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## **Drawing a Line in the Sand: Assessing the Trump Administration’s Interpretation of Both Congressional Trade Legislation and Judicial Trade Precedent**

*“The President is limited to ‘action . . . to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security.’ ‘Moreover, the leeway that the statute gives the President in deciding what action to take in the event the preconditions are fulfilled is far from unbounded.’ . . . Plaintiffs . . . argue that the Section [232] Steel Tariff is being used in trade negotiations to draw concessions from other countries unrelated to steel imports.”<sup>1</sup>*

### I. INTRODUCTION

The United States has engaged in intermittent periods of free trade and protectionism throughout its existence, dating back to its independence from Britain after the American Revolution.<sup>2</sup> The President of the United States has control over treaty negotiations with foreign nations, as delineated in Article II, Section 2 of the United States Constitution, which states the President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”<sup>3</sup> Article I, Section 8 of the Constitution similarly entitles Congress “to regulate Commerce with foreign Nations” under what is known as the Commerce Clause.<sup>4</sup> At first glance, it is evident that the President has less than absolute power over international affairs.<sup>5</sup> Nevertheless, these clauses indicate that the separation of powers, a bedrock principle of

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1. *Severstal Exp. GMBH v. United States*, No. 18-00057, 2018 Ct. Int’l Trade LEXIS 38, at \*22-23 (Apr. 5, 2018) (citations omitted) (first quoting Trade Expansion Act of 1962, 19 U.S.C. § 1862(c)(1)(A)(ii) (2018); and then quoting *Fed. Energy Admin. v. Algonquin SNG, Inc.* 426 U.S. 548, 559 (1976)).

2. See JOHN W. TYLER, *SMUGGLERS & PATRIOTS: BOSTON MERCHANTS AND THE ADVENT OF THE AMERICAN REVOLUTION* 238-39 (1986) (demonstrating Patriots encouraging Continental Congress to repeal revenue acts for easier trade with other colonies); see also Michael A. Bailey et al., *The Institutional Roots of American Trade Policy: Politics, Coalitions, and International Trade*, 49 *WORLD POL.* 309, 311 tbl.1 (1997) (highlighting Congress’s consistent switching between reducing and raising tariffs between 1846 and 1934).

3. U.S. CONST. art. II, § 2, cl. 2.

4. *Id.* art. I, § 8, cl. 3.

5. See Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 *HARV. L. REV.* 1221, 1223, 1228 (1995) (discussing trend of possible unconstitutional “congressional-executive agreements” highlighting legislative branch’s enhanced role in treaty-making).

the Constitution, is implicated when setting U.S. foreign policy.<sup>6</sup>

Instead of becoming absorbed with the political rhetoric of the times, the debate over the *constitutional* role of each branch within trade policy and complex judicial responses to this persistent conflict better suits an analysis of whether the executive branch overstepped its bounds.<sup>7</sup> Examining the Trump Administration's actions at the domestic level is best done through the lens of the Trade Expansion Act of 1962 and the Trade Act of 1974.<sup>8</sup> At the international level, the lawfulness of the President's unilateral denial of tariff concessions agreed to under multilateral conventions, such as the World Trade Organization (WTO) and the North American Free Trade Agreement/United States-Mexico-Canada Agreement (NAFTA/USMCA), is determined by analyzing the rules of international customary and treaty law.<sup>9</sup>

At the heart of the domestic analysis are cases such as *Federal Energy Administration v. Algonquin SNG, Inc.*,<sup>10</sup> *Silfab Solar, Inc. v. United States*,<sup>11</sup> and *Severstal Export GMBH v. United States*,<sup>12</sup> which have addressed whether the President has properly exercised the grants of power under the Trade Expansion Act of 1962 and the Trade Act of 1974.<sup>13</sup> These federal decisions all ruled in favor of the President at the time, indicating that he properly imposed monetary exactions in the form of a license fee system, as well as steel tariffs under section 232 of the Trade Expansion Act of 1962 (Section 232) and solar panel tariffs under section 201 of the Trade Act of 1974 (Section 201).<sup>14</sup> In addition, these rulings

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6. See JAMES M. MCCORMICK, *AMERICAN FOREIGN POLICY & PROCESS* 253 tbl.7.1 (Carolyn Merrill et al. eds., 6th ed. 2014) (comparing shared foreign policy powers between President and Congress).

7. See THE FEDERALIST NO. 75, at 378 (Alexander Hamilton) (Ian Shapiro ed., 2009) (laying out initial controversy between respective branches over treaty-making power); The Impact of Trade Agreements: Effect of the Tokyo Round, U.S.-Israel FTA, U.S.-Canada FTA, NAFTA, and the Uruguay Round on the U.S. Economy, USITC Pub. 3621, Inv. No. TA-2111-1, at 7 (Aug. 2003) (Final), <https://www.usitc.gov/publications/332/pub3621.pdf> [<https://perma.cc/4UJ7-RFW7>] (highlighting complex delegation of Congress's broad authority over trade to President).

8. See Trade Expansion Act of 1962 § 232, 19 U.S.C. § 1862 (2018); Trade Act of 1974 § 201, 19 U.S.C. § 2251; see also John B. Rehm, *Developments in the Law and Institutions of International Economic Relations: The Kennedy Round of Trade Negotiations*, 62 AM. J. INT'L L. 403, 406 (1968) (indicating purpose of Act in 1962 to achieve political goal of Western Alliance).

9. See General Agreement on Tariffs and Trade art. I, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 (explaining most-favored nation principle where all members' goods treated no less favorably than others); BRANDON J. MURRILL, CONG. RESEARCH SERV., R45557, THE PRESIDENT'S AUTHORITY TO WITHDRAW THE UNITED STATES FROM THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA) WITHOUT FURTHER CONGRESSIONAL ACTION 16 (2019), <https://fas.org/sgp/crs/row/R45557.pdf> [<https://perma.cc/YGY9-YQQE>] (identifying likelihood of adverse ruling and award against United States at WTO through President's actions).

10. 426 U.S. 548 (1976).

11. 892 F.3d 1340 (Fed. Cir. 2018).

12. No. 18-00057, 2018 Ct. Int'l Trade LEXIS 38 (Apr. 5, 2018).

13. Trade Expansion Act of 1962 § 232 (codifying presidential power to restrict trade impairing U.S. national security); Trade Act of 1974 § 201 (codifying presidential power to restrict trade threatening U.S. industry).

14. See *Algonquin*, 426 U.S. at 571 (holding monetary exactions through license fee system enacted by presidential proclamation authorized by Section 232); *Silfab Solar*, 892 F.3d at 1349 (holding President's tariffs on imported solar products justified under Section 201); *Severstal*, 2018 Ct. Int'l Trade LEXIS 38, at \*18 (noting

indicated that the trade statutes constitutionally delegate authority from Congress to the President.<sup>15</sup> The courts, however, did not consider whether President Trump, by using his executive power to independently enact tariffs, denied Congress the authority “to regulate Commerce with foreign Nations” under Article I, Section 8 of the Constitution.<sup>16</sup> Another question these cases implicate is whether President Trump has purposefully misconstrued the definition of a threat to national security in order to accomplish his agenda for the economy and gain control over the NAFTA/USMCA and the WTO.<sup>17</sup> Nevertheless, it is difficult to analyze President Trump’s actions, because there is very little judicial analysis

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President enacting steel tariffs permissible exercise of authority under Section 232). Section 232 authorizes the President to impose restrictions on imports that “threaten to impair U.S. national security[.]” while Section 201 allows the President to impose trade measures on imports that are a “substantial cause or threat of serious injury to a U.S. industry.” See BROCK R. WILLIAMS ET AL., CONG. RESEARCH SERV., R45529, TRUMP ADMINISTRATION TARIFF ACTIONS (SECTIONS 201, 232, AND 301): FREQUENTLY ASKED QUESTIONS 2 (2019), <https://crsreports.congress.gov/product/pdf/R/R45529> [<https://perma.cc/RLG4-6VV8>] (introducing U.S. trade laws granting presidential authority for tariff actions). Although not directly at issue in *Algonquin*, *Silfab Solar*, and *Severstal*, section 301 of the Trade Act of 1974 (Section 301) also grants the President the power to direct the suspension of trade agreements or impose import restrictions if a foreign country “violates . . . any trade agreement or is unjustifiable and burdens or restricts U.S. commerce.” See *id.*; see also Trade Act of 1974 § 301, 19 U.S.C. § 2411 (2018) (highlighting presidential power when foreign countries inhibit U.S. commerce).

15. See *Algonquin*, 426 U.S. at 551 (indicating all parties agree Section 232(b) authorizes quotas on petroleum imports); *Silfab Solar*, 892 F.3d at 1349 (permitting presidentially-imposed solar panel tariffs under Section 201); *Severstal*, 2018 Ct. Int’l Trade LEXIS 38, at \*18 (permitting presidentially-imposed steel tariffs under Section 232); *supra* note 14 (analyzing case law and explaining presidential power under U.S. trade laws).

16. See U.S. CONST. art. I, § 8, cl. 3 (conferring commerce power on Congress); THE FEDERALIST NO. 51, at 264 (James Madison) (Ian Shapiro ed., 2009) (mentioning each department must stick to its “constitutional means” to resist other departments encroaching); Glenn C. Altschuler, *How Congress Can Take Back Control over Tariffs*, HILL (June 2, 2019, 12:30 PM), <https://thehill.com/opinion/finance/446513-how-congress-can-take-back-control-over-tariffs> [<https://perma.cc/42WZ-V2Z3>] (arguing Congress should enact legislation to reassert its authority in trade realm); Elizabeth Balboa, *Tariff Tutorial: What Is Section 232, and Is Trump Using It Correctly?*, BENZINGA (July 15, 2018, 2:57 PM), <https://www.benzinga.com/government/18/07/12019589/tariff-tutorial-what-is-section-232-and-is-trump-using-it-correctly> [<https://perma.cc/UG3A-QRT4>] (highlighting Senator Bob Corker’s statement urging President Trump to seek congressional Section 232 claim approval); *supra* notes 11-14 and accompanying text (highlighting specific cases evaluating President Trump’s tariffs, which only address validity of presidential action).

