"Essentially Limitless": Restraining Administrative Overreach Under Section 232

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ABSTRACT

In March 2018, the Trump Administration employed a little-known trade measure, known as Section 232 for its location in the Trade Expansion Act of 1962, to impose broad tariffs on imports of steel and aluminum. Section 232 allows the President to impose tariffs to protect against imports that "threaten to impair the national security." Domestic and foreign stakeholders have pushed back against the Administration's reading of the law by filing complaints with the World Trade Organization (WTO), filing lawsuits in U.S. courts, and advancing bills to limit the President's authority under Section 232. However, the WTO is not well-positioned to define national security interests for its member states either through amendment of its treaties or by Appellate Body decision. Nor is a challenge in the United States court system likely to succeed without reconsideration of the non-delegation doctrine or Chevron deference. Legislation is therefore the best method for restricting the scope of executive authority under Section 232. Congress should pass the Bicameral Congressional Trade Authority Act of 2019 requiring a joint resolution of Congress to implement Section 232 remedies and involving the Department of Defense in the investigation.

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INTRODUCTION

The Trump Administration has been criticized for its use of a little-known trade law designed to protect against imports that "threaten to impair the national security."[1] The Administration employed the trade measure, known as Section 232 for its location in the Trade Expansion Act of 1962,[2] to impose broad tariffs on imports of steel and aluminum, and has conducted investigations of automobiles and auto parts and uranium products. A wide range of domestic and foreign stakeholders views the Administration's interpretation of "national security" as a bad-faith reading of the law, calculated to deliver on protectionist campaign promises.[3]

Those stakeholders are pushing back. Many countries, including several key U.S. allies and trading partners, filed complaints with the World Trade Organization (WTO).[4] Domestically, a trade association representing steel-

1. 19 U.S.C. § 1862(b)(3)(A) (2018). See *infra* notes 41–49 for examples of criticism.

2. 19 U.S.C. § 1862 (2018).

3. *See, e.g.*, *Tariffs: Implications for U.S. Foreign Policy and the International Economy: Hearing Before the S. Foreign Relations Comm.*, 115th Cong. 3–4 (2018) (statement of Joshua Bolten, President and CEO, Business Roundtable). President Trump and several advisers declared that these tariffs fulfill a campaign promise to protect the steel industry against unfair imports. *See, e.g.*, Corey Lewandowski, *Trump's Pro-American Trade Policy Is Just What He Promised*, THE HILL, Mar. 7, 2018, https://thehill.com/opinion/white-house/377111-trumps-pro-american-trade-policy-is-just-what-he-promised [https://perma.cc/52X6-LF2R]; Peter Navarro, *President Trump Is Keeping His Promise to Defend Our Steel and Aluminum Industries*, USA TODAY, Mar. 12, 2018, https://www.usatoday.com/story/opinion/2018/03/12/president-trump-keeping-his-promise-defend-our-steel-and-aluminum-industries-peter-navarro-column/414720002/ [https://perma.cc/XS8B-T74G].

4. *See, e.g.*, Request for Consultations by China, *United States — Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS/544/1 (Apr. 9, 2018); Request for Consultations by Canada, *United States — Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS/550/1 (June 6,

importing companies filed a lawsuit at the Court of International Trade (CIT).[5] Additionally, several members of Congress have introduced bills to limit the President's authority under Section 232.[6] But those efforts may not be enough to limit executive authority.

This note examines several possible institutions that might be well-positioned to challenge the President's determination that certain imports are a threat to impair national security. It first explores the potential for restriction by the WTO, either through an amendment to the General Agreement on Tariffs and Trade (GATT) or by a decision of the Appellate Body. Second, it considers judicial review as an independent method of restricting executive action. Third, this note considers an array of potential legislative solutions, including: (1) involving the International Trade Commission (ITC) in determining threats to national security, (2) extending congressional mechanisms for rescinding administrative action, and (3) requiring congressional approval of executive branch determinations. This note concludes that Congress is best positioned to check the President's overreach and should do so by permitting Section 232 determinations when Congress approves those determinations by joint resolution.

I. ACTORS AT THE INTERSECTION OF TRADE AND NATIONAL SECURITY

A. World Trade Organization and the National Security Exception

The WTO is the premier international organization that creates rules for trade between nations and settles disputes over those rules. Its legal basis is found in the WTO Agreements, treaties that have been negotiated and signed by almost all countries.[7] Non-discrimination is the most basic principle of the WTO, and it is codified in the GATT in the form of most-favored nation (MFN) and national treatment provisions.[8] The MFN provision prevents a state from imposing higher tariffs on one trading partner than on another, while the national treatment provision prevents a state from treating foreign businesses differently from its own. However, these principles are not universal; most famously, Article XXIV allows deviation from the MFN principle in order to create free trade agreements.[9]

2018); Request for Consultations by Mexico, *United States — Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS/551/1 (June 7, 2018); Request for Consultations by the European Union, *United States — Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS/548/1 (June 6, 2018).

5. Am. Inst. for Int'l Steel v. United States, No. 19-37, slip op. at 7 (Ct. Int'l Trade Mar. 25, 2019).

6. *See, e.g.*, Trade Authority Protection Act, H.R. 5760, 115th Cong. (2018); Trade Security Act of 2018, S. 3329, 115th Cong. (2018); A bill to amend the Trade Expansion Act of 1962 to require Congressional approval before the president adjusts imports that are determined to threaten to impair national security, S. 3013, 115th Cong. (2018); Promoting Responsible and Free Trade Act, H.R. 6923 (2018).

7. *Overview*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm [https://perma.cc/S9KU-585Z] (last visited May 22, 2019).

8. General Agreement on Tariffs and Trade 1994 art. II, Apr. 15, 1994, 1867 U.N.T.S. 190.

9. *Id.* art. XXIV.

The WTO enforces the commitments made in its treaties through its dispute settlement system. The dispute settlement system has two layers: (1) the Dispute Settlement Body (DSB) and (2) the Appellate Body.[10] When a member country believes it has been injured by another country's violation of WTO obligations, it files a complaint with the DSB. After a consultation process with the country that has taken the action that is deemed contrary to WTO obligations, the complainant can request appointment of a panel of three experts to adjudicate the dispute.[11] After the panel has received evidence and briefs, it circulates a draft report of its finding to the disputing parties for comments.[12] The panel report is adopted by the DSB unless a party notifies the DSB of its intention to appeal.[13]

If one party appeals, a three-member panel of the Appellate Body, which has seven permanent members, reviews each party's argument.[14] It accepts factual findings by the DSB but may uphold, modify, or reverse legal conclusions of the panel.[15] Where an adopted panel or Appellate Body decision concludes that a member state's law or regulation is inconsistent with a WTO commitment, the member state is required to change its law to conform with WTO obligations.[16] If the member refuses to comply, the DSB may authorize the complainant to impose retaliatory tariffs against the offending party equal to the damage it has suffered.[17] Members have applied these tariffs against the United States and European Union in sophisticated ways, targeting politically sensitive industries or the home regions of key elected officials.[18] The losing party may also offer the injured party compensation in the form of reduced tariffs, but this remedy is rarely used because the MFN principle requires the party to extend the same tariff reduction to all other WTO members.

The WTO has long protected the ability of member states to impose tariffs in the name of national security. Article XXI of the GATT states that the agreement does not:

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

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10. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.

11. *Id.* art. 4, 6.

12. *Id.* art. 11.

13. *Id.* art. 16. The DSB may also reject the panel report by consensus, but this has never happened. *The Process — Stages in a Typical WTO Dispute Settlement Case*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s4p1_e.htm [https://perma.cc/5AX9-VGMP] (last visited May 22, 2019).

14. Understanding on Rules and Procedures Governing the Settlement of Disputes, *supra* note 10, at art. 17.

15. *Id.*

16. *Id.* art. 19.

