

NATIONAL SECURITY TARIFFS: A THREAT TO EFFECTIVE TRADE POLICY

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ABSTRACT

International trade policy in the United States prior to 1934 was determined by a Congress that represented the interests of diverse and changing domestic production. Southern agriculture pursued free trade policies to enable access to foreign markets for their goods, while Northern industry sought protection against imports that would stymie their nascent development. By 1934, it became clear that trade policy needed to be streamlined and accelerated to address the rapidly changing trade landscape. In order to stave off some of the destruction of the Great Depression,

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Congress temporarily delegated its power to regulate trade to the President to manage international trade policy. Since that first delegation, Presidents capitalized on this delegation to pursue a policy of free trade, leading to phenomenal domestic economic growth, vast expansion of global trade, and a more peaceful world. This policy has been turned on its head since 2018 when the Trump Administration began using this delegated authority not in the pursuit of free trade and democracy, but rather to solicit political support from certain domestic industries and to punish uncooperative countries. Much of this new strategy to trade is rooted in the national security exception present in U.S. trade law.

In this paper, I argue that the national security exception created by the 1962 Trade Expansion Act during the Cold War is meant to be extraordinarily narrow and rarely used, and that any broad application of this exception would likely compromise the world trade system altogether. I suggest that Congress, where trade policy power lies, should reassert control over trade policy and guide the President's hand in the pursuit of beneficial economic goals for the United States as a whole.

I will begin this paper with a historical exploration of trade policy through the lens of protective tariffs. I will then emphasize the development of the national security exception in domestic trade law, paying special attention to the most recent iteration of this exception being applied today. I will then compare this national security exception in domestic law to the essential security exception found in international trade law to better understand its meaning and application on a global scale. Finally, I will review domestic caselaw and legislation related to the delegation of trade policymaking authority to the President and argue how this power is being abused by the Trump Administration and what should be done to change that.

INTRODUCTION

In the United States, the Executive branch of government is responsible for, among other things, foreign affairs, including treaty negotiation and foreign policymaking.¹ The Legislature is responsible for, among other things, the regulation of interstate and international commerce.² The nondelegation doctrine, paramount to the concept of separation of powers, restricts the Legislature from delegating its lawmaking power to the

1. U.S. Const. art. II; *see also* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) (concluding that the President is the voice of the nation in front of other nations).

2. *See* U.S. Const. art. I § 8 (“The Congress shall have Power To . . . regulate Commerce with foreign Nations, and among the several States . . .”).

policymaking Executive.³ This limited the growth of the administrative state throughout the nineteenth and early twentieth centuries. However, over time, as the United States expanded and diversified and became a more advanced and complex economy, it became apparent that some delegation of power to the law enforcement and public policy head of the government would be necessary.⁴ By 1934, in the midst of the progressive New Deal program, Congress made the first outright delegation of their trade authority to the President, beginning the ongoing fight over who is Constitutionally authorized to regulate commerce.⁵

That 1934 Act, known as the Reciprocal Trade Agreements Act (RTAA), was highly controversial when it was enacted. One congressional representative from New York opined that it was “an outright betrayal of our representative form of government [that] amounts to an open admission by Congress that . . . it is now incompetent and unfit to legislate properly, intelligently and in the public interest.”⁶ It was seen as a “radical” change in commercial policy. That Act, passed in the midst of the Great Depression and upon the aggressive lobbying of President Roosevelt and his Secretary of State, Cordell Hull, was an attempt to give the President a stronger hand in using trade policy to improve the domestic economic environment by opening the door to free trade.

The RTAA, which I discuss in more detail later, paved the way for a number of subsequent trade acts, many of which expanded the President’s authority to conduct trade policy through the use of trade agreements and tariff adjustments. Those delegations of power were carefully constructed so as to limit the President’s actions by enabling him to moderate, but not to legislate trade policy. But the vagueness in these delegations has left a great deal of interpretive power in the hands of the Executive, raising concerns about improper delegation by Congress and abuse of power by the Executive.

Those concerns rarely materialized into legal inquiries or actions, principally because the President tended to use the delegated trade authority to pursue the goals of trade liberalization and the promotion of U.S. exports,

3. See U.S. Const. art. I, § 1 (noting that the legislative branch is vested with “all legislative powers,” which has been interpreted to mean that those powers may not be delegated away). *But see*, Keith E. Whittington and Jason Iuliano, *The Myth of the Non-delegation Doctrine*, 165 U. PA. L. REV. 379, 380–81 (2017) (contending that the non-delegation doctrine never fully constrained the ability of Congress to delegate its power to the President).

4. See Whittington and Iuliano, *supra* note 3 at 384–86 (“[C]ontemporaries understood that the demise of the nondelegation doctrine was part and parcel of the reconstruction of the constitutional order that was wrought by the New Deal.”).

5. *Id.* at 385 (discussing the New Deal revolution in delegated authority to enact social programs).

6. 78 CONG. REC. 5,613 (1934).

which have become an increasingly essential part of the U.S. economy.⁷ That changed in 2018, when the Trump Administration decided to utilize their delegated trade power under the Trade Expansion Act of 1962 to impose worldwide tariffs on steel and aluminum, finding that those “articles are being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security of the United States.”⁸ This action prompted a number of observers to question the basis for utilizing national security as a reason to restrict worldwide imports.⁹

In this short paper, I argue that the congressional delegation of trade authority to the Executive to restrict trade on the basis of national security, as well as the Trump Administration’s broad interpretation of that authority, violate the non-delegation doctrine and likely put the United States in violation of its commitments under world trade rules. This assertion will be answered through two inquiries: first, did the congressional delegation of power to the Executive to impose tariffs on the basis of national security violate the intelligible principle of the non-delegation doctrine? And second, is the President’s broad interpretation of the national security exception found in section 232 of the Trade Expansion Act of 1962 justifiable and defensible?

To answer these questions, I will first explain what the section 232 tariffs are and the authority from which they emanate. I will then trace the history of the delegated trade authority to identify the origins of the national security exception, including a jaunt through the battles over trade authority from the nineteenth century through today. I then provide a comparative examination of the equivalent authority within the World Trade Organization (WTO) and how that entity is addressing new defenses by other countries on national security grounds. And finally, I will work through recent trends in

7. See, e.g., CONG. RESEARCH SERV., U.S. TRADE TRENDS AND DEVELOPMENTS 1–2 (2018), <https://fas.org/sgp/crs/row/R45420.pdf> [<https://perma.cc/GF4S-JPHQ>] (explaining that the U.S. accounted for approximately 25% of world trade in 2018); See also BUSINESS ROUNDTABLE, HOW THE U.S. ECONOMY BENEFITS FROM INTERNATIONAL TRADE & DEVELOPMENT (2015), https://tradepartnership.com/wp-content/uploads/2015/01/US_State_Study.pdf [<https://perma.cc/VG6Z-DJ2P>] (discussing the more than \$2 trillion in goods and services exports from the United States in 2013).

8. Proclamation No. 9705, 83 Fed. Reg. 11,625 (March 15, 2018) (applying worldwide tariffs on steel and aluminum imports on the basis of national security).

9. See, e.g., Simon Lester & Huan Zhu, CATO INST., CLOSING PANDORA’S BOX: THE GROWING ABUSE OF THE NATIONAL SECURITY RATIONALE FOR RESTRICTING TRADE, 2 (2019) (describing the domestic and international concerns over the invocation of Section 232 to justify steel and aluminum tariffs). *But see* Henry Fernandez, *Trump tariffs are about national security: Peter Navarro*, Fox Bus., (May 31, 2018) (interviewing White House National Trade Council Director Peter Navarro, who said, “This particular action on steel and aluminum is not about unfair trade practices. It’s about national security . . . without an aluminum steel industry, we don’t have a country.”).

the courts and legislature to curtail or modify this authority, and I will assess their likelihood of success. I begin with a brief examination of the section 232 tariffs for context.

THE SECTION 232 TARIFFS

President Trump imposed worldwide tariffs on steel and aluminum imports into the United States on March 8, 2018.¹⁰ The tariffs were authorized by the power vested in the President through the Trade Expansion Act of 1962.¹¹ Tariff levels were set at 25% for steel and 10% for aluminum, regardless of the origin. Because this was a congressionally delegated power, the President was not required to seek approval from, only notification of, Congress for this action.¹²

The President could have relied upon myriad legal justifications that exist within U.S. law that have been used frequently in the past to protect industries such as steel. These include section 201 of the Trade Act of 1974, which allows import restrictions to prevent a surge of foreign imports that threaten to cause serious injury to a U.S. industry.¹³ He could also have relied upon section 301 of that statute, which allows import restrictions to counter unfair trade practices by foreign countries, such as market access restrictions.¹⁴ Rather, the Administration chose to rely upon a provision that had previously been used twenty-seven times prior to 2017, with a positive finding of threat in only nine of those investigations.¹⁵ Seven investigations have been initiated since 2017, with five finding threats, and three ongoing

10. Proclamation No. 9705, *supra* note 8; Proclamation No. 9711, 83 Fed. Reg. 13,361 (March 22, 2018) (“In the exercise of these authorities, I have decided to adjust the imports of steel articles by imposing a 25 percent ad valorem tariff on steel articles, as defined below, imported from all countries except Canada and Mexico.”).

11. *See* Trade Expansion Act of 1962, Pub. L. No. 87-794 § 232(b), 76 Stat. 877 (“[The President] shall take such action, and for such time, as he deems necessary to adjust the imports of such article and its derivatives so that such imports will not so threaten to impair the national security.”); 19 U.S.C. § 1862 is the codified form of Pub. L. No. 87-794 § 232.

12. *See* § 232(d), 76 Stat. at 877 (“A report shall be made and published upon the disposition of each request, application, or motion under subsection (b).”)

13. *See* Trade Act of 1974, Pub. L. No. 93-618 § 201(a)(1), 88 Stat. 2011 (“A petition for eligibility for import relief for the purpose of facilitating orderly adjustment to import competition may be filed with the International Trade Commission . . . by an entity, including a trade association, firm, certified or recognized union, or group of workers, which is representative of an industry.”).

14. *See id.* at § 301(a) (listing a variety of improper foreign trade measures that were grounds for Presidential action).

15. CONG. RESEARCH SERV., SECTION 232 INVESTIGATIONS: OVERVIEW AND ISSUES FOR CONGRESS 58–61 app. B (2020), <https://fas.org/sgp/crs/misc/R45249.pdf> [<https://perma.cc/B5E4-3HMD>].

as of the publication of this article.¹⁶

As brief background, the Trade Expansion Act of 1962 was enacted in the midst of the Cold War, when national security threats were significant concerns for the United States.¹⁷ The Act delegated some congressional trade power to the executive in cases involving threats to national security, broadly defined. Section 232 of that Act is the subject of discussion here, as it was the basis for recent actions by the Trump Administration raising concerns about abuse of the delegated powers.¹⁸

Section 232(b) of the Trade Expansion Act of 1962, as amended by the Trade Act of 1974,¹⁹ stipulates that when an “article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security,” [the President is authorized to] “take such action, and for such time, as he deems necessary to adjust the imports of [the] article and its derivatives so that . . . imports [of the article] will not threaten to impair the national security.”²⁰

The Act requires the Secretary of Commerce to commence an investigation under section 232 upon the request of any federal agency or interested party (or of their own will).²¹ That investigation is intended to determine whether the targeted product “is being imported into the United States in such quantities or under such circumstances as to threaten to impair”²² U.S. national security.²³ Though it is not clear precisely what congress meant by “national security” when they enacted this legislation, the Act contains certain factors that need to be considered in investigating a national security threat under the Act, including:

- domestic production needed for projected national defense requirements;
- domestic capacity;
- the availability of human resources and supplies essential to the national defense; and,
- potential unemployment, loss of skills or investment, or decline in government revenues resulting from displacement of any

16. *Id.*

17. Pub. L. No. 87-794, 76 Stat. 872 (1962).

18. *Id.* at § 232.

19. Pub. L. No. 93-618, 88 Stat. 1978.

20. § 232(b), 76 Stat. 877.

21. *See id.* (“Upon request of the head of any department or agency, upon application of an interested party, or upon his own motion, the Director of the Office of Emergency Planning . . . shall immediately make an appropriate investigation . . .”).

22. *Id.*

23. *See* CAITLAIN DEVEREAUX LEWIS, CONG. RESEARCH SERV., PRESIDENTIAL AUTHORITY OVER TRADE: IMPOSING TARIFFS AND DUTIES, 2–3 (2016), <https://fas.org/sgp/crs/misc/R44707.pdf> [<https://perma.cc/3JS7-6ELZ>].

domestic products by excessive imports.²⁴

The Secretary of Commerce must produce a report for the President within 270 days of the initiation of the investigation to allow the President to determine which action to take, if any. The President may use trade restrictions, such as import tariffs, to mitigate the threat, or may choose other means or no action at all. In any case, the President must report to congress on actions taken within 30 days and must publish a summary of the action in the Federal Register for public view.²⁵

Since its passage, the Act has been used to conduct thirty–one investigations (through 2019) to determine whether an import poses a risk to the national security of the United States. In more than half of these cases, the Department of Commerce did not find that the target imports posed a threat to national security. In the remaining cases in which they did identify a threat, the President took action in just over half. Most of the cases involving section 232 prior to the Trump Administration have involved petroleum or minerals.²⁶ As of early 2020, U.S. Customs and Border Protection has collected over \$9 billion in tariff revenue from goods restricted by section 232 since 2018.²⁷ To better understand how the national security exception came to be relied upon as a tool to protect domestic producers at the expense of liberal world trade, we must take a trip back in time.

A. Tariffs and Public Policy

Article I, Section 8 of the U.S. Constitution designates in no uncertain terms the power over international trade to the U.S. Congress. It says that Congress shall have the “Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States,”²⁸ and “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”²⁹ This clearly leaves up to Congress the decision on whether to impose tariffs

24. § 232(c), 76 Stat. 877.

25. See 19 U.S.C. § 1862(c) (“By no later than the date that is 30 days after the date on which the President makes any determinations under paragraph (1), the President shall submit to the Congress a written statement of the reasons why the President has decided to take action, or refused to take action, under paragraph (1).”).

26. See CONG. RESEARCH SERV. *supra* note 15, at 58–61 app. B. (identifying 8 cases of oil or petroleum and 12 cases involving steel and minerals).

27. *Id.* at 15 (“As of August 12, 2020, two full years since the Section 232 tariffs took effect, U.S. Customs and Border Protection (CBP) assessed \$7.3 billion in steel tariffs and \$2.2 billion in aluminum tariffs.”).

28. U.S. Const. Art. I, § 8, cl. 1.

29. U.S. Const. Art. I, § 8, cl. 3.

on imported goods, and if so, at what rate. And this is what Congress had done exclusively prior to the 1930s.³⁰ One of the mechanisms frequently used to regulate international trade is the application or removal of tariffs, a power undoubtedly in the hands of Congress, but since 1934, delegated to the President through the trade acts discussed below.³¹

Yet even before we reach the relevant trade acts, we must highlight the Constitutional designation of related powers. The President plays a role in international trade and policymaking as the negotiator of treaties — including trade agreements — with other countries, with the Advice and Consent of the Senate.³² I have argued elsewhere that this power includes the ability to take action related to diplomacy through trade, such as through the imposition and lifting of trade embargos meant to achieve certain political goals.³³ However, there is little doubt that the President's Constitutional powers over trade are limited at best and rather are to be dictated by the Congress, where those powers are housed.