17. See Charlene Barshefsky et al., *WTO Issues Groundbreaking Decision on GATT National Security Exception*, WILMERHALE (Apr. 9, 2019), <https://www.wilmerhale.com/en/insights/client-alerts/20190409-wto-issues-groundbreaking-decision-on-gatt-national-security-exception> [<https://perma.cc/XXL3-FWVR>] (summarizing WTO panel decision and forecasting subsequent effect on imposition of tariffs); Henry Olsen, *The President Has Too Much Power Over Tariffs. Congress Should Reclaim That Authority.*, WASH. POST (June 14, 2019), <https://www.washingtonpost.com/opinions/2019/06/14/president-has-too-much-power-over-tariffs-congress-should-reclaim-that-authority/?arc404=true> [<https://perma.cc/HM53-NEA8>] (arguing enacting statute limiting national security threat determinations would allow Congress to regain power); Doug Palmer & Matthew Nussbaum, *Trump Puts Aluminum Imports in ‘National Security’ Crosshairs*, POLITICO (Apr. 26, 2017, 9:25 PM), <https://www.politico.com/story/2017/04/26/trump-aluminum-imports-trade-237665> [<https://perma.cc/FS7V-4K5S>] (pointing to lack of counterarguments available when United States blocks imports on national security grounds); William Alan Reinsch & Jack Caporal, *The WTO’s First Ruling on National Security: What Does It Mean for the United States?*, CTR. FOR STRATEGIC & INT’L STUD. (Apr. 5, 2019), <https://www.csis.org/analysis/wtos-first-ruling-national-security-what-does-it-mean-united-states> [<https://perma.cc/JPC3-XS8D>] (announcing WTO panel’s first decision on justiciability of circumstances for invoking national security exception).

that takes place with respect to the inner workings of presidential decision-making, as it is widely held that such topics are not within the realm of the courts.<sup>18</sup>

This Note addresses the influx of legal challenges from foreign corporations to President Trump's tariffs against imported goods, despite many U.S. federal courts affirming the constitutionality of the President's powers under the Trade Expansion Act of 1962 and the Trade Act of 1974.<sup>19</sup> Part II provides a brief overview of trade relations, legislation, and treaties that have arisen over the course of U.S. history.<sup>20</sup> Next, this Note explores the recent challenges to presidential exercises of the tariff-setting power, and concludes it is unlikely the judiciary will diverge from its practice of deferring to the executive branch's decisions under the notion that the President is delegated that power.<sup>21</sup> Finally, this Note contemplates whether the WTO may become a more popular forum for challenges to tariffs enacted under a President's claim that such tariffs are justified by national security concerns.<sup>22</sup>

## II. HISTORY

### A. Survey of U.S. Tariffs from 1789 to the Present

The power-sharing dilemma that ignited systemic backlash against the Trump tariffs derives from a lack of specificity, or rather a certain ambiguity, in the Constitution.<sup>23</sup> As with most of the original pieces of law upon which the United States was founded, the *raison d'être* behind those congressional acts lies in the

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18. See *Corus Grp. PLC v. Int'l Trade Comm'n*, 352 F.3d 1351, 1358-59 (Fed. Cir. 2003) (deciding proclamation reviewable because agency implicated President's nondiscretionary authority, but no relief granted against President); *Florsheim Shoe Co. v. United States*, 744 F.2d 787, 795 (Fed. Cir. 1984) (indicating rationale behind President's actions under delegated authority not subject to judicial review).

19. See *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 570-71 (1976) (affirming President can control imports through system of license fees); *infra* Section II.C (presenting cases where presidential tariff power upheld).

20. See Michael Lind, *Free Trade Fallacy*, NEW AM. FOUND. (Jan. 1, 2003), <https://web.archive.org/web/20060106154801/http://www.newamerica.net/index.cfm?pg=article&DocID=1080> [<https://perma.cc/U8QJ-DUH8>] (providing historic overview of American approach to free trade); *infra* Part II (detailing trade law progression in United States).

21. See *infra* Sections III.A-B (stating recent cases decided under decades of precedent on delegation suggest things unlikely to change).

22. See *infra* Section III.C (highlighting recent WTO determination permitting panel to analyze country invoking national security exception).

23. See JON R. JOHNSON, C.D. HOWE INST., *THE ART OF BREAKING THE DEAL: WHAT PRESIDENT TRUMP CAN AND CAN'T DO ABOUT NAFTA 3* (James Fleming ed., 2017), [https://www.cdhowe.org/sites/default/files/attachments/research\\_papers/mixed/Commentary\\_464.pdf](https://www.cdhowe.org/sites/default/files/attachments/research_papers/mixed/Commentary_464.pdf) [<https://perma.cc/SV99-RY94>] (comparing President's foreign affairs powers versus congressional trade powers). The President can ratify treaties only with two-thirds of the Senators' votes. *Id.* Withdrawing from a treaty, however, does not require the same standard, and according to NAFTA Article 2205, the President can withdraw from the agreement "six months after providing written notice of withdrawal to the other Parties." *Id.* at 4.

political and economic separation from Britain.<sup>24</sup> During the period between 1776 and 1781, the years constituting the American Revolution, trade with Britain was nonexistent due to the British blockade on the newly-created nation.<sup>25</sup> As a result, there were no functioning tariff laws in any of the states, other than in the Commonwealth of Virginia, and the effect on the United States losing its largest trading partner was highly detrimental to its young economy.<sup>26</sup>

During the Confederation Period from 1783 to 1789, the states controlled the tariffs levied on Britain, which, given the indebtedness of the states, needed to be heavily protectionist.<sup>27</sup> Those tariffs were ultimately quite unsuccessful and federal legislators closely studied their failure, including future President James Madison, who sought to counteract the crippling piece of legislation from the British Privy Council with a federal tariff singlehandedly protecting all of the states.<sup>28</sup> Due to the nature of the Articles of Confederation, the Continental Congress was unable to initiate a nationwide protectionist measure against Britain until 1789, nearly two years after the states began ratifying the current Constitution to adopt the modern, bicameral Congress.<sup>29</sup> With this first national tariff, Congress placed duties ranging from 5% on most imports to 50% on goods such as “steel, ships, cordage, tobacco, salt, indigo, [and] cloth.”<sup>30</sup>

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24. See JOHN C. MILLER, *THE FEDERALIST ERA: 1789-1801*, at 149 (1960) (indicating Federalists anticipated “host of evils” after war with Britain). Specifically, the “drying up of the import duties from which the government drew most of its revenues” was a concern that laid a systemic foundation for the Tariff of 1789. *Id.*

25. See William Hill, *The First Stages of the Tariff Policy of the United States*, AM. ECON. ASS’N, Nov. 1893, at 9, 39 (indicating Britain’s laws forbidding trade after American Revolution).

26. See *id.* at 40 (outlining three reasons for inability to draw revenue from commerce post American Revolution). Virginia continued its tariff acts because its major export, tobacco, was still in great demand, much more so than the exports of Carolina, Massachusetts, or New York, which were largely inhibited by the British trade prohibition with the United States. *Id.*

27. See HAROLD UNDERWOOD FAULKNER, *AMERICAN ECONOMIC HISTORY 176-78*, 181 (Guy Stanton Ford ed., 1924) (explaining Congress’s failure to retaliate against British Navigation Acts). Congress was unable to use a federal tariff in retaliation against the British blockade due to the weakness of congressional power under the Articles of Confederation. *Id.*; see William Hill, *Protective Purpose of the Tariff Act of 1789*, 2 J. POL. ECON. 54, 55 (1893) (stating Congress urged states to adopt tariffs).

28. See Michael Schwarz, *The Great Divergence Reconsidered: Hamilton, Madison, and U.S.-British Relations, 1783-89*, 27 J. EARLY REPUBLIC 407, 416 (2007) (examining British order-in-council on navigation of 1783 barring American ships from entering West Indies).

29. See NAT’L DEMOCRATIC INST. FOR INT’L AFFAIRS, *ONE CHAMBER OR TWO? DECIDING BETWEEN A UNICAMERAL AND BICAMERAL LEGISLATURE* 6 (1996), [https://www.ndi.org/sites/default/files/029\\_ww\\_onechamber\\_0.pdf](https://www.ndi.org/sites/default/files/029_ww_onechamber_0.pdf) [<https://perma.cc/3K8G-9W64>] (describing compromise between different degrees of federalism led to modern Congress); *U.S. Constitution Ratified*, HISTORY (Nov. 24, 2009), <https://www.history.com/this-day-in-history/u-s-constitution-ratified> [<https://perma.cc/KSP2-VXAQ>] (providing timeline for drafting and ratifying Constitution). When the Constitution established a federation out of what had originally been a confederation, power shifted from the states to the federal government. See NAT’L DEMOCRATIC INST. FOR INT’L AFFAIRS, *supra*, at 6 (highlighting need for centralized government, but with separation of powers); see also Douglas A. Irwin, *New Estimates of the Average Tariff of the United States, 1790-1820*, 63 J. ECON. HIST. 506, 506 (2003) (indicating early congressional tariff activities with respect to newly-created United States).

30. See MILLER, *supra* note 24, at 15; see also John Mark Hansen, *Taxation and the Political Economy of*

Historians debate whether the Tariff Act of 1789 was truly a protectionist measure at heart or more of a revenue-generating tariff, and for those who choose the latter, the Tariff of 1816 (Dallas Tariff) is the original, purely protectionist tariff.<sup>31</sup> Congress enacted the Dallas Tariff based on Alexander Dallas's report of manufacturing, modeled after its 1789 predecessor that had been based on a similar report from Alexander Hamilton.<sup>32</sup> At this point in the young nation's existence, after its second major military conflict against Britain in the War of 1812, its geographical regions began to solidify their industrial capacities.<sup>33</sup> Regardless of whether the region was primarily industrial or agricultural, there was great support for the Dallas Tariff in both the North and the South because of the desire to raise revenue after the War of 1812, and to protect against continued British market flooding despite the fact that warfare had ended.<sup>34</sup> Nevertheless, it was largely understood that the Dallas Tariff would only remain for a few years, until 1819, when authorities believed the danger of a possible resumption of armed conflict with the British would have subsided.<sup>35</sup>

As a whole, the Dallas Tariff had less of an effect on reducing hostilities with Britain than it did on creating Southern contempt for a protectionist policy by 1820.<sup>36</sup> When the nation's first large-scale financial crisis known as the Panic

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*the Tariff*, 44 INT'L ORG. 527, 529 (1990) (indicating tariffs necessary for discharging debts and protecting manufacturers). It is estimated that officials imposed duties on seventy-one classes of imported articles. See Hansen, *supra*, at 529.

31. See Act of July 4, 1789, ch. 2, 1 Stat. 24 (establishing duties on goods, wares, and merchandise); C.K. McFarland & Nevin E. Neal, *The Nascence of Protectionism: American Tariff Policies, 1816-1824*, 45 LAND ECON. 22, 22 (1969) (claiming revenue needs of Treasury sole motive for tariff); see also Norris W. Preyer, *Southern Support of the Tariff of 1816—A Reappraisal*, 25 J.S. HIST. 306, 306 (1959) (claiming United States passed first protective tariff in 1816 to bolster cotton and wool industries).

32. See McFarland & Neal, *supra* note 31, at 24 (indicating Dallas's report "one of the most significant financial reports in American history"). Dallas divided manufactures into three classes: the first group of goods would have a protective duty because they were being produced in sufficient amounts to satisfy the home market; the second group included goods of limited production, which would also have a heavy duty for the purpose of both revenue and protection; and the third group included goods not produced in sufficient quantities for home consumption, for which he recommended only a revenue duty. *Id.* Dallas stated that "manufacturers were 'the means of future safety and independence' for the nation" and that "'recently or partially established' manufacturers deserved government support." See Douglas A. Irwin, *The Aftermath of Hamilton's "Report on Manufactures"*, 64 J. ECON. HIST. 800, 816, 819 (2004) (demonstrating heightened aggressiveness of tariffs under Madison and Jefferson through Dallas's actions).