17. *Id.* art. 22.

18. *See, e.g.*, Geoff Winestock and Neil King Jr., *EU to Target GOP's Swing States in Payback for Bush Steel Tariffs*, WALL ST. J., Mar. 22, 2002, https://www.wsj.com/articles/SB101674938851653120 [https://perma.cc/4WZR-Q2JK].

> fissionable materials or the materials from which they are derived; (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; [or] (iii) taken in time of war or other emergency in international relations.[19]

Discussions within the Preparation Committee indicate that the drafters of the GATT struggled to create language that properly balanced security and commercial interests.[20] Drafters worried that, if dispute settlement panels construed Article XXI too broadly, "under the guise of security, countries will put on measures which really have a commercial purpose."[21] The WTO however, does not police those worries. Indeed, it generally declines to hear Article XXI cases, hesitating to declare measures enacted under the guise of security inconsistent with treaty obligations.[22]

B. United States and Section 232 Tariffs

Section 232 of the Trade Expansion Act of 1962 (Section 232) allows the President to protect industries vital to national security from import competition by imposing tariffs.[23] The legislation became law in the same month as the Cuban Missile Crisis,[24] shortly after the United States placed an embargo on all Cuban goods.[25] Section 232 authorizes the President to impose restrictions on certain imports based on the Department of Commerce's determination that the targeted products are "being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security."[26] The Department of Commerce may initiate an investigation: (1) in response to an industry petition, (2) by request of the head of any U.S. department or agency, or (3) through self-initiation by the executive branch.[27] The Trade Expansion Act establishes a clear procedure for a Section 232 investigation, but the executive branch's interpretation of "national security" and proposed remedy is subject to broad discretion.[28]

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19. General Agreement on Tariffs and Trade 1994, *supra* note 8, at art. XXI.

20. WORLD TRADE ORG., ANALYTICAL INDEX OF THE GATT 600 (1994), https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art21_gatt47.pdf [https://perma.cc/J56F-VDEA].

21. *Id*.

22. *See id*. at 600–05 (analyzing historical invocations of Article XXI).

23. 19 U.S.C. § 1862 (2018).

24. Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 872 (1962). The Cuban Missile Crisis was a thirteen-day standoff between the United States and the Soviet Union from October 16–28, 1962 concerning Soviet missiles placed in Cuba. *See The Cuban Missile Crisis, October 1962*, OFF. OF THE HISTORIAN, DEP'T OF STATE, https://cdn.loc.gov/service/ll/fedreg/fr027/fr027026/fr027026.pdf [https://perma.cc/BX5K-NKCV].

25. Proclamation No. 3447, 27 Fed. Reg. 1,085 (Feb. 7, 1962).

26. § 1862(b)(3)(A).

27. § 1862(b)(1).

28. *See* FEA v. Algonquin SNG, Inc., 426 U.S. 548 (1976) (affirming that Congress granted the President broad authority to duties and licensing fees rather than restricting the President to imposing quotas).

The Bureau of Industry and Security (BIS) in the Department of Commerce conducts the Section 232 investigation in consultation with other agencies to determine the effects of the specified imports on national security.[29] Public hearings and consultations may also be held in the course of the investigation.[30] Section 232 directs BIS to consider certain factors, including: (1) domestic production needed for projected national defense requirements; (2) domestic capacity; (3) the availability of human resources and supplies essential to the national defense; and (4) potential unemployment, loss of skills or investment, or decline in government revenues resulting from displacement of any domestic products by excessive imports.[31] The Secretary of Commerce has 270 days from the investigation's initiation date to prepare a report advising the President on whether the targeted product is being imported "in such quantities or under such circumstances as to threaten to impair" U.S. national security and providing recommendations for remedy based on the findings.[32] The President has ninety days after receiving the report to adopt, reject, or not act on the Secretary's recommendations.[33] After making a decision, the President has fifteen days to implement the action and thirty days to submit a written statement to Congress explaining the action or inaction.[34]

The executive branch has rarely used Section 232. The Department of Commerce (and the Department of the Treasury before it) completed a total of twenty-six Section 232 investigations between 1962 and 2016, and two additional cases remain ongoing as of the publication of this note.[35] In sixteen of these cases, the Secretary of Commerce determined that the targeted imports did not threaten to impair national security.[36] Ten times, the Secretary of Commerce determined that the targeted imports threatened to impair national security and made recommendations to the President, who acted on eight of those recommendations.[37] The last investigation before the Trump Administration occurred in 2001.[38] Prior to the steel and aluminum investigation, the last time a President took remedial action using Section 232 was in 1982.[39]

By contrast, the Trump Administration has been relatively active in its use of Section 232 investigations. The Trump Administration initiated Section 232 investigations on U.S. steel and aluminum imports shortly after taking office.[40]

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29. *See* RACHEL FEFER ET AL., CONG. RESEARCH SERV., SECTION 232 INVESTIGATIONS: OVERVIEW AND ISSUES FOR CONGRESS 2 (2019).
30. 19 U.S.C. § 1862(b)(2)(A)(iii) (2018).
31. § 1862(d).
32. § 1862(b)(3)(A).
33. *Id*.
34. § 1862(b)(2)(A)(iii).
35. FEFER, *supra* note 29, at 3–5.
36. *Id*.
37. *Id*.
38. *Id*.
39. *Id*.
40. *Id*. at 5–6.

After investigating, Secretary of Commerce Wilbur Ross released reports concluding that steel and aluminum are important to U.S. national security and displacement of domestic industries by excessive quantities of imports harmed the domestic economy.[41] The report recommended several possible remedies, including import quotas, broad tariffs on steel and aluminum imports, and larger tariffs applied to a smaller group of countries.[42] The Department of Defense released a memo arguing that steel and aluminum imports did not, in fact, raise concerns based on its ability to obtain steel for defense needs.[43] Nevertheless, in March 2018, President Trump applied twenty-five percent and ten percent tariffs, respectively, on certain steel and aluminum imports.[44]

Several months after the imposition of steel and aluminum tariffs, the Trump Administration initiated a Section 232 investigation on U.S. automobile and automobile part imports.[45] In response to petitions filed by domestic uranium ore and titanium sponge producers, the Administration initiated new investigations in July 2018 and March 2019, respectively.[46] The investigation into automobiles and automobile parts has especially drawn criticism that it might impose tariffs based on an overbroad interpretation of "national security" because these goods are less associated with the defense industry than even steel, aluminum, or uranium.[47]

Congress, business groups, and trading partners of the United States have criticized the Administration's recent use of Section 232. These critics have questioned the use of the trade statute and the proper interpretation of threats to national security on which Section 232 investigations are based. For example, the Senate passed a non-binding resolution by a vote of 88-11 to limit the President's authority under Section 232.[48] The U.S. Chamber of Commerce press release after the automobiles and auto parts investigation was announced criticized the decision as abuse of the Section 232 power and claimed that it would "deal a staggering blow to the very industry it purports to protect and would threaten to

41. U.S. DEP'T OF COMMERCE, THE EFFECT OF IMPORTS OF STEEL ON THE NATIONAL SECURITY (2018), https://www.commerce.gov/sites/default/files/the_effect_of_imports_of_steel_on_the_national_security_-_with_redactions_-_20180111.pdf [https://perma.cc/69KR-LKVX].

42. *Id*.

43. Memorandum from James Mattis, Sec'y of Def., on Response to Steel and Aluminum Policy Recommendations (Feb. 16, 2018), https://www.commerce.gov/sites/default/files/department_of_defense_memo_response_to_steel_and_aluminum_policy_recommendations.pdf [https://perma.cc/458C-NFT4].

44. *See* FEFER, *supra* note 29, at 7–8.

45. *Id*. at 1.