International trade expanded slowly throughout the nineteenth century.³⁴ And throughout that period, import tariffs were largely utilized as a form of government revenue as well as a form of protection against competing imports.³⁵ High tariffs and mercantilist policies spurred domestic industrialization but constrained rapid growth in international trade throughout this period.

Tariffs bounced up and down throughout the nineteenth century largely due to differences of opinion between the cotton-exporting Southern states, which preferred low tariffs, and the industrializing Northern states, which wanted to protect their nascent industry with high tariffs.³⁶ The early United

30. See, e.g., CAITLAIN DEVEREAUX LEWIS *supra* note 23, at 2 (“Prior to the early 1930s, Congress itself usually set tariff rates for imported products.”).

31. See CAITLAIN DEVEREAUX LEWIS *supra* note 23, at 2 (“From 1934 until 1974, Congress continued to enact legislation delegating some authority to the President to negotiate tariff rates with other countries within pre-approved levels, and to implement agreed-upon tariff rates through proclamation, rather than through congressional legislation.”).

32. U.S. Const. Art. II, § 2, cl. 2 (The president has the “Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”).

33. Kevin J. Fandl, *Adios Embargo: The Case for Executive Termination of the U.S. Embargo on Cuba*, 54 AM. BUS. L. J. 293–346 (Summer 2017) (justifying the Executive’s unilateral power to terminate the trade embargo on Cuba on the basis of foreign policy power rather than trade power).

34. See, e.g., Douglas A. Irwin, *Historical Aspects of U.S. Trade Policy*, NBER REPORTER, Summer 2006, at 17–18 (explaining that U.S. trade policy shifted from focusing on agricultural protection to emphasizing industrial exports in the early 20th century).

35. Douglas A. Irwin, *Tariffs and Growth in Late Nineteenth Century America*, 12 (June 2000) (unpublished manuscript, Dartmouth College), <https://www.dartmouth.edu/~dirwin/docs/Growth.pdf> [<https://perma.cc/XD86-JVU2>].

36. DOUGLAS A. IRWIN, *CLASHING OVER COMMERCE*, 12–13 (2017).

States developed thanks in part to slave labor that lowered the costs of production for cotton plantations and the resulting exports from those farms.³⁷ While the North was struggling to develop infant industry in the face of stiff import competition from Britain, the South was thriving from their low-cost exports. Accordingly, the North sought to use tariffs to protect against more efficient imported products while they invested in industrialization, whereas the South supported policies of open trade to ensure full access to foreign markets for their cotton exports.³⁸

The mid-nineteenth century, then, was a tumultuous period in American history with respect to trade policy, with the South favoring open trade in an effort to allow it market access for its agricultural exports, and the North favoring protection of its infant industry against competition from more efficiently produced imports.³⁹ Tariff policy was fodder for a number of presidential elections in this period, with Republicans largely in favor of protectionist policies and Democrats in favor of freer trade.⁴⁰ Two significant federal government expenses prior to 1930 resulted in increased tariffs to cover the costs — the Civil War and World War I.



FIGURE 1. CAMPAIGN POSTER FOR THE 1892 ELECTION OF DEMOCRAT GROVER CLEVELAND. SOURCE: CORNELL UNIVERSITY LIBRARY.

37. See, e.g., Sven Beckert, *Empire of Cotton*, THE ATLANTIC (Dec. 12, 2014), <https://www.theatlantic.com/business/archive/2014/12/empire-of-cotton/383660/> [<https://perma.cc/M7J7-34GR>] (“Slavery stood at the center of the most dynamic and far-reaching production complex in human history [cotton]”).

38. DOUGLAS A. IRWIN, *supra* note 36, at 9 (“The raising or lowering of protective tariffs has always sparked heated debate because those tariffs affect which sectors of the economy will expand and which will contract.”).

39. DOUGLAS A. IRWIN, *supra* note 36, at 7.

40. DOUGLAS A. IRWIN, *supra* note 36, at 230.

Democrat James Polk took office in 1844 after running a successful campaign favoring reduced tariffs to protect Southern cotton farmers.⁴¹ He facilitated the enactment of the 1846 Walker Tariff, which reduced most import tariffs and may have helped set in motion the North-South showdown leading to the Civil War.⁴² With the emergence of the powerful and rapidly-industrializing North after the Civil War, a policy of protectionism prevailed, implemented in earnest by the Republican leadership at the end of the nineteenth and start of the twentieth centuries. Major enactments, including the McKinley Tariff Act of 1890 and the Dingley Tariff Act, raised average tariffs on imported goods to as high as 52%.⁴³ Republicans argued that these were necessary to protect the growth of the American industrial sector, mainly in the North.

The agriculture sector of the nineteenth century United States was most harmed by the high tariffs favored by the industrializing North.⁴⁴ The United States grew its historic economy out of cotton. The boom in cotton, which began in the late eighteenth century, put the United States on the map as a major global commercial player.⁴⁵ By the mid-nineteenth century, U.S. cotton exports accounted for close to 80% of British consumption.⁴⁶ And by the start of the Civil War in 1861, cotton exports comprised 61% of the value of all U.S. exports. And while it seems clear that the comparative advantage the United States had in producing cotton so efficiently came from the reliance on slave labor, the fact is that King Cotton was a powerful industry and a major contributor to the growth of the early United States.

The efficient production of cotton in the early United States meant opportunity for income from exports. During the Civil War, for instance, the Confederacy in the South struggled to effectively finance their wartime operations because their entire economy consisted of cotton exports to Britain rather than a broader domestic tax base, as had been developing in the North.⁴⁷ The ultimate prohibition of slavery through the Thirteenth

41. See John C. Pinheiro, *James K. Polk: Domestic Affairs*, THE MILLER CENTER, <https://millercenter.org/president/polk/domestic-affairs> [<https://perma.cc/88HR-KA2C>] (last visited Oct. 20, 2020) (explaining that Polk opposed protective tariffs in general but supported those that protected disadvantaged domestic industries).

42. See generally Scott C. James & David A. Lake, *The Second Face of Hegemony: Britain's Repeal of the Corn Laws and the American Walker Tariff of 1846*, 43 INT'L ORG. 1, 1–2 (1989) (discussing how the Walker Tariff affected relations between Northern and Southern states).

43. DOUGLAS A. IRWIN, *supra* note 36, at 296.

44. DOUGLAS A. IRWIN, *supra* note 36, at 176 (explaining the Compromise of 1833 and how South Carolina's agriculture sector was particularly affected by new tariffs).

45. Beckert, *supra* note 37.

46. Beckert, *supra* note 37.

47. See DOUGLAS A. IRWIN, *supra* note 36, at 216 (describing the conflicting views about influencing British policy toward the Confederacy, such as restricting cotton exports to force

Amendment to the U.S. Constitution⁴⁸ and the Northern defeat of the South in the Civil War substantially changed the dynamic of Southern trade and economic progress.

Significantly, what had been changing throughout the 1800s in early America was the shift from raw material exports, like cotton, to manufactured exports, like textiles. While the cotton gin, invented in 1793, substantially increased U.S. dependence, especially in the South, on raw cotton exports, the development of cotton into textiles was occurring mostly in England, and those goods were sold back to the United States. Advances in the industrial production of textiles led to the creation of textile mills in the North of the United States, beginning its nascent manufacturing sector.⁴⁹ Raw material exports from the South dominated U.S. trade for most of the nineteenth century (see Figure 2. U.S. Trade Balance to GDP: Raw Materials and Manufactured Goods., below). But this trend flipped at the turn of the century, when industry in the North became more efficient, and partially due to the end of slavery, raw cotton exports became less efficient.

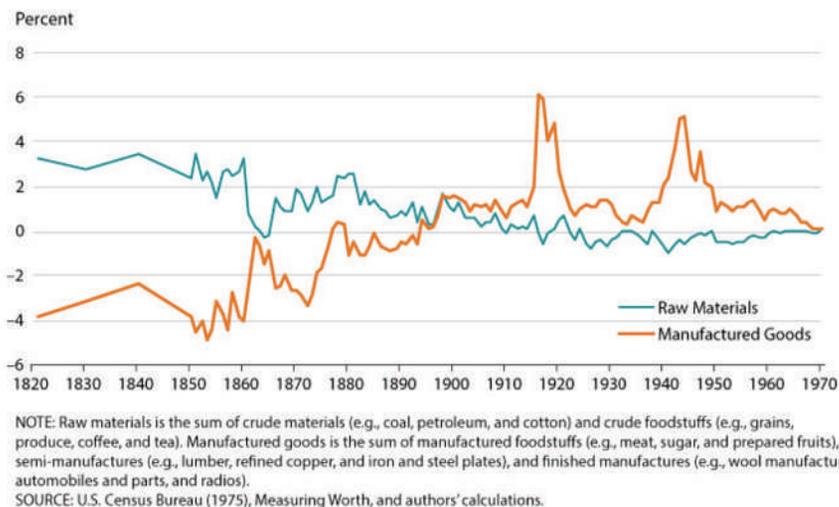


FIGURE 2. U.S. TRADE BALANCE TO GDP: RAW MATERIALS AND MANUFACTURED GOODS.⁵⁰

The political fight over tariff policy during this period was heated, with

British support or exporting more to encourage British sales).

48. U.S. CONST. amend. XIII.

49. FREDERICK M. PECK & HENRY H. EARL, *FALL RIVER AND ITS INDUSTRIES 77* (New York, Atlantic Publishing and Engraving Co. 1877) (explaining that nearly all textile factories were located in the Northern states by 1810).

50. Brian Reinbold & Yi Wen, *Historical U.S. Trade Deficits*, FED. RES. BANK OF ST. LOUIS, (May 17, 2019), <https://doi.org/10.20955/es.2019.13> [<https://perma.cc/P4DC-Z9TZ>].

the southern states increasingly concerned about the growing power of the North in driving tariff decisions. A Senator made the following comment in 1892 about the importance of cotton and the fight against tariffs:

The existing tariff is an obstruction to healthy and legitimate commerce. It narrows and restricts the markets for American products, and especially those of agriculture. It is based upon the idea that the American farmer must look to the home market alone, and if that does not give remunerative prices for his surplus, the loss must be borne patiently and patriotically for the general welfare.⁵¹

Despite this powerful force against tariffs in the South, the American voting population was concentrated in the North, where industry was beginning to develop and where industrialists demanded protection from foreign competition. As Republicans maintained control of power from the end of the Civil War through World War I, they were willing to accommodate these demands, keeping America a protectionist country and allowing rapid industrialization to take place, almost entirely concentrated in the northern states.⁵² The continued push for tariffs to protect infant industry in the North paid off as U.S. industry became efficient enough to compete on world markets by the early 1900s.

The election of progressive Democrat Woodrow Wilson in 1912, along with the capture of Congress by the Democrats, led to a policy of reducing tariffs and promoting more free trade. At that time, the Democratic party platform was opposed to the implementation of tariffs for the purpose of protecting domestic industry.⁵³ Rather, they believed that tariff policy should be solely focused on government revenue:

We declare it to be a fundamental principle of the Democratic party that the Federal government, under the Constitution, has no right or power to impose or collect tariff duties, except for the purpose of revenue, and we demand that the collection of such taxes shall be limited to the necessities of government honestly and economically administered.⁵⁴

Following this radical shift in trade policy, Democrats in Congress took

51. G. G. Vest, *The Real Issue*, 431 N. AM. REV. 401, 402–03 (1892).

52. See generally Benjamin O. Fordham, *Protectionist Empire: Trade, Tariffs, and United States Foreign Policy, 1890-1914*, 31 STUD. IN AM. POL. DEV. 170, 170–73 (2017) (providing a comprehensive foreign policy analysis of the use of tariff as trade policy prior to World War I).

53. DEMOCRATIC PARTY, 1912 DEMOCRATIC PARTY PLATFORM, (1912), <https://www.presidency.ucsb.edu/documents/1912-democratic-party-platform> [<https://perma.cc/N8NK-V8BE>].

54. *Id.*

steps to substantially reduce protective tariffs and unchain the federal government from the increasingly large businesses that they had been supporting with protective tariffs in the past. Shortly after taking office in 1913, President Wilson spoke to a joint session of Congress about tariffs:

We long ago passed beyond the modest notion of “protecting” the industries of the country and moved boldly forward to the idea that they were entitled to the direct patronage of the Government. For a long time—a time so long that the men now active in public policy hardly remember the conditions that preceded it—we have sought in our tariff schedules to give each group of manufacturers or producers what they themselves thought that they needed in order to maintain a practically exclusive market as against the rest of the world. Consciously or unconsciously, we have built up a set of privileges and exemptions from competition behind which it was easy by any, even the crudest, forms of combination to organize monopoly; until at last nothing is normal, nothing is obliged to stand the tests of efficiency and economy, in our world of big business, but everything thrives by concerted arrangement.⁵⁵

Wilson went further and explained that the only duties that ought to be maintained in the interest of revenue were those on imports of goods that the United States did not produce.⁵⁶ His goal, therefore, was to create a free market that eliminated unfair competition through government supports in the form of tariffs. The Democratically controlled Congress enacted these reforms with minimal Republican support in 1913, bringing average tariffs down from 40% to 27%, and the percentage of duty-free imports rose from 54% to 69% by 1916.⁵⁷

The impact of this new progressive trade policy was felt immediately. Manufactured exports from the United States dramatically increased, while imports remained largely stable, generating a substantial trade surplus for the United States of \$4 billion by 1919.⁵⁸ However, lower

55. President Woodrow Wilson, Address to a Joint Session of Congress on Tariff Reform, (Apr. 8, 1913), <https://millercenter.org/the-presidency/presidential-speeches/april-8-1913-message-regarding-tariff-duties> [<https://perma.cc/MJ37-ZYZ4>].

56. *See id.* (“We must abolish everything that bears even the semblance of privilege or of any kind of artificial advantage, and put our business men and producers under the stimulation of a constant necessity to be efficient, economical, and enterprising, masters of competitive supremacy, better workers and merchants than any in the world. Aside from the duties laid upon articles which we do not, and probably cannot, produce, therefore, and the duties laid upon luxuries and merely for the sake of the revenues they yield, the object of the tariff duties henceforth laid must be effective competition, the whetting of American wits by contest with the wits of the rest of the world.”).

57. DOUGLAS A. IRWIN, *supra* note 36, at 338.

58. *See* DOUGLAS A. IRWIN, *supra* note 36 (describing the increase from a surplus of \$471 million in 1914 to \$4 billion by 1919).

tariff levels also meant less government revenue. After World War I broke out in 1914 and the United States became involved, financing of the war effort became challenging.⁵⁹ Republicans attacked the new tariff policy as the reason for the weak financial position of the federal government, despite the substantial boom in the domestic economy.⁶⁰

Rather than raising tariffs once again, President Wilson took the unprecedented route of calling for an increase in taxes with the creation of a federal income tax.⁶¹ The Sixteenth Amendment to the U.S. Constitution was enacted in 1913, authorizing the federal government to levy and collect an income tax.⁶² Shortly after passage of that Amendment, Congress enacted the Underwood Tariff Act, which used the momentum of reform to substantially lower import tariffs while also imposing the first federal income tax.⁶³ The income tax quickly came to replace the government revenue that had been procured from tariffs in the past (see Figure 3, below). Imports quickly became a substantial source of both opportunity and threat to the stability of the U.S. economy.