33. See Henry Steele Commager & Richard B. Morris, *Introduction* to GEORGE DANGERFIELD, *THE AWAKENING OF AMERICAN NATIONALISM: 1815-1828*, at xi, xi (Henry Steele Commager & Richard B. Morris eds., 1965) (introducing post-1812 period of prosperity among American regions). The Northeast was moving from trade and shipping toward industrial enterprises; the South remained concentrated on cotton cultivation; and the West sought to continue its participation in the "transportation revolution." *Id.*

34. See DANGERFIELD, *supra* note 33, at 12-13 (indicating political, economic, and social conditions ideal for tariff increases); see also Preyer, *supra* note 31, at 320-21 (indicating Southern support for tariffs during height of British market dumping in 1816).

35. See DANGERFIELD, *supra* note 33, at 14 (suggesting use of Dallas Tariff for temporary fix).

36. See Act of Apr. 27, 1816, ch. 107, 3 Stat. 310 (providing tariff conditions unfavorable to Southern states); Preyer, *supra* note 31, at 322 (recalling lack of prosperity, patriotism, and promises in 1820 made Southerners antiprotectionist).

of 1819 hit, manufacturing in the North was unaffected due to that industry's ability to perform robustly, despite the low prices, unlike the South, which was harmed by the increase in levies on imports of wool, cotton, and iron.<sup>37</sup>

Southern animosity towards tariffs reached its apex after the Tariff of 1828, also known as the "Tariff of Abominations," due to the fear that highly-levied manufactured goods would become too expensive.<sup>38</sup> As a result, the Nullification Crisis ensued in 1833, in which South Carolina declared the Tariffs of 1828 and 1832 unconstitutional, and thus void under the theory that states had the power to reject federal laws beyond the federal government's constitutional powers.<sup>39</sup> In Congress that same year, Henry Clay and John C. Calhoun proposed the Tariff of 1833, or the "Compromise Tariff," which dropped the uniform tariff rate to 20% of the cost of goods purchased.<sup>40</sup> For nine years, the tariff rate stagnated at 20%, until 1842 when the Whig Party broke away from President John Tyler and reinstated increased protectionist duties at an average of 33%.<sup>41</sup>

When Congress passed the "Walker Tariff" in 1846, it ended the short reign of Whig protectionism and ushered in the United States' largest period of free trade up until that point, which would last until the beginning of the Civil War.<sup>42</sup> With the start of the Civil War coming in the wake of the Panic of 1857, protectionism spiked once again under the Morrill Act of 1861, which served the purpose of generating revenue for the War.<sup>43</sup> The custom of strong protectionism

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37. See Preyer, *supra* note 31, at 320-21 (explaining how lower prices made raw materials cheaper without greatly inhibiting profit from sales). "[I]n 1816 cotton had sold at thirty cents a pound. Now it sold at not more than fifteen cents a pound. Therefore, 'if, in 1816, cotton cloth sold at thirty cents per yard, and now it sells at twenty cents, it is substantially just as good a sale.'" *Id.* (quoting 36 ANNALS OF CONG. 2071 (1820) (statement of Rep. Barbour)).

38. See Act of May 19, 1828, ch. 55, § 2, 4 Stat. 270, 271 (enacting tariffs on unmanufactured wool starting at 40%, rising to 50% ad valorem); F.W. Taussig, *The Early Protective Movement and the Tariff of 1828*, 3 POL. SCI. Q. 17, 20 (1888), reprinted in F.W. TAUSSIG, *THE TARIFF HISTORY OF THE UNITED STATES* 68, 71 (1888) (indicating fear of British retaliatory tariffs in burgeoning southern cotton industry).

39. See generally Act of July 14, 1832, ch. 227, 4 Stat. 583 (listing inapplicable tariff values because statute ultimately struck down); Act of May 19, 1828, ch. 55, 4 Stat. 270 (listing tariff values ultimately not applicable due to constitutional violation); David F. Ericson, *The Nullification Crisis, American Republicanism, and the Force Bill Debate*, 61 J.S. HIST. 249, 263 (1995) (explaining debate between Daniel Webster and John C. Calhoun on tariffs' constitutionality).

40. See Compromise Act, ch. 55, 4 Stat. 629 (1833) (enacting 20% duty); see also F.W. TAUSSIG, *THE TARIFF HISTORY OF THE UNITED STATES* 98 (5th ed. 1910) (noting compromise between protectionists and free traders driving force behind Tariff Act of 1833).

41. See John A. Moore, "The Grossest and Most Unjust Species of Favoritism" *Competing Views of Republican Political Economy: The Tariff Debates of 1841 and 1842*, 29 ESSAYS ECON. & BUS. HIST. 59, 63-66 (2011) (identifying Whig protectionist trade policy); see also TAUSSIG, *supra* note 40, at 100-01 (explaining Tariff of 1842 only lasted four years).

42. See Act of July 30, 1846, ch. 74, 9 Stat. 42 (providing more lenient tariff policy than Whig era); TAUSSIG, *supra* note 40, at 102 (acknowledging free traders saw era of "exceptional prosperity" due to low duties).

43. See TAUSSIG, *supra* note 40, at 139 (indicating all congressional sessions carried out between 1861 and 1865 involved duty increases).

remained during the Reconstruction Era and lasted all the way through the Roaring Twenties, even during the creation of the federal income tax under the Revenue Act of 1913.<sup>44</sup> This additional stream of revenue made it possible to reduce tariffs, resulting in revenue further bolstered by the worldwide demand for American products—especially during World War I.<sup>45</sup>

The unprecedented combination of the Great Depression and the Smoot-Hawley Tariff Act of 1930 caused economic devastation and resulted in the first period of extended trade liberalism in U.S. history.<sup>46</sup> When incoming President Franklin D. Roosevelt and the Democrats vowed to reduce tariffs and passed the Reciprocal Trade Agreements Act of 1934, it set the stage for the subsequent restructuring of American trade policy.<sup>47</sup> Under this new executive-controlled tariff policy, a multilateral approach emerged after World War II, which phased out the original bilateral approach and led to the General Agreement on Tariffs and Trade (GATT).<sup>48</sup> The fact that the United States remains in this multilateral sphere of global trade, created in 1947, is largely due to the effectiveness of the

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44. See Revenue Act of 1913, ch. 16, § 1, 38 Stat. 114, 114-63 (listing dutiable items); see also Hansen, *supra* note 30, at 545 (referring to purpose and impact of federal income tax).

45. See Hansen, *supra* note 30, at 547 (describing decline of reliance on tariff revenues after imposition of income tax).

46. See Judith Goldstein, *The Political Economy of Trade: Institutions of Protection*, 80 AM. POL. SCI. REV. 161, 164 (1986) (indicating institutional responsibility for tariffs shifted from Congress to President in light of Great Depression); see also Mario J. Crucini, *Sources of Variation in Real Tariff Rates: The United States, 1900-1940*, 84 AM. ECON. REV. 732, 732 (1994) (claiming Smoot-Hawley key contributor to Great Depression).

47. See Reciprocal Trade Agreements Act of 1934, Pub. L. No. 73-316, ch. 474, 48 Stat. 943 (codified as amended at 19 U.S.C. §§ 1351-1354 (2018)) (amending Smoot-Hawley Tariff Act and ushering in era of liberal trade policy); see also Goldstein, *supra* note 46, at 164 (pointing to revitalization of American trade dynamics). The two main factors leading to change in American trade policy were a reduction in Congress's constitutionally-mandated role in tariff making in favor of the executive and the Great Depression's weakening effect on the power of protectionist ideology while setting the stage for enhanced free trade. See Goldstein, *supra* note 46, at 164-65; see also Claude Schwob, *Did the Reciprocal Trade Agreements Act of 1934 Initiate a Revolution in the American Trade Policy?*, 34 HIST. SOC. RES., no. 4, 2009, at 377, 379 (reviewing changes in congressional role with respect to trade). Secretary of State Cordell Hull saw the removal of protectionist barriers as a way of permitting countries indebted to the United States after World War I to pay off their loans by increasing their exports to the United States. See Schwob, *supra*, at 386.

48. See Judith L. Goldstein et al., *Institutions in International Relations: Understanding the Effects of the GATT and the WTO on World Trade*, 61 INT'L ORG. 37, 40 (2007) (pledging to implement tariff reductions and "most-favored nation" treatment to participants within agreement). The GATT's preamble indicates that it was founded on the principle of nondiscrimination and mutually advantageous trading. See *id.* at 45. Goldstein provides an outline of the GATT's origins:

In pursuit of these objectives, the organization defined rules to govern trade policy and sponsored eight rounds of trade negotiations, which led to reciprocal reductions in tariffs and nontariff barriers. Participation in the organization both prohibited nations from deviating from regime rules and provided a set of potential benefits; most notably, that trading partner policies would be predictable and consistent with the general tenets of the organization.

*Id.* at 40.



seven rounds of negotiations that took place among the GATT's members.<sup>49</sup> Another boost to the United States' internationalist, pro-trade policy was the creation of NAFTA in 1994.<sup>50</sup> As a result of those endeavors, the post-Smoot-Hawley era has seen average U.S. tariff rates fall, until the anti-establishment movement that solidified with President Trump's election in 2016.<sup>51</sup>

### B. *The Legislative and Judicial Framework Behind the Trump Tariffs*

After President Trump decided that a major element of his political agenda would be to initiate protectionist measures against the United States' major trading partners, the Department of Commerce had to find the legislative backbone to support such a controversial exercise of presidential power.<sup>52</sup> Ultimately, the following constitutional framework guided Secretary of Commerce Wilbur Ross to arrive at his decision and justified enacting tariffs under the national security exception found in Section 232.<sup>53</sup> Article I, Section 1 of the Constitution—preceding the Commerce Clause—states: “All legislative Powers herein granted shall be vested in a Congress.”<sup>54</sup> Additionally, Article II, Section 3 of the Constitution, besides laying out congressional powers, also directs the President to “take Care that the Laws be faithfully executed.”<sup>55</sup> This delineation of power in

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49. See *The GATT Years: From Havana to Marrakesh*, WORLD TRADE ORG., [https://www.wto.org/English/thewto\\_e/whatis\\_e/tif\\_e/fact4\\_e.htm](https://www.wto.org/English/thewto_e/whatis_e/tif_e/fact4_e.htm) [<https://perma.cc/EBA8-BE7P>] (listing various negotiation rounds and aspects accomplished during them). The Geneva, Annecy, Torquay, Geneva II, and Dillon Rounds took place from 1947 to 1960 and involved tariff concessions. See *id.* It was not until the Kennedy Round in Geneva in 1964 that antidumping laws against exporting and selling a product into a market below the normal price became an additional focal point for the GATT, beyond just reducing tariffs. See *id.* Finally, the Uruguay Round, which led to replacing the GATT with the WTO, mandated expanding the GATT trading rules to two new sectors of the economy: those previously too difficult to liberalize—agriculture and textiles—and those that were increasing in global importance in the 1980s—trade in services, intellectual property, and the removal of foreign investment policy restrictions. See William R. Cline, *Evaluating the Uruguay Round*, 18 WORLD ECON. 1, 1 (1995) (explaining why such negotiations rounds important for international trading systems).

50. See Alan S. Blinder, *The Free-Trade Paradox: The Bad Politics of a Good Idea*, FOREIGN AFF., Jan./Feb. 2019, at 119, 120 (showing trend towards international trade and steps taken to encourage trade after World War II).