46. *Id*.

47. For example, Senator Portman mocked the idea of "minivans from Canada" as a threat to national security. William Mauldin & Mike Colias, *New Tariffs Threaten to Boost Prices of Imported Cars and Parts*, WALL ST. J. (Feb. 15, 2019), https://www.wsj.com/articles/new-tariffs-threaten-to-boost-prices-of-imported-cars-and-parts-11550236094 [https://perma.cc/68J3-AGCV].

48. 164 Cong. Rec. S4891 (daily ed. July 11, 2018), https://www.congress.gov/crec/2018/07/11/CREC-2018-07-11-pt1-PgS4890.pdf [https://perma.cc/93CX-A4B8].

ignite a global trade war."[49] And the National Association of Manufacturers warned that "incorrectly using the 232 statute will create unintended consequences for U.S. manufacturing workers."[50]

Multiple trading partners have shown skepticism toward tariffs imposed through a broad interpretation of national security and filed WTO complaints questioning whether the national security justification was made in good faith. China filed a complaint with the WTO alleging that the use of Section 232 is actually an application of safeguard provisions using a bad-faith application of a national security justification to avoid procedural requirements.[51] The U.S. steel industry has previously used safeguard provisions for protection against import competition, but the WTO has found several such measures invalid, including the U.S. safeguards imposed on steel imports in 2001.[52] China's complaint therefore reflects a belief that the United States is attempting to use Section 232 as a loophole to avoid the WTO scrutiny that would be applied to safeguard provisions. Several prominent U.S. allies and trading partners, including Canada, Mexico, and the European Union, have since filed complaints with the WTO, alleging violations of treaty obligations.[53] Canada claimed that it is "entirely inappropriate to view any trade with Canada as a national security threat to the United States,"[54] and the European Union alleged that the United States "sought to use the threat of trade restrictions as leverage to obtain concessions from the EU."[55]

II. PROBLEMS PRESENTED BY IMPROPER USE OF SECTION 232

Using Section 232 where no threat to national security exists harms the United States and the rules-based international trading system.

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49. Press Release, U.S. Chamber of Commerce, U.S. Chamber Statement on Potential Auto Tariffs (May 24, 2018), https://www.uschamber.com/press-release/us-chamber-statement-potential-auto-tariffs [https://perma.cc/C3GB-8ZGB].

50. Press Release, National Association of Manufacturers, NAM Statement on Section 232 Investigation into Auto Imports (May 24, 2018), http://www.nam.org/Newsroom/Press-Releases/2018/05/NAM-Statement-on-Section-232-Investigation-into-Auto-Imports/ [https://perma.cc/YDN5-MMZ9].

51. Request for Consultations by China, *United States — Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS/544/1 (Apr. 9, 2018).

52. *See, e.g.*, Appellate Body Report, *United States — Definitive Safeguard Measures on Imports of Certain Steel Products*, WTO Doc. WT/DS248/AB/R (adopted Nov. 10, 2003).

53. *See* FEFER, *supra* note 29, at 18; Request for Consultations by Canada, *United States — Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS/550/1 (June 6, 2018); Request for Consultations by Mexico, *United States — Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS/551/1 (June 7, 2018); Request for Consultations by the European Union, *United States — Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS/548/1 (June 6, 2018).

54. Press Release, Global Affairs Canada, Statement by Canada on Steel and Aluminum (Mar. 1, 2018), https://www.canada.ca/en/global-affairs/news/2018/03/statement-by-canada-on-steel-and-aluminum.html [https://perma.cc/4SS7-WYFB].

55. Press Release, European Commission, European Commission Reacts to the US Restrictions on Steel and Aluminum Affecting the EU (May 31, 2018), http://europa.eu/rapid/press-release_IP-18-4006_en.htm [https://perma.cc/QLJ7-ETB8].

A. Harms to the United States

The harm to the United States is threefold. First, executive use of Section 232 without a threat to impair national security harms the country's system of governance because it exceeds the authority delegated by Congress. Second, designating imports from strategic allies as threats to national security harms important security relationships. Third, tariffs impose costs upon consumers and cause inefficient allocation of resources.

First, without a threat to national security, the executive action does not conform with Section 232 and thus exceeds the authority delegated by Congress. Article I, Section 8 of the U.S. Constitution gives Congress the power "to regulate Commerce with foreign Nations."[56] Though Congress has the sole power to impose tariffs under this section of the Constitution, it may delegate certain aspects of its power to the executive branch where the delegation contains an "intelligible principle" upon which the executive branch can base its regulations.[57] In this case, Section 232 delegates the Article I, Section 8 power to regulate commerce with foreign countries to the executive branch by giving the President the authority to impose tariffs where a good "is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security."[58] If the President were allowed to impose tariffs where national security is not threatened, the action would be unconstitutional because it exceeds the authority delegated by Congress.

Second, using Section 232 as a path of least resistance to imposing tariffs harms security relationships with historical allies. The President has broad authority under Article II of the Constitution to conduct foreign relations and may certainly change or end diplomatic relationships with historical allies.[59] In addition, the President is authorized to declare that imports from historical allies are a threat to impair national security under Section 232. But a President seeking to unilaterally impose tariffs on imports without regard for the method by which they are imposed might choose to use Section 232 because it has the least potential for confrontation. Section 232 investigations do not involve independent agencies,[60] and the national security justification avoids the WTO scrutiny of safeguards.[61] However, declaring that imports from historical allies are a threat to impair national security where no such threat exists is sure to harm relationships with those countries. Canadian Prime Minister Justin Trudeau called the label of national security threat "insulting and unacceptable" in a television interview.[62]

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56. U.S. CONST. art. I, § 8.

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

58. 19 U.S.C. § 1862 (2018).

59. *See* U.S. CONST. art. II, § 2.

60. See *supra* Section I.B for discussion of the Section 232 investigation process.

61. *See, e.g.*, Appellate Body Report, *United States — Definitive Safeguard Measures on Imports of Certain Steel Products*, WTO Doc. WT/DS248/AB/R (adopted Nov. 10, 2003).

62. Interview by Chuck Todd, Moderator of Meet the Press, with Justin Trudeau, Prime Minister, Canada, on NBC (June 2, 2018).

And in its official comment on the automobiles and auto parts investigation, the European Union claimed that declaring it a threat to U.S. national security "weakens the bonds with friends and allies."[63] Therefore, potential for harm to security relationships makes the use of Section 232 suitable only in response to genuine threats to national security.

Third, unjustified tariffs are a net economic burden on the United States. Tariffs are taxes on consumers that reduce the efficiency of resource allocation and decrease economic growth. A system of voluntary exchange without government limitation yields the most economically efficient allocation of scarce resources.[64] Though efficient allocation of resources maximizes the creation of wealth, these gains are not equal across industries and regions.[65] As a result, governments often impose tariffs to protect the losers of trade at the expense of wealth creation.[66] While these tariffs benefit domestic industry by raising import prices to match or exceed domestic prices, consumers pay more for goods and services than they would in a less-burdened market. An analysis by the think tank American Action Forum estimated the cost of the Section 232 tariffs on steel and aluminum at $7.5 billion.[67] For example, analyses by the Peterson Institute for International Economics[68] and the Center for Automotive Research[69] each found

63. European Union, Comment Letter on Section 232 National Security Investigation of Imports of Automobiles and Automobile Parts, 83 Fed. Reg. 24,735 (July 9, 2018), https://www.regulations.gov/document?D=DOC-2018-0002-2259 [https://perma.cc/KF6M-N4A8].

64. *See* Daniel J. Ikenson, *Trade on Trial, Again*, CATO POL'Y REP. (2016), https://www.cato.org/policy-report/mayjune-2016/trade-trial-again [https://perma.cc/367R-CEA6]; *see generally* MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962).

