application of tariffs, and I'll tell you, we're gonna [sic] probably have to use them in at least some cases, because they have to understand we're not playing games any longer, folks. We're not playing games. If we take these steps, jobs and factories will come roaring back into our country.[81]

Importantly, though, he would go on to add (almost as an afterthought) that "[m]anufacturing is also a matter of national security. It's national security. Our manufacturing is being decimated,

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[78] Factbase Videos, *Speech: Donald Trump – Pittsburgh, PA – April 13*, *2016*, at 00:06:33-00:06:41, YOUTUBE (Oct. 26, 2017), https://www.youtube.com/watch?time_continue=2546&v=hdE4J5wHZnY.

[79] *Id.* at 00:41:54-00:42:34 (emphasis added).

[80] *Donald Trump Campaign Rally in Tampa, Florida*, C-SPAN (Aug. 24, 2016), https://www.c-span.org/video/?414315-1/donald-trump-campaigns-tampa-florida.

[81] *Id.* at 1:01:13.

decimated, we're not going to have manufacturing."[82] An argument in good-faith must recognize that Trump did in fact claim the domestic manufacturing industry to be one element of an extremely broad umbrella of national security concerns, though he did not elaborate further as to how. At the very least, he hedged his bets by shrouding job growth in the cloak of national security concern.

All the same, this mention of national security in regard to the strength of domestic industry appeared to be a disclaimer of sorts and seems to take a backseat to the greater political message of personal economic prosperity for voters. This note is not arguing that a robust steel industry in the United States and a healthy national security apparatus are mutually exclusive, nor that they need be for the president's use of Section 232 of the Trade Expansion Act to be pre-textual. An important distinction is that Trump had previously identified, as did the Departments of Commerce and Defense, that China was the primary contributor to excess steel capacity, and yet he has applied *global* tariffs to *all* steel and aluminum imports.

B. President Trump's Political Approach to Tariffs

Since his election, Donald Trump has repeatedly threatened to impose tariffs of up to twenty-five percent on the import of foreign cars.[83] On July 25, 2018, after imposing steel and aluminum tariffs on European imports, President Trump met with E.U. Commission President Jean-Claude Junker to discuss a host of issues, the future of trade between the United States and the E.U. amongst them.[84] Both parties were embroiled in the beginnings of a trade war as Europe had imposed retaliatory tariffs upon U.S. goods to counter the tariffs on steel and aluminum.[85] The day before the meeting took place, President Trump telegraphed his opinion regarding the upcoming talks in two tweets. In the first, he stated that:

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[82] *Id.* at 1:01:53.

[83] Christina Wilkie & Tucker Higgins, *Trump, EU Agree to Work on Lowering Tariffs, Averting a Potential Trade War*, CNBC (July 25, 2018, 7:52 PM ET), https://www.cnbc.com/2018/07/25/trump-we-hope-to-work-something-out-on-a-fair-trade-deal-with-europe.html.

[84] *Id.*

[85] Richard Partington, *Trump Threatens Car Tariffs After EU Sets Up £2.5bn of Levies on US*, THE GUARDIAN (June 22, 2018, 12:02 EDT), https://www.theguardian.com/business/2018/jun/22/bourbon-levis-prices-rise-eu-enforces-tariffs-us.

> [t]ariffs are the greatest! Either a country which has treated the United States unfairly on Trade [sic] negotiates a fair deal, or it gets hit with Tariffs [sic]. It's as simple as that - and everybody's talking! Remember, we are the "piggy bank" that's being robbed. All will be Great [sic]![86]

President Trump later tweeted tweet that he "[had] an idea for [the European Union]. Both the U.S. and the E.U. drop all Tariffs, Barriers, and Subsidies [sic]! That would finally be called Free Market [sic] and Fair Trade [sic]! Hope they do it, we are ready—but they won't!"[87]

The result of the meeting was hailed as an apparent success for both parties. President Trump remarked that both parties had "agreed . . . to work together toward zero tariffs, zero non-tariff barriers and zero subsidies on non-auto industrial goods."[88] According to Juncker, each party reached the agreement that escalation of a trade war should be cooled, and that the parties would "reassess existing tariffs on steel and aluminum."[89] In the process, the E.U. agreed to buy billions of dollars' worth of American exports.[90]

The context in which such specific terms were struck is perhaps even more telling than the discussions themselves. On May 23, 2018, the Trump Administration initiated a Section 232 investigation into motor vehicle and auto-part imports to assess their potential risk to national security.[91] On the same day, the Wall Street Journal reported that President Trump was seeking to impose new tariffs on automobile imports up to the twenty-five percent that he had already placed on steel, and that the tariffs were meant to target Japanese and European auto makers.[92] On June 22, 2018, the E.U. took

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[86] *Trump on Twitter (July 24): Trade, Russia, EU*, REUTERS (July 24, 2018, 9:28 PM), https://www.reuters.com/article/us-usa-trump-tweet/trump-on-twitter-trade-russia-eu-idUSKBN1KF04D.

[87] *Id.*

[88] David Smith & Dominic Rushe, *Trump and EU Officials Agree to Work Toward 'Zero Tariff' Deal*, THE GUARDIAN (July 25, 2018, 16.52 EDT), https://www.theguardian.com/us-news/2018/jul/25/trump-juncker-trade-war-eu-zero-tariff-deal.

[89] *Id.*

[90] *Id.*

[91] CONG. RESEARCH SERV., IF 10971: SECTION 232 AUTO INVESTIGATION, (Oct. 24, 2018).