51. See *id.* (recognizing Trump's protectionist outbursts shocked observers who saw them foreign to mainstream U.S. politics). Trump, however, was effective in slapping tariffs on aluminum and steel because Americans' belief in free trade is not completely wholehearted and sincere. *Id.* at 121. Part of the reason why courts rule in favor of presidential, discretionary trade power is because belief in “free trade” depends on how and when courts pose the question. See *id.* (commenting on level of support for free trade fluctuates).

52. See *National Security Tariffs: Section 232*, REPUBLICAN POL'Y COMMITTEE (June 26, 2018), <https://www.rpc.senate.gov/policy-papers/national-security-tariffs-section-232> [<https://perma.cc/6KJH-JN3Q>] (summarizing Wilbur Ross's memo finding security threats to American steel and aluminum production through imports).

53. See Trade Expansion Act of 1962 § 232(a), 19 U.S.C. § 1862(a) (2018) (stating national security exception); see also *National Security Tariffs: Section 232*, *supra* note 52 (explaining where Trump Administration claims to draw authority from when invoking steel and aluminum tariffs).

54. See U.S. CONST. art. I, § 1 (indicating vesting clause for exclusive federal legislative power).

55. See *id.* art. II, § 3; see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (delineating limits on presidential power by implementing legislative check through requirement of prior congressional

the Constitution raises questions as to whether the executive branch has the authority to act unilaterally in this area based on a “national security” concern.<sup>56</sup>

One of the two main statutes utilized as the basis for the Trump tariffs on steel and aluminum, the Trade Expansion Act of 1962, specifically Section 232, exists pursuant to the congressional power granted by Article 1, Section 8 of the Constitution to “lay and collect Taxes, Duties, Imposts, and Excises” as well as the authority to “regulate Commerce with foreign Nations” under the Commerce Clause.<sup>57</sup> The other statute, the Trade Act of 1974, under Section 201 and Section 301, authorizes the President to protect domestic industries against surges in imports and suspend trade with foreign governments that violate an international trade agreement or burden U.S. commerce as a result of discriminatory trade practices.<sup>58</sup> The question pertaining to these two statutes, with respect to their use under the Trump Administration, is whether they delegate congressional power to regulate foreign commerce to the President under the guise of national security concerns and in the form of tariffs on steel, aluminum, and solar panels.<sup>59</sup>

With respect to the judicial system’s role in the tariff-power analysis, the United States Court of International Trade (CIT)—formerly the United States Customs Court—is the federal court with “exclusive jurisdiction over all cases involving regulation of international trade, including customs classification and valuation and actions taken under the various trade remedy statutes.”<sup>60</sup> Although the Supreme Court has set most of the precedent regarding the separation of powers and the nondelegation doctrine, the Customs Courts Act of 1980 greatly expanded the CIT’s subject matter jurisdiction, giving it the authority to decide

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act). *Youngstown* further states that “[i]n the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.” 343 U.S. at 587.

56. See Roger Yu, *Trump’s Tariff Tweets. What Can He Really Do?*, USA TODAY (Dec. 6, 2016, 5:03 PM), <https://www.usatoday.com/story/money/2016/12/06/trumps-tariff-tweets-what-can-he-really-do/95044162/> [<https://perma.cc/Y6ZM-FQ2G>] (suggesting no clear constitutional answer on illegality of unilateral, presidential tariff enactment).

57. See U.S. CONST. art. I, § 8, cl. 1; *id.* cl. 3; Trade Expansion Act of 1962 § 232(b); see also Complaint at 1, *Am. Inst. for Int’l Steel, Inc. v. United States*, 376 F. Supp. 3d 1335 (Ct. Int’l Trade 2019) (No. 18-00152) (indicating delegation of legislative authority to President under Section 232 unconstitutional).

58. See Trade Act of 1974 § 201 (addressing presidential authority to temporarily protect domestic industries under Section 201); *id.* § 301 (highlighting presidential authority under Section 301 with reference to unfair foreign actions inhibiting U.S. commerce); *supra* note 14 (discussing statutes allowing President to restrict imports based on specific concerns).

59. See CAITLAIN DEVEREAUX LEWIS, CONG. RESEARCH SERV., R44707, PRESIDENTIAL AUTHORITY OVER TRADE: IMPOSING TARIFFS AND DUTIES 1 (2016), <https://fas.org/sgp/crs/misc/R44707.pdf> [<https://perma.cc/9X6M-64Y5>] (analyzing Trump tariffs with understanding of constitutional and statutory underpinnings of tariff-making power).

60. See Stuart Anderson, *The Lawsuit that Could Stop the Steel Tariffs*, FORBES (Oct. 9, 2018, 12:04 AM), <https://www.forbes.com/sites/stuartanderson/2018/10/09/the-lawsuit-that-could-stop-the-steel-tariffs/#64cb4f3f4d59> [<https://perma.cc/TV6F-NVVU>] (describing court hearing American Institute for International Steel (AII) lawsuit against United States).

“any civil action commenced against the United States, its agencies, or its officers, that arises out of any law” pertaining to international trade.”<sup>61</sup> This court has been just as valuable in setting precedent on the interpretation of tariff-making legislation as the Supreme Court and the Federal Circuit, and will continue to do so in the foreseeable future.<sup>62</sup>

Notably, President Trump is not only facing domestic legal challenges to his tariffs, but also international legal challenges from China and the European Union through the dispute settlement mechanisms of the WTO and NAFTA/USMCA.<sup>63</sup> During the international legal process, the complaining countries negatively affected by the steel and aluminum tariffs may request that the WTO form a panel.<sup>64</sup> Then, this panel makes an objective inquiry into and analyzes the United States’ removal of concessions against the complainant, and, if the panel rules in the complainant’s favor, it decides whether the complainant can apply retaliatory tariffs.<sup>65</sup>

### C. Case Law Arising Prior to the Trump Administration

A litany of case precedent exists to deal with the separation of powers issue that arises from President Trump’s unilateral enactment of steel and aluminum

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61. See Customs Courts Act of 1980, Pub. L. No. 96-417, tit. 2, § 201(i), 94 Stat. 1727, 1729 (codified as amended at 28 U.S.C. § 1581(i) (2018)) (outlining CIT’s jurisdiction); The Economic Effects of Significant U.S. Import Restraints: Sixth Update 2009, USITC Pub. 4094, Inv. No. 332-325, at 59, 65 (Aug. 2009) (Final), <https://www.usitc.gov/publications/332/pub4094.pdf> [<https://perma.cc/3K3T-Z9Q6>] (indicating prior to 1934, tariffs exclusive and nondelegable domain of Congress); see also Jeffrey Bossert Clark, *The Recent Controversy Over the Non Delegation Doctrine*, ENVTL. L. & PROP. RTS. PRAC. GROUP NEWSL. (Federalist Soc’y, D.C.), Oct. 1, 1999, at 2-3 (explaining Article I, Section 1 provides constitutional basis for nondelegation doctrine). The nondelegation doctrine is premised on the theory that Congress may not relinquish its unilateral authority to make laws to any other branch of government. See Clark, *supra*; see also *About the Court*, U.S. CT. INT’L TRADE, <https://www.cit.uscourts.gov/about-court#history> [<https://perma.cc/D3LX-5CHX>] (noting court receives its power under Article III of Constitution). “(P)ersons adversely affected or aggrieved by agency actions arising out of import transactions are entitled to the same access to judicial review and judicial remedies as Congress had made available for persons aggrieved by actions of other agencies.” *About the Court*, *supra* (alteration in original).

62. See LEWIS, *supra* note 59, at 7-8 (mentioning role of CIT at trial level with jurisdiction over claims involving presidential proclamations).

63. See CAITLAIN DEVEREAUX LEWIS, CONG. RESEARCH SERV., LSB10097, THREATS TO NATIONAL SECURITY FOILED? A WRAP UP OF NEW TARIFFS ON STEEL AND ALUMINUM 4 (2018), <https://fas.org/sgp/crs/misc/LSB10097.pdf> [<https://perma.cc/3XSC-NFZD>] (alluding to WTO panel investigations); see also Understanding on Rules and Procedures Governing the Settlement of Disputes art. 1-3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 (providing process by which members can bring disputes regarding infringements of rights under agreement).

64. See LEWIS, *supra* note 63, at 4 (explaining how WTO panel approaches tariff disputes); see also CONG. RESEARCH SERV., R45249, SECTION 232 INVESTIGATIONS: OVERVIEW AND ISSUES FOR CONGRESS 21-22 (2018), <https://fas.org/sgp/crs/misc/R45249.pdf> [<https://perma.cc/2FGW-X4V3>] (mentioning China’s challenge at WTO, first through consultations and then through request for panel).

65. See LEWIS, *supra* note 63, at 4 (reiterating WTO panel’s approach to tariff disputes); see also CONG. RESEARCH SERV., *supra* note 64, at 21-22 (examining China’s WTO challenge involving consultations and request for panel).

tariffs in 2018.<sup>66</sup> The landmark case in the field of the nondelegation of powers doctrine is *J.W. Hampton, Jr., & Co. v. United States*,<sup>67</sup> in which the Supreme Court mandated that Congress provide an “intelligible principle” to guide its delegations of congressional authority to the President.<sup>68</sup> The Court, however, has not applied the general nondelegation doctrine in striking down any congressional delegations of power since 1935.<sup>69</sup> In other words, there has not been a decision setting limits to the President’s power vis-à-vis Congress as important as *United States v. Lopez*<sup>70</sup> was in the realm of federalism, for example.<sup>71</sup> In fact, prior cases often appear convoluted as to the line between presidential and congressional power, such as *United States v. Curtiss-Wright Export Corp.*,<sup>72</sup> where the Supreme Court indicated that the President has much greater discretion with his power over foreign affairs, absent congressional input, than he does with his

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66. See B.W. Patch, *The Tariff Power*, CQ PRESS (May 10, 1945), [https://library.cqpress.com/cqresearcher/document.php?id=cqresrre1945051000#H2\\_3](https://library.cqpress.com/cqresearcher/document.php?id=cqresrre1945051000#H2_3) [<https://perma.cc/MR9S-V5L3>] (describing Supreme Court’s interpretation of congressional use and delegation of tariff power).

67. 276 U.S. 394 (1928).

68. *Id.* at 409 (providing rationale behind why Congress’s delegation of tariff-setting power constitutional). The Court in *J.W. Hampton* stated:

The same principle that permits Congress to exercise its rate-making power in interstate commerce by declaring the rule which shall prevail in the legislative fixing of rates . . . justifies a similar provision for the fixing of customs duties on imported merchandise. If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.

*Id.*; see *Intelligible Principle Law and Legal Definition*, USLEGAL, <https://definitions.uslegal.com/i/intelligible-principle/> [<https://perma.cc/RZ3T-Q3GC>] (defining “intelligible principle”). Chief Justice John Marshall defined the function of the “intelligible principle” as the requirement that Congress “provide a ‘general provision’ by which ‘those who act’ can ‘fill up the details’” when it is delegating quasi-legislative powers to another branch of government. See *Intelligible Principle Law and Legal Definition*, *supra*.

69. See Edward H. Stiglitz, *The Limits of Judicial Control and the Nondelegation Doctrine*, 34 J.L. ECON. & ORG. 27, 30-31 (2018) (indicating lack of Supreme Court invalidation of statute under doctrine since 1935); Anderson, *supra* note 60 (explaining how Supreme Court has not struck down statute under nondelegation doctrine in many years).