65. The Stolper-Samuelson Theorem provides the theoretical framework for unequal returns to human capital-intensive labor and lower skilled labor because of expanded international trade. Stolper and Samuelson theorized that increasing the relative price of a good will create higher returns to the factor of production used most intensively in the production of the good and lower returns to the other factor. Wolfgang F. Stolper & Paul A. Samuelson, *Protection and Real Wages*, 9 REV. ECON. STUD. 58, 73 (1941); *see also* David Autor, David Dorn & Gordon Hanson, *The China Shock: Learning from Labor-Market Adjustment to Large Changes in Trade*, 8 ANNUAL REV. ECON. 205 (2016) (discussing the distributional impact on U.S. industries and labor markets of China's integration into the world economy in the 1990s and 2000s).

66. *See, e.g.*, Eduardo Luzio & Shane Greenstein, *Measuring the Performance of a Protected Infant Industry: The Case of Brazilian Microcomputers*, 77 REV. ECON. STAT. 622, 622–23 (1995) (measuring the performance of the Brazilian microcomputer industry, which was subject to a significant domestic content requirement, relative to international competitors with more liberalized markets); *see also generally* RONALD ROGOWSKI, COMMERCE AND COALITIONS: HOW TRADE AFFECTS DOMESTIC POLITICAL ALIGNMENTS (1989) (testing against historical evidence a hypothesis that relative differences in factor of production endowments lead to either class-based or urban-rural conflict in trade policy).

67. JACQUELINE VARAS, AM. ACTION F., THE TOTAL COST OF TRUMP'S TARIFFS (Feb. 14, 2019), https://www.americanactionforum.org/research/the-total-cost-of-trumps-new-tariffs/ [https://perma.cc/KAC7-WFBN].

68. MARY E. LOVELY, JÉRÉMIE COHEN-SETTON & EUIJIN JUNG, PETERSON INST. INT'L ECON., VEHICULAR ASSAULT: PROPOSED AUTO TARIFFS WILL HIT AMERICAN CAR BUYERS' WALLETS (2018), https://piie.com/system/files/documents/pb18-16.pdf [https://perma.cc/63H4-9EY7].

69. MICHAEL SCHULZ ET AL., CTR. AUTO. RESEARCH, CONSUMER IMPACT OF POTENTIAL U.S. SECTION 232 TARIFFS AND QUOTAS ON IMPORTED AUTOMOBILES & AUTOMOTIVE PARTS 6 (2018), https://www.cargroup.org/wp-content/uploads/2018/07/NADA-Consumer-Impact-of-Auto-and-Parts-Tariffs-and-Quotas_July-2018.pdf [https://perma.cc/MY5N-T7KD].

that car prices would increase up to nearly $7,000 if the ongoing Section 232 investigation results in a twenty-five percent tariff on automobiles and auto parts. Tariffs also negatively affect businesses. The CEO of Ford Motor Company estimated that the steel and aluminum tariffs have cost the company $1 billion in profit.[70] Harley-Davidson announced in its 2018 Q4 earnings call that it expected tariffs to cost the company between $100 million and $120 million in 2019,[71] months after it announced it will shift some production of motorcycles to Europe to avoid retaliatory tariffs by the European Union.[72] Because of these costs, Congress has decided that only specific circumstances justify tariffs and delegated the authority to impose tariffs in only those circumstances.[73] In Section 232, Congress stated that one such circumstance is to protect against imports that threaten to impair national security. However, where no threat to national security exists, Congress has found no justifiable benefit of the tariffs that exceed the costs to society.

B. Harm to the Rules-Based System of International Trade

Use of Section 232 under a false pretense of national security also harms the rules-based system of international trade. Unlike the laws of states, international law operates on a system of horizontal enforcement. Rather than the WTO prosecuting and punishing states that violate its treaties, an injured state must file a complaint.[74] If successful, retaliatory tariffs imposed by the injured party—not the WTO—provide the coercive power to compel the state in violation to comply. But a remedy of tit-for-tat violation of treaty obligations defeats the object and purpose of the WTO. The result is higher tariffs applied unequally across countries.[75] While the rules-based international trading system has enough legitimacy that states in violation generally come into compliance, an issue as core to state sovereignty as defining a state's own national security interests threatens that system.

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70. Interview by David Westin, Anchor of Bloomberg Daybreak Americas, with Jim Hackett, CEO, Ford Motor Co., on Bloomberg TV (Sept. 26, 2018).

71. John Olin, CFO, Harley-Davidson, Q4 2018 Results Earnings Conference Call (Jan. 29, 2019).

72. Harley-Davidson, Inc., Securities and Exchange Commission Form 8-K (June 25, 2018), http://investor.harley-davidson.com/node/17401/html [https://perma.cc/R5XH-GQ6Z].

73. In addition to Section 232, Congress has delegated authority to the executive branch to impose tariffs in retaliation to unfair trade practices by trading partners and as a temporary emergency safeguard to protect a domestic industry from a sudden, unforeseeable surge in imports. *See* 19 U.S.C. § 3501 (2018); 19 U.S.C. § 2101 (2018).

74. WORLD TRADE ORG., *supra* note 20.

75. For example, if China's WTO case is successful and it imposes retaliatory tariffs against the United States, average tariff levels across WTO members will be higher, and China's tariffs will be less equal across countries. *See* Steve Charnovitz, *Rethinking WTO Trade Sanctions*, 95 AM. J. INT'L L. 792, 792 (2001) ("The most salient feature of dispute settlement in the World Trade Organization (WTO) is the possibility of authorizing a trade sanction against a scofflaw member government. This feature, however, is a mixed blessing. On the one hand, it fortifies WTO rules and promotes respect for them. On the other hand, it drains away the benefits of free trade and provokes 'sanction envy.'").

Most of these problems exist even when imports may threaten to impair national security, but Congress delegated this authority to the President to create a more unitary decision-making process on issues relating to the country's security. Consequently, excessive deference to the executive branch allows the President to make decisions on policy trade-offs in situations that Congress never intended. However, it is unclear whether any institution is better positioned than the President to decide that import competition against a domestic industry constitutes a threat to national security. The WTO, U.S. courts, and Congress can all act to restrict the President's use of Section 232. Accordingly, this note next analyzes those institutions' abilities to ensure that Section 232 tariffs accurately reflect the threat to national security.

III. WTO RESTRICTION ON THE NATIONAL SECURITY JUSTIFICATION

The WTO is not well positioned to define national security interests for its member states. The WTO has historically avoided interpreting Article XXI of the GATT, which provides an exception for member states to act in their national security interest. But it now faces pressure to serve as a check on the United States tariffs imposed under the guise of national security.[76] Non-enforcement of Article XXI creates potential for abuse because it allows a loophole to form by which a state could claim that a trade barrier is in its national security interest to avoid compliance with other WTO requirements. To avoid this, the WTO could restrict a state's ability to define its national security interest through amendment to Article XXI or by Appellate Body decision. Both approaches are flawed, however, and could irreparably damage the institution's relationship with the United States.

WTO member states invoked Article XXI several times in disputes under the GATT dispute resolution systems that preceded the WTO. The United States first invoked the national security exception in 1949 when Czechoslovakia challenged U.S. export licensing controls that discriminated against certain destination countries for national security reasons.[77] The GATT contracting parties rejected the complaint, and one country stated that "every country must be the judge in the last resort on questions relating to its own security. On the other hand, every contracting party should be cautious not to take any step which might have the effect of undermining the General Agreement."[78] The idea that "national security" is defined by the state invoking Article XXI was again advanced decades later.

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76. *See, e.g.*, Request for Consultations by China, *United States — Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS/544/1 (Apr. 9, 2018); Request for Consultations by Canada, *United States — Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS/550/1 (June 6, 2018); Request for Consultations by Mexico, *United States — Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS/551/1 (June 7, 2018); Request for Consultations by the European Union, *United States — Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS/548/1 (June 6, 2018).