[92] William Mauldin, Timothy Puko & Kate O'Keefe, *Trump Administration Looks Into New Tariffs on Imported Vehicles*, WALL STREET J. (May 23, 2018, 8:58 pm ET), https://www.wsj.com/articles/trump-administration-weighs-new-tariffs-on-imported-vehicles-1527106235?mod=article_inline.

official action in response to the tariffs on steel and aluminum by placing tariffs on a wide variety of U.S. consumer goods.[93]

President Trump took to Twitter later on June 22 to decry the E.U. tariffs and say that "if these Tariffs [sic] and Barriers [sic] are not soon broken down and removed, we will be placing a 20% tariff on all of their cars coming into the U.S. Build them here!"[94] During this same period, China had also retaliated for the tariffs levied against them—including steel and aluminum, among others[95]—by placing tariffs on a litany of U.S. goods, and perhaps most acutely, soybeans.[96]

According to a Forbes article published on July 8, 2018, this resulted in a drastic drop in the price of U.S. soybeans between May and July, which forecasted what would be a nearly eight-billion-dollar loss in total revenue.[97] Seventeen days later, already mitigating a twenty-five percent tariff on steel exports and a ten-percent tariff on aluminum exports, as well as a threatened twenty to twenty-five percent tariff on all auto exports, the E.U. Commissioner met with President Trump to discuss, among other things, trade. The result of the meeting was an agreement to halt any potential future tariffs, *including on automobiles and auto parts*.[98] In exchange, the European Union agreed to lower tariffs on non-auto industrial goods and increase its imports of two U.S. goods: liquefied natural gas and *soybeans*.[99]

Trump's concern regarding a trade imbalance between the United States and foreign auto-manufacturers has been documented for some time longer than the May 23 initiation of a Section 232 investigation would indicate. At the previously discussed April 13,

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[93] Partington, *supra* note 85.

[94] *Id.*

[95] President Trump had previously imposed tariffs on several Chinese goods, most prominently solar panels, based on presidential authority under § 201 of the Trade Act of 1974. *See Section 201 Solar Tariffs*, SOLAR ENERGY INDUSTRIES ASS'N, https://www.seia.org/research-resources/section-201-solar-tariffs (last visited Feb. 3, 2019). This provision pertains to domestic industries that are "serious[ly] injure[d]" or "threat[ened] with "serious" injury by increased import. 19 U.S.C. § 2251(a).

[96] Chuck Jones, *Trump's and China's Tariffs Could Do Permanent Damage to Soybean Farmers*, FORBES (July 8, 2018, 2:45PM), https://www.forbes.com/sites/chuckjones/2018/07/08/trumps-and-chinas-tariffs-could-do-permanent-damage-to-soybean-farmers/#3d07d207287f.

[97] *Id.*

[98] *Trump and EU's Juncker Pull Back from All-Out Trade War*, BBC NEWS (July 26, 2018), https://www.bbc.com/news/world-us-canada-44961560.

[99] *Id.*(emphasis added).

2016 campaign rally in Pittsburgh, Donald Trump expressed serious dismay at what he perceived to be a problematic imbalance in auto-trade with Japan, in which he stated:

> And you talk about trade imbalance, they send us millions of cars we send them practically nothing. And what do we get, and then we defend them, and it's all wonderful, but we gotta get paid something, we gotta get a little, we gotta do something. Folks, we're getting ripped [off] by everybody . . . .[100]

In that quote, candidate Trump acknowledged that there was a strategic military partnership with Japan, but still indicated that his primary concern with the trade imbalance was not defense or manufacturing related, but rather getting "paid something."[101]

Japan has not been alone in drawing the president's ire over a perceived imbalance in international trade of automobiles and auto-parts. Trump has consistently derided European manufacturers, specifically those from Germany, for selling large numbers of vehicles in the United States while importing comparatively fewer. In an interview given to a German newspaper just before his inauguration, President-elect Trump remarked that "[w]hen you walk down Fifth Avenue [in Manhattan], everybody has a Mercedes-Benz parked in front of his house," as well as rhetorically asked "[h]ow many Chevrolets do you see in Germany? Not many, maybe none . . . . It's a one way street."[102] In that same interview, he threatened multiple German luxury automakers—as well as Japanese automaker Toyota—because of his dismay with their manufacturing operations outside of the United States, saying "[i]f you want to build cars in the world, then I wish you all the best. You can build cars for the United States, but

[100] *Speech: Donald Trump – Pittsburgh, PA – April 13, 2016*, *supra* note 78, at 00:37:11-00:37:29.

[101] *Id.*

[102] Griff Witte & Rick Noack, *Trump's tariff threats suddenly look very real in the heartland of Germany's car industry*, WASHINGTON POST (June 22, 2018), https://www.washingtonpost.com/world/europe/trump-has-long-threatened-to-hike-tariffs-on-european-cars-german-auto-workers-now-fear-he-isnt-bluffing/2018/06/22/bfcf2326-6e60-11e8-b4d8-eaf78d4c544c_story.html?utm_term=.3e0114381a5d.

for every car that comes to the USA, you will pay thirty-five percent tax."[103]

President-elect Trump additionally called out BMW by name for its potential plans to operate a manufacturing plant in Mexico, saying "I would tell BMW that if you are building a factory in Mexico and plan to sell cars to the USA, without a thirty-five percent tax, then you can forget that."[104] It is worth noting that the automakers that Trump called out by name for exporting to the United States also have plants that manufacture and distribute vehicles within the United States.[105]

C. National Security as a Clear Pretext: Autos

While the primary focus of this note is on the initial promulgation of tariffs on steel and aluminum imports into the United States—where it may be difficult to parse the president's rhetoric during the campaign and early days of his presidency from a potentially legitimate national security concern regarding steel and aluminum imports—the initiation of the third investigation into the import of what are generally consumer goods demonstrates a narrative that is in line with the president's proclamations made both on the campaign trail and once in office.

Trump's views on the importation of cars, especially luxury automobiles, clearly appear to be rooted in his "Make America Great Again" platform of general economic nationalism. For years, Donald Trump has lamented domestic automobile manufacturing output and criticized foreign auto-makers. During his candidacy and time as president-elect, Trump suggested taxing automobile imports at the border, and in the early part of his Presidency he reiterated his position. Once he had successfully unilaterally promulgated tariffs on steel and aluminum in the name of national security—which were ultimately applied to hostile and allied nations alike—President Trump initiated the same investigative process into the national security implications of foreign auto imports on the domestic auto-manufacturing economy. On June 22, 2018, nearly one month after requesting the investigation—which was originally scheduled to

[103] Edward Taylor & Andreas Rinke, *Trump Threatens German Carmakers with 35 Percent U.S. Import Tariff*, REUTERS (Jan. 16, 2017, 4:04 AM), https://www.reuters.com/article/us-usa-trump-germany-autos-idUSKBN1500VJ.

[104] *Id.*

[105] *Id.*

conclude in August 2018, and later pushed back until November 2018[106]—President Trump threatened to impose tariffs of twenty-percent on automobiles[107] in direct response to retaliatory tariffs from the European Union.