70. 514 U.S. 549 (1995).

71. See *id.* at 602 (Thomas, J., concurring) (indicating lack of checks and balances on federalism potentially quite ominous). In his concurring opinion in *Lopez*, Justice Thomas identified the inherent danger in writing Congress “a blank check” by continuing to use the “substantial effects” on interstate commerce test for determining whether Congress could enact a statute under its Commerce Clause power. *Id.* The *Lopez* Court held that the Gun-Free School Zones Act of 1990 was invalid because it went beyond Congress’s Commerce Clause power. *Id.* at 551 (majority opinion). See Response Memorandum in Support of Plaintiffs’ Opposition to Defendants’ Motion for Judgment on the Pleadings and Reply Memorandum in Support of Plaintiffs’ Motion for Summary Judgment at 3-4, Am. Inst. for Int’l Steel v. United States, 376 F. Supp. 3d 1335 (Ct. Int’l Trade 2019) (No. 18-00152) [hereinafter Response Memorandum] (addressing absence of Commerce Clause challenge before *Lopez* for almost sixty years).

72. 299 U.S. 304 (1936).

power over internal affairs.<sup>73</sup> Despite the broad discretion afforded to the President over international issues, the Court has ultimately maintained that Congress must set some “boundaries” that go along with the intelligible principle that the President will use in implementing Congress’s delegated commerce powers.<sup>74</sup>

Domestically, in *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>75</sup> the Supreme Court limited the executive power, holding that the President’s foreign affairs powers do not include the “power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation’s lawmakers, not for its military authorities.”<sup>76</sup> Internationally, the Court addressed the issue of delegation of powers in international trade in *Star-Kist Foods, Inc. v. United States*,<sup>77</sup> and expressed that a meaningful limitation on the President’s authority through some sort of standard is necessary for a constitutionally valid delegation, as it confines his discretion and ensures he is not misusing the legislative purpose to select a remedy.<sup>78</sup> The U.S. Court of Customs and Patent Appeals also considered the issue under the Trading with the Enemy

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73. See *id.* at 320 (indicating presidential discretion necessary for maintaining successful international relations and avoiding embarrassment). In this particular case, the Court held in favor of the President, deciding that his embargo on the sale of weapons to parties involved in the Chaco War was valid because Congress may not intrude on the President’s discretion regarding negotiation and law-making in foreign affairs. *Id.* at 312, 319, 329.

74. See *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946) (explaining sufficiency of Congress’s set “boundaries” of delegated authority for validity of statute).

75. 343 U.S. 579 (1952).

76. See *id.* at 587 (indicating President’s power to faithfully execute laws cannot give him law-making power simultaneously); see also *Clinton v. City of New York*, 524 U.S. 417, 438 (1998) (reiterating lack of provision in Constitution authorizing President to enact, amend, or repeal statutes).

77. 275 F.2d 472 (C.C.P.A. 1959).

78. See *id.* at 481 (indicating Congress gives broad discretion to President under Trade Agreements Act of 1934). The court in *Star-Kist Foods* stated:

A constitutional delegation of powers requires that Congress enunciate a policy or objective or give reasons for seeking the aid of the President. In addition the act must specify when the powers conferred may be utilized by establishing a standard or “intelligible principle” which is sufficient to make it clear when action is proper. And because Congress cannot abdicate its legislative function and confer carte blanche authority on the President, it must circumscribe that power in some manner. This means that Congress must tell the President what he can do by prescribing a standard which confines his discretion and which will guarantee that any authorized action he takes will tend to promote rather than flout the legislative purpose. . . .

In the act before us, the Congressional policy is pronounced very clearly. The stated objectives are to expand foreign markets for the products of the United States “by regulating the admission of foreign goods into the United States in accordance with the characteristics and needs of various branches of American production so that foreign markets will be made available to those branches of American production which require and are capable of developing such outlets by affording corresponding market opportunities for foreign products in the United States.”

*Id.* at 480; cf. *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (using term “blank check for the President”).

Act in *United States v. Yoshida International, Inc.*,<sup>79</sup> and stated “[i]t is nonetheless clear that no undelegated power to regulate commerce, or to set tariffs, inheres in the Presidency.”<sup>80</sup> Finally, *Florsheim Shoe Co. v. United States*<sup>81</sup> provides an example of a statute much more limited in scope than the Trade Expansion Act of 1962; the statute contains an intelligible principle, which states “the President’s authority under Section 504(a) is limited—although he may withdraw preferential treatment entirely, he may not adjust rates of duty.”<sup>82</sup>

#### D. The Story of the Trump Tariffs Themselves

On April 19, 2017, Secretary Ross began investigating the impact of steel imports on national security.<sup>83</sup> As part of that investigation, the Secretary held a public hearing on May 24, 2017, and allowed interested persons to submit written statements.<sup>84</sup> The investigation lasted through January 11, 2018, when the Secretary sent President Trump his report, titled “The Effects of Imports of Steel on the National Security” (Steel Report).<sup>85</sup> After the Steel Report, on February 18,

79. 526 F.2d 560 (C.C.P.A. 1975).

80. *See id.* at 572 (indicating President has certain “inherent” powers in conducting foreign relations and foreign affairs). Although broadly granting power to an “unscrupulous, rampant President, willing to declare an emergency when none exists” is dangerous and unwise, it is not for the court to judge Congress’s wisdom. *See id.* at 584. The question before the court—delegation of legislative actions from Congress to the President—is “one of power, not of policy.” *See id.* (quoting *Norman v. Balt. & Ohio R.R. Co.*, 294 U.S. 240, 297 (1935)). In *Yoshida*, Congress delegated power to the President under Section 5(b) of the Trading with the Enemy Act, authorizing the President to regulate imports during declared national emergencies. *See id.*; Trading with the Enemy Act, Pub. L. No. 65-91, ch. 106, § 5(b), 41 Stat. 411, 415 (1917) (codified as amended at 50 U.S.C. § 4305(b) (2018)); *see also* *Marshall Field & Co. v. Clark*, 143 U.S. 649, 693 (1892) (highlighting important difference between executing acts of Congress and making laws).

81. 744 F.2d 787 (Fed. Cir. 1984).

82. *See id.* at 795 (indicating subject matter of statute involves foreign affairs whereby Congress commonly delegates power); *see also* *Opp Cotton Mills, Inc. v. Adm’r of Wage & Hour Div.*, 312 U.S. 126, 144 (1941) (indicating essentials of legislative function preserved when Congress set standards for administrative agency to follow); *U.S. Cane Sugar Refiners’ Ass’n v. Block*, 683 F.2d 399, 402 (C.C.P.A. 1982) (referring to President’s valid exercise of authority under Section 201). The administrator’s actions in *Opp Cotton Mills*, under the Fair Labor Standards Act of 1938, to cap the hourly wage in the cotton mill industry at forty cents were not the result of an unconstitutional delegation of power by Congress. *See Opp Cotton Mills*, 312 U.S. at 135-36, 144-45. Compare Trade Expansion Act of 1962 § 232(b), 19 U.S.C. § 1862(b) (2018) (indicating President can take Secretary’s recommendations on tariffs to protect national security interests), with Trade Act of 1974 § 301(a), 19 U.S.C. § 2411(a) (allowing President to impose sanctions for existing foreign trade practices affecting United States).

83. *See* Complaint, *supra* note 57, at 9 (discussing current administration’s investigation into impact of steel and aluminum on national security).

84. *See id.* (indicating next stage of Secretary Ross’s investigation into proposed tariffs).

85. *See* OFFICE OF TECH. EVALUATION, U.S. DEP’T OF COMMERCE, THE EFFECT OF IMPORTS OF STEEL ON THE NATIONAL SECURITY 6 (2018), [https://www.commerce.gov/sites/default/files/the\\_effect\\_of\\_imports\\_of\\_steel\\_on\\_the\\_national\\_security\\_-\\_with\\_redactions\\_-\\_20180111.pdf](https://www.commerce.gov/sites/default/files/the_effect_of_imports_of_steel_on_the_national_security_-_with_redactions_-_20180111.pdf) [<https://perma.cc/M4AB-V9RV>] (outlining Secretary Ross’s findings). The Steel Report recommended a range of alternative actions, including global tariffs, each of which had the objective of maintaining 80% capacity utilization for the U.S. steel industry. *Id.* At the same time, the Secretary issued a report with similar conclusions regarding aluminum imports. *See* OFFICE OF TECH. EVALUATION, U.S. DEP’T OF COMMERCE, THE EFFECT OF IMPORTS OF ALUMINUM ON THE NATIONAL

2018, Secretary of Defense Jim Mattis sent a memorandum to Secretary Ross indicating that the Department of Defense (DoD) “does not believe that the findings in the reports impact the ability of DoD programs to acquire the steel or aluminum necessary to meet national defense requirements.”<sup>86</sup> But on March 8, 2018, President Trump issued Proclamation No. 9704—a 10% tariff increase on aluminum—and Proclamation No. 9705—a 25% tariff increase on steel—which were imposed on all countries other than Canada and Mexico, effective March 23, 2018.<sup>87</sup> President Trump thus reintroduced strong protectionist policies into American governance, the likes of which had not been seen in over seventy years, and broke away from the traditional Republican posture favoring free trade.<sup>88</sup>

### E. Case Law Arising in Response to the Trump Tariffs

In 1976, the Supreme Court examined presidential authority under the lens of international trade on oil imports in *Federal Energy Administration v. Algonquin SNG, Inc.*, which was later cited in *Severstal Export GMBH v. United States* to evaluate President Trump’s authority under Section 232.<sup>89</sup> In *Algonquin*, the Court decided that Section 232 was not a forbidden delegation of legislative

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SECURITY 6 (2018), [https://www.commerce.gov/sites/default/files/the\\_effect\\_of\\_imports\\_of\\_aluminum\\_on\\_the\\_national\\_security\\_-\\_with\\_redactions\\_-\\_20180117.pdf](https://www.commerce.gov/sites/default/files/the_effect_of_imports_of_aluminum_on_the_national_security_-_with_redactions_-_20180117.pdf) [<https://perma.cc/92B6-2ATS>] (providing Secretary Ross’s findings).

86. See Memorandum from James N. Mattis, Sec’y of Def., to Wilbur Ross, Sec’y of Commerce (Feb. 18, 2018), [https://www.commerce.gov/sites/default/files/department\\_of\\_defense\\_memo\\_response\\_to\\_steel\\_and\\_aluminum\\_policy\\_recommendations.pdf](https://www.commerce.gov/sites/default/files/department_of_defense_memo_response_to_steel_and_aluminum_policy_recommendations.pdf) [<https://perma.cc/BF86-UB9W>] (indicating DoD disagreed in part with Department of Commerce over metal industry findings).

87. Proclamation No. 9704, 83 Fed. Reg. 11,619, 11,621 (Mar. 8, 2018); Proclamation No. 9705, 83 Fed. Reg. 11,625, 11,627-28 (Mar. 8, 2018). Section 3 of Proclamation No. 9705 authorized Secretary Ross to provide relief from the 25% tariff increase “for any steel article determined not to be produced in the United States in a sufficient and reasonably available amount or of a satisfactory quality and . . . to provide such relief based upon specific national security considerations.” Proclamation No. 9705, 83 Fed. Reg. at 11,627.