77. WORLD TRADE ORG., *supra* note 20.

78. *Id.*

During a GATT Council discussion in 1982 on trade restrictions that were applied for non-economic reasons by the European Economic Community (EEC), its member states, Canada, Australia, and the United States declared that Article XXI reflected "inherent rights" that require neither justification nor approval from the GATT contracting parties.[79] The most extensive representation of the competing views on this issue arose out of the 1985 United States trade embargo on Nicaragua. While the United States continued its claim that "national security" is self-defining and not reviewable by the GATT contracting parties, Nicaragua argued that Article XXI should be limited to a right of self-defense against states subject to aggression.[80]

A. Restriction by Amending Article XXI

The WTO could restrict U.S. authority to define its own national security interests by amending Article XXI. Language could be added describing situations where trade restrictions appropriately are exempted by Article XXI, and the dispute settlement panels could measure state actions against those guidelines. However, any dissenting member may reject the proposed amendment because the WTO operates by consensus.[81] For example, the WTO completed negotiations on the Trade Facilitation agreement in 2014, which established requirements for simplification and harmonization of customs processes.[82] But India threatened to vote against adoption of the agreement unless it received protection for its food subsidy programs from challenges claiming they violated WTO obligations.[83] India delayed adoption for several months before securing a "peace clause" commitment from the United States promising not to challenge India's programs.

Similarly, the United States would likely prevent adoption of any amendment that would restrict its authority to define its own national security interests. The United States has made clear throughout the history of the GATT and WTO that it considers the self-defining aspect of Article XXI to be essential to U.S. sovereignty. The history of Article XXI shows that the United States is not the only country to take this position. While there may be general suspicion that some trade restrictions, including the United States' recent use of Section 232, are not actually exempted under Article XXI, few WTO member states would be willing to relinquish the authority they retain under the current language. Therefore,

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79. *Id*.

80. *Id*. at 601. The panel did not decide the issue because the claim's terms of reference stated that "the Panel cannot examine or judge the validity or motivation for the invocation of Article XXI(b)(iii) by the United States." *Id*.

81. Marrakesh Agreement Establishing the World Trade Organization art. IX, Apr. 15, 1994, 1867 U.N.T.S. 154.

82. General Council Decision, Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization, WTO Doc. WT/L/940 (Nov. 27, 2014).

83. *See* Amy Kazmin & Shawn Donnan, *US and India End WTO Stand-Off*, FIN. TIMES (Nov. 13, 2014), https://www.ft.com/content/b0898366-6b0d-11e4-be68-00144feabdc0 [https://perma.cc/L3JZ-3BEN].

restrictions on self-definition of national security interest by treaty would be politically unfeasible.

B. Restriction by Appellate Body Decision

The WTO could also establish principles restricting self-definition of national security interests through an Appellate Body decision. While its members have discussed the scope of Article XXI extensively throughout the institution's history, the Appellate Body has never defined "essential security interests." That said, the DSB recently issued a panel report for the Russia/Ukraine/dispute that may force the WTO Appellate Body to interpret Article XXI.[84] Ukraine brought a claim in 2016 alleging that Russia had blocked transit from Ukraine to third countries, making shipments of goods impossible. Russia responded by claiming the actions were "necessary for the protection of its essential security interests taken in time of war or other emergency in international relations."[85] The United States offered a third-party submission supporting Russia's position by reiterating its own longstanding position that "[e]very Member of the WTO retains the authority to determine for itself those matters that it considers necessary to the protection of its essential security interests."[86]

The DSB panel held that Article XXI is not self-judging because the phrase "which it considers" does not qualify each of the three sub-paragraphs of Article XXI(b).[87] Therefore, a country that invokes Article XXI must objectively meet the requirements in one of Article XXI(b)'s enumerated sub-paragraphs.[88] This requires the DSB and Appellate Body to interpret each sub-paragraph, including "war" and the catchall phrase "emergency in international relations." The panel interpreted "emergency in international relations" to mean "a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state."[89] Ultimately, the panel held that Russia's invocation of Article XXI was justified because "relations between Ukraine and Russia had deteriorated to such a degree that they were a matter of concern to the international community."[90] The United States would surely maintain its position that Article XXI is self-judging in defense of its actions under Section 232. But if that argument fails, the United States might attack the panel's

84. Request for Consultations by Ukraine, *Russia — Measures Concerning Traffic in Transit*, WTO Doc. WT/DS512 (Sept. 21, 2016), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds512_e.htm [https://perma.cc/LD2F-WLB3].

85. General Agreement on Tariffs and Trade 1994, *supra* note 8, at art. XXI(b)(iii).

86. U.S. Third-Party Submission Regarding GATT Article XXI, *Russia — Measures Concerning Traffic in Transit*, WTO Doc. WT/DS512 (Nov. 7, 2017), https://ustr.gov/sites/default/files/enforcement/DS/US.3d.Pty.Sub.Re.GATT.XXI.fin.%28public%29.pdf [https://perma.cc/U2Q7-WMNW].

87. Panel Report, *Russia — Measures Concerning Traffic in Transit*, at 50, WTO Doc. WT/DS512/R (Apr. 5, 2019), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds512_e.htm [https://perma.cc/LD2F-WLB3].

88. *Id.*

89. *Id.* at 42.

90. *Id.* at 54.

strict interpretations of "war" and "emergency in international relations." The panel found that "[w]ar refers to armed conflict," and "political or economic differences between Members are not sufficient, of themselves, to constitute an emergency in international relations."[91] The panel's interpretation appears to categorically exclude economically costly trade wars, and the United States might argue that its national security includes economic security.[92]

Because Ukraine is likely to appeal the DSB panel decision and because there are numerous challenges to the United States tariffs on steel and aluminum, the Appellate Body will have the opportunity to address restrictive state actions that it believes are inconsistent with Article XXI. Appellate Body action would be easier than amending Article XXI because its decisions are adopted by negative consensus. Where one objector can block adoption by treaty, one supporter can ensure adoption by Appellate Body decision. However, such a decision would face backlash because it is not drafted by WTO member states. States ceded specific aspects of their sovereignty when they created the GATT and the WTO, but disagreement over which aspects of sovereignty they have ceded threatens the WTO system. If the WTO Appellate Body tells the United States that it has ceded such a core element of sovereignty as the ability to define what constitutes threats to its own national security, there is a strong possibility that the United States would withdraw from the WTO. The United States has long been discontent with what it views as Appellate Body overreach, but it has taken an aggressive strategy under the Trump Administration to redirect the course of the WTO.[93] Since the beginning of the Trump Administration, the United States has blocked all appointments to the Appellate Body as existing judges' terms end.[94] President Trump has also repeatedly threatened to withdraw from the WTO.[95] While that threat may not currently be politically feasible, national sovereignty and national security are issues that elicit a protective reflex from voters.[96] Voters who are indifferent about the WTO today may turn strongly against it if they perceive it as

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91. *Id.* at 41–42.

92. *See* VARAS, *supra* note 67 ("The president's tariffs, when combined with corresponding retaliation, threaten over $400 billion of traded goods annually.").

93. *See, e.g.*, *Hearing on S. 1919 Before the S. Fin. Comm.*, 110th Cong. 6 (2008) (statement of Warren Maruyama, General Counsel, Office of the U.S. Trade Representative), *cited by* JENNIFER HILLMAN, INST. INT'L ECON. L. THREE APPROACHES TO FIXING THE WORLD TRADE ORGANIZATION'S APPELLATE BODY: THE GOOD, THE BAD AND THE UGLY? 4 n.8 (Dec. 2018), www.law.georgetown.edu/wp-content/uploads/2018/12/Hillman-Good-Bad-Ugly-Fix-to-WTO-AB.pdf [https://perma.cc/M344-AT22]; Roger, P. Alford, *Reflections on US-Zeroing: A Study in Judicial Overreaching by the WTO Appellate Body*, 44 COLUM. J. TRANSNAT'L L. 196 (2006).