Absent a finished report with recommendations from the Department of Commerce, President Trump had no authority to impose a twenty-percent tariff on automobiles. The threat that he made to do so was structured not as a proclamation of concern for the domestic auto-industry, but as an ultimatum in response to the European Union's imposition of retaliatory tariffs on *consumer goods unrelated* to the American automobile market as a whole.[108] The president withdrew his immediate threats to impose tariffs on European automobiles in exchange for an immediate increase in European importation of American products unrelated to automobiles, as well as future negotiations surrounding the elimination of trade barriers entirely.[109]

Trump did in fact receive a report from Commerce on February 17, 2019, just hours before that 270-day statutory deadline; the administration declined to publicly publish the report or divulge its findings and conclusions during the 90-day period in which the President was required to agree or disagree.[110] On May 17, 2019, once again on the final day of the statutory period, the administration

[106] RACHEL F. FEFER, CONG. RESEARCH SERV., IF 10971: SECTION 232 AUTO INVESTIGATION, (2018).

[107] Partington, *supra* note 85.

[108] Among the items targeted by the E.U. and China are Harley-Davidson motorcycles, which are manufactured in the State of Wisconsin. It has been suggested that this targeted tariff was an attempt to apply pressure to House Majority Leader Paul Ryan, a Republican from Wisconsin, as well as undermine President Trump in key electoral voting blocks. *See* Partington, *supra* note 85; *see also* Edward Helmore, *Chinese Retaliatory Tariffs Aim to Hit Trump in His Electoral Base*, THE GUARDIAN (June 24, 2018), https://www.theguardian.com/business/2018/jun/24/tariffs-trump-china-red-states-retaliation.

[109] *Trump and EU's Juncker pull back from all-out trade war*, *supra* note 98. Though statutorily different, Trump's tariff war with China also demonstrates that he views tariffs as a normal means of economic policy with political considerations. For example, President Trump postponed another round of tariffs on Chinese goods on August 13, 2019, out of concern for the Christmas season "just in case some of the tariffs would have an impact on U.S. consumers." Kevin Breuninger, *Trump Says He Delayed Tariffs Because of Concerns Over Christmas Shopping Season*, CNBC (Aug. 13, 2019), https://cnb.cx/2Tx7yvt.

[110] David Lawder & David Shepardson, *U.S. Agency Submits Auto Tariff Report to White House*, REUTERS (Feb. 17, 2019), https://reut.rs/2GMZYbY.

published Proclamation 9888 which states that the President concurred with Commerce's conclusion that auto imports did in fact pose a threat to national security.[111] The proclamation further states that imported automobiles and auto parts will reduce the strength of the domestic auto-industry and by extension domestic research and development within the field.[112]

According to the proclamation, President Trump's action to be taken subsequent to his agreement with the report would be to continue to pursue trade negotiations with other nations under 19 U.S.C. § 1862(c)(3)(A)(i), which provides the President a 180-day period to successfully ameliorate the trade concern through negotiations.[113] The proclamation goes on to assert that if an agreement is not reached or is ineffective, the "statute authorizes the President to take other actions he deems necessary to adjust imports and eliminate the threat that the imported article poses to national security."[114] As of the beginning of October, 2019, the administration had still withheld the report from the public, and with it any substantive explanation of the information gathering processes employed and empirical justifications put forth therein. In effect, the administration came to a conclusion that is facially suspect and relied upon and relied upon yet another provision within the statute to use the following six-months as a cudgel to brow-beat other countries into falling in line with the President's domestic economic agenda.

Within approximately two months of receiving the steel and aluminum reports, Trump issued proclamations that would ultimately impose global tariffs on the metals.[115] In the case of automobiles, it took the president nearly ninety days to agree or disagree with the auto-tariff report, and his official action in response was to procrastinate for another six months while the specter of tariffs loomed over auto-manufacturing countries. Even where the rationale provided for the metals was pretextual, as this note suggests, the administration's prompt response in the application of tariffs at least suggested that the alleged national security harm was urgent.

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[111] ADJUSTING IMPORTS OF AUTOMOBILES AND AUTOMOBILE PARTS INTO THE UNITED STATES, 84 FED. REG. 23433 (May 17, 2019), *available at* https://www.federalregister.gov/documents/2019/05/21/2019-10774/adjusting-imports-of-automobiles-and-automobile-parts-into-the-united-states.

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *See* Proclamation 9704, *supra* note 2; Proclamation 9705, *supra* note 1.

President Trump has repeatedly threatened European and Asian auto-making countries with tariffs, has actually been delivered and concurred with a report which purports to support the application of tariffs on automobiles and their parts for national security purposes, and yet has chosen to prolong the alleged injury to U.S. national security for an additional six months to attempt to solve the dispute through trade negotiations, which, based on his actions following the metal tariffs metals, would have occurred just the same. While the nature of different national security threats may vary temporally—i.e. imminent military attack vs. gradual rising sea levels—declining to act on the matter more than a year after personally, and nearly six months after legally proclaiming it a matter of national security implies a lack of urgency of associated with the notion of security. Instead, it gives the appearance that the imports are not a current threat to national security as contemplated by the statute, but that, absent the rationale, the President would lack tariff leverage to negotiate with other nations.

In a very practical way, the tariffs on steel and aluminum have brought foreign nations to the negotiating table. The tariffs have prompted some countries, like South Korea, to meet with the U.S. and renegotiate quotas on steel and aluminum. It has forced others, such as the China, to enter into a trade war with the United States, a combative process that will likely require extensive negotiations to end. Once at "the table," Trump has raised the possibility of increased tariffs in order to obtain concessions on trade. What lays bare the pretextual reliance on Section 232 to impose Trump's otherwise unavailable action on trade is the leveraging of a first round of global tariffs to get the attention of the world, followed by a threat of tariffs that could only be justified at the time based on an *incomplete investigation* under Section 232. Now the investigation *is* complete, it states that auto tariffs are a threat, and yet it is the *threat* of tariffs that is being used as little more than a cudgel while we apparently suffer injury to our national security.