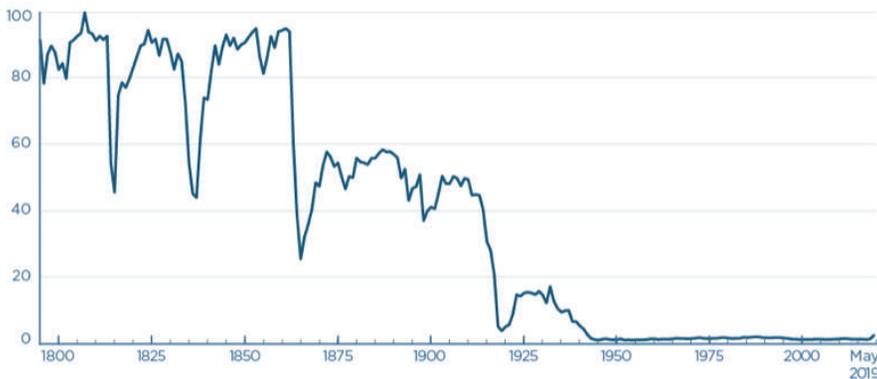


FIGURE 3. U.S. TARIFF REVENUE AS PERCENT OF TOTAL GOVERNMENT REVENUE 1795 – MAY 2019.⁶⁴

U.S. participation in World War I, reluctant though it was, left a bad taste in the mouths of many Americans, leading them to reject a larger role

59. DOUGLAS A. IRWIN, *supra* note 36, at 340–41.

60. See DOUGLAS A. IRWIN, *supra* note 36, at 339–40 (explaining how Republicans reduced the Democratic majority in congress during the midterm elections of 1914).

61. See DOUGLAS A. IRWIN, *supra* note 36, at 340 (discussing passage of the Revenue Act of 1916, which ultimately led to the 16th Amendment to the U.S. Constitution).

62. U.S. CONST. amend. XVI.

63. Note that the highest federal income tax rate in the Underwood Tariff was 6%.

64. Chad P. Bown & Douglas A. Irwin, *Is Trump Right When He Tweets That Tariffs Bring in Government Revenue? Here Are 5 Things You Need to Know*, WASH. POST. (July 16, 2019, 7:00 AM), <https://www.washingtonpost.com/politics/2019/07/16/tariff-revenue-trump-tweets-things-you-need-know/> [<https://perma.cc/3S43-W7KS>].

in foreign affairs after the war ended in 1918. Lack of U.S. leadership at the time left European allies with the power to assert control over Germany by forcing rigid reparations for their aggressions in the war.⁶⁵ In the United States, Republicans regained control of Congress and won the Presidency in 1920, using their power to reverse the liberalization that began with the Underwood Tariff.⁶⁶ U.S. farmers in particular were hurt in the post-war period as European farmers rebounded from the war and their demand for imports withered.

The new Warren Harding Republican administration signed into law the Emergency Tariff Act of 1921,⁶⁷ as well as the 1922 Fordney-McCumber Act,⁶⁸ each of which raised the level of import tariffs in order to protect domestic farming and industry. The increased tariffs did not help U.S. farmers, who faced more serious concerns over declining global agricultural prices due to overproduction. Republican Herbert Hoover, who took office in 1928, promised more protection for the farmers. But once the tariff wallet was opened, other American producers wanted their fair share as well.⁶⁹ This led to passage of the 1930 Tariff Act.⁷⁰

The Tariff Act of 1930, notoriously known as the Smoot-Hawley Tariff Act, raised tariffs on over 20,000 imported goods.⁷¹ The effects of that Act are debated, but evidence suggests that the slowdown in international trade resulting from higher tariffs in the United States, and retaliatory tariffs among U.S. trading partners, may have extended the effects of the Great Depression and the global economic downturn. A key part of that Act is the Congressional delegation of power to the President to raise tariffs on imports when he determines that the exporting country has unreasonably restricted U.S. exports or when foreign imports discriminate against domestic producers.⁷²

65. See, e.g., *Versailles Revisited*, THE ECONOMIST, July 6, 2019, at 14 (providing an insightful analysis of the impact of reparation payments on Germany via the Treaty of Versailles).

66. See DOUGLAS A. IRWIN, *supra* note 36, at 349 (describing the immediate return to protectionism once Republicans took control of Congress and the Presidency in 1920).

67. Emergency Tariff Act of 1921, Pub. L. No. 67-10, 42 Stat. 9-19 (1921).

68. Tariff Act of 1922, Pub. L. No. 67-318, 42 Stat. 858 (1922).

69. See *Protectionism in the Interwar Period*, DEP'T OF STATE OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1921-1936/protectionism> [<https://perma.cc/HZ5B-SS3F>] (last visited Oct. 22, 2020) (discussing the increased demand to raise tariffs across all sectors of the economy).

70. Tariff Act of 1930, ch. 497, Pub. L. No. 71-361, 46 Stat. 590 (1930).

71. *Id.*

72. Tariff Act of 1930, ch. 497, §338(a), 46 Stat. 704 (1930) (codified as amended at 19 U.S.C. §1338(a)) (“The President when he finds that the public interest will be served thereby shall by proclamation specify and declare new or additional duties as hereinafter provided upon articles wholly or in part the growth or product of, or imported in a vessel of, any foreign

The impact of the 1930 Tariff Act has been debated extensively.⁷³ What is clear, however, is that it failed to alleviate the worsening global recession and the dramatic decline in international trade. The Act was originally intended to provide protection to farmers in the face of increasing agricultural imports; however, what is often overlooked is at this time, the economy was doing particularly well, with low unemployment and strong economic growth.⁷⁴ As word got out that the farmers were getting tariff protection, a number of other industries requested the same protection, resulting in over 800 goods receiving some form of tariff protection in the Act.⁷⁵

Economists have largely assumed that the Great Depression was caused in large part due to the October 1929 stock market crash. Some other theorists, however, have asserted that the 1930 Tariff Act itself was the principal cause of the risky trading leading to the 1929 crash and subsequent depression.⁷⁶ In either case, we can see similarities between the actions taken by the Hoover Administration in 1930 and those taken by the Trump Administration in 2019.⁷⁷ Recovering from the effects of the 1930 Act required broad new trade legislation, something unlikely in the political environment of 2020.

country whenever he shall find as a fact that such country—(1) Imposes, directly or indirectly, upon the disposition in or transportation in transit through or reexportation from such country of any article wholly or in part the growth or product of the United States any unreasonable charge, exaction, regulation, or limitation which is not equally enforced upon the like articles of every foreign country; or (2) Discriminates in fact against the commerce of the United States . . .”).

73. See, e.g., John Steele Gordon, *A Bad Law, Badly Timed*, BARRONS (Apr. 21, 2017) <https://www.barrons.com/articles/smoot-hawley-tariff-a-bad-law-badly-timed-1492833567> [<https://perma.cc/7FCM-BDFW>] (discussing the strong opposition to the bill by economists and industrialists alike); DOUGLAS A. IRWIN, PEDDLING PROTECTIONISM: SMOOT–HAWLEY AND THE GREAT DEPRESSION 2011 (providing an in-depth examination of the effects of the Act on the extent of the Great Depression).

74. David Greene, *Smoot-Hawley Tariff Act: A Classic Economics Horror Story*, NAT’L PUB. RAD. (Apr. 5, 2018), <https://www.npr.org/2018/04/05/599707003/smoot-hawley-tariff-act-a-classic-economics-horror-story> [<https://perma.cc/29D5-KK93>] (interviewing Douglas Irwin and Sally Helm about the effects of the Act).

75. *Id.*

76. See Alan Reynolds, *What Do We Know about the Great Crash?*, Nat’l Rev., Nov. 9, 1979, at 1416 (arguing that investors act on information affecting future decisions, making it likely that the pending Act would have affected decisions made by investors even before the bill became law).

77. See, e.g., Chad P. Bown and Eva Zhang, *Trump’s 2019 Protection Could Push China Back to Smoot-Hawley Tariff Levels*, PETERSON INST. FOR INT’L ECON., (May 14, 2019, 5:00PM) <https://www.piie.com/blogs/trade-and-investment-policy-watch/trumps-2019-protection-could-push-china-back-smoot-hawley> [<https://perma.cc/C4FZ-EGBV>] (discussing the potential effects of the tariffs on Chinese exports on the global trading system and likening them to the Smoot-Hawley Tariff Act).

B. Delegation of Tariff Policy to the Executive

The effects of the Smoot-Hawley Tariff Act were felt immediately and broadly across the U.S. and global economies. The political fallout was unmistakable as Democrats swept into Congress and the White House in the 1932 election, bringing Franklin Delano Roosevelt to power in the midst of the Great Depression.⁷⁸ Until this time, trade policy power remained in the Congress, where the Constitution designated it.⁷⁹ The Democratically controlled Congress of 1934 dramatically changed this approach with passage of the 1934 Reciprocal Trade Agreements Act (RTAA).

The RTAA was the first congressional delegation of trade power to the President that authorized him to lower tariffs in order to pursue a progressive trade liberalization policy.⁸⁰ That Act enabled the President, from time to time,⁸¹ to modify duties and other import restrictions as part of any trade agreements that he enters into. In other words, the RTAA empowered the President to negotiate trade agreements that included adjustments to import tariff rates, as well as other restrictions. More precisely, it allowed the President to *lower* tariffs on goods from certain countries in the interest of moderating the free trade environment in a favorable manner.⁸²

The 1934 Act was the first time Congress delegated its trade authority to the President, and it did so on a limited basis—subject to re-authorization every three years. The Act was a strategic maneuver by newly elected President Roosevelt and his astute Secretary of State, Cordell Hull, given the distaste in Congress for tariff reductions in the midst of the Great Depression.⁸³ Because the Act was reciprocal in nature and limited in scope,

78. See Douglas A. Irwin, *From Smoot-Hawley to Reciprocal Trade Agreements: Changing the Course of U.S. Trade Policy in the 1930s* in MICHAEL D. BORDO, CLAUDIA GOLDEN AND EUGENE N. WHITE, *THE DEFINING MOMENT: THE GREAT DEPRESSION AND THE AMERICAN ECONOMY IN THE TWENTIETH CENTURY* 325 (1998) (describing trade policy changes resulting from the political changes following the electoral sweep in 1932).

79. U.S. CONST. art. I, § 8.

80. Reciprocal Tariff Act of 1934, ch. 474, 48 Stat. 943 (1939) (codified as amended at 19 U.S.C. §1351(a)) (“[T]he President, whenever he finds as a fact that any existing duties or other import restrictions of the United States or any foreign country are unduly burdening and restricting the foreign trade of the United States . . . is authorized from time to time . . . [t]o proclaim such modifications of existing duties and other import restrictions, or such additional import restrictions, or such continuance, and for such minimum periods, of existing customs or excise treatment of any article covered by foreign trade agreements, as are required or appropriate to carry out any foreign trade agreement that the President has entered into hereunder.”).

81. *But see* Trading with the Enemy Act of 1917, ch. 106, §5(b), Pub. L. No. 65-91, 40 Stat. 411 (1917) (codified as amended at 50 U.S.C. §4305(b)(1)(B)) (enabling the President to take actions related to imports and exports during time of war).

82. Irwin, *supra* note 78, at 325.

83. See WILLIAM KRIST, *GLOBALIZATION AND AMERICA’S TRADE AGREEMENT*, (2009)

the threat of surging imports that would further weaken the U.S. economy was minimized, while the power of the President to use trade as a means to expand opportunities for U.S. exporters was enhanced.

President Roosevelt wasted little time in using the newly delegated power from the RTAA to enter trade agreements with a number of countries, beginning with Cuba in 1934.⁸⁴ By 1945, at the dawning of the world trade system, the United States had entered into reciprocal trade agreements with twenty-eight countries.⁸⁵ And because the delegated authority did not require congressional authorization for the new agreements the President entered into, the process was swift and certain. This authority, which had been successively renewed every three years, was also utilized by President Truman when negotiating and signing the General Agreement on Tariffs and Trade (GATT) in 1947, which was implemented in the United States via Executive Order under the authority of the RTAA.⁸⁶

In making his case to Congress in 1945 for another extension of the RTAA, President Roosevelt said “we cannot succeed in building a peaceful world unless we build an economically healthy world.”⁸⁷ Congress authorized the Act every three years through 1962. By 1962, the world trade landscape had shifted dramatically. While the Cold War raged on, Europe had consolidated its growing economic power into the European Economic Community via the 1957 Treaty of Rome. This led President Kennedy to fear that U.S. exporters would lose access to European markets, which now had borderless access to neighboring countries within the new customs union. Kennedy pushed for trade authority that went beyond the RTAA by enabling him to negotiate a 50% reduction in current tariff levels and also to increase tariffs by 50% from their 1934 levels if necessary.⁸⁸

https://www.wilsoncenter.org/chapter-1-us-trade-policy-crisis#_ftn10 [<https://perma.cc/6PAH-WVTK>] (discussing the movement to preserve tariffs as the means to decrease the unemployment rate in the United States and to restore the American standard of living).

84. Reciprocal Trade Agreement with Cuba of 1934, Cuba-U.S., Aug. 24, 1934, 49 Stat. 3559 (entered into with force Sept. 3, 1934).

85. Irwin, *supra* note 78, at 343–45.

86. See, e.g., Thomas William France, *The Domestic Legal Status of the GATT: The Need for Clarification*, 51 WASH. & LEE L. REV. 1481, 1482 (1994) (suggesting that, though Congress recognized the authority of the original GATT agreement, no implementing legislation was ever enacted); John H. Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 249, 265 (1967) (“The theory of the executive branch has been that GATT was authorized by a combination of existing statutes and presidential power, and that therefore there was no need to submit it to Congress.”).

87. Recommendation for Renewal of Trade Agreements Act, DEP’T OF ST. BULL., April 1945, at 531.

88. See CENT. INTELLIGENCE AGENCY, GATT AND THE KENNEDY ROUND, CENTRAL INTELLIGENCE AGENCY (1964) (describing the tense state of affairs as President de Gaulle of France shut out the United Kingdom from the European Common Market and appeared to be taking protectionist measures that could harm U.S. exporters).

The new trade environment created by the RTAA largely reflected a relational approach to trade, emphasizing the need to trade not only goods but also access. Scholar Doug Irwin argued that the Democrats could easily have repealed the Smoot-Hawley Tariff Act when they took control in 1932 but they chose not to.⁸⁹ His theory is that they were aware of the changed environment of trade, with retaliatory trade barriers erected around the world that would not suddenly come down in the event of a full repeal.⁹⁰ Thus, the better approach was to target those countries with whom we had particular trade relationships that we wanted to improve upon. This created the reciprocal approach that was utilized through the creation of the World Trade Organization (WTO) in 1995.