94. Frank Langfitt, *U.S. Blocks Appointments of New Judges to World Trade Organization*, NAT'L PUB. RADIO (Oct. 2, 2018), https://www.npr.org/2018/10/02/653570018/u-s-blocks-appointments-of-new-judges-to-world-trade-organization [https://perma.cc/EQ3X-7GHT].

95. *Id.*

96. *See* Frank Newport, *Trump's Foreign Policy and American Public Opinion*, GALLUP (July 12, 2018), https://news.gallup.com/opinion/polling-matters/237134/trump-foreign-policy-american-public-opinion.aspx [https://perma.cc/H4GP-V6A5] (documenting shifts in public opinion in response to security threats).

a threat to U.S. sovereignty and security. The cost of a country as large and involved in world trade as the United States withdrawing from the WTO would be immense if tariff increases became permanent. Without the remedy of the WTO dispute settlement mechanism, other countries would certainly apply reciprocal tariffs. Thus, a willingness by the Appellate Body to rule on such a controversial topic risks destabilizing the entire rules-based system of international trade.

IV. JUDICIAL REVIEW IN U.S. COURTS

United States courts may review the executive branch's determinations of what constitutes a threat to impair national security for compliance with the Administrative Procedure Act, the Trade Expansion Act of 1962, and the U.S. Constitution. However, the judicial branch is ultimately unlikely to serve as a check on the President's use of Section 232.

A. Violation of U.S. Constitution

The CIT recently rejected a lawsuit that argued that Section 232 violates the separation of powers that the Constitution requires. The American Institute for International Steel (AIIS) argued that Section 232 violates the separation of powers because it does not include an "intelligible principle."[97] The lawsuit called the application of Section 232 "essentially limitless" and too broad to be lawfully delegated by Congress because the definition of "national security" is so broad as to include the domestic economic performance of specific industries. In *Field v. Clark*, the Supreme Court established the non-delegation doctrine, which holds that Congress cannot delegate its legislative power to the President.[98] Any legislation that delegates authority to the executive branch must include an intelligible principle to guide the agency.[99] The Court applied the non-delegation doctrine to Section 232 in *FEA v. Algonquin*, in which it held that Section 232 contains an intelligible principle because it requires a cabinet-level determination that imports threaten national security and limits the President's actions to those he deems necessary to protect national security.[100]

While AIIS argued that "there is nothing that the President may or may not take into account in determining whether the national security, as elastically defined, may be threatened or impaired by the imports,"[101] the CIT held that

97. Complaint at 5, Am. Inst. for Int'l Steel v. United States, No. 18-00152 (Ct. Intl. Trade June 27, 2018), http://www.aiis.org/wp-content/uploads/2018/06/EMBARGOED_June_27_AIIS_-Plaintiffs-Complaint.pdf [https://perma.cc/J5DZ-MKKJ].

98. Marshall Field & Co. v. Clark, 143 U.S. 649, 692–94 (1892).

99. J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle . . . , such legislative action is not a forbidden delegation of legislative power").

100. FEA v. Algonquin SNG, Inc., 426 U.S. 548, 559–60 (1976).

101. Complaint at 5, Am. Inst. for Int'l Steel v. United States, No. 18-00152 (Ct. Intl. Trade June 27, 2018), http://www.aiis.org/wp-content/uploads/2018/06/EMBARGOED_June_27_AIIS_-Plaintiffs-Complaint.pdf [https://perma.cc/J5DZ-MKKJ].

Algonquin squarely addressed the issue.[102] The CIT admitted that "the broad guideposts . . . of section 232 bestow flexibility on the President and seem to invite the President to regulate commerce by way of means reserved for Congress."[103] But it rejected attempts to distinguish *Algonquin* as narrowly decided or superseded by developments in administrative law.[104] Judge Gary Katzmann admitted that the CIT was bound by *Algonquin* but chose to write *dubitante* to argue that Section 232 "has permitted the transfer of power to the President in violation of the separation of powers."[105] He analyzed the principles of Section 232 identified in *Algonquin* but found that they do not limit the President.[106] For example, he found that the "President is not bound in any way by any recommendations made by the Secretary," and the definition of national security is "so broad that it not only includes national defense but also encompasses the entire national economy."[107] Ultimately, Judge Katzmann found that Section 232 "provide[s] virtually unbridled discretion to the President with respect to the power over trade that is reserved by the Constitution to Congress."[108]

AIIS has promised to appeal the CIT decision.[109] However, any claim under the non-delegation doctrine is unlikely to succeed because the Supreme Court has applied it leniently for decades. Some commentators even declared it dead.[110] But that may soon change. Justice Thomas expressed doubts about the "intelligible principle" test in 2001,[111] and Justice Kavanaugh has promoted a variant for major rules promulgated by agencies.[112] Until the Court revisits its jurisprudence, claims based on the non-delegation doctrine are unlikely to succeed.[113]

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102. Am. Inst. for Int'l Steel v. United States, No. 19-37, slip op. at 7 (Ct. Int'l Trade Mar. 25, 2019).

103. *Id.* at 13.

104. *Id.* at 7–12.

105. *Id.* at 27 (Katzmann, J., dubitante).

106. *Id.* at 26.

107. *Id.*

108. *Id.* at 27.

109. Press Release, American Institute for International 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/X5KY-H6HT].

110. *See e.g.*, Cass Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2001) ("It is often said that the nondelegation doctrine is dead."); Jason Iuliano & Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 NOTRE DAME L. REV. 619, 619 (2018) ("The nondelegation doctrine is dead. It is difficult to think of a more frequently repeated or widely accepted legal conclusion."). Ironically, both articles argue that the non-delegation doctrine is, in fact, not dead.

111. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001) (Thomas, J., concurring).

112. United States Telecom Ass'n v. FCC, 855 F.3d 381, 422 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc) (requiring Congress to provide a clear statement authorizing the agency to promulgate major rules).

113. *See* Gundy v. United States, 728 F.2d 484 (2d Cir. 2017), *cert. granted*, No. 17-6086 (argued Oct. 2, 2018).

B. Violation of the Administrative Procedure Act

The Administrative Procedure Act governs actions by federal agencies implementing legislation and allows for judicial review of final "agency action."[114] Despite a presumption in favor of judicial review, however, it is likely that neither the report by the Secretary of Commerce nor the President's final rule imposing tariffs is reviewable under the APA. "Final agency action" exists where the action (1) marks the consummation of the agency's decision process[115] and (2) was one by which "rights or obligations have been determined" or from which "legal consequences will flow."[116] The Court in *Dalton v. Specter* held that no final agency action exists where one agency prepares a report culminating in a recommendation for a separate decisionmaker because no legal consequences flow from that action.[117] Section 232 contains a similar procedure. The report by the Secretary of Commerce has no effect independent of the President and can be adopted or changed before it takes legal effect. Therefore, it is likely not a "final agency action." The challenge in *Dalton* ultimately failed because the Court found that the President's actions could not be reviewed either. The Court cited *Franklin v. Massachusetts*, which held that the President is not an "agency" under the APA.[118] His decisions were therefore not subject to judicial review. Indeed, plaintiffs seeking a preliminary injunction against the steel and aluminum tariffs acknowledged that *Dalton* would preclude review of the President's action in its challenge.[119] A court reviewing a challenge to the President's action under Section 232 is likely to closely follow the *Dalton* precedent and hold that judicial review is precluded.