While Trump's reliance on the national security clause is troubling in application, it also raises concern when determining how to counteract the measures. For example, by the end of September, 2019, the steel capacity utilization rate had passed the 80% threshold earmarked in the report and proclamation, yet there was no apparent end in sight for the tariffs.[116] With steel tariffs persisting beyond their

[116] *This Week's Raw Steel Production*, AMERICAN IRON AND STEEL INSTITUTE, https://www.steel.org/industry-data (last visited Oct. 6, 2019) ("Adjusted year-to-

justified necessity, and the threat of auto-tariffs seemingly indefinitely looming, we are left with a serious concern: has the President truly found a loophole to circumvent institutional and Constitutional norms, and if so, what can be done about it?

IV. POWERS AND POTENTIAL LIMITATIONS OF THE PRESIDENT'S TARIFF AUTHORITY

A. Inherent Executive Power, or Lack Thereof

Thus far, this note has focused on Trump's authority to impose tariffs exclusively based on the affirmative findings and recommendations of a Section 232 report. Implicit in that discussion is the premise that, absent this statutory grant of executive authority by the legislature, the president would otherwise be unable to take this action. This is because the constitutional authority to impose such measures lies with Congress. Article I, § 8, clause 1 grants Congress the enumerated power to "lay and collect taxes, duties, imposts and excises . . . ."[117] It further grants Congress the power "[t]o regulate commerce with foreign nations . . . ."[118]

Based exclusively on the text of the Constitution, it is apparent that the power to levy taxes upon goods involved in commerce between the United States and foreign countries lies with the Congress, not the president. Moreover, Article II only grants the president the "[p]ower, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."[119] While President Trump may view tariffs as an essential tool in the treaty negotiation process, Article II does not afford him the latitude to impose them simply because it would be expedient, or desirable. Following Justice Jackson's tripartite framework, found in his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, a

date production through September 28, 2019 was . . . at a capability utilization rate of 80.6 percent.").

[117] U.S. CONST. art. I, § 8, cl. 1.

[118] U.S. CONST. art. I, § 8, cl. 3.

[119] U.S. CONST. art. II, § 2, cl. 2.

president can take an action beyond the context of their own Constitutional powers only if the legislative branch has authorized the president to perform such actions.[120] Regarding this topic, the president would only have the authority to impose these tariffs if the legislative branch has delegated some of its authority to the executive.

B. History of Congressional Delegation of Tariff's Authority

In the case of tariff policy, Congress has, in limited contexts, incrementally granted the president greater control over the process of adjusting tariffs. Prior to, and through the passage of the Smoot-Hawley Tariff Act of 1930, Congress exercised "exclusive authority over U.S. tariffs."[121] However, in 1934, a Democratic Congress passed the Reciprocal Trade Agreements Act ("RTAA"), and in doing so granted the president the authority to negotiate and *reduce* tariffs with foreign countries, without congressional approval.[122] President Roosevelt saw this mandate as essential for creating a diplomatic environment conducive for convincing foreign protectionist governments to lower their own barriers to trade.[123] As a result of its passage, the president was permitted to negotiate and enter into "bilateral, reciprocal trade agreements with a view toward the tariffs of mutual interest to the United States and specific trade partners."[124]

The RTAA did not, however, permit the president to unilaterally impose new tariffs targeting *individual* countries or items not already on the "dutiable" or "duty-free" lists promulgated by Congress.[125] United States trade policy continued to liberalize in the three decades following the RTAA, primarily by seeking higher trade participation through the reduction of tariffs and non-tariff barriers.[126] It was the passage of the Trade Expansion Act of 1962, and specifically the backstop provision of Section 232, which delegated

[120] *See*, *e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 635-55 (1952).

[121] DOUGLAS A. IRWIN, *From Smoot-Hawley to Reciprocal Trade Agreements: Changing the Course of U.S. Trade Policy in the 1930s*, *in* THE DEFINING MOMENT: THE GREAT DEPRESSION AND THE AMERICAN ECONOMY IN THE TWENTIETH CENTURY 325, 325 (Michael D. Bordo, Claudia Goldin & Eugene N. White eds., Univ. of Chicago Press 1998).

[122] *Id.*

[123] *Id.* at 339-40.

[124] U.S. INT'L TRADE COMM'N, PUB. NO. 4094: THE ECONOMIC EFFECTS OF SIGNIFICANT U.S. IMPORT RESTRAINTS 65 (6th ed. 2009).

[125] IRWIN, *supra* note 121, at 341.

[126] U.S. INT'L TRADE COMM'N, *supra* note 124, at 65-70.

the authority to the president to impose unilateral tariffs in the face of a national-security threat. Such an explicit congressional mandate arguably places this sort of action in Zone 1 of Justice Jackson's test, and in the abstract presumptively makes President Trump's imposition of tariffs Constitutional, despite the lack of explicit executive authority.[127] If that is the presumption, then the cognizable legal arguments seeking to have a court[128] strike down President Trump's tariffs as unconstitutional are limited and have, to this point in time, been reduced to two approaches.

C. Legal Challenges to Trump's Tariff Authority

1. Severstal Exp. GMBH v. United States

The first tact, as asserted in a lawsuit brought in April 2018 by Severstal Export GmbH,[129] is to argue that the president's specific actions are an exercise of power outside of the legislative grant found in Section 232.[130] In *Severstal*, the plaintiffs challenged the lawfulness of President Trump's Proclamation Number 9705 as applied to them and sought a preliminary injunction against the United States, as well as several executive department heads and the president.[131] The court first determined that the plaintiffs' standing to assert a private right of action for review of a presidential proclamation on tariffs under 28 U.S.C. § 1581(i)[132] was not limited by the term "agency" action in 28 U.S.C. § 2631(i).[133] However, § 1581 does not authorize proceedings directly against the president, and President Trump was therefore removed as a defendant.[134] While the opinion applied a four-factor analysis to determine whether or not a preliminary injunction should

[127] *See, e.g.*, *Youngstown Sheet & Tube Co*., 343 U.S. at 635-55.

[128] 28 U.S.C § 1581(i)(2) (2012) (pursuant to the Court Customs Act of 1980, the Court of International trade exercises exclusive jurisdiction over civil suits regarding tariffs implemented "for reasons other than the raising of revenue.").

[129] Severstal Export GmbH is the subsidiary of a Russian company acting as a steel importer.

[130] *Severstal Exp. GMBH v. United States*, No. 18-00057, 2018 Ct. Intl. Trade LEXIS 38 (Ct. Int'l Trade Apr. 5, 2018).