Republican opposition to the RTAA was largely muted during World War II, especially as U.S. manufacturers had achieved superior abilities to provide the implements necessary for the war, driving U.S. economic growth.⁹¹ Following the war, trade became more intertwined with national security concerns. The GATT, signed in 1947, was the set of rules that would govern a new world of trade and promote peaceful interactions that benefited the new global community that existed after the war.⁹² A national security exception was built into the GATT, allowing countries to raise tariffs in the event of a threat to their domestic security, highlighting the ongoing concerns about economic and political relations of this period.⁹³ This will be addressed in more detail below.

The RTAA provided the President with broad, though temporary, authority to control tariffs. While he could not determine which goods were dutiable and which were not, he was authorized to increase or decrease the tariff on any dutiable good by up to 50%.⁹⁴ This new executive authority signaled a shift in how trade policy would be carried on for years to come.⁹⁵

The next period in global trade and political history was the Cold War, which developed after the end of World War II when the Soviets, disgruntled by the late and limited involvement of the United States, began their expansion into Eastern Europe in the early 1940s. Politically, the United

89. *Id.* at 326 (making the case for a reciprocal approach to tariff reduction rather than a one-way opening).

90. *Id.*

91. *Id.* (suggesting that Republicans would have tried to repeal the RTAA but for the strong economic growth resulting since its implementation).

92. *Id.* (confirming that the republicans would not reverse the new approach to consensus-based trade with the rise of U.S. power following World War II).

93. General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 194.

94. Irwin, *supra* note 78, at 341.

95. Irwin, *supra* note 78, at 341–42 (discussing how interest groups took little notice of this legislation as they could not anticipate how it would be used, despite the fact that it became foundational for trade policy for decades to come).

States was following the approach of “containment,” trying to limit Soviet expansion without directly confronting them. Economically, this policy involved economic isolation and the conversion of trade policy into national security policy.

By 1947, the nexus between trade and national security was clear. President Truman set in motion the future of U.S. foreign relations, mainly in Europe, by asserting that the United States would support those countries seeking freedom from communism. This “Truman Doctrine” became the foundation for the North Atlantic Treaty Alliance (NATO), which remains in effect today, and which works to promote national security in Europe and to protect markets for U.S. exports.⁹⁶ Free trade, however, became linked also to communism, as the Republicans asserted their worries over the effects on domestic industry. One Republican Senator at the time noted, “Reds in the United States continually whoop it up for further tariff reductions because they realize that removal of tariff protection is one of the surest ways of bankrupting the United States industry.”⁹⁷ This was a very dramatic shift from political sentiments just a few decades earlier.

Cases linking trade protection and national security abounded during the Cold War. The sardine industry argued that they deserved protection because their fisherman could act as spies. The glassware industry argued for protection because they supplied the majority of blown glass tubes essential to the war effort.⁹⁸ At the same time, the Truman Administration was advocating for free trade in the interest of national security. At a speech in 1947, Truman said, “we cannot find security in isolation . . . [because the nation’s] foreign relations, political and economic, are indivisible.”⁹⁹ In 1949, Senator A. Willis Robertson asked, rhetorically, “[w]hat is the cold war about? It is over trade.”¹⁰⁰

Throughout the Cold War period, trade protection became synonymous with national security. Defensive tariffs were justified on the basis of protecting U.S. interests. As economic development enabled more efficient

96. Thomas W. Zeiler, *Managing Protectionism: American Trade Policy and the Cold War*, 22 *DIPLOMATIC HIST.* 337, 344 (1998) (“Liberal trade was crucial for [the United States and Western Europe] and thus was essential to national security.”).

97. *Id.* at 345–46.

98. *Brief from J. J. Smith on Opposing Reduction in Tariff on Canned Sardines* in *HEARINGS ON THE OPERATION OF THE TRADE AGREEMENTS ACT AND THE PROPOSED INTERNATIONAL TRADE ORGANIZATION*, 80TH CONG., 643–44 (1947); *Letter from the American Glassware Association to the Committee for Reciprocity Information on Urging to Protect Job Opportunities in the Glassware Industry by Tariff Protection* in *HEARINGS ON THE OPERATION OF THE TRADE AGREEMENTS ACT AND THE PROPOSED INTERNATIONAL TRADE ORGANIZATION*, 80TH CONG. 811–12 (1947).

99. Harry S. Truman, Address Delivered at Baylor University: Foreign and Economic Policy, 1 *PUB. PAPERS* 167 (March 6, 1947).

100. 81 *CONG. REC.* 12,623 (1949).

production abroad, domestic industries were increasingly threatened. Economic protection was sought on the basis of national security, and new trade acts reflected this shift in focus.¹⁰¹

BACKGROUND TO THE NATIONAL SECURITY EXCEPTION

One of the underlying questions that this article must address is how national security became entwined with trade policy and whether limits exist to the President's use of the national security exception to block imports. Some have argued that there is a "reciprocal and dynamic interaction in international relations of the pursuit of wealth and the pursuit of power."¹⁰² Nowhere does that interaction resonate more soundly than in trade policy. To begin, I will briefly trace the key acts that have shifted congressional power to the President over trade. These steps are critical in understanding the progression of a shifting balance of power over trade policy.

The National Security exception did not appear in statutory form until the height of the Cold War in 1962, just as the Soviet Union was working with Cuba to position its military apparatus close to the mainland United States.¹⁰³ Prior to that authorization, the focus of congressional delegations to the President for trade were on negotiating reductions in tariffs, not in imposing additional tariffs. The first delegation of trade power to the President was the 1934 RTAA, which I discussed above.

Though it would be another eight years before the national security exception we know today would come into existence, the Trade Act of 1954, passed just after the Korean War, made the first association of national defense with trade.¹⁰⁴ That Act included a provision that modified the former delegation of authority to enable the President to prevent trade benefits if "the President finds that such reduction would threaten domestic production needed for projected national defense requirements."¹⁰⁵ It is worth noting that the National Security Act, which substantially consolidated military and

101. See Zeiler, *supra* note 96 at 350–60 (arguing that national security served the interests of sectors affected by increasing free trade and efficiency by foreign industries).

102. ROBERT GILPIN, U.S. POWER AND THE MULTINATIONAL CORPORATION 43 (1975); see also ROBERT O. KEOHANE, AFTER HEGEMONY 21–22 (1984) (discussing Robert Gilpin's definition of international political economy).

103. See generally Kevin J. Fandl, *Adios Embargo: The Case for Executive Termination of the U.S. Embargo on Cuba*, 54 AM. BUS. L.J. 293–346 (2017) (providing a thorough history of the relationship between the United States and Cuba).

104. See RACHEL F. FEFER ET AL., CONG. RESEARCH SERV., R45249, SECTION 232 INVESTIGATIONS OVERVIEW AND ISSUES FOR CONGRESS, 36–37 (2019) ("Concern over national security, trade, and domestic industry was first raised by the Trade Agreements Extension Act of 1954.") (Internal citation omitted).

105. Trade Agreements Extension Act of 1954, ch. 445, § 2, 68 Stat. 360, 360 (1954) (granting the President a one-year extension of his RTAA trade negotiating authority).

foreign policy elements of the federal government, was enacted in 1947, just seven years prior to the Trade Act.

The 1954 Act, though significant in its addition of a national security clause, did little to provide structure around the use of that exception. In particular, it restricted the President from providing a trade agreement benefit if, after his own investigation, the President determines that such a benefit would increase imports in a manner affecting domestic production needed for projected national security requirements.¹⁰⁶ Because the authority in the 1954 Act expired after one year, an extension was passed in 1955 that included more precise language about the use of the national security exemption.¹⁰⁷ That Act added a process by which the Director of the Office of Defense Mobilization (ODM) would be responsible for carrying out an investigation into potential national security threats from imports. Upon his recommendation, the President was required to initiate his own investigation and, if appropriate, take actions to restrict imports.¹⁰⁸

The 1958 Act essentially codified an investigatory procedure by which the head of the ODM would still examine potential threats to national security related to imported goods and make a recommendation to the President on the basis of that investigation; however, this Act required the President to take action unless the President determines that the imports do not pose a national security threat.¹⁰⁹ In the discussion of the 1958 Act, the Senate Finance Committee said the following: “As was the purpose when the national security section was added in the 1955 extension of the Act, the amendments are designed to give the President *unquestioned authority* to limit imports which threaten to impair defense-essential industries.”¹¹⁰ This was a substantial expansion of the President’s powers to restrict trade benefits on the grounds of national security, as the Committee itself

106. *Id.*

107. Trade Agreements Extension Act of 1955, ch. 169, 69 Stat. 162 (1955).

108. Trade Agreements Extension Act of 1955 sec. 7, § 2(b) (“In order to further the policy and purpose of this section, whenever the Director of the Office of Defense Mobilization has reason to believe that any article is being imported into the United States in such quantities as to threaten to impair the national security, he shall so advise the President, and if the President agrees that there is reason for such belief, the President shall cause an immediate investigation to be made to determine the facts. If, on the basis of such investigation, and the report to him of the findings and recommendations made in connection therewith, the President finds that the article is being imported into the United States in such quantities as to threaten to impair the national security, he shall take such action as he deems necessary to adjust the imports of such article to a level that will not threaten to impair the national security.”).

109. Trade Agreements Extension Act of 1958, . L. No. 85-686, sec. 8, § 2(b), 72 Stat. 673, 678 (1958).

110. COMM. ON FIN., TRADE AGREEMENTS EXTENSION ACT OF 1958, S. REP. NO. 1838, at 5–6 (1958) (emphasis added).

recognized.¹¹¹

The 1958 Act requires the Director of the ODCM to initiate an investigation at the request of any interested party or of his own accord. If that Director, after considering the possible impact of imports on the national economy, believes that such imports pose a national security threat, he shall promptly advise the President accordingly.¹¹² Those findings should be based upon the following non-exclusive list:

- domestic production needed for projected national defense requirements
- capacity of domestic industries to meet national defense requirements
- existing and anticipated availabilit[y] of the human resources, products, raw materials, and other supplies and services essential to national defense
- investment, exploration and development necessary to support industrial growth¹¹³

The Trade Expansion Act of 1962, which I will unpack in more detail in the next section, left the requirements and procedures largely unchanged from the 1958 Act, other than replacing the role of the Director of the ODCM with the Director of Emergency Planning.¹¹⁴ The former provision was located in Section 232 of the Trade Expansion Act. The 1974 Trade Act further updated the investigative authority, naming the Secretary of the Treasury, in consultation with the Secretaries of Commerce and Defense, as the starting point for national security investigations over imports.¹¹⁵ A limit on this authority was added with the Crude Oil Windfall Profit Tax Act of 1980, which allowed Congress to enact a resolution of disapproval to overturn Section 232 actions related to petroleum or petroleum products.¹¹⁶

The most substantial changes since § 232 was codified in 1962 were in the 1988 Omnibus Trade and Competitiveness Act.¹¹⁷ That Act once again relocated investigatory authority to the Department of Commerce in consultation with the Department of Defense, removing Treasury altogether. In addition, the Act required the Secretary of Commerce to hold a public hearing or otherwise permit public comment on any § 232 investigation, and

111. *Id.* at 6 (noting that “[t]he authority of the President is thereby broadened considerably”).

112. Trade Agreements Extension Act of 1958 § 8.

113. *Id.*

114. Trade Expansion Act of 1962, Pub. L. No. 87-794, (1962).

115. Trade Act of 1974, Pub. L. No. 93-618, sec. 127, § 232, 88 Stat. 1978, 1993 (1975).

116. Crude Oil Windfall Profit Tax of 1980, Pub. L. No. 96-223, sec. 402, § 232, 94 Stat. 229, 301 (1980).

117. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988).

it added a deadline of 270 days for those investigations to be concluded. Once a recommendation was delivered to the President, he has 90 days to act on that recommendation. No further changes to that section of the Act have been made since 1988.

CLARIFYING THE MEANING OF NATIONAL SECURITY IN TRADE

With that background on the relationship between national security and the congressional delegation of trade power to the President, we turn to the more immediate situation of invoking that power as a means of restricting trade. The Trump Administration in particular has been adamant about relying on national security as a justification for trade restrictions. As noted by Peterson Institute Senior Fellow Chad Bown, “To this administration, everything is about national security.”¹¹⁸ Similarly, the White House’s trade advisor Peter Navarro said in an interview with the Center for Strategic and International Studies (CSIS) that “Economic security is national security.”¹¹⁹ This echoes the language of the Senate Finance Committee in the passage of the 1958 Trade Agreements Extension Act, in which they said, “[T]he country’s national security is tied closely to its internal economic welfare.”¹²⁰ Thus, national security can serve as a justification for economic sanctions to those who would link the two together.

The problem for making the link between national and economic security in the United States is the separation of powers. It is not entirely clear from a legal perspective which branch of government — the legislative or executive — has the power to unilaterally control trade sanctions in the interest of national security. Traditionally, the legislative branch has controlled international trade law,¹²¹ while the Executive has controlled most national security decisions. Drawing the connection between the two, then, should require collaboration between the two branches. For purposes of our discussion here, it may make sense to briefly trace the origin of this power before we address in whose hands it lies.

When President Kennedy was elected in 1961, he was facing a new

118. Ana Swanson & Paul Mozur, *Trump Mixes Economic and National Security, Plunging the U.S. Into Multiple Fights*, N.Y. Times (June 8, 2019), <https://www.nytimes.com/2019/06/08/business/trump-economy-national-security.html> [<https://perma.cc/5FTV-ZBG B>].

119. Interview by Andrew Phillip Hunter with Peter Navarro, Assistant to the President and Dir. of the White House Office of Trade & Mfg. Policy, in Washington, D.C. (Nov. 9, 2018).

120. COMM. ON FIN., TRADE AGREEMENTS EXTENSION ACT OF 1958, S. REP. NO. 1838, at 12 (1958).

121. U.S. CONST. art. I, § 8, cl. 1.

world for politics and trade. The European Economic Community (EEC), which was formed in 1957, had unified the European countries for political and economic purposes and formed a significant trading bloc of increasingly wealthy consumers for U.S. exports. Accordingly, free trade was on the mind of President Kennedy, who said that the United States needs to “trade or fade.”¹²² The 1962 Trade Expansion Act, considered one of the most significant achievements of Kennedy’s administration, created the office of the U.S. Trade Representative, solidified executive power to negotiate trade agreements, and created the trade adjustment assistance program to assist industries impacted by more open trade.¹²³

The Trade Expansion Act of 1962 was the most significant expression to date of the Administration’s effort to utilize trade policy as a major component of national security policy. As President Kennedy noted on the enactment of this Act:

This 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. Increased economic activity resulting from increased trade will provide more job opportunities for our workers. . . . The results can bring a dynamic new era of growth. . . . 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.¹²⁴

The Act followed previous trade acts in granting the Executive temporary power to lower tariffs with trading partners through the negotiation of trade agreements. The 1962 Trade Expansion Act also granted the Executive the power to raise tariffs in the event of a threat to the national security of the United States.¹²⁵ Though similar power appeared in previous trade acts,¹²⁶ Section 232 provided more clarity in the procedure for initiating

122. U.S. HOUSE OF REPRESENTATIVES COMM. ON WAYS AND MEANS, 87TH CONG., LEGISLATIVE HISTORY OF H.R. 11970, at 1390 (1967).