Even if these actions could be reviewed under the APA, the broad deference given to agencies to interpret statutes would likely defeat a challenge. Establishment of tariffs under Section 232 is an example of informal rulemaking under the APA because the action involves the creation of policy with future effects rather than adjudication of facts with retroactive effect.[120] The standard of review for informal rulemaking is the "arbitrary and capricious" test, in which the agency must prove a rational connection between the facts found and the choice

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114. 5 U.S.C. § 706 (2018).

115. *See* Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 112–14 (1948); s*ee also* FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 242 (1980) (holding that an agency provision subject to revision or correction is not final agency action).

116. Bennett v. Spear, 520 U.S. 154, 178 (1997) (citing Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 71 (1970)).

117. Dalton v. Specter, 511 U.S. 462 (1994).

118. Franklin v. Massachusetts, 505 U.S. 788 (1992).

119. Severstal Export GMBH v. United States, No. 18-37, slip op. at 15 (Ct. Int'l Trade Apr. 5, 2018).

120. *See* United States v. Fla. E. Coast Ry., 410 U.S. 224 (1973) (finding a presumption of informal rulemaking unless otherwise stated in the statute); *see also* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988) (Scalia, J., concurring) (explaining the difference between future effect, retroactive effect, and secondary retroactivity).

made.[121] Courts evaluate whether the agency: (1) considered relevant factors, (2) failed to consider important aspects of the issue, (3) offered an explanation counter to the evidence, or (4) offered an implausible explanation.[122] In the case of the steel and aluminum tariffs, the Department of Defense released a memo suggesting that proper consideration of U.S. security relationships with historical allies is not consistent with the choice made to broadly impose tariffs.[123] In addition, the Federal Reserve Bank of Dallas released a report finding that the measures could lead to a 3.5 percent reduction in GDP growth if retaliatory tariffs escalate to a trade war.[124] A court may find that the President's failure to consider relationships with historical allies and dynamic effects on economic growth resulted in an "arbitrary and capricious" rule. But even if the action does not fit its critics' definition of "national security," courts will likely defer to the broader Department of Commerce definition.

The Secretary of Commerce's determination is likely to survive a challenge because courts give broad deference to agency interpretations of statutes. Under the doctrine of *Chevron* deference, courts defer to the agency interpretation of statutes where (1) the statute is ambiguous and (2) the agency interpretation is based on a permissible construction of the statute.[125] In this case, a court is likely to find that "such quantities," "such circumstances," and "national security" are ambiguous terms with several plausible definitions. It would therefore accept the agency interpretation if the construction is "a reasonable policy choice for the agency to make."[126] The Secretary's report explains its statutory constructions of these terms. Relying on the Secretary's report from the 2001 Section 232 investigation of iron ore and semi-finished steel, the report found that "national security" extends beyond national defense to include the general security and welfare of certain "critical industries."[127] It also found that the "such quantities" and "such circumstances" requirement could be satisfied by factors illustrated—but not exclusively defined—in Section 232(d).[128] Though a court may not find this to be the best interpretation of Section 232, the construction bases its reasoning in the approaches of previous administrations and satisfies the permissibility

121. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (citing Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)).

122. *Id.*

123. Memorandum from James Mattis, *supra* note 43.

124. Michael Sposi & Kelvindir Virdi, *Steeling the U.S. Economy for the Impacts of Tariffs*, 13 FED. RESERVE BANK DALLAS 1 (Apr. 2018), https://www.dallasfed.org/~/media/documents/research/eclett/2018/el1805.pdf [https://perma.cc/8QDN-D3U7].

125. Chevron v. Natural Res. Def. Council, 467 U.S. 837 (1984).

126. Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Serv., 545 U.S. 967, 986 (2005).

127. U.S. DEP'T OF COMMERCE, *supra* note 41, at 13–14.

128. *Id.* at 16 ("It is these three factors–displacement of domestic steel by excessive imports and the consequent adverse impact on the economic welfare of the domestic steel industry, along with global excess capacity in steel–that the Secretary has concluded create a persistent threat of further plant closures that could leave the United States unable in a national emergency to produce sufficient steel to meet national defense and critical industry needs. The Secretary finds this 'weakening of our internal economy may impair the national security' as defined in Section 232.").

requirement of *Chevron* deference.[129] Unless the Supreme Court revives the non-delegation doctrine or reconsiders *Chevron* deference, the United States judicial system is unlikely to ensure the President uses Section 232 only where there is a genuine threat to national security.

V. LEGISLATIVE RESTRICTIONS ON EXECUTIVE AUTHORITY

The best solution to ensure that the executive branch does not use Section 232 to impose tariffs without a genuine threat to national security is for Congress to reserve its own authority to determine whether imports constitute a "threat to impair the national security." This is the most desirable check on the President's authority because it complies with the constitutional system of separation of powers. The Constitution delegates authority over tariffs to Congress, and it has broad authority to structure the Section 232 process. While it has chosen to create very little structure around the Section 232 process, this approach has led to the executive branch's current exceedingly broad definition of national security. The judicial branch also has the authority to create principles that ensure compliance with the separation of powers, but it has adopted a deferential approach towards the political branches. James Madison wrote in *Federalist No. 51*, his famous essay on the separation of powers, that "[a]mbition must be made to counteract ambition."[130] It is apparent now that Congress must regain its ambition to make the United States government one that is "oblige[d] to control itself."[131]

Congress can reserve its authority over Section 232 through amendment of the Trade Expansion Act of 1962 or the Congressional Review Act. An obvious limitation of a legislative approach to limit the President's authority is the President's role in the legislative process. Once a bill is passed by both chambers of Congress, the President must sign it before it becomes law.[132] An ambitious President may resist such an attempt to limit authority and veto the bill. Congress may override a veto by a vote of two-thirds of both branches; however, this is a difficult task.[133] If legislative action succeeds, it will likely do so because the President chose not to veto the bill.

A. Delegation to the International Trade Commission

Congress has several options to amend the structure of Section 232 without adding its own involvement in the process. The most obvious solution is to amend the list of factors the Department of Commerce may use to define national

129. The new justices on the Supreme Court have shown skepticism towards *Chevron* deference. *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149–58 (10th Cir. 2016) (Gorsuch, J., concurring) (arguing that the use of *Chevron* deference in Brand X violates separation of powers by allowing the executive branch to overrule judicial decisions even though the APA expressly directs courts to review agency action).

130. THE FEDERALIST NO. 51 (James Madison).

131. *Id.*

132. U.S. CONST. art. I, § 7.

133. *Id.*

security. But the Department of Commerce considers this list to be illustrative rather than exhaustive. Even factors in an exhaustive list could be interpreted broadly. Interpretation of these factors could be made less political if the investigative process is shifted from the Department of Commerce to the International Trade Commission (ITC). The ITC is an adjudicative body that determines whether imports are dumped or subsidized, whether a surge of imports injured an industry in safeguards investigations, or whether an importer is violating United States patent and trademark law.[134] It consists of six commissioners, three nominated by each party, who serve nine-year terms and are removable by the President only for cause.[135] By comparison, the Secretary of Commerce is a presidential political appointee.[136]

Extending the ITC's jurisdiction to include determinations of whether imports are a threat to national security appears at first to be a natural extension of its existing jurisdiction. The President would be able to impose tariffs only after a positive determination. But there are several problems with this structure. First, the ITC has no national security expertise. It is well-positioned to perform economic analysis and determine whether imports have injured domestic industry, but national security is an entirely different area of policy with complex considerations. While the Department of Commerce contains the BIS and Congress has committees on both Finance and Foreign Affairs, the ITC employs no dedicated staff for national security issues. Second, ITC adjudication of threats to national security dilutes accountability within the executive branch. Alexander Hamilton expressed concerns about accountability in a diluted executive branch in *Federalist No. 70*, arguing that it "conceal[s] faults and destroy[s] responsibility."[137] While the inability to remove ITC commissioners without cause ensures a removal from the politics of the presidency, it also removes them from the accountability imposed by elections.[138] The Framers considered structuring the executive branch as a triumvirate, but they were concerned about the dilution of decision-making power regarding national security—Eldridge Gerry called such a structure a "general with three heads,"[139] and as President Truman famously

134. *Mission*, INT'L TRADE COMM'N, https://www.usitc.gov/press_room/mission_statement.htm [https://perma.cc/H83Q-VC6G] (last visited May 22, 2019).