[131] *Id.* at 5-6.

[132] 28 U.S.C. § 1581 (2012) (section 1581 governs the manner in which civil actions may be brought against the "United States and agencies and officers thereof" in cases heard in the Court of International Trade).

[133] *Severstal Exp. GMBH*, 2018 Ct. Intl. Trade LEXIS 38, at 6, n. 3.

[134] *Severstal Exp. GMBH*, 2018 Ct. Intl. Trade LEXIS 38, at 6-7.

be granted,[135] the substantive factor that addressed the president's capacity to apply these tariffs in this manner was the second, the "plaintiffs' likelihood of success on the merits."[136]

In the opinion, the court devoted most of its analysis to two issues: the justiciability of the claim, and the second-factor regarding the president's likelihood of success on the merits.[137] In regards to justiciability, the court noted that the plaintiffs conceded "that Section 1862 constitutes a constitutional delegation of authority,"[138] *and* that the plaintiffs expressly did not challenge the procedure followed by the president and the Department of Commerce in promulgating the Steel tariffs.[139] Pursuant to prior precedent, the Court of International Trade "lacks the power to review the president's lawful exercise of discretion."[140] However, case law does narrowly permit the Court of International Trade to review presidential action in cases where there is a potentially "clear misconstruction of the governing statute . . . or [if it is] action outside delegated authority."[141] Severstal argued that the president "seriously misapprehended" his authority by proclaiming steel tariffs under § 1862, and that as a result he had exceeded his statutory authority.[142] Essentially, the plaintiffs argued *not* that the president had misleadingly rolled out tariffs under the guise of an essential national security measure, but that he had instead misunderstood the mandate given to him by the act and proceeded to act outside of its bounds.[143] The court found this argument to be sufficiently pled and chose not to dismiss the claim for issues regarding justiciability.

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[135] *Id.* at 7. (The entire four factor analysis was "(1) whether plaintiffs will suffer irreparable harm absent the requested relief; (2) plaintiff's likelihood of success on the merits (3) whether the balance of hardships favor plaintiffs; and (4) whether the public interest would be served by granting relief.").

[136] *Id.* at 7.

[137] *Id.*

[138] *Id.* at 18.

[139] *Id.* at 19.

[140] *Id.* at 19. As authority, the Court cited *Dalton v. Specter*, 511 U.S. 462 (1994), and *United States v. George S. Bush & Co., Inc.*, 310 U.S. 371 (1940).

[141] *Severstal Exp. GMBH*, Ct. Int'l. Trade LEXIS 38, at 19-20, *quoting Corus Group v. ITC*, 352 F.3d at 1361 (internal quotation marks omitted).

[142] *Severstal Exp. GMBH*, 2018 Ct. Intl. Trade LEXIS 38, at 19-20.

[143] *Severstal Exp. GMBH.*, 2018 Ct. Intl. Trade LEXIS 38, at 18, n. 9 (clarifying that Plaintiffs did not make an argument that President Trump's actions would be reviewable under the Administrative Procedure Act, nor is there any indication that they filed an administrative claim challenging either the report from the Department of Commerce or the tariffs specifically).

Despite finding the cause of action to be justiciable, as well as entertaining several of the plaintiffs' arguments regarding the merits of the case, the court determined that Severstal was not likely succeed on the merits in total. The Court dismissed defendants' arguments regarding Severstal's failure to exhaust their administrative remedies as required under 28 U.S.C. § 2637(d) on two grounds:[144] (1) the plaintiffs likely were not eligible for relief under the regulation because they were a foreign entity; and (2) the regulatory review process was not the proper forum to adjudicate plaintiffs' claim that the Steel Tariff itself was invalid due to the president's misapprehension of his authority.[145]

The court was also unpersuaded by the government's argument that once President Trump received the report from the Department of Commerce, the court could "look no further," or in other words, beyond the administrative record.[146] Instead, the court determined that the president's action must be reviewed against the mandate itself, which limits the president to "action . . . to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security."[147]

However, the plaintiffs failed to persuade the court that the steel tariff was being utilized as an instrument to "draw concession[s] from other countries unrelated to steel imports."[148] Plaintiffs supported their argument with the president's own words, directly referencing a quote in which President Trump stated that "[t]ariffs on Steel and Aluminum will only come off if new & fair NAFTA agreement is signed."[149] Severstal also argued that President Trump's statements regarding tariffs at his 2016 Pittsburgh rally[150] demonstrated that the national security rationale for the tariffs was entirely pretextual, and in service of his economic agenda.

However, the court focused its review of the president's actions primarily as it related to the words of the statute. According to

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[144] *Severstal Exp. GMBH.*, 2018 Ct. Intl. Trade LEXIS 38, at 21 (noting that under § 2637(d), plaintiffs bringing a cause of action under 28 U.S.C. § 1581(i) are required to exhaust their administrative remedies where appropriate).

[145] *Severstal Exp. GMBH.*, 2018 Ct. Intl. Trade LEXIS 38, at 21-22.

[146] *Severstal Exp. GMBH.*, 2018 Ct. Intl. Trade LEXIS 38, at 22.

[147] 19 U.S.C. § 1862(c)(1)(A)(ii).

[148] *Severstal Exp. GMBH*, 2018 Ct. Intl. Trade LEXIS 38, at 23, *citing* Plaintiff's Brief at 17-18.

[149] *Severstal Exp. GMBH.*, 2018 Ct. Intl. Trade LEXIS 38, at 24.

[150] Factbase Videos, *Speech: Donald Trump, supra* note 79, at 00:35.00 - 00:37.00.

the court, § 1862(d) provides a series of required—though not exclusive—factors that must serve as the president's basis for imposing tariffs based on a national security threat, generally covering the United States demand for steel for military and domestic infrastructure purposes, the domestic capacity to satisfactorily meet such demand, and the potential negative impact on domestic production and employment that steel importation has.[151] The court found that the steel tariffs reasonably met those requirements, and that the statutory language was broad and permissive enough that reference to a trade deal like NAFTA could plausibly fall under the economic concerns rooted in the statute.