123. The Trade Expansion Act, CQ ALMANAC, <https://library.cqpress.com/cqalmanac/document.php?id=cqal62-1326212> [<https://perma.cc/RDP4-EGQW>].

124. 108 CONG. REC. S21,927 (daily ed. Oct. 11, 1962) (President’s Remarks upon the Signing of H.R. 11970, The Trade Expansion Act of 1962).

125. Trade Expansion Act of 1962, Pub. L. No. 87-794, § 232, 76 Stat. 872, 877 (1962).

126. *See, e.g.*, Trade Agreements Extension Act of 1954, ch. 445, § 2, 68 Stat. 360, 360 (1954) (“No action shall be taken . . . to decrease the duty on any article if the President finds that such reduction would threaten domestic production needed for projected national defense requirements.”); Trade Agreements Extension Act of 1955, ch. 169, sec. 7, § 2(b), 69 Stat. 162 (1955) (authorizing the President to adjust imports to safeguard national security); Trade Agreements Extension Act of 1958, Pub. L. No. 85-686, sec. 8, § 2(b), 72 Stat. 673 (1958) (authorizing the President to adjust imports on the basis of national security).

and conducting an investigation and imposing tariffs under this provision. In particular, the 1962 Trade Expansion Act builds on the 1930 Act by allowing the President, upon investigation by the Secretary of Commerce, to enact import restrictions on trade that threatens to impair the national security of the United States.¹²⁷

Section 232 of the 1962 Trade Expansion Act enables the President to impose import restrictions (i.e., tariffs) on goods “being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security.”¹²⁸ The Department of Commerce may initiate an investigation 1) in response to a request from industry; 2) at the request of the head of a U.S. government agency; or 3) of its own accord in the Executive branch.¹²⁹

Once an investigation under this section of the Trade Act is initiated, the Bureau of Industry and Security (BIS) within the Department of Commerce may hold public hearings or seek public comments.¹³⁰ The BIS is required to take into account the following factors when making their determination: (1) domestic production needed for projected national defense requirements; (2) domestic capacity; (3) the availability of human resources and supplies essential to the national defense; and (4) potential unemployment, loss of skills or investment, or decline in government revenues resulting from displacement of any domestic products by excessive imports.¹³¹ Within 270 days of initiating the investigation, the Secretary of Commerce has 270 days to provide a report to the President advising him on whether imports are entering the United States “in such quantities or under such circumstances as to threaten to impair” the national security of the United States.¹³² From that point, the President has 90 days to adopt the report, reject the report, or choose not to take action at all.¹³³ Following his decision, the President has 15 days to implement that decision and 30 days

127. Trade Expansion Act of 1962, P.L. 87-794, §232(b)-(c), 76 Stat. 877 (codified as amended at 19 U.S.C. §1862(b)-(c)) (If the Secretary of Commerce “finds that an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security,” then the President is authorized to take “such other actions as the President deems necessary to adjust the imports of such article so that such imports will not threaten to impair the national security”). See also CAITLAIN DEVEREAUX LEWIS, *supra* note 31, at 4 (highlighting § 232(b)-(c) of the Trade Expansion Act of 1962, empowering the President to take necessary actions to adjust trade imports to maintain national security).

128. 19 U.S.C. § 1862(b)(3)(A).

129. *Id.* at § 1862(b)(1).

130. *Id.* at 19 U.S.C. § 1862(b)(2)(A)(iii) (2018).

131. *Id.* at § 1862(d).

132. *Id.* at § 1862(b)(3)(A).

133. *Id.* at § 1862(c).

to notify Congress of his decision and associated actions.¹³⁴

Similar legislation was enacted subsequent to the 1962 Trade Expansion Act. Principally, the Trade Act of 1974 allowed the President to modify duty rates in response to market access restrictions abroad,¹³⁵ or to provide special treatment to certain countries.¹³⁶ The 1977 International Emergency Economic Powers Act (IEEPA) gave the President substantial power to restrict trade with certain countries or nationals of those countries in the event of an unusual or extraordinary foreign threat to U.S. national security, foreign policy, or the U.S. economy.¹³⁷

No further far-reaching legislation was enacted since 1977 empowering the President to determine import restrictions or tariff levels. However, a number of provisions providing localized power were included in subsequent trade agreements. This includes the North America Free Trade Agreement of 1993,¹³⁸ the Uruguay Round Agreements Act of 1994,¹³⁹ and the Dominican Republic–Central America Free Trade Agreement of 2005.¹⁴⁰ None of these agreements are the focus of the import restrictions being examined in this article.

Between 1962 and 2016, section 232 of the Trade Expansion Act of 1962 was utilized twenty-six times.¹⁴¹ In only eight of those cases did a President take action to restrict trade on the basis of national security.¹⁴² The Trump Administration has relied heavily on the use of this section to justify increases in tariffs on imports, as discussed in more detail below. This shift in trade policy signals an end to the progressive era associating trade liberalization with national security and democratization, and suggests a new moment of protectionism, possibly violating our obligations under international trade rules that did not exist when the progressive move toward

134. *Id.* at § 1862(c)(1)(B)-(2).

135. Trade Act of 1974, Pub. L. No. 93–617, §301, 88 Stat. 2001 (1975) (codified as amended at 19 U.S.C. §2132).

136. *Id.* at § 501.

137. International Emergency Economic Powers Act of 1977, P.L. 95-223, §203(a)(1)(B), 91 Stat. 1626 (1977) (codified as amended at 50 U.S.C. §1702(a)(1)(B)).

138. North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, §201, 107 Stat. 2068 (1993) (codified as amended at 19 U.S.C. §3331(a)(1)).

139. Uruguay Round Agreements Act, Pub. L. No. 103-465 §111(a), 108 Stat. 4819 (1994) (codified at 19 U.S.C. §3521(a)). For a complete discussion of the implications of this authority, see *Essential Security at the World Trade Organization* discussion below.

140. Dominican Republic–Central America Free Trade, Pub. L. No. 109-53, §201(a), 119 Stat. 467 (2005), (codified at 19 U.S.C. §4031(a)).

141. Paul Bettencourt, “*Essentially Limitless*”: *Restraining Administrative Overreach Under Section 232*, 17 GEO. J.L. & PUB. POL’Y 711, 716 (explaining the minimal application of Section 232 prior to the Trump Administration).

142. See RACHEL FEFER ET AL., CONG. RSCH. SERV., SECTION 232 INVESTIGATIONS: OVERVIEW AND ISSUES FOR CONGRESS 3–5 (2019) (discussing Section 232 investigations in which the President took action).

liberalization began. To better understand this new moment in trade policy, I will examine in the next section the prior uses of national security as a justification to import restrictions.

THE SCOPE OF THE SECTION 232 NATIONAL SECURITY EXCEPTION

Federal Energy Administration v. Algonquin SNG, Inc. sets the tone and establishes the precedent for our current state of affairs related to national security and trade.¹⁴³ This case involved the use of license fees as a non-tariff restriction on imports in an instance in which tariffs seemed to be ineffective. The case addressed the scope of the Section 232(b) power, which had been widely seen as a power that allowed the president, upon the recommendation of the U.S. Department of Commerce, to adjust imports when those imports were affecting national security, not necessarily license fees. The “adjustments” allowed previously under this exception were typically quantitative restrictions—tariffs and quotas. Petitioners challenged the use of non-quantitative measures as outside the scope of delegated power under Section 232(b).

The problem began in 1959, when President Eisenhower was advised that crude oil imports were entering the United States in such quantities as to threaten the national security of the United States.¹⁴⁴ The President implemented the Mandatory Oil Import Program (MOIP) under the authority of Section 8 of the Trade Agreements Act of 1958,¹⁴⁵ the predecessor to Section 232(b).¹⁴⁶ MOIP established quotas on oil imports in order to give domestic oil refineries and producers time to “catch-up” to rising demand; however, as with similar protectionist trade policies, demand outpaced the development of new production, undermining the efforts of Eisenhower, as well as Presidents Kennedy and Nixon thereafter.¹⁴⁷

Rising demand for oil in the United States and slow growth in domestic oil production largely frustrated the efforts of the executive in limiting oil imports. Accordingly, President Nixon substantially modified the quota program to convert it to a license fee program, charging a sum per barrel of imported oil and raising that sum over a period of years.¹⁴⁸ This program was still ineffective in addressing the imbalance between domestic demand and production by the time President Ford took office in 1974. By 1975, President Ford decided to immediately advance the planned increases in

143. *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976).

144. *Id.* at 552.

145. Pub. L. No. 85-686, 72 Stat. 678 (1958).

146. Presidential Proclamation No. 3279, 3 CFR 11 (1959/1963 Comp.).

147. *Algonquin*, 426 U.S. at 552–554.

148. Presidential Proclamation No. 4210, 3 CFR 31 (1974).

license fees that had been scheduled to phase-in over subsequent years.¹⁴⁹ This action was the basis for the *Algonquin* lawsuit.

The question raised in the *Algonquin* case was whether the Executive exceeded its delegated authority in establishing license fees on oil imports and, if not, whether it did so in violation of proper procedural steps.¹⁵⁰ The Federal District Court found in favor of the government and upheld the argument that the President had been congressionally-delegated the power to use any means necessary to offset the threat, and that the imposition of license fees here conformed to the statutory procedures.¹⁵¹

The Court of Appeals for the District of Columbia disagreed. That court concluded that imposing license fees rather than tariffs or quotas was an improper expansion of the delegated congressional authority.¹⁵² They surmised that the delegation from Congress was quite clear and that reading the statute to allow the President to take indirect actions to restrict imports would run afoul of the delegated power.¹⁵³ In the opinion of the Court, the delegation only allowed the President to impose direct controls, such as tariffs and quotas, and did not allow him to use license fees as was done here.¹⁵⁴

The U.S. Supreme Court reversed the central finding of the appellate court, concluding instead that the delegation is broad and expansive. They relied upon precedent from the 1928 *Hampton & Co. v. United States* case, which stated: “[i]f Congress shall lay down by legislative act an *intelligible principle* to which the [President] is directed to conform, such legislative action is not a forbidden delegation of legislative power.”¹⁵⁵ The Justices contended that Congress had, in this case, laid down an intelligible principle by requiring the President to act only upon the recommendation of the Secretary of the Treasury, and that the statute constrains the President by limiting his actions to those that would alleviate the national security threat and no more.¹⁵⁶

It is imperative to note here that the Court was not making a broad judgment that the President is within his right to utilize any trade restriction he chooses to limit imports in the interest of national security:

[O]ur conclusion here, fully supported by the relevant legislative history, that the imposition of a license fee is authorized by §

149. Presidential Proclamation No. 4341, 3A CFR 2 (1975).

150. *Algonquin*, 426 U.S. at 556.

151. *Algonquin SNG Inc. v. Fed. Energy Admin.* 518 F.2d 1051, 1062 (App. D.C. 1975).

152. *Id.*

153. *Id.* at 1055.

154. *Id.* 1059.

155. *Hampton & Co. v. United States*, 276 U.S. 394, 409 (1928) (emphasis added).

156. *Algonquin*, 426 U.S. at 559 (finding that the delegation found in Section 232(b) easily conforms to the intelligible principle test).

232(b) in no way compels the further conclusion that any action the President might take, as long as it has even a remote impact on imports, is also so authorized.¹⁵⁷

However, the limitations on that right never had an opportunity to be outlined, as no further challenges were brought thereafter.

Since those Cold War cases, there had been little use of Section 232 by the Executive branch. However, the Trump Administration has quickly latched onto this provision as a justification for issuing a number of trade sanctions against U.S. trading partners. This has led to strong reactions among the trade policy community in both liberal and conservative circles, as well as calls for revision of the statute or even rescission of the congressional delegation of power to the President. In 2019, the American Institute for International Steel brought a legal challenge against the Trump Administration for its use of this provision. I discuss the case in more detail below.

In a 2019 article from the conservative Heritage Foundation, Tori Whiting and Riley Walters advocate for reform of the Section 232: “Section 232 of the Trade Expansion Act of 1962 is an antiquated trade tool that gives the executive branch virtually unchecked authority to impose or increase tariffs on U.S. imports if those imports are thought to threaten U.S. national security.”¹⁵⁸ “The executive branch is not asked here to simply fill in details—it is making trade policy.”¹⁵⁹

I will address the merits of the challenges to the delegation of trade power in the final section of this article. Next, I will examine the potential implications under international law should the United States be found in violation of our trade obligations by imposing import restrictions without justification in international law. To do that, I will examine the Essential Security exemption found in the GATT Agreement, which closely resembles the National Security exception found in U.S. domestic law.

ESSENTIAL SECURITY AT THE WORLD TRADE ORGANIZATION

The national security exception to trade rules has been a part of the GATT since its founding in 1947. In the original draft Charter for the GATT, national security had been combined with other general exceptions to GATT rules, such as preservation of health and protection of the environment.

157. *Algonquin*, 426 U.S. at 571.

158. Tori Whiting & Riley Walters, *Fixing America’s Broken Trade Laws: Section 232 of the Trade Expansion Act of 1962*, HERITAGE FOUNDATION, May 22, 2019.

159. Todd N. Tucker, *New Challenge to Trump’s National Security Tariffs and Executive Power* (July 5, 2018), <https://www.lawfareblog.com/new-challenge-trumps-national-security-tariffs-and-executive-power> [https://perma.cc/ELR7-BUYB].

However, the final Charter separated commercial from security exceptions, placing national security in a subsequent article.¹⁶⁰

Nothing in this Agreement shall be construed

(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.¹⁶¹

The risk that such a broad exception could pose to the sanctity of the trade commitments made by the parties to the agreement was no doubt in the consciousness of the drafters:

We gave a good deal of thought to the question of the security exception which we thought should be included in the Charter. We recognized that there was a great danger of having too wide an exception and we could not put it into the Charter, simply by saying: 'by any Member of measures relating to a Member's security interests,' because that would permit anything under the sun. Therefore we thought it well to draft provisions which would take care of real security interests and, at the same time, so far as we could, to limit the exception so as to prevent the adoption of protection for maintaining industries under every conceivable circumstance. . . . there must be some latitude here for security measures. It is really a question of balance. We have got to have some exceptions. We cannot make it too tight, because we cannot prohibit measures which are needed purely for security reasons. On the other hand, we cannot make it so broad that, under the guise

160. Article XXI Note by the Secretariat, GATT Doc. MTN.GNG/NG7/W/16 (Aug. 18, 1987) (providing an overview of the background of GATT Article XXI as part of the Uruguay Round of multilateral trade negotiations).

161. GATT Art. XXI.

of security, countries will put on measures which really have a commercial purpose.¹⁶²

The highly interpretive nature of this provision did not go unnoticed by member states or commentators. There was substantial room for abuse, and countries could easily have invoked this exception for a variety of economic advantages that ultimately undermined the new world trade system. Good faith was the principal basis underlying decisions not to invoke this provision unless absolutely necessary.¹⁶³ CATO Institute scholar Simon Lester has argued that the good faith corral may be breaking down as the Trump Administration aggressively pursues Section 232 cases on spurious national security grounds, leaving the WTO little recourse but to either defer to his broad interpretation, thus opening the door to similar actions by other member states, or pass judgment on the invocation itself, going beyond what the United States has argued the WTO should opine on and likely leading the U.S. to distance itself from the trade body.¹⁶⁴

The first case in which the United States invoked GATT Article XXI in a dispute was in 1949, when Czechoslovakia filed a complaint against the United States alleging that the latter was withholding export licenses for certain goods from Czechoslovakia in violation of GATT rules. The United States defended its actions on the basis of national security under Article XXI(b)(2), to which the GATT Chairman noted, “every country must be the judge in the last resort on questions relating to its own security.”¹⁶⁵ This was the only noted application of Article XXI(b)(ii), which deals with arms trafficking. Subsequent cases relied on the more general subsection (iii).