135. *Commissioner Bios*, INT'L TRADE COMM'N, https://www.usitc.gov/press_room/bios.htm [https://perma.cc/GS75-KX8G] (last visited May 22, 2019).

136. One landmark case described agency directors and cabinet members as the "alter ego" of the president. Myers v. United States, 272 U.S. 52 (1926). Myers was partially overruled with respect to independent agencies, such as the ITC, whose heads perform quasi-legislative and quasi-judicial functions. *Cf.* Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).

137. THE FEDERALIST NO. 70 (Alexander Hamilton).

138. *Compare* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001) (arguing that closer presidential control over the administrative state increases the bureaucracy's accountability to the public), *with* Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT. L. REV. 965 (1997) (arguing that the president claiming credit for agency rules infringes upon the Separation of Powers by politicizing an essentially ministerial task).

139. *Monday, June 4th, 1787*, *in* 5 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 150 (Jonathan Elliott ed., 1845).

quipped about his office, "the buck stops here."[140] Unlike the subject matter of most delegations to the executive branch, Section 232 concerns national security. Article II gives the executive branch authority over national security, so Congress should not violate its unitary structure by subjecting national security authority to an independent agency.

B. Current Proposals

Congress has proposed several amendments to Section 232 in which it either may reject or must approve executive action. Congressman Kind proposed a bill that uses the Congressional Review Act (CRA) system of joint resolutions of disapproval to allow Congress to nullify any "congressionally delegated trade action."[141] That category includes Section 232 among other trade laws. The CRA allows Congress to nullify agency rules within sixty legislative days after issuance through a majority vote of each chamber of Congress and the President's signature.[142] The CRA defines "agency" the same as the APA, which does not include action by the President. But this is not because including the President in that definition would violate the Constitution. The Court in *Franklin v. Massachusetts* held that the APA's definition of "agency," the action of which is subject to judicial review, did not extend to the President because the statute is silent on the issue, and there is a presumption against subjecting the President's action to judicial review "[o]ut of respect for the separation of powers and the unique constitutional position of the President."[143] But no constitutional barrier stands between Congress expanding the definition of "agency" to explicitly include presidential action on authority delegated by Congress. By analogy, there is no constitutional barrier to Congress expanding its authority under the CRA to include congressionally delegated trade actions. This does not mean that Congress may review presidential action that derived authority under Article II, but it has the authority to subject its own delegation of authority to such oversight procedures. This would not be the first instance of this type of procedure. Section 232 currently contains a provision allowing Congress to nullify tariffs on petroleum imports using a procedure similar to the CRA.[144] A bill sponsored by Senator Portman would expand this subsection to include all action under Section 232.[145]

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140. During his presidency, President Truman kept a 2-1/2" × 13" sign on his desk that read "The Buck Stops Here." *"The Buck Stops Here" Desk Sign*, HARRY S. TRUMAN PRESIDENTIAL LIBRARY & MUSEUM, www.trumanlibrary.org/buckstop.htm [https://perma.cc/77CG-MEAF] (last visited May 22, 2019), *cited by* Free Enterprise Fund v. Public Co. Accounting Oversight Bd., 561 U.S. 477, 513–514 (2010) ("Without [authority to remove those who assist him in carrying out his duties], the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else.").

141. Trade Authority Protection Act, H.R. 5760, 115th Cong. (introduced May 10, 2018), https://www.congress.gov/bill/115th-congress/house-bill/5760/text [https://perma.cc/QW6M-QVWJ].

142. 5 U.S.C. § 801 (2018).

143. 505 U.S. 788, 800–01 (1992).

144. 19 U.S.C. § 1862(f) (2018).

145. Trade Security Act of 2018, S. 3329, 115th Cong. (2018).

These bills essentially create a mechanism allowing Congress to challenge the President's determination that imports threaten national security. By allowing Congress to act when it considers necessary rather than requiring congressional action, this procedure reduces the likelihood of messy congressional trade politics undermining legitimate action under Section 232. But there are also downsides of this mechanism. Requiring a separate action after an agency issues a final rule creates uncertainty for markets and trading partners. Sixty legislative days means about four months of real time, during which economic and political actors are unable to make decisions about how to respond to tariffs that may or may not enter into force.[146] The duration of this uncertainty is extended when considering that the President is likely to veto the joint resolution of disapproval. The CRA has only been successful in repealing rules issued at the end of a president's term because a President is almost certain to veto an attempt to rescind actions by that President's own administration.[147] The President would surely veto an attempt to use the mechanisms under the Kind and Portman bills.

At one point in time, Congress might have been able to structure the law as a legislative veto to reject administrative action without requiring the President's signature. But this approach was declared unconstitutional in 1983. In *INS v. Chadha*, the Court held that a provision of immigration law that allowed the House of Representatives to override determinations made by the Attorney General violated constitutional requirements that bills and resolutions must gain a majority in both chambers of Congress and be presented to the President for signature.[148] While a joint resolution of disapproval structured as a legislative veto does not contain bicameralism issues, the presentation clause requires Congress to risk a presidential veto in order to create law.[149] To be sure, Congress can override a presidential veto with a two-thirds vote by both chambers. But this would limit the role of Congress in challenging the president's action under Section 232 to extraordinary circumstances. Such a limited ability to challenge the President may prove to be wise because it requires bipartisan support, but the uncertainty created by a process with an uncertain number of final actions imposes avoidable costs.[150]

A better procedure would be one where Congress is required to hold a fast-tracked vote on approval of the executive branch determination. Congress has

146. *See Days in Session of the U.S. Congress*, LIBRARY OF CONG., https://www.congress.gov/days-in-session [https://perma.cc/H7XZ-9SRL].

147. *See* Paul Larkin, Jr., *The Trump Administration and the Congressional Review Act*, 16 GEO. J.L. & PUB. POL'Y 505, 508–09 (2018) (explaining the use of the Congressional Review Act to rescind "midnight regulations" issued at the end of the previous administration).

148. INS v. Chadha, 462 U.S. 919 (1983).

149. *See* U.S. CONST. art. I, § 7.

150. In a survey of 20,000 small-business owners, "Uncertainty over Economic Conditions" ranked as the fourth-most important problem and "Uncertainty over Government Actions" ranked sixth among a list of seventy-five policy and operational issues. HOLLY WADE, NAT'L FED'N INDEP. BUS., SMALL BUSINESS PROBLEMS & PRIORITIES (2016), https://www.nfib.com/assets/NFIB-Problems-and-Priorities-2016.pdf [https://perma.cc/LKK5-XBX9].

proposed two bills that follow this procedure. The Bicameral Congressional Trade Authority Act (BCTAA), proposed by Senator Toomey, amends Section 232 to require a joint resolution of approval from Congress within sixty legislative days for the President's action to take effect.[151] The bill proposed by former Congressman Sanford is similar, but congressional approval is required only for the determination that the imports under investigation "threaten to impair the national security."[152] The President determines the remedy only after this approval.

The BCTAA requiring approval for the entire process is the better version of this structure. Under the current form of the law, the President has extremely broad authority to impose trade restrictions on a wide range of countries. This authority could be used more broadly than is justified by the threat to national security. For example, the Department of Defense memo on the steel and aluminum investigation argued for more