Perhaps most importantly, the court did not find the referenced statements to NAFTA and Pennsylvania steel production to be "sufficient on their own to underpin a credible case that the president has clearly misconstrued his authority under Section 1862."[152] In fact, this conclusion was the result of a mere hypothetical thought exercise in which the court assumed "arguendo that these types of statements *could* affect the analysis."[153] Ultimately, the court held that the plaintiffs' likelihood of success on the merits was "very low." [154] In the time since this case was decided, the president has continued to make public statements that indicate his inclination to use the national security rationale as a loophole to impose tariffs. All the same, the court's ruling implies that such statements may have little to no bearing on the scope of the court's analysis in the future, and that even if they were to be taken into account, the court has declined to articulate a threshold or standard that must be met in order to make the case. Instead, the court has read the statute to be broadly permissive and would appear to be disinclined to counteract presidential action so long as a report and its subsequent action plausibly fall within the factors enumerated in the statute.

2. *American Institute for International Steel Inc. et al. v. United States et al*

[151] *Severstal Exp. GMBH*, 2018 Ct. Intl. Trade LEXIS 38, at 26-27.
[152] *Id.* at 28.
[153] *Id.*
[154] *Id.*

Since this tact seems to make the president's action unassailable, another route—as argued by plaintiffs *American Institute for International Steel Inc., et al*,[155] ("AIIS") —is to challenge the statutory provision in its entirety as an unconstitutional delegation of legislative power to the president. This approach is a far broader challenge of the statute that faces some of the precedential difficulties of *Severstal*. In 1976, the Supreme Court held in *Federal Energy Administration v. Algonquin SNG, Inc.* that Section 232(b) of the Trade Expansion Act was, in that iteration,[156] a constitutionally legitimate delegation of power to the president by which the president could impose a "system of monetary exactions" on imports.[157] Quoting *Hampton & Co. v. United States*,[158] the Court articulated the standard for determining the constitutionality of the delegation found in Section 232 as "an intelligible action to which the [president] is directed to conform."[159] In *Algonquin*, the Court found that the precondition to the president adjusting imports—namely the completion of a report articulating a national security threat and recommendations from his executive agency—was a sufficiently intelligible action to which the president must clearly conform, making the general delegation of authority presumptively constitutional.[160] Furthermore, the Court concluded that Congress's authorization of the president to "take such action, and for such time, as he deems necessary to adjust the imports of [an] article and its derivatives" was not limited to adjustment through quantitative measures, such as quotas.[161] The majority reached this conclusion as

[155] *Am. Inst. for Int'l. Steel, Inc. v. Unites States*, 376 F. Supp. 3d 1335 (Ct. Int'l Trade 2019).

American Institute for International Steel Inc. et al v. United States et al, 376 F. Supp. 3d 1335 (Ct. Int'l Trade 2019).

[156] 19 U.S.C. § 1862(b) (1970) (the Trade Expansion Act of 1962 has been amended on several occasions since its promulgation. In this instance, the Court was looking at Section 232(b) as amended by § 127(d) of the Trade Act of 1974).

[157] *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 US 548, 551-2 (1976) (analyzing the president's authority under § 232(b) to apply license fees to petroleum imports).

[158] *See Hampton & Co. v. United States,* 276 U.S. 394 (1928) (upholding a legislative provision that permitted the president to adjust import duties on similar products in order to equalize the difference between domestic and foreign production costs).

[159] *Algonquin*, 426 U.S. at 559.

[160] *Algonquin*, 426 U.S. at 559.

[161] *Algonquin*, 426 U.S. at 561.

a result of the legislative branch's apparent acquiescence to similar actions undertaken by President Nixon in 1974.[162]

Oral argument in the *American Institute for International Steel* case was held on December 19, 2018, in front of a three-judge panel at the Court of International Trade.[163] According to news reports, the panel "seemed to acknowledge" the constraints that the *Algonquin* holding had placed on them, though they were highly probative of the boundaries of what individual goods the Department of Justice felt the president could deem to be a national security threat, so much so that one judge asked if peanut-butter could be tariffed under this rationale.[164] While that specific example carries with it a cheeky sensibility, the underlying reality is that there is no clear jurisprudential watermark indicating the cut-off between statutorily plausible threat to national security and farcical pretext, nor how to go about establishing one.

Ultimately, the court held that the plaintiff's claims were insufficient to overcome the precedent established in *Algonquin*. In their decision, the court dismissed the plaintiff's argument that changes resulting from the APA, as well as cases regarding judicial review of Presidential decision-making, required that the court set *Algonquin* aside.[165] The court's opinion was more sympathetic to the argument against the breadth of the statute, stating 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 . . . ."[166] Still, the panel was not moved enough to ignore *Algonquin*'s binding authority and pointed to Judiciary's inability to inquire into the President's motives or review his fact-finding for support. Judge Katzmann filed a separate opinion *dubitante*,[167] essentially arguing

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[162] *Algonquin*, 426 U.S. at 561-71.

[163] Glenn Thrush, *Trump's Use of National Security to Impose Tariffs Faces Court Test,* N.Y. TIMES, (Dec. 19, 2018), https://www.nytimes.com/2018/12/19/us/politics/trump-national-security-tariffs.html.

[164] *Id.*

[165] *Am. Inst. for Int'l. Steel, Inc. v. Unites States*, 376 F. Supp. 3d 1335, 1343-44 (Ct. Int'l Trade 2019).

[166] *Id.* at 1344.

[167] "[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." *Id.* (quoting Lon Fuller,

that, while he was bound by *Algonquin*, it is perhaps time for this issue to be reexamined by a higher court in light of the changing circumstances since *Algonquin*'s reasoning.[168]

Upon losing, Plaintiffs directly petitioned to the Supreme Court, though their request for certification was denied without explanation on June 24, 2019.[169] The question of how the current makeup of the Supreme Court would generally rule on a question of statutory interpretation involving the president's discretion regarding national security is a thorough and complex issue that is simply too much for this note. However, given the strength of prior precedent, it is uncertain that the current composition of the court would seek to overturn decades of jurisprudence in order to strip the president of discretionary authority regarding a matter that apparently falls under the category of national security.