After relations between Czechoslovakia and the United States deteriorated during the Cold War, the United States ceased providing GATT benefits to Czechoslovakia on the grounds of Article XXI(b)(iii), formally dissolving their trade relationship in 1951.¹⁶⁶ Peru followed suit a few years later, invoking the same article to ban imports from Czechoslovakia.¹⁶⁷ Neither of these instances led to a challenge that would have clarified the scope of the exception.

162. U.N. SCOR, 2nd Sess., U.N. Doc EPCT/A/PV/33, p. 20–21 and Corr. 3 (July 24, 1947).

163. See, e.g., Simon Lester & Huan Zhu, *Closing Pandora’s Box: The Growing Abuse of the National Security Rationale for Restricting Trade*, CATO Institute (June 25, 2019), <https://www.cato.org/publications/policy-analysis/closing-pandoras-box-growing-abuse-national-security-rationale> [<https://perma.cc/7MNG-JAEA>] (discussing the Trump administration’s abusive invocation of national security to justify tariffs).

164. *Id.*

165. United States Embargo on Strategic Goods, GATT Doc. CP.3/SR.22 (June 8, 1949).

166. United States – Suspension of obligations between the US and Czechoslovakia, GATT Doc. CP.6/SR.12 (Sept. 28, 1951).

167. Prohibition of Czechoslovakian imports by Peru, GATT Doc. L/235, (Oct. 4, 1954).

A number of subsequent invocations of Article XXI were made by the United States and other countries, though again, none resulted in a clarification of the meaning of the Article. Two cases involving countries other than the United States include the case of Sweden's global import quota system on footwear, discussed below, and a complete suspension of imports from Argentina into the European Economic Community (EEC), Canada and Australia in the midst of the Falklands war.¹⁶⁸ The Argentina case involved extensive discussion in the GATT Council; however, the measures were removed two months after Argentina notified the GATT of the potential violation, thus no findings were made.

In 1985, the United States effectively embargoed all trade with Nicaragua—imports and exports—on the basis of protecting U.S. essential security.¹⁶⁹ Nicaragua countered that the ban was not for security reasons but rather for coercion. President Reagan justified the embargo on the grounds of national security, implying that the government of Daniel Ortega was dangerously close to the Soviet Union and supportive of communist operations in Cuba.¹⁷⁰ Nicaragua further argued that the invocation of Article XXI should be clearly based upon a specific and observable threat, whereas the United States argued that it was clearly within each sovereign state's power to determine what the threat is and how to respond to it. In this instance, a panel was formed; however, the terms of reference for that panel explicitly precluded it from examining the validity of the U.S. invocation of Article XXI.¹⁷¹ The Panel report, which did not judge the use of Article XXI, was not adopted by the parties. The embargo was removed in 1990.¹⁷²

Since those initial cases, only a few instances of WTO panels exist in which Article XXI is addressed. The 1992 breakup of Yugoslavia into

168. See Ministerial Declaration of 29 November 1982, GATT Doc. L/5424, at 11 (Nov. 29, 1982) (outlining how the contracting parties to the General Agreement on Tariffs and Trade plan to abide by GATT).

169. See, e.g., Dan Morgan, *Why the Nicaraguan Embargo?*, WASH. POST, (May 5, 1985), <https://www.washingtonpost.com/archive/opinions/1985/05/05/why-the-nicaraguan-embargo/cce6b434-354d-41fa-a405-f06882eb6e42/> [https://perma.cc/HED9-HAJN] (comparing previous presidential uses of a trade embargo to President Reagan's decision to use one against Nicaragua).

170. See, e.g., Bill Neikirk & Raymond Coffey, *Reagan Puts Embargo on Nicaragua to 'Mend Their Ways'*, CHI. TRIBUNE (May 2, 1985), <https://www.chicagotribune.com/news/ct-xpm-1985-05-02-8501260877-story.html> [https://perma.cc/43HY-UTPC] (explaining the reasoning behind Reagan's decision to impose a trade embargo against Nicaragua).

171. See Communication from the United States, *Trade Measures Affecting Nicaragua*, GATT Doc. L/5803 (May 9, 1985) (describing an Executive Order by the United States in placing a trade embargo on Nicaragua).

172. See Council of 3 Apr. 1990, *Minutes of Meeting*, GATT Doc. C/M/240 (May 4, 1990) (outlining the minutes of a meeting with countries bound to the General Agreement on Tariffs and Trade); see also Council of 3 Apr. 1990, *Trade Measures Affecting Nicaragua*, GATT Doc. L/6661 (Mar. 23, 1990) (lifting Nicaragua's trade embargo on the United States).

Serbia and Montenegro occurred in the midst of trade restrictions imposed by the United States, the European Community, and others.¹⁷³ Those trade restrictions were initially defended under Article XXI; however, because the breakup of Yugoslavia meant that there was no certainty as to the status of the new republics within the GATT, there could be no application of GATT rules. Similarly, the United States imposed a complete embargo on Cuba in 1962 that was justified by Article XXI.¹⁷⁴ Cuba notified the GATT of the economic embargo but no action was taken at that time to form a panel.¹⁷⁵

Complaints by various countries about the application of Article XXI measures without following any notification procedures prompted the Council in 1982 to debate and finally issue an interpretive decision. They noted that the application of Article XXI could pose a serious trade disruption and affect the benefits accruing from the GATT Agreement itself. As such, they felt it important to require a notification provision in Article XXI for all affected parties so that, at the very least, countries would know when it is necessary to take action to protect their economies. The decision made by the Contracting Parties is as follows:

1. Subject to the exception in Article XXI:a, contracting parties should be informed to the fullest extent possible of trade measures taken under Article XXI;
2. When action is taken under Article XXI, all contracting parties affected by such action retain their full rights under the General Agreement; and,
3. The Council may be requested to give further consideration to this matter in due course.¹⁷⁶

The broad terms in which Article XXI is drafted give countries a significant amount of power, both in terms of when a country applies the exception and how they defend the use of the exception. In his 1998 assessment of the essential security exception, Professor Raj Bhala makes the case that the wording of the exception grants countries near limitless

173. See Communication from European Communities, *Trade Measures Taken by the European Community Against the Socialist Federal Republic of Yugoslavia*, GATT Doc. L/6948 (Dec. 2, 1991) (challenging the termination of special benefits for Yugoslavia and thus reverting them back to MFN status under GATT rules).

174. See Proclamation No. 3447, 3 C.F.R. 26 (Feb. 3, 1962) (issuing a trade embargo against Cuba by the United States).

175. Committee on Industrial Products, *Inventory of Non-Tariff Barriers, Specific Limitations on Imports and Exports*, GATT Doc. COM.IND/6/Add.4 (Dec. 12, 1968) (describing national security measures the United States may take regarding trade with foreign countries if certain threats to the nation arise).

176. See Decision of 30 November 1982, *Decision Concerning Article XXI of the General Agreement*, GATT Doc. L/5426 (Dec. 2, 1982) (considering the practical implications of Article XXI on general trade).

power to invoke the provision on the basis of real or perceived threats and that their invocation cannot be challenged by affected parties nor are they required to justify the rationale for their invocation.¹⁷⁷ This was evident in the 1961 case of Ghana blocking trade with newly-admitted Portugal on the basis of a perceived threat.¹⁷⁸ In that case, the Chairman said, “each contracting party was the sole judge of what was necessary in its essential security interests.” There could therefore be no objection to Ghana regarding the boycott of goods as justified by security interests.¹⁷⁹

Bhala suggested that GATT Article XXI enables countries to behave as “cowboys,”¹⁸⁰ with unfettered discretion in the application and justification of trade restrictions based on claims of national security. The only significant limitation in the use of this article is in the wording requiring trade sanctions to be “necessary” for the “protection” of that country’s “essential security interests.”¹⁸¹ This limitation attempts to clarify that the purpose of Article XXI is to address national security threats—not any economic threat. Threats to non-security sectors should be addressed by other provisions of the GATT, such as the safeguard provisions found in Article XIX.

One example of the potential conflation between national security and commercial threats emerged in the 1975 imposition of a global import quota system in Sweden for certain footwear.¹⁸² Justifying the measure under Article XXI, Sweden claimed that the

decrease in domestic production has become a critical threat to the emergency planning of Sweden’s economic defence as an integral part of the country’s security policy. This policy necessitates the maintenance of a minimum domestic production capacity in vital industries. Such a capacity is indispensable in order to secure the provision of essential products necessary to meet basic needs in case of war or other emergency in international relations.¹⁸³

The GATT Council reviewed this measure with great skepticism and

177. See Raj Bhala *National Security and International Trade Law: What the GATT Says, and What the United States Does*, 19 U. Pa. L. Rev. 263, 268–69 (1998) (discussing the broad scope of power provided by Article XXI).

178. See GATT, Secretariat, *Multilateral Trade Negotiations the Uruguay Round*, GATT Doc. MTN.GNG/NG7/W/16 (Aug. 18, 1987) (responding to a request by the negotiating group on GATT articles to provide background on XXI).

179. *Id.*

180. This term was the frequent choice of Raj Bhala in his essay examining Article XXI. Bhala, *supra* note 177.

181. See General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A–11, 55 U.N.T.S. 194 [hereinafter GATT] (outlining the history and background of Article XXI and participating countries’ obligations under GATT).

182. See *Sweden – Import Restrictions on Certain Footwear*, GATT Doc. L/4250 (Nov. 17, 1975) (describing Sweden’s decision to institute a global quota for certain footwear).

183. *Id.* at 3.

ultimately Sweden withdrew the ban in 1977.¹⁸⁴

The World Trade Organization (WTO) came into existence on January 1, 1995, along with the GATT 1994 rules, applying largely the same essential security exception as the previous GATT.¹⁸⁵ The first WTO case brought against the United States to challenge the use of Section 232 was brought by China and six other injured countries in April 2018.¹⁸⁶ That case raised three complaints under the rules of the GATT, to which both China and the United States are parties. First, they claimed that the United States is in violation of Article II of the GATT, which binds parties to the tariff levels they committed to under the GATT.¹⁸⁷ By raising tariffs on steel and aluminum without proper justification, China argues that the United States is nullifying or impairing a benefit that they were expected to receive as a party to the GATT.

The second claim made by China at the WTO was that the United States was violating Article I of the GATT, which is the bedrock principle of Most Favored Nation (MFN).¹⁸⁸ MFN essentially ensures that member states to the WTO do not provide more favorable treatment to certain countries than they do for all member states—benefits to one member state should go to all member states. In this case, because the United States is deliberately applying new tariffs for steel and aluminum imports from some countries but exempting others (namely Canada, Mexico and the EU), it is discriminating against China and other similarly situated member states.

Finally, China makes the case that what the United States is doing, in effect, is attempting to apply a safeguard measure, which falls under Article XXI of GATT rules.¹⁸⁹ However, even if the Section 232 tariffs were to be considered a safeguard under GATT rules, the United States failed to follow the proper procedures in investigating the nature of the threat and providing evidence to the parties against whom the trade restriction would apply. The United States, for its part, argues that:

184. *Id.* See also Council of Representatives, *Report on Work Since the Thirtieth Session*, GATT Doc. L/4254 (Dec. 2, 1975) (documenting Brazil's implementation of its import deposit system).

185. See General Agreement on Tariffs and Trade, *supra* note 86, at 669 (“Nothing in this Agreement shall be construed . . . to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests . . . taken in time of war or other emergency in international relations . . .”).

186. See World Trade Organization, *Request for Consultations by China, U.S.—Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS/544/1 (Apr. 9, 2018) (explaining China's decision to adjust steel and aluminum imports to the United States).

187. See Analytical Index of GATT, *Article II – Schedule of Concessions*, GATT Doc. (outlining obligations of participating countries under GATT).

188. See Analytical Index of GATT, *Article I – General Most Favored Nation Treatment*, GATT Doc. (describing most favored nation treatment under GATT).

189. See General Agreement on Tariffs and Trade, *supra* note 86, at 639.

the tariffs imposed under Section 232 of the US Trade Expansion Act were necessary for the protection of its essential security interests given the key role steel and aluminium plays in US national defence; these measures were therefore justified under Article XXI of the GATT and not subject to review by a WTO panel.¹⁹⁰

A panel was formed to hear these claims on November 21, 2018, and a decision is expected in fall of 2020.¹⁹¹

Beyond the China case, similar cases have been filed against the United States at the WTO by India,¹⁹² the European Union,¹⁹³ Canada,¹⁹⁴ Mexico,¹⁹⁵ Norway,¹⁹⁶ Russia,¹⁹⁷ Switzerland,¹⁹⁸ and Turkey.¹⁹⁹ Likewise, the United States has filed WTO complaints against China,²⁰⁰ Canada,²⁰¹ Mexico,²⁰² the

190. See WTO Dispute Settlement, *Panels Established to Review US Steel and Aluminium Tariffs, Countermeasures on US Imports*, WORLD TRADE ORG. (Nov. 21, 2018) (outlining the WTO's Dispute Settlement Body's examination of tariffs on steel and aluminium by the United States).

191. See World Trade Organization, *United States — Certain Measures on Steel and Aluminium Products, Communication from the Panel*, WTO Doc. DS544 (Sept. 10, 2019) (describing the duties of the WTO panel).

192. See World Trade Organization, *United States — Certain Measures on Steel and Aluminium Products, Communication from the Panel*, WTO Doc. DS547 (Sept. 10, 2019).

193. See World Trade Organization, *United States — Certain Measures on Steel and Aluminium Products, Communication from the panel*, WTO Doc. DS548 (Sept. 10, 2019).

194. See World Trade Organization, *Communication from the Panel, United States — Certain Measures on Steel and Aluminium Products, Report of the Panel*, WTO Doc. DS550 (July 11, 2019).

195. See World Trade Organization, *United States — Certain Measures on Steel and Aluminium Products, Report of the Panel*, WTO Doc. DS551 (July 11, 2019).

196. See World Trade Organization, *United States — Certain Measures on Steel and Aluminium Products, Constitution of the Panel Established at the Request by Norway*, WTO Doc. DS552 (Aug. 19, 2019).

197. See World Trade Organization, *United States — Certain Measures on Steel and Aluminium Products, Constitution of the Panel Established at the Request of the Russian Federation*, WTO Doc. DS554 (Jan. 25, 2019).

198. See World Trade Organization, *United States — Certain Measures on Steel and Aluminium Products, Constitution of the Panel Established at the Request of Switzerland*, DS556 (May 2, 2019).

199. See World Trade Organization, *United States — Certain Measures on Steel and Aluminium Products, Constitution of the Panel Established at the Request of Turkey*, DS564 (Aug. 19, 2019).