88. See Mark Landler, *Trump, the Insurgent, Breaks with 70 Years of American Foreign Policy*, N.Y. TIMES (Dec. 28, 2017), <https://www.nytimes.com/2017/12/28/us/politics/trump-world-diplomacy.html> [<https://perma.cc/78W6-6EFN>] (identifying change of course from “reliable anchor” of liberal international order to inward-focused nation); Jim Tankersley, *Trump Upends GOP Message on Economy*, WASH. POST (Aug. 31, 2015), [https://www.washingtonpost.com/news/wonk/wp/2015/08/31/trump-upends-gop-message-on-economy/?utm\\_term=.e179f1aadb98](https://www.washingtonpost.com/news/wonk/wp/2015/08/31/trump-upends-gop-message-on-economy/?utm_term=.e179f1aadb98) [<https://perma.cc/E3QW-N6CS>] (providing Trump’s electoral rallying cry against foreign governments’ political context behind Trump’s protectionist beliefs).

89. *Compare* Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 559-60 (1976) (holding proper delegation under Section 232), *with* Severstal Exp. GMBH v. United States, No. 18-00057, 2018 Ct. Int’l Trade LEXIS 38, at \*18 (Apr. 5, 2018) (citing *Algonquin*, where statute not including legislative override still constitutional delegation of authority). The *Severstal* case involved Swiss and U.S. subsidiary companies that arrange and import steel from Russia, a country subject to a 25% tariff on steel under Proclamation No. 9705. 2018 Ct. Int’l Trade LEXIS 38, at \*5. The companies challenged the lawfulness of the Proclamation and sought a preliminary injunction to prevent the government from collecting the 25% tariff on imported steel. *Id.* at \*5-6. In *Algonquin*, according to the power given to him in the Trade Expansion Act of 1962, specifically Section 232(b), the President issued similar executive orders creating a license fee system on oil imports. See 426 U.S. at 550-52. States and utility companies sued the federal government, arguing that Section 232 did not authorize the President to impose such fees. *Id.* at 555-56.

power by Congress to the President because the Secretary of the Treasury, after an investigation, recommended the President take action to reduce oil imports in the name of national security.<sup>90</sup> Similarly, in *Severstal*, exporting companies alleged President Trump's steel tariffs exceeded his statutory authority, but the CIT, echoing *Algonquin* principles, decided President Trump's national security determination was valid on the basis of his broad presidential discretion.<sup>91</sup> Further, *Silfab Solar, Inc. v. United States* considered another grant of presidential power under Section 201, commonly known as the "escape clause" in the Trade Act of 1974, which authorizes the President to impose tariffs under prescribed conditions.<sup>92</sup> Although examining a different statute from *Severstal*, the same premise existed in *Silfab Solar*, in that plaintiffs requested an injunction on the President's action due to the statute's unconstitutional application as a result of a lacking intelligible principle.<sup>93</sup> Ultimately, the Federal Circuit affirmed the CIT's decision, ruling against the plaintiffs because there was no presidential action outside delegated authority; in other words, there was a guiding intelligible principle that the President followed.<sup>94</sup>

90. See 426 U.S. at 559-61 (stating plaintiffs' argument not supported by statutory or legislative authority to overcome alleged security threat). The Court squarely addressed the issue and concluded that "Section 232(b) authorizes the President to act after a finding by the Secretary of the Treasury that a given article is being imported" in a way to threaten national security. *Id.* at 561. As a result, Section 232's language seems to clearly grant the President "a measure of discretion in determining the method to be used to adjust imports." *Id.* Although not implicated in this Note, Section 232 was later amended to strike some of the language therein and insert new subsections relating to imports threatening national security. See Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, sec. 1501, § 232, 102 Stat. 1107, 1257 (codified as amended at 19 U.S.C. § 1862 (2018)) (inserting new language, which substituted items like "Secretary of Treasury" for "Secretary of Commerce").

91. See 2018 Ct. Int'l Trade LEXIS 38, at \*5, \*27-28 (stating steel industry's "overall economic situation" does not foreclose finding of threat to national security).

92. See *Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1342-43 (Fed. Cir. 2018) (stating CIT indicated importing solar products causing injury to domestic industry); see also Trade Act of 1974 § 201, 19 U.S.C. § 2411 (2018). *Silfab Solar Inc.*, a Canadian corporation, sought a preliminary injunction to bar the enforcement of presidentially-imposed tariffs on solar products. *Silfab Solar*, 892 F.3d at 1342. The court held that it did not have the authority to review the President's substantial share determination because such acts are no more subject to review than if Congress itself had exercised that judgment. *Id.* at 1349. "If Congress desires to eliminate these tariffs or to cabin the President's authority, that is a matter for Congress to address in future legislation, not a matter for this court . . ." *Id.*

93. See *Silfab Solar*, 892 F.3d at 1342 (describing premise behind plaintiffs' lawsuit.)

94. See *id.* at 1346, 1349 (ruling against plaintiffs because President did not violate statutory mandate); see also *Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 89 (Fed. Cir. 1985) (indicating plaintiff failed to prove presidential trenching on delegated power). The *Maple Leaf* court stated:

Maple Leaf then says that . . . the Commission—and therefore the President—violated statutory requirements because there is no adequate finding of injury to the frozen mushroom industry (as distinct from the canned mushroom industry). . . .

. . . .

. . . For a court to interpose, there has to be a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority. . . .

. . . We cannot, however, turn this case into the ordinary administrative review in other areas in



Moving forward, the argument in *American Institute for International Steel, Inc. v. United States*<sup>95</sup> directly rebukes the holding of *Algonquin*, and asserts that Section 232 violates the nondelegation doctrine and the principle of separation of powers that is fundamental to the Constitution.<sup>96</sup> The AIIS argued Section 232 violates the separation of powers principle because the statute permits essentially limitless consideration into the factors that the President can utilize to support his opinion on an import's perceived threat to national security and does not provide an intelligible principle.<sup>97</sup> Such an argument, although unsuccessful

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which the court looks to see if substantial evidence supports the agency's findings. . . . It is enough for this case that, as we have held, the ITC did in fact make the ultimate finding and determination that there was such injury (or threat).

*Maple Leaf*, 762 F.2d at 89-90. "Once it is determined, as we have just done, that the President's exercise of his authority under Section 504(a) to limit duty-free treatment for these Indian leather goods was within his constitutionally delegated power, there is no further role for the CIT or for this court." *Florsheim Shoe Co. v. United States*, 744 F.2d 787, 795 (Fed. Cir. 1984) (indicating rationale behind President's actions under delegated authority not subject to judicial review); see *Corus Grp. PLC v. Int'l Trade Comm'n*, 352 F.3d 1351, 1356 (Fed. Cir. 2003) (admitting need for clear violation of statute by commission to make resulting presidential action unconstitutional). "Hence, '[s]o long as the Commission's analysis does not violate any statute and is not otherwise arbitrary and capricious,' the various commissioners composing a majority need not rely on identical or consistent methodologies in explaining their conclusions." *Corus*, 352 F.3d at 1363 (alteration in original) (citation omitted) (quoting *U.S. Steel Grp. v. United States*, 96 F.3d 1352, 1363 (Fed. Cir. 1996)); see *United States v. George S. Bush & Co.*, 310 U.S. 371, 379-80 (1940) (asserting limited amount of scrutiny applicable to presidential decision-making on rates of duty). "And the judgment of the President that on the facts, adduced in pursuance of the procedure prescribed by Congress, a change of rate is necessary is no more subject to judicial review under this statutory scheme than if Congress itself had exercised that judgment." *George S. Bush & Co.*, 310 U.S. at 379-80; see *Michael Simon Design, Inc. v. United States*, 609 F.3d 1335, 1344-45 (Fed. Cir. 2010) (analogizing *George S. Bush & Co.* because both involved legal errors by recommending commissions). "The similarity between the two cases further confirms that the trial court correctly held that the Presidential proclamation at issue in this case was not reviewable based on the appellants' claim that the Commission's recommendation was legally flawed." *Michael Simon*, 609 F.3d. at 1345.

95. 376 F. Supp. 3d 1335 (Ct. Int'l Trade), cert. denied, 139 S. Ct. 2748 (2019) (mem.).

96. See Motion for Summary Judgment at 29, *Am. Inst. for Int'l Steel*, 376 F. Supp. 3d 1335 (No. 18-00152) (arguing *Algonquin* does not control outcome presented in this action). The first argument is that *Algonquin* does not settle the dispute in this case because the claim in *Algonquin* was a narrow, statutory one—whether the specific remedy chosen by the President under Section 232, an import licensing fee, was authorized by the statute—as opposed to a constitutional question. See *id.* The second argument states that the absence of a provision for judicial review in Section 232 means that it is unable to "ascertain whether the will of Congress has been obeyed." See *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 218 (1989) (quoting *Mistretta v. United States*, 488 U.S. 361, 379 (1989)); see also *Yakus v. United States*, 321 U.S. 414, 425 (1944) (describing courts only concerned with ascertaining whether will of Congress obeyed); Response Memorandum, *supra* note 71, at 3-4 (providing introduction to argument for lack of "boundaries" in statute). Ultimately, the CIT ruled that the President had "unbridled discretion" with respect to trade. *Am. Inst. for Int'l Steel*, 376 F. Supp. 3d at 1352; see Press Release, Am. Inst. for Int'l Steel, AIIS Comment on U.S. Court of International Trade Ruling (Mar. 25, 2019), <http://www.aiis.org/2019/03/aiis-comment-on-u-s-court-of-international-trade-ruling/> [<https://perma.cc/2H5W-ELTV>] [hereinafter AIIS Press Release] (recognizing argument for appeal).

97. See Complaint, *supra* note 57, at 19 (indicating absence of "intelligible principle"). The President exercises too wide a range of options under Section 232 because he can impose tariffs, quotas, and/or licensing fees. See *id.* at 5-6. In addition, "[t]he rate of tariffs (or extent of quotas) is not confined in any respect, as illustrated here by the arbitrary choice of 25%." Response Memorandum, *supra* note 71, at 12; see Trade Expansion Act of 1962 § 232(d), 19 U.S.C. § 1862(d) (2018) (providing factors to weigh in determining whether

in *Severstal* and *Silfab Solar*, has the backing of many scholars who believe Congress should safeguard the United States' trade commitments with legislation that blocks the President's unilateral withdrawal from treaties and enactment of tariffs without any legitimate national security interest.<sup>98</sup>

### III. ANALYSIS

#### A. Courts May Review Executive Determinations, but Are Unlikely to Effectively Check the President's Powers

Statutory delegation of tariff-related power from Congress to the President remains routinely upheld by the judiciary.<sup>99</sup> Specifically, the Supreme Court's firmly-held position in the 1976 *Algonquin* decision was rooted in the statute under consideration having "establishe[d] clear preconditions to Presidential action," which form an intelligible principle that the President must conform.<sup>100</sup> The preconditions ordained by Congress in Section 232(b)-(c) include: an investigation by the Secretary of Commerce into the national security implications of the importation of certain articles into the United States; a final report initiated by the Secretary of Commerce no later than 270 days after the commencement of such investigation; and a delineated timeframe by which the President must inform Congress whether he intends to heed the advice of the Secretary, how he intends to adjust the imports, and his reasoning for doing so.<sup>101</sup>

This Department of Commerce process appeared to be the vanguard issue behind the AIIS challenge to the President's exercise of such a delegated congressional tariff power.<sup>102</sup> Despite the detail in Section 232, AIIS claimed the statute

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national security threat exists).