Furthermore, this note does not support the proposition that the spirit or intent of the statute was inherently flawed, and that the president should be entirely stripped of this authority. As a matter of both expedience and constitutional mandate, it is a colorable argument that the president should have broad authority to act decisively in moments of crisis, or in response to threats to domestic security. The true issue here is that the statute has been misappropriated for a duplicitous purpose, and that by the statute's wording, as well as by the deference granted to executive authority on matters of national security, it is difficult for individuals to assail pretextual actions in court. Therefore, the most reasonable and prudential step to curb this sort of activity is for Congress to amend the statute and require an affirmative congressional response to any tariffs proposed under Section 232.

V. A LEGISLATIVE SOLUTION FOR A DELEGATIVE PROBLEM

A. Appetite for an Amendment

Since the promulgation of the Section 232 tariffs, a number of bipartisan bills have been discussed and put forward in support of

Anatomy of the Law, 147 (1968)) (internal quotation marks omitted) (alterations in original).

[168] *Id.*

[169] *No. 18-1317*, *American Institute for International Steel, Inc., et al. Petitioners, v. United States, et al.*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/18-1317.html (last visited Sept. 28, 2019).

curtailing the president's power to impose tariffs on the basis of national security, as well as in other limited contexts in which the president may impose tariffs.[170] Rather than repealing the national security clause outright, legislators have primarily proposed amending the statute to require any presidential action first be submitted to Congress before taking effect. However, once the president's desired action has been presented to Congress, there are separate ways in which Congress may exercise its oversight. In one configuration, the president's tariffs or quotas would presumably come into effect unless Congress affirmatively disapproved of the president's action. This approach mirrors the existing Congressional override-provision for Petroleum and Petroleum Products found in 19 U.S.C. 1862(f). The other approach would instead require a vote by Congress affirmatively accepting the president's desired action, effectively diminishing the president's submission to the level of a policy proposal. This type of mechanism is found in the bipartisan Bicameral Congressional Trade Authority Act, primarily sponsored by Senators Pat Toomey (R-Pa) and Mark Warner (D-Va).[171] As a condition of tariff implementation, the Act would require an approval resolution from Congress.[172] The Act would also delegate investigative authority to the Department of Defense, while still allowing Commerce to suggest the remedy.[173] Furthermore, the Act would also add a narrower definition of the term national security,[174] retroactively apply to Section 232 tariffs within

[170] Revana Sharfuddin, *Bipartisan Reform Bills Aim to Control Trade Taxes*, NATIONAL TAXPAYERS UNION FOUNDATION (Dec. 10, 2018), https://www.ntu.org/foundation/detail/bipartisan-reform-bills-aim-to-control-trade-taxes (this note does not address the other limited contexts in which the president is permitted to impose tariffs because they do not require the same national security rationale as Section 232).

[171] *See* Press Release, Toomey and Warner Renew Fight to Restore Congressional Authority over National Security Tariffs, (Jan. 30, 2019) https://www.toomey.senate.gov/?p=op_ed&id=2338.

[172] Sen. Pat Toomey, et al., *Bicameral Congressional Trade Authority Act of 2019* (S. 287), SEN. PAT TOOMEY, https://www.toomey.senate.gov/files/documents/232%20one%20pager.pdf (last visited Sept. 28, 2019).

[173] *Id.*

[174] *See id.* (The bill would restrict Section 232 investigations to "goods with applications in military equipment, energy resources, and/or critical infrastructure. These goods must also constitute a 'substantial cause' of a threat to impar U.S. national security.").

the last four years,[175] and would require the International Trade Commission to "administer an exclusion process for future Section 232 actions."[176]

In another bill that seemed particularly pointed toward reigning in this specific administration, Senators Rob Portman, Doug Jones, and Joni Ernst introduced the "Trade Security Act of 2018."[177] In this proposed legislation, it would be the responsibility of the Secretary of Defense—not Commerce—to identify and justify the national security rationale for imposing tariffs.[178] The Department would send the threat report to the president, and if the president decided to act upon the report, they would direct the Secretary of Commerce, in consultation with the Department of Defense and the U.S. Trade Representative, to develop an remedial response and provide the president with an official recommendation.[179] This thought process leading to the bifurcation of the investigative process appears to derive from Secretary Mattis's comments on the Steel report.[180] Furthermore, if the president were to decide to take action, such action would be sent to Congress for debate. If Congress were to fail to pass a resolution *disapproving* of the president's action, it would automatically take effect after the statutory period for congressional debate. In effect, this would broaden the existing provision for disapproval of action regarding petroleum and petroleum products found in 19 U.S.C. 1862(f) by including *all* imported goods.[181]

A similar bill, proposed by Representatives Mark Sanford and Jim Cooper, focuses primarily on the president's authority under 19 U.S.C. 1862(c), the clause that currently outlines the president's ability to take unilateral action. In the proposed amendment,

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[175] *See id.* (The outstanding tariffs on steel and aluminum would be automatically repealed unless Congress passed an approval resolution within 75 days of the act's passage.).

[176] *Id.*

[177] *See* Press Release, Rob Portman, U.S. Senator, Portman, Jones, Ernst Introduce Trade Security Act to Reform National Security Tariff Process & Increase Congressional Oversight, (Aug. 1, 2018) https://www.portman.senate.gov/public/index.cfm/2018/8/portman-jones-ernst-introduce-trade-security-act-to-reform-national-security-tariff-process-increase-congressional-oversight.

[178] *Id.*

[179] *Id.*

[180] *See* Mattis, *supra* note 69, at 1-2 (indicating that the cognizable national security threat based on steel importation came specifically from Chinese production).

[181] Trade Security Act of 2018, S. 3329, 115th Cong. § 2 (2018).

subsection (c)(2) would only authorize the president to submit his desired action for congressional approval.[182] Similar to the Trade Security Act, the desired action of the president would take effect unless Congress affirmatively disapproved of the action.

B. The Prudent Solution

The most prudential legislative course of action would be to incorporate essential elements of the Trade Security Act of 2018, while also allowing the president to submit alternative recommendations present in the report should Congress reject the president's initially desired action. This is to say that the Department of Defense should be primarily responsible for identifying the scope and magnitude of any national security risk of domestic imports, as well as for making initial recommendations for decisive action. If the president has determined that they wish to act on a recommendation, it should be submitted to both houses of Congress with the presumption that it will take effect *unless* either body votes to reject the president's action. If a recommendation is in fact rejected, the president should have the authority to submit the other courses of recommendation action provided in the final report through the same legislative process.