200. Constitution of the Panel Established at the Request of the United States, *China — Additional Duties on Certain Products from the United States*, WTO Doc. WT/DS558/3 (Jan. 25, 2019).

201. Notification of A Mutually Agreed Solution, *Canada — Additional Duties on Certain Products from the United States*, WTO Doc. WT/DS557/4 (settled on May 23, 2019).

202. Notification of A Mutually Agreed Solution, *Mexico — Additional Duties on Certain Products from the United States*, WTO Doc. WT/DS560/4 (settled on May 28, 2019).

EU²⁰³ and Turkey,²⁰⁴ claiming that the countermeasures taken by those countries in response to the Section 232 tariffs were improperly applied and should have been the result of successful WTO dispute resolution decisions as opposed to unilateral action. Cases brought by and against Canada and Mexico were settled in light of negotiations over the United States-Mexico-Canada Trade Agreement that was finalized in December 2019. The countermeasure complaints are a bit hypocritical by the United States considering the frequent use of countermeasures by the United States in cases of antidumping prior to authorization by the WTO.²⁰⁵ The United States has defended its actions, as expected, under the Safeguards provision of the GATT rules, Article XXI.

Most recently, the WTO dipped into the realm of interpreting national security with the April 2019 ruling in the *Russia – Traffic in Transit* case.²⁰⁶ Ukraine filed this case with the WTO Dispute Settlement Body in 2016, claiming that Russia was violating the provisions of the GATT by blocking Ukrainian goods transiting through Russia on their way to Kazakhstan and the Kyrgyz Republic. Russia asserted in its defense GATT Article XXI, claiming that the conflict between Ukraine and Russia in 2014 created an emergency in international relations and justified the trade restriction. Furthermore, Russia claimed that the WTO had no jurisdiction to interpret the rationale for a member state's invocation of Article XXI as that exception should be "totally self-judging."²⁰⁷ Interestingly, the United States joined in supporting Russia's defense theory.

The Panel in the *Russia – Traffic in Transit* case was the first to directly assess the invocation of Article XXI. In this case, they first assessed whether there was a national emergency, which they determined on the basis of a number of United Nations General Assembly resolutions. They had little trouble agreeing with Russia that a national emergency existed. The second aspect of the review was to ensure that the measures were tied to the mitigation of that national emergency. In this case, the Panel concluded that it is entirely up to the member states' discretion to determine which measures are an appropriate response to that national emergency. Though they emphasized the requirement of good faith in international law, an obligation

203. Constitution of the Panel Established at the Request of the United States, *European Union – Additional Duties on Certain Products from the United States*, WTO Doc. WT/DS559/3 (Jan. 25, 2019).

204. Constitution of the Panel Established at the Request of the United States, *Turkey – Additional Duties on Certain Products from the United States*, WTO Doc. WT/DS561/3 (Jan. 25, 2019).

205. Such actions are taken pursuant to Section 301 of the Trade Act of 1974.

206. Report of the Panel, *Russia – Measures Concerning Traffic in Transit*, WTO Doc. WT/DS512/R (adopted Apr. 26, 2019).

207. *Id.* at 30–31.

that is “crystallized in demanding that the measures at issue meet a minimum requirement of plausibility in relation to the proffered essential security interests, i.e., that they are not implausible as measures protective of these interests.”

What is clear from this case is that the national security exception found in Article XXI is not “self-judging.” Rather, the WTO has jurisdiction to review these claims and to assess whether they are justified. They clarified their interpretation of an emergency in international relations as “a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state.”²⁰⁸ And though they sided with Russia, which invoked the exception, they made it clear that they would not sit on the sidelines in similar disputes. Three additional cases have been filed on the basis of Article XXI, all brought by Qatar against the United Arab Emirates,²⁰⁹ the Kingdom of Bahrain²¹⁰ and the Kingdom of Saudi Arabia.²¹¹ The United States is a likely target of similar proceedings soon.

The essential security exception in the GATT rules is a tricky animal. On the one hand, it is necessary to enable countries to protect their essential security interests when those interests are directly affected by imported goods. On the other hand, leaving it up to countries to define “security” gives every member state a “get out of jail free” card when they apply this safeguard to block trade. Some trade experts have argued that the WTO dispute settlement system would be ineffective in resolving these matters, so a new solution may be called for. Simon Lester of the CATO Institute, for instance, has called for a rebalancing approach that encourages invoking countries to exchange restrictions in certain sectors, due to national security to be counterbalanced by new openings in other sectors to maintain the benefits expected by the member states.²¹² We may perhaps have more clarity on the appropriate application of this provision as a surge of cases make their way through the dispute settlement system.

208. *Id.* at 52.

209. Report of the Panel, *United Arab Emirates – Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights*, WTO Doc. WT/DS526 (panel composed Sept. 3, 2018).

210. Report of the Panel, *Bahrain – Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights*, WTO Doc. WT/DS527 (in consultations July 31, 2017).

211. Report of the Panel, *Saudi Arabia – Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights*, WTO Doc. WT/DS528 (in consultations July 31, 2017).

212. See Lester, *supra* note 163.

RECENT TRADE AND NATIONAL SECURITY TRENDS

The National Security Exception under the Trade Expansion Act of 1962 was last used, prior to the Trump Administration, in 1986. That case involved metal-forming machine tools. In that instance, Commerce concluded that the target imports did pose a threat to national security.²¹³ The President responded by negotiating voluntary export restraints with key exporters of those goods in foreign markets.²¹⁴ It should be noted that such restraints were outlawed with the formation of the World Trade Organization in 1995.

The ambiguity resulting from both the essential security exception under GATT rules and the national security exception under the 1962 Trade Expansion Act rules in the United States have created both an opportunity and a threat for industry. Much like what happened in 1929 as the Smoot-Hawley Tariff Act was being discussed, weaker domestic industries saw potential protection against competing imports in the form of new tariffs. Granting that protection can shield industry against economic threats but can also harm industries that rely upon imports and would face retaliation in the face of new tariffs, justifying import restrictions on the basis of national security conceals the true nature of these import restrictions. In fact, they appear to be protectionist in nature:

President Trump is increasingly blurring the line between America's national and economic security, enabling him to harness powerful tools meant to punish the world's worst global actors and redirect them at nearly every trading partner, including Mexico, Japan, China and Europe . . . His approach has grown more aggressive over the past two years, culminating in an expansive view of national security that has plunged the United States into an economic war with nearly every trading partner.²¹⁵

The precedent set in *Algonquin* and relied on now to justify the President's Section 232 tariffs may be more limited than the Administration contends. In that opinion, Justice Marshall made it apparent that:

Our holding today is a limited one. As respondents themselves acknowledge, a license fee as much as a quota has its initial and direct impact on imports, albeit on their price as opposed to their

213. *The President's Statement on the Revitalization of the Machine Tool Industry*, 22 Weekly Comp. Pres. Doc., Dec. 16, 1986, at 1654.

214. CONG. RSCH. SERV., *supra* note 15 at 4.

215. Ana Swanson & Paul Mozur, *Trump Mixes Economic and National Security, Plunging the U.S. into Multiple Fights*, N.Y. TIMES (June 8, 2019), <https://www.nytimes.com/2019/06/08/business/trump-economy-national-security.html> [https://perma.cc/5FTV-ZBG B].

quantity . . . As a consequence, our conclusion here . . . in no way compels the further conclusion that Any action [sic] the President might take, as long as it has even a remote impact on imports, is also so authorized.²¹⁶

In the most recent round of national security reviews by the Department of Commerce with respect to steel and aluminum imports, Commerce used a broad definition of *national security*: “the general security and welfare of certain industries, beyond those necessary to satisfy national defense requirements, which are critical for minimum operations of the economy and government.”²¹⁷ Despite the fact that the Court rarely limits congressional delegations of power to the President, the Trump Administration appears to be interpreting that delegation in such a way as to erase any intelligible principle that might allow congress to maintain control over tariff policy. And one thing is clear — the overarching principles of international trade regulation rest clearly within the houses of Congress.²¹⁸

A. Judicial Action: Broad Challenges to Congressional Delegation of Trade Authority

The non-delegation doctrine holds that the Congress shall not delegate its legislative powers, found in Article I of the U.S. Constitution, to the President.²¹⁹ Should Congress delegate its powers to the Executive, it must provide an “intelligible principle” to guide the use of that delegated power.²²⁰ Because the power to regulate international trade is identified as a congressional power, it shall not be delegated to the President without an intelligible principle for utilizing it.

Challenges to the delegation of power to the President face an uphill battle.²²¹ Such delegations are not new, nor are the challenges to them.²²² The first significant legal challenge to the delegation of congressional trade authority took place in 1892.²²³ That case questioned Congress’s power to

216. *Algonquin*, 426 U.S. at 571.

217. DEP’T OF COM., BUREAU OF INDUS. & SEC., *THE EFFECT OF IMPORTS OF STEEL ON THE NATIONAL SECURITY*, 1 (2018).

218. U.S. CONST. art. I, § 8.

219. U.S. CONST. art. I (stating that “all legislative Powers herein granted shall be vested in a Congress of the United States”).

220. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

221. *See, e.g., Alexander Volokh, Judicial Non-delegation, The Inherent-Powers Corollary, and Federal Common Law*, 66 EMORY L.J. 1391, 1393 (2017) (suggesting that nearly every federal statute based on delegated authority withstands judicial scrutiny).

222. *See, e.g., Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (striking down a delegation of power under Roosevelt’s National Industrial Recovery Act related to interstate transport of oil).

223. *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892).

delegate the power to unilaterally impose import tariffs in retaliation for restrictions faced by U.S. exporters. The statute in question was the Tariff Act of 1890, which granted duty-free access to 300 mostly agricultural goods.²²⁴ The Act included a provision that enabled the President to suspend the duty-free treatment of any goods from a country that imposes duties or other restrictions on U.S. exports. According to the Act, the President

shall have the power, and it shall be his, duty to suspend, by proclamation to that effect, the provisions of this act relating to the free introduction of such sugar, molasses, coffee, tea, and hides, the production of such country, for such time as he shall deem just.²²⁵

The President used the powers outlined in the Tariff Act and was met with a challenge by U.S. importers of the goods facing increased tariffs. Petitioners claimed that Congress had unlawfully delegated both legislative and treaty-making powers to the President.²²⁶ However, the Supreme Court determined that, while it is true that Congress may not delegate legislative power to the President, this Act was not in any way giving the President the power to legislate. When the President used the power in the Act to suspend duty-free access, the imports were taxed at the former rate established by Congress, not at a new rate set by the President.²²⁷ The Court upheld the Act as a valid delegation of Congressional power to the President.²²⁸

A similar case emerged in 1928 to challenge the delegation of Congressional authority found in the Tariff Act of 1922.²²⁹ In that Act, Congress stipulated:

[W]henever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this act do not equalize the said differences in costs of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and determine and proclaim the changes in classifications or increases or decreases in any rate of duty provided in this act shown by said ascertained differences in such costs of production necessary to equalize the

224. Tariff Act of 1890, ch. 1244, 26 Stat. 567.

225. *Id.* at 612.

226. *Marshall Field & Co. v. Clark*, 143 U.S. at 681.

227. *Id.* at 693.

228. *Id.*

229. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928).

same.²³⁰

When importers challenged the constitutionality of this section of the Act, the U.S. Supreme Court again upheld the delegation as a valid exercise of Congressional power since it did not pass off legislative power to the President. The principles set forth in this case are particularly relevant today, as they are the same used in the *Algonquin* case discussed earlier. It is worth quoting in its entirety here:

If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power. If it is thought wise to vary the customs duties according to changing conditions of production at home and abroad, it may authorize the Chief Executive to carry out this purpose, with the advisory assistance of a Tariff Commission appointed under congressional authority.²³¹

This *intelligible principle* test enables Congress to designate the President as their agent in carrying out their trade goals.²³²

In the midst of the *Lochner* era, the U.S. Supreme Court was not particularly sympathetic to delegations of legislative trade power to the Executive. Two cases highlight this point. The first was based on objections to the congressional delegation of power made by the 1933 National Industrial Recovery Act in the midst of the Great Depression.²³³ That Act enabled President Roosevelt to issue rules that promoted fair competition, labor rights, and public works.²³⁴ Roosevelt enacted Executive Order 6199 on the basis of that authority, which restricted the transport of oil across state borders. An oil refinery—Panama Refining Co.—challenged the delegation as unlawful, and the U.S. Supreme Court in an 8-1 decision agreed that Congress had not provided any structure within which the President could utilize the delegated authority.²³⁵

230. Tariff Act of 1922, ch. 356, 42 Stat. 858, 941 (1922).

231. *Hampton*, 276 U.S. at 404.

232. CAITLAIN DEVEREAUX LEWIS, CONG. RSCH. SERV., R44707, PRESIDENTIAL AUTHORITY OVER TRADE: IMPOSING TARIFFS AND DUTIES 11–12 (2016) (“As is evident from these cases, a delegation by Congress will likely be upheld as constitutional so long as the statute allows the President to act as the “agent” of the legislative department, rather than play a law-making role.”).

233. *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 430 (1933) (“If § 9 (c) [of the National Industrial Recovery Act] were held valid . . . Instead of performing its law-making function, the Congress could at will and as to such subjects as it chose transfer that function to the President.”).

234. National Industrial Recovery Act, Pub. L. No. 73–67, 48 Stat. 195 (1933).

235. Justice Benjamin Cardozo was the sole dissenting justice. *Pan. Ref. Co.*, 293 U.S., 433.

The second case was a unanimous ruling by the Supreme Court in a case involving the sale of sick chickens.²³⁶ Again under the National Industrial Recovery Act, Congress delegated authority to the President to develop codes of conduct for businesses, which would be written by business groups and boards within those industries. The regulatory power was derived from the Commerce Clause, the root of many expansive federal regulatory efforts in this historical period. But the relevant legal question for our purposes is whether Congress appropriately delegated its legislative power to the President to enact codes of conduct, to which the Court resoundingly affirmed that it did not.

The *intelligible principle* was discussed with respect to trade in the 1975 *Yoshida International* case.²³⁷ In that case, which is more directly aligned to our examination here, the President declared a national emergency and imposed import duties on Japanese goods under the authority of the Trading with the Enemy Act of 1917. The Court made it abundantly clear that it would not question the judgment of the President about the nature of the national emergency — this would be considered a political question outside the court’s purview. However, it retained the authority to question what he did with that power. “A standard inherently applicable to the exercise of delegated emergency powers is the extent to which the action taken bears a reasonable relation to the power delegated and to the emergency giving rise to the action.”²³⁸

What we can conclude from this series of key cases is the following:

1. the Congress has wide latitude in delegating its trade power to the President so long as it does so with intelligible guidelines for his action;
2. if the President declares a national emergency under a statute that delegates trade power, the President’s use of any such delegated power must be reasonably related the national emergency; and,
3. the Courts will not review the President’s rationale for declaring a national emergency but will review his use of trade power under the invoked national emergency statute.

A recent case, which is still pending as of the publication of this article, challenges the delegation of power both on lack of national security grounds and on Fifth Amendment Due Process grounds, claiming that the President

236. See *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 528 (1935) (“Of the six counts, one charged the sale to a butcher of an unfit chicken. . . .”).