98. See Brian McKeon & Caroline Tess, *How Congress Can Take Back Foreign Policy: A Playbook for Capitol Hill*, FOREIGN AFF., Jan./Feb. 2019, at 76, 84 (2019) (suggesting Congress enact legislation blocking Trump from leaving multilateral institutions); *supra* notes 91-94 and accompanying text (indicating unsuccessful outcome of *Severstal* and *Silfab Solar* cases on absence of intelligible principle argument); see also Elliott Abrams, *Trump Versus the Government: Can America Get Its Story Straight?*, FOREIGN AFF., Jan./Feb. 2019, at 129, 132-33, 136 (2019) (indicating Trump's anti-trade agenda backed by Americans seeking change in existing global trade order).

99. See *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 570-71 (1976) (indicating Section 232 properly delegated power to President for national security). The national security provision within the Trade Expansion Act of 1962 allowed the President to impose a license fee system for oil imports in the 1970s. See *id.*; *United States v. Yoshida Int'l, Inc.*, 526 F.2d 560, 572 (C.C.P.A. 1975) (reinforcing idea President relies on congressional delegation of treaty-altering power, not constitutional law itself). "It is nonetheless clear that no undelegated power to regulate commerce, or to set tariffs, inheres in the Presidency." *Yoshida*, 526 F.2d at 572.

100. See *Algonquin*, 426 U.S. at 549, 570-71 (indicating President's actions authorized because no indication statute's delegation bars license fee system); *supra* Section II.C (outlining cases where federal courts affirmed validity of statutory delegation of power).

101. See Trade Expansion Act of 1962 § 232(b)-(c) (outlining procedure in executive branch's request for increase in tariffs, quotas, or other trade-related mechanisms).

102. See *Am. Inst. for Int'l Steel, Inc. v. United States*, 376 F. Supp. 3d 1335, 1338 (Ct. Int'l Trade), *cert. denied*, 139 S. Ct. 2748 (2019) (mem.) (summarizing Department of Commerce's role under Section 232); see also *Algonquin*, 426 U.S. at 559 (maintaining Section 232(b)'s standards sufficient to meet delegation of powers

contains no “boundaries” on the President’s discretion in adjusting the tariff rates on imports of steel and aluminum because it does not adequately address any limits on what circumstances the President may deem a threat to “national security.”<sup>103</sup> Particularly, Section 232 unnecessarily “bestow[s] flexibility on the President and seem[s] to invite the President to regulate commerce by way of means reserved for Congress, leaving very few tools beyond his reach.”<sup>104</sup> Nevertheless, despite the legitimacy of this argument, it always remained quite implausible that the courts would deny President Trump the power to implement tariffs on imports of steel and aluminum when he claimed such measures are required for the national security of those industries, largely due to the precedential method in which courts analyze such questions.<sup>105</sup> As the Founding Fathers clearly indicated when they drafted the Constitution, the President holds the highest office in the land and must remain unencumbered by the other branches of government in his duty to administer the laws and to ensure the enduring success and safety of the American people.<sup>106</sup> Although AIIS appealed the CIT de-

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attack on license fee system). In *Algonquin*, the Court ruled that the discretion provided to the President under Section 232(b) is far from unbounded because the statute restricts the President’s actions only to imports he deems a threat to national security. 426 U.S. at 559-60. *But see* Complaint, *supra* note 57, at 6 (describing President’s unfettered discretion). Further, Section 232(c) “articulates a series of specific factors to be considered by the President in exercising his authority under § 232(b).” *Algonquin*, 426 U.S. at 559; *see* *Marshall Field & Co. v. Clark*, 143 U.S. 649, 681 (1892) (reviewing Court’s decision ruling against importers of sugar, molasses, coffee, tea, and hides). In *Marshall Field*, the Court disagreed with the importers’ argument that section 3 of the Tariff Act of 1890 was unconstitutional because it “delegate[d] to him both legislative and treaty-making powers.” *See* 143 U.S. at 681. Instead, the Court supported its decision with the fact that “Congress itself prescribed, in advance, the duties to be levied, collected, and paid, on sugar, molasses, coffee, tea, or hides,” and so all that remained for the President to do was to carry out the law, not make it. *Id.* at 692.

103. *See* Response Memorandum, *supra* note 71, at 3-4 (introducing argument for lack of “boundaries” in statute). The plaintiffs in *American Institute for International Steel* used *Youngstown* to demonstrate that the Court has set limits on the President’s foreign affairs powers when they encroach on Congress’s legislative powers. *Id.* at 13; *cf.* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (limiting President’s foreign affairs power to not include seizing private property to control domestic economy).

104. *Am. Inst. for Int’l Steel*, 376 F. Supp. 3d at 1344; *see supra* note 97 (describing President’s increased power).

105. *See* *U.S. Cane Sugar Refiners’ Ass’n v. Block*, 683 F.2d 399, 402 (C.C.P.A. 1982) (finding President Reagan acted within delegated authority in issuing Proclamation 4941). Although the case centers on section 201 of the Trade Expansion Act of 1962, as opposed to Section 232, which the Trump Administration has used to levy steel and aluminum tariffs, it sets forth the valuable principle that courts will not inquire into the President’s decision-making process in determining whether the conditions under which the President imposes the tariffs are truly legitimate. *Id.* at 404.

106. *See* THE FEDERALIST NO. 75, *supra* note 7, at 379-80 (Alexander Hamilton) (indicating Senate cannot interfere with President’s role in providing security for Americans through treaty-making power). Hamilton stated:

To have [e]ntrusted the power of making treaties to the Senate alone, would have been to relinquish the benefits of the constitutional agency of the President in the conduct of foreign negotiations. . . . Though it would be imprudent to confide in him solely so important a trust, yet it cannot be doubted that his participation would materially add to the safety of the society.

cision, the Supreme Court denied certiorari, likely because the Court has traditionally applied the non-delegation doctrine leniently.<sup>107</sup>

*B. Judicial Standard of Review for Approving Presidential Exercise of Trade Power*

Returning to the common motif that federal courts have often assented to the President's exercise of tariff authority, especially under the Trade Expansion Act of 1962, it is crucial to grasp the standard of review applied by these courts in their determination as to the validity of the use of presidential power.<sup>108</sup> There are three recurring themes from prior cases examining presidential exercises of power in the realm of trade law that courts must consider in determining whether, in accordance with a statute, the President's actions are valid.<sup>109</sup> Nevertheless, although courts may review the President's actions, the judicial branch is an unlikely avenue to successfully check the President's power.<sup>110</sup>

*1. Recurring Themes Solidifying Congress's Delegation of Power to the President*

First, in order for a statutory delegation of power to be valid, the statute delegating power from Congress to the President cannot confer upon the President any congressional legislative power.<sup>111</sup> In order to determine whether the President is acting within his constitutional powers, courts must examine whether he is acting as an agent of Congress, as he should be according to the constitutional delegation doctrine, or whether he is exercising his personal, political free will.<sup>112</sup>

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*Id.* This idea likely explains the courts' rationale for standing by the President's exercise of tariff power, delegated to him by Congress, under a statute. *Id.*

107. See *Am. Inst. for Int'l Steel, Inc. v. United States*, 139 S. Ct. 2748 (2019) (mem.) (denying certiorari without explanation); AHS Press Release, *supra* note 96 (providing summary of case's outcome); see also *supra* Sections II.C, II.E (outlining history of nondelegation cases before Trump Administration). Judge Katzmman further elaborated that Section 232 "provides virtually unbridled discretion to the President with respect to the power over trade that is reserved by the Constitution to Congress." *Am. Inst. for Int'l Steel*, 376 F. Supp. 3d at 1352.

108. See LEWIS, *supra* note 59, at 13 (highlighting considerations for analyzing statutes delegating tariff-modifying powers to President); *supra* Section II.C (outlining cases setting forth standard of review for President's tariff power). "[W]hile courts will not review the reasoning behind a threshold determination made by the President, such as the existence of a national emergency, or the fact-finding involved in arriving at that determination, they will closely review whether the action taken in response bears a reasonable relationship to that determination." LEWIS, *supra* note 59, at 13.

109. See LEWIS, *supra* note 59, at 13 (listing three options for Congress when drafting validly delegable legislation).

110. See *infra* Section III.B.2 (describing courts unlikely to have impact on presidential power and solutions).

111. See LEWIS, *supra* note 59, at 13 (stating first principle behind properly delegating legislative power). "[A] delegation should empower the President to act as the agent of the legislative department by carrying out its will, as clearly expressed in the statute." *Id.*

112. See *Clinton v. City of New York*, 524 U.S. 417, 438 (1998) (reiterating no provision in Constitution

Second, the judicial branch will not assess the President's decision-making process in arriving at a determination that some condition exists that triggers his ability to take action under the statute.<sup>113</sup> This position has a negative, direct effect on determining whether the President is exercising law-making powers because it gives the President carte blanche to act how he pleases.<sup>114</sup> A court cannot answer the question as to whether the President has abided by the intelligible principle set forth in the statute if it chooses not to consider the President's rationale for administering a tariff proclamation under the authority of said statute.<sup>115</sup> Third, the courts have traditionally focused their scrutiny on the President's selected means of executing his delegated powers to determine whether his actions are permissible.<sup>116</sup> Specifically, this refers to whether the President followed the limitations placed on the delegated powers he received from Congress in the form of time restrictions and durations, as well as tariff ranges.<sup>117</sup> Having witnessed this customary standard of review applied in *Algonquin*, *Severstal*, and *Silfab Solar*, it is hardly a surprise that AIIS met the same fate in their case.<sup>118</sup>

The Supreme Court created precedent with respect to Section 232 when it held that the statute does not constitute an improper delegation of power and grants

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authorizes President to enact, amend, or repeal statutes). The Supreme Court used its ruling in *Marshall Field*, in which it upheld the Tariff Act of 1890, as a point of comparison to Congress's delegation of power in the Line Item Veto Act of 1996. *See id.* at 444. Unlike in the latter, where the President was exercising a personal policy judgment under a statute, which is forbidden, when he suspended a tariff exemption, the President was executing a policy that Congress had embodied in the statute. *Id.*

113. *See* U.S. Cane Sugar Refiners' Ass'n v. Block, 683 F.2d 399, 404 (C.C.P.A. 1982) (confirming President's motives for acting under statute not subject to judicial review).

114. *See* Response Memorandum, *supra* note 71, at 3 (implying presidential free reign for tariffs under statute combined with lack of judicial review); *see also* Star-Kist Foods, Inc. v. United States, 275 F.2d 472, 481-82 (C.C.P.A. 1959) (abdicated legislative function and conferring carte blanche authority on President not permitted). As stated in *Star-Kist Foods*:

Congress must tell the President what he can do by prescribing a standard which confines his discretion and which will guarantee that any authorized action he takes will tend to promote rather than flout the legislative purpose. It is not necessary that the guides be precise or mathematical formulae to be satisfactory in a constitutional sense.