The first alteration, which would place the Department of Defense in charge of the investigation and recommendation process, should serve to create some semblance of separation from the president's commercial and economic policymakers and those otherwise charged with ensuring national security. While there is language in the statute pertaining to threats to the capacity of domestic industry and by extension maintenance of infrastructure that supports the inclusion of the Department of Commerce in the investigation and recommendation process, the implicit connection between national economic health and the federal government's capacity to guaranty the security of the nation is not so inextricable as to warrant placing the executive agency tasked with "promot[ing] job creation and economic growth by ensuring fair and reciprocal trade"[183] as the primary arbiter of whether international trade policy constitutes a threat to national security.

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[182] H.R. 6337, 115th Cong. § 2 (2017-2018).

[183] *About Commerce*, U.S. DEP'T. OF COMMERCE, https://www.commerce.gov/about (last visited Feb. 3, 2019).

Secretary Mattis's memo evidenced that the commercial interest of the health of domestic industry must be weighed against not only the realities surrounding the United States' current ability to procure materials for military manufacturing and exercise military authority abroad, but also the external effect that protectionist policy would have on crucial military strategic relationships with allied nations. This is not to say that the Department of Commerce should be completely removed from the process, but simply that it should not be given a vehicle to effectuate its separate agency objectives under the guise of a national security imperative.

The second alteration, which would require the president to submit his proposed action to Congress with the presumption of effectuation and possibility of rejection, strikes an ideal balance between acknowledging the president's broad powers and expertise in the realm of national security, and maintaining Congress's enumerated authority in regulating taxation and trade among foreign nations. This note doesn't seek to completely dismiss that variances in international trade can ultimately result in threats to military and domestic economic security. In fact, both the Departments of Commerce and Defense concluded that China's production and dumping of steel in international markets presented a threat to domestic and allied steel production. Continued decimation of domestic industry because of exceptional raw-material output by an adversarial power could plausibly lead to serious strategic consequences and supply shortages should the United States come to engage in an arms race[184] or military conflict with an increasingly aggressive China. As compared to a deliberative body attentive to all conceivable governmental interests, the Department of Defense is arguably best equipped to utilize its expertise to identify threats and prescribe decisive action to cure this imbalance and secure the national defense. However, the determination to levy taxes on imported goods from allied and adversarial alike is fundamentally a question of policy for which the legislature has been explicitly designated to decide with finality.

With that said, requiring that a presidential proposal under Section 232 receive affirmative approval from both houses of Congress presents a concern that the legislature will not actively and sufficiently exercise their oversight authority in the review process.

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[184] Andrew E. Kramer, *Russia Pulls Out of I.N.F. Treaty in 'Symmetrical' Response to U.S. Move*, N.Y. TIMES (Feb. 2, 2019), https://www.nytimes.com/2019/02/02/world/europe/russia-inf-treaty.html).

Theoretically, legislators would actively and vigorously debate the merits and implications of such a proposed action and, if the president could demonstrate both a real threat to national security and viable course of action to address it, plausibly accept the president's recommendations regardless of their personal ideological bent. However, in practice, requiring positive affirmation of a recommended action from both houses would likely strip the president of almost all of the authority the legislature purports to have granted in the statute. In this case, the executive branch could make a vetted and reasoned policy proposal, but so long as there is a sufficient number of legislators who oppose the proposal, serious political debate wouldn't be necessary, and legislators could simply sit on their hands until the clock runs out. If the action ultimately proves to have been unnecessary, legislators will tout a feather in their cap for standing up to the Office of the President. If a national security threat does in fact materialize, oppositional legislators who didn't have to seriously debate the faults of the proposal would not be bound by any argument they made at its introduction and easily cast blame upon the executive agency's inability to present a sufficiently cogent policy rationale at the outset.[185] Given that the report would include thorough investigative findings and recommendations, the argument in favor of taking action would exist before a presidential proposal ever reached Congress. With a presumption that the action would take effect unless disapproved, oppositional legislators would be required to do their job and make a cogent policy argument as to why that course of action would be unwise and should not be accepted. While alteration of the statute preserves some delegation of authority to the president, it would promote the open discourse between co-equal branches embedded in the Constitutional design and force legislators to assume greater responsibility for some of their inherent obligations.

Finally, it is conceivable that Congress may accept the president's conclusion that a national security threat exists but find that president's proposed action is untenable or politically unpalatable. In these instances, the president should have the ability to submit additional proposals containing any other recommendations outlined by the final investigative report. If, for example, the Trump Administration had proposed the current universal tariff, and Congress

[185] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 131-34 (Camille Smith ed., 1980) (providing a more detailed critique of the pitfalls of legislative delegation in the American political system.

had affirmatively rejected it, this proposed framework provides that president would still have been able to propose the alternative recommendation of targeted tariffs. This back and forth would ostensibly create a greater likelihood of some affirmative action on a potentially serious national security matter and promote the co-equal branches to exercise their obligations.

VI. CONCLUSION

The Trade Expansion Act of 1962 was a bold piece of legislation aimed at reshaping the contours of international trade policy. Even while relying upon the principal that free and unencumbered trade between nations would inherently encourage international cooperation and lead to global economic prosperity, the drafters realistically understood that in limited circumstances, completely liberalized trade could leave domestic industries necessary for the assurance of national security vulnerable. In creating Section 232, Congress delegated a sliver of their tariff authority to the president so as to empower the president to take decisive action as a means of last resort.

With a shifting global economic and power structure, there is a logic to still allowing the president to actively participate in the process of wielding punitive economic tools to ensure American security. However, case law has demonstrated that the boundaries of a national security rational found in Section 232 are quite elastic and difficult to pin down based on the language of the statute. As a result, the United States has found itself embroiled in animosity with its allies and a trade war with an adversarial power seeking to become the new global hegemon. President Donald Trump's reliance on the statute as a pre-textual means of imposing tariffs on all foreign nations has demonstrated a need for Congress to retake some of its delegated authority and exercise real oversight over presidential actions that fall under Article I enumerated powers. They should do so not by eliminating the provision altogether, but by amending the National Security Clause to require the Department of Defense to justify a national security rational and recommended action, to require bicameral vote on the proposed action with a presumption of passage absent majority disapproval, and to permit the president, should they so choose, to submit all actions recommended by final investigative report.