237. See *United States v. Yoshida Int’l Inc.*, 526 F.2d 560, 579 (C.C.P.A. 1975) (discussing a surcharge put in place to help regain a “favorable balance of trade” that had been lost by the United States).

238. *Id.* at 578.

is arbitrarily discriminating against importers.²³⁹ That case has not yet been decided but raises an interesting new front in challenges to the delegation of congressional power.

B. Judicial Action: Narrow Challenges to Section 232

“Though courts will not normally review the essentially political questions surrounding the declaration or continuance of a national emergency, they will not hesitate to review the *actions* taken in response thereto or in reliance thereon.”²⁴⁰

Several legal challenges have emerged in an effort to restrict the power of the Executive to apply the national security exception with impunity. One of the first cases challenging this application of power was brought by the U.S. subsidiary of a Russian oil producer, Severstal Export GmbH. That 2018 case asserted that the President had acted outside of his delegated congressional authority by applying tariffs on steel imports despite there being no national security threat. The injunction sought by petitioners was dismissed by the CIT on a finding that the petitioners would be unlikely to prevail on the merits of the case.²⁴¹

The first case to come to fruition in a challenge to the present use of Section 232 was brought by a trade association in June 2018.²⁴² The petitioners in that case, representing the American international steel industry, argued that “Congress created an unconstitutional regime in section 232, in which there are essentially no limits or guidelines on the trigger or the remedies available to the President, and no alternative protections to assure that the President stays within the law, instead of making the law himself.”²⁴³ They did not argue that there was any violation of procedure in investigating and applying the import restrictions; rather, their main concern was the alleged violation of the nondelegation doctrine and the resulting

239. Complaint at 1–3, *MedTrade Inc. v. United States*, No. 19–00009 (Ct. Int’l Trade filed Jan. 17, 2019).

240. *Yoshida*, 526 F.2d at 579.

241. See Order Denying Motion for Preliminary Injunction at 5–9, *Severstal Export GmbH v. United States*, No. 18–00057, 2018 WL 1705298 (Ct. of Int’l Trade April 5, 2018) (No. 18–00057) (“The degree of potential harm is thus insufficient to overcome plaintiffs’ low likelihood of success on the merits. . . . Therefore, a preliminary injunction will not issue.”).

242. Complaint at 1–2, *Am. Inst. for Int’l Steel, Inc. v. United States*, 376 F.Supp. 3d 1335 (Ct. Int’l Trade 2019) (No. 18–00152), *aff’d* 2020 U.S. App. LEXIS 6106 (Fed. Cir., Feb. 28, 2020), *cert. denied*, 207 L. Ed. 2d 1079 (2020).

243. Memorandum in Support of Plaintiffs’ Motion for Summary Judgment at 3–4, *Am. Inst. for Int’l Steel, Inc. v. United States*, 376 F.Supp. 3d 1335 (Ct. Int’l Trade 2019) (No. 18–00152), *aff’d* 2020 U.S. App. LEXIS 6106 (Fed. Cir., Feb. 28, 2020), *cert. denied*, 207 L. Ed. 2d 1079 (2020).

injury to their industry.²⁴⁴

The CIT held in March 2019 that the President was acting within his lawfully delegated powers. They relied upon the *Algonquin* decision to justify their decision, finding that congress had established an “intelligible principle” to guide presidential action when they delegated this power through Section 232.²⁴⁵ It is worth noting that one of the judges in that CIT decision, Judge Katzmman, wrote separately to question the validity of such a broad delegation of congressional power.²⁴⁶

That decision was appealed to the U.S. Court of Appeals for the Federal Circuit, which issued its decision in February 2020, upholding the decision of the lower court.²⁴⁷ In their decision, a unanimous Court of Appeals for the Federal Circuit agreed with the conclusions of the CIT, finding that the congressional delegation of power to restrict imports in the interest of national security was a proper delegation of power to the President, and that the delegation in this case included an intelligible principle to limit abuse of that delegation.²⁴⁸

The ruling of the CAFC was quite clear, rejecting the broad claim that Section 232 is an unconstitutional delegation of legislative power to the executive. They emphasized that their ruling is based upon the binding precedent set forth in the *Algonquin* case, and they make no judgment on what the ruling would be should that precedent be overturned.²⁴⁹ The petitioner appealed their case to the U.S. Supreme Court, and that Court denied *cert* in June 2020.²⁵⁰

C. Congressional Action

Two pieces of legislation were proposed in late 2019 in an effort to reign in the President’s section 232 powers. The first, a bill by Senator Pat Toomey, a Republican from Pennsylvania, aims to reassert congressional

244. See *Am. Inst. for Int’l Steel, Inc. v. United States*, 2020 U.S. App. LEXIS 6106, at *11–13 (Fed. Cir., Feb. 28, 2020) (“AIIIS stated a single claim: that section 232, on its face, is an unconstitutional delegation of legislative power to the President.”), *cert. denied*, 207 L. Ed.2d 1079 (2020).

245. CONG. RSCH. SERV., *supra* note 15, at 37.

246. See *Am. Inst. For Int’l Steel, Inc. v. United States*, No. 18–00152, slip op. at 15–16 (Katzmann, J., dubitante) (“There is no provision in the Constitution that vests in the President the same ‘Power To Lay and collect . . . Duties.’ In short, the power to impose duties is a core legislative function.”).

247. *Am. Inst. for Int’l Steel, Inc.*, 2020 U.S. App. LEXIS 6106, *cert. denied*, 207 L. Ed. 2d 1079 (2020).

248. See *Id.* at *13 (relying on *Algonquin* as controlling authority).

249. *Id.*

250. *Am. Inst. for Int’l Steel Inc.*, 2020 U.S. App. LEXIS 6106, *cert. denied* 207 L. Ed. 2d 1079 (2020).

power over the regulation of commerce, including the use of tariffs. Toomey notes that “the Constitution is very unambiguous” about where trade power is housed: Article I, within the bounds of the legislature. The second proposed bill was proffered by Senator Rob Portman of Ohio, another Republican facing criticism from farmers and others hurt by the Administration’s tariffs. Senator Portman’s bill only enables congress to disapprove of the President’s use of 232 powers, while providing him with a veto power over that disapproval. Portman emphasized, “We must be able to hold countries that threaten our national security accountable” while preventing abuse of the tool.²⁵¹ Neither of these bills are expected to pass.

THE FUTURE OF CONGRESSIONAL TRADE DELEGATION TO THE EXECUTIVE

As of this writing, several Section 232 investigations remain pending, including the potentially very significant investigation into automobiles and automobile parts.²⁵² The future of these investigations depends largely on the post-hoc review of the federal courts rather than on the findings of Commerce, which tend to take a defensive posture in the current political environment. Whether the President acts on those recommendations is another question that largely depends on the anticipated impact on the economy from more tariffs.

The more interesting question is whether Congress will take a more assertive role with respect to the delegation of trade power to the Executive. As I have explained above, the power to regulate international trade clearly rests with the Congress. And though it can be argued that trade policy power may be exercised by the President in the context of foreign affairs negotiations, such as in levying trade sanctions to encourage specific behaviors,²⁵³ the power to impose import restrictions or reductions is certainly a congressional power, though one that has been delegated repeatedly to the President since 1934. However, as I have tried to make apparent in this article, that power has always been in limited contexts and almost always in the pursuit of more open trade, rather than less.

The national security exception inserted into the 1955 Trade Agreement

251. Lindsay Wise, *Lawmakers Make Long-Shot Bid to Check Presidential Tariffs Powers*, WALL ST. J. (Sept. 15, 2019, 3:26 PM), <https://www.wsj.com/articles/lawmakers-make-long-shot-bid-to-check-presidential-tariff-powers-11568571897?mod=searchresults&page=1&pos=1> [<https://perma.cc/WTU9-UPS8>].

252. See RACHEL F. FEFER, BILL CANIS & BROCK R. WILLIAMS, CONG. RSCH. SERV., IF10971 *SECTION 232 AUTO INVESTIGATION* (2020) (discussing the “potential economic impact” of tariffs on auto parts and the issues that remain for Congress going forward).

253. See, e.g., Fandl, *supra* note 103, at 295 (arguing in support of Executive power to terminate an economic embargo related to foreign policy goals).

Extension Act and codified in subsequent legislation reflected the fear of the American people and their congressional representatives that Soviet economic power might compromise our ability to maintain our advantage should the Cold War develop into a direct military conflict. At that time, it seemed appropriate to endow the President with the power to fend off this threat with as many tools as possible, including the ability to restrict trade. The Act purports to pursue the following three goals: 1) stimulate economic growth in the United States and enlarge foreign markets for U.S. goods; 2) strengthen relationships with foreign countries in the “free world,” and; 3) “prevent Communist economic penetration.”²⁵⁴

Section 232 is the focus of the current tariffs, but it must be read in both historical context and also in light of the prior section of that statute. Section 231 requires the President to suspend or withdraw from any trade agreement that provides any duty-free or tariff reductions applied to any country or area “dominated . . . by Communism.”²⁵⁵ The fact that Section 232 was not modified by the 1962 Act reflected the continued concern over the communist economic threat.²⁵⁶

The original national security provision, which was part of the 1955 Trade Agreements Extension Act, is often ignored in the literature surrounding Section 232 because it was considered vague and incomplete. However, it is worthwhile examining briefly the rationale for the insertion and the debate surrounding the addition of this broad new power. Indeed, with great foresight, the U.S. Council to the International Chamber of Commerce commented in 1955 that “it is unlikely that the full meaning of this amendment will be clear until a history of administrative practice and possibly court interpretation develops.”²⁵⁷ In commentary following the delegation, the Chairman of the House Ways and Means Committee observed:

In arriving at his decision [the President] must consider the impact of that decision on our total foreign policy, and on the economies of the nations of the free world that are aligned with us. He must also consider the impact of any decision on our overall strength and security, keeping in mind that *any modification of a duty on imports or that a quota would inevitably result in a curtailment of*

254. Trade Expansion Act of 1962, Pub. L. No. 87-794, § 102, 76 Stat. 872, 872.

255. *Id.* § 231.

256. *See, e.g.,* Stanley D. Metzger, *The Trade Expansion Act of 1962*, 51 Geo. L.J. 425, 463 (1963) (explaining why no changes were made to the National Security exception).

257. DAVID W. MACEachron, U.S. COUNCIL OF THE INT’L CHAMBER OF COMMERCE, ANALYSIS OF THE TRADE AGREEMENTS EXTENSION ACT OF 1955, at 8 (1955) <https://babel.hathitrust.org/cgi/pt?id=mdp.35112101127670&view=1up&seq=4> [<https://perma.cc/WYE4-U3E6>].

exports by the United States.²⁵⁸

The U.S. Council recognized that this grant of power was far more sweeping than the original delegation in 1934,²⁵⁹ and they stated that both advocates of free trade and protectionism could interpret the National Security clause in their interests.²⁶⁰ In effect, the National Security provision could be used for political rather than either economic or security purposes.

Congress reasserted some of its authority over trade in the 1962 Trade Expansion Act, when it required the President to solicit Congressional approval before any trade agreement would be approved; this was not required under the 1934 RTAA.²⁶¹ This was modified by the 1974 Trade Act, which enabled the President to enter into trade agreements on the basis of an up or down vote by Congress in what was known as “fast track authority.”²⁶² This authority, referred to today as “Trade Promotion Authority,”²⁶³ requires pre-authorization by Congress, which has been in effect through a series of extensions almost consistently through the last authorization in 2015.²⁶⁴ That reauthorization extends TPA through 2021.

It is imperative that these protections not be abused in an effort to facilitate protectionist fervor, favoring special interests at the expense of broad economic growth. The U.S. Congress is a body of 535 voices, each with very different interests with respect to trade. In retrospect, the founding fathers might have reconsidered the designation of trade authority within Article I of the Constitution. It is largely for this reason that Congress designated the President, who has responsibility for foreign affairs, to implement the legislative vision for trade policy and, where necessary, to adopt that vision to the circumstances of the global environment. However, in none of the aforementioned statutes does Congress willingly cede its

258. *Id.* (emphasis added).

259. *Id.* (“The loose language of this amendment confers upon the President more sweeping power over the foreign trade of this country than is granted by the original provisions of the Trade Agreements Act.”).

260. *Id.* (“The phrase ‘the national security’ has many meanings and has been used freely by both advocates and opponents of a liberalized trade program.”).

261. Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 872.

262. See Trade Act of 1974, Pub. L. No. 93-618, §§ 151-154, 88 Stat. 1978, 2001-08 (codified at 19 U.S.C. §§ 2191-2194) (describing the brief approving or disapproving resolutions Congress can give, as well as how amendments and debate time are limited, and that there is a window of time in which the vote must occur for trade agreement proposals).

263. Trade Act of 2002, Pub. L. No. 107-210, § 2101, 116 Stat. 993, 993 (codified at 19 U.S.C. § 3801) (explaining that the title may be referred to as the “Bipartisan Trade Promotion Authority Act of 2002”).

264. See Bipartisan Congressional Trade Priorities and Accountability Act of 2015, Pub. L. No. 114-26, § 103, 129 Stat. 320, 333-37 (codified at 19 U.S.C. § 4202) (discussing how the President may enter trade agreements through 2018 based on this act, and through July 1, 2021 if “trade authorities procedures are extended . . .”).

power over trade policy. Each Act includes a clear mandate with goals and mechanisms meant to achieve those goals. The fact that the President is tasked with carrying out those goals should not be mistaken for a wholesale shift in policymaking power.

The world in 1955 is obviously quite distinct from the world of 2019, in terms of both trade and national security. We currently operate within a world trade system that has evolved tremendously, whereby countries have bound themselves and their economic progress to the fate of one another within a world trade system. The rules of that system provide safeguards, including national security, that enable countries to pursue their trade objectives freely while maintaining carefully crafted exemptions to be called upon in limited circumstances, as seen in the Russia case described above. Yet none of this provides clarity on what lies ahead.

History has shown that, though congressional delegation of power to the President is criticized, the judicial branch gives broad discretion for such delegations to occur.²⁶⁵ The precedent in *Algonquin* emphasizes the degree of discretion the Court is willing to give to the Executive, and the recent decision in *American Institute for International Steel* confirms this assumption. However, this outcome should not be surprising and is avoidable. It is not the role of the Court to develop and implement trade policy. This is the role of the Congress, and it is a role that has largely been shirked since 1934. Since the eighteenth century, Congress has balanced the diverse needs of domestic industries and agriculture with the pursuit of international trade, and the President has enforced these policies. Today, Congress must reassert this policymaking power and work together with the President to determine the optimal outcome of effective trade policies that benefit the United States as a whole rather than special interests. Much like domestic tax policy, which Congress works hand in glove with the Executive to enact, the two branches must determine what kind of a country the United States intends to be: the narrowly-focused protectionist harbor it was in the nineteenth and early twentieth centuries, or the beacon of free and fair trade that it became. This is not a question for one man alone to answer.

265. See Keith E. Whittington & Jason Iuliano, *The Myth of the Non-delegation Doctrine*, 165 U. PA. L. REV. 379, 380–81 (2017) (introducing the argument that courts have never gone through any period in which “legislative delegations of power” were limited by the nondelegation doctrine).