*Star-Kist Foods*, 275 F.2d at 480; *cf.* Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) (using term "blank check for the President").

115. *See* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) (demanding Congress place intelligible principle within statute to guide presidential exercise of legislative delegation).

116. *See* United States v. Yoshida Int'l, Inc., 526 F.2d 560, 574 (C.C.P.A. 1975) (suggesting President's selected means somewhere less than "full and all-inclusive power to regulate commerce").

117. *See* LEWIS, *supra* note 59, at 13 (explaining Congress responsible for setting forth specified activities within intelligible principle to guide President's actions).

118. *See generally* Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548 (1976); *Silfab Solar, Inc. v. United States*, 892 F.3d 1340 (Fed. Cir. 2018); *Am. Inst. for Int'l Steel, Inc. v. United States*, 376 F. Supp. 3d 1335 (Ct. Int'l Trade), *cert. denied*, 139 S. Ct. 2748 (2019) (mem.); *Severstal Exp. GMBH v. United States*, No. 18-00057, 2018 Ct. Int'l Trade LEXIS 38 (Apr. 5, 2018).

the President discretion in determining the method to use in adjusting imports.<sup>119</sup> The plaintiffs in *Algonquin* unsuccessfully argued that the President overstepped his statutory authority when he implemented a system of license fees, rather than a set of quotas, on oil imports.<sup>120</sup> When the *Algonquin* Court ruled against the plaintiffs, it applied the intelligible principle standard that had emerged from *J.W. Hampton* and began the judicial custom with respect to Section 232 of deferring to the President's broad authority to adjust tariffs once the Department of Commerce finds a national security threat.<sup>121</sup>

Next, a debate over Section 232's justiciability arose when Severstal Export, a Swiss company, and its American affiliate claimed President Trump's Proclamation No. 9705, imposing a 25% tariff increase on steel imports, infringed on their interests.<sup>122</sup> Like the plaintiffs in *Algonquin*, the Severstal entities attempted to challenge the President's exercise of the authority Congress delegated to him through Section 232.<sup>123</sup> Ultimately, the court decided that the President did not violate his exercise of authority because there was no indication from either statutory authority or legislative history that using economic motives as a rationale for finding a threat to national security is in any way prohibited.<sup>124</sup>

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119. See *Algonquin*, 426 U.S. at 570-71 (describing Court's rationale).

Section 232(b) easily fulfills th[e] test. It establishes clear preconditions to Presidential action—*inter alia*, a finding by the Secretary of the Treasury that an "article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security." Moreover, the leeway that the statute gives the President in deciding what action to take in the event the preconditions are fulfilled is far from unbounded. . . .

. . . [T]he language of § 232(b) seems clearly to grant him a measure of discretion in determining the method to be used to adjust imports. We find no support in the language of the statute for respondents' contention that the authorization to the President to "adjust" imports should be read to encompass only quantitative methods—i.e., quotas—as opposed to monetary methods—i.e., license fees—of effecting such adjustments.

*Id.* at 559-61; see Trade Expansion Act of 1962 § 232(b), 19 U.S.C. § 1862(b) (2018); see also *supra* note 90 (commenting on later change to Section 232 language impacting named Secretary).

120. See *Algonquin*, 426 U.S. at 551-52 (stating Court must determine if Section 232(b) authorizes installing license fee system).

121. See *id.* at 559, 570-71 (indicating no statutory intent preventing President from enacting monetary exactions).

122. See *Severstal*, 2018 Ct. Int'l Trade LEXIS 38, at \*5-6 (setting forth factual background to cause of action). "The steel being imported by plaintiffs is shipped from Russia and is thus subject to the 25 percent tariff levied by Proclamation No. 9705. Plaintiffs . . . seek a preliminary injunction to prevent the government from collecting the additional 25 percent tariff." *Id.* See generally Proclamation No. 9705, 83 Fed. Reg. 11,625 (Mar. 8, 2018).

123. See *Severstal*, 2018 Ct. Int'l Trade LEXIS 38, at \*18 (claiming President seriously exceeded his statutory authority). "Plaintiffs argue that the President has misconstrued Section [232] by over-reading what can constitute a threat to national security, in finding that steel imports currently represent such a threat." *Id.* at \*22. "[P]laintiffs argue that the aforementioned statement regarding NAFTA . . . reveal[s] that the President's stated national security motives were pretextual, and the President has clearly read Section [232] as granting authority to adopt tariffs for purely economic reasons, including to bolster his position in trade renegotiations." *Id.* at \*26.

124. See *Severstal Exp. GMBH v. United States*, No. 18-00057, 2018 Ct. Int'l Trade LEXIS 38, at \*27-28

Finally, in *Silfab Solar*, three manufacturers of crystalline silicon photovoltaic (CSPV) cells challenged Section 201, which was used by the President to impose 30% tariffs on CSPV cells in Proclamation No. 9693.<sup>125</sup> On appeal, the Federal Circuit added to the second theme of the common judicial approach to delegation questions—that judicial inquiries into the President’s rationale for action are virtually nonexistent.<sup>126</sup>

## 2. *Anticipating the Return to a Balanced, Three-Branch System*

The President has too much power under Section 232, and with a judiciary unwilling to revisit its jurisprudence, the effectiveness of judicial review of enacted tariffs will remain opaque.<sup>127</sup> The most viable solution for Congress would be to enact legislation that would check the executive branch by returning to Congress much of the trade power it had delegated to the President during the early twentieth century.<sup>128</sup> Congress could restrict what countries or imports the President can declare a national security threat, and effectively take back its constitutional power from the President because Trump’s major deviation from the intent and purpose of Section 232—as well as Section 201 and Section 301—

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(Apr. 5, 2018) (finding President did not exceed statutory authority). *Severstal* provided:

Plaintiffs have pointed to neither statutory authority nor legislative history which suggest that Section [232](d) clearly forecloses the President from finding a threat to national security due to the overall economic situation of the steel industry. Where, as here, an industry is found to produce goods vital to U.S. national security, the court finds it highly unlikely that Presidential statements indicating an overarching economic rationale for Section [232] tariffs are clearly inconsistent with that statute’s grant of authority.

*Id.* (citation omitted).

125. See *Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1344 (Fed. Cir. 2018) (providing lawsuit’s characteristics). *Silfab Solar* provided that “under the NAFTA Statute, the President must determine whether the tariffs apply to Canadian imports.” *Id.* Notwithstanding the International Trade Commission’s findings, President Trump determined that CSPV imports from Canada accounted for a substantial share of total imports, and thus contributed to serious injury or threat of serious injury to U.S. industry. *Id.*

126. See *id.* at 1346 (clarifying importance of CIT’s “injury” finding versus its less important “recommendations” before presidential action). The decision in *Silfab Solar* demonstrated the International Trade Commission need not suggest a recommendation for remedy, but only find that serious injury or threat thereof exists before the President carries out his own largely unhindered tariff implementation strategy. *Id.*; see *United States v. George S. Bush & Co.*, 310 U.S. 371, 379-80 (1940) (affirming President’s judgment no more subject to judicial review than if Congress itself exercised judgment); *Michael Simon Design, Inc. v. United States*, 609 F.3d 1335, 1340 (Fed. Cir. 2010) (demonstrating lack of limitations in statutory language means President’s actions not judicially reviewable); *Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 89 (Fed. Cir. 1985) (indicating President’s findings of fact and motivations for actions not subject to review).

127. See *supra* note 97 and accompanying text (explaining lack of intelligible principle in statute leaves President unchecked).

128. See *Altschuler, supra* note 16 (suggesting legislation may ultimately prove Congress’s best method of regaining control over trade); *supra* Section IIA (showing influx of executive-controlled tariff policy by early twentieth century).

exceeds the authority Congress originally delegated.<sup>129</sup> In doing so, it would restore faith in the constitutional system of separation of powers and reinstate a balanced government.<sup>130</sup>

### C. *Uncertain Implications on the International Stage*

From an international perspective, the Trump Administration's Section 232 tariffs have been and will likely continue to be challenged at the WTO, based on the argument that the United States is violating its promises as a member of the international organization.<sup>131</sup> The United States, however, has routinely argued that the national security exception found in Article XXI of GATT applies, and the WTO panel does not have the power to deliberate the merits of a member's decision to invoke the exception.<sup>132</sup> In April of 2019, a WTO dispute settlement panel issued a landmark ruling in a case between Russia and Ukraine, in which Russia, like the United States, argued that it could impose trade-restrictive measures in the name of national security.<sup>133</sup> The panel ultimately rejected the Russian (and American) argument that the circumstances under which the exception was invoked are nonjusticiable.<sup>134</sup> Although this is merely the beginning of the WTO's deliberations into the national security question—and future panel decisions could very well determine the opposite to be true—this decision indicates that a venue remains open for importers to the United States, such as AIIS, to bring and potentially succeed on their challenges to the Trump Administration's tariffs.<sup>135</sup>

## IV. CONCLUSION

Courts are unwilling to closely scrutinize presidential action in relation to its

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129. See U.S. CONST. art. I, § 8, cl. 1 (conferring power to regulate commerce on Congress); Olsen, *supra* note 17 (mentioning Senator Charles Grassley keen to take back power over tariffs through legislation); *supra* note 14 (outlining purposes of U.S. trade laws). A step in the right direction would be to pass Senator Rand Paul's Regulations from the Executive in Need of Scrutiny Act, also known as the REINS Act, which would mandate congressional approval of any regulation put forth by the executive branch that creates an economic impact of \$100 million or more. See Olsen, *supra* note 17.

130. See THE FEDERALIST NO. 51, *supra* note 16, at 264 (James Madison) (mentioning each department must stick to its "constitutional means" to resist encroachment by other departments); Altschuler, *supra* note 16 (calling for bipartisan agreement reasserting Congress's authority over trade to foreign countries).

131. See CONG. RESEARCH SERV., *supra* note 64, at 22 (describing China's allegation of United States violating most-favored nation treatment). For example, China brought a dispute in April of 2018 and requested a panel in October. *Id.* at 21-22.

132. See *id.* at 23-24 (explaining "self-judging" nature of national security exception claim).

133. See Reinsch & Caporal, *supra* note 17 (introducing first WTO panel decision on justiciability of grounds for invoking national security exception).

134. See *id.* (explaining panel's decision and outlining steps for reviewing country's decision to invoke national security exception).

135. See Barshefsky et al., *supra* note 17 (introducing issues Trump Administration will face on international level despite failure of domestic constitutional challenge).



exercise under a statute supported by an intelligible principle guiding congressional delegation of authority to the President. In *American Institute for International Steel, Inc. v. United States*, the CIT ruled in favor of the President because the complaint lacked originality, from a legal perspective, for the court to acknowledge the claim to be novel in such a way that it would overrule its previous decisions permitting presidential discretion within the bounds of a constitutional delegation of statutory power. With a final decision that, in essence, reiterates the findings of *Algonquin*, it appears as if U.S. courts have firmly committed themselves to broadly deferring to the President on the national security question, especially when the executive makes decisions under properly delegated power from Congress in the form of the Trade Expansion Act of 1962 or the Trade Act of 1974. Until Congress or international players decide to challenge the President's use of those statutes and his determinations of certain imports as threats to national security, the President will continue to "trump" the balance of power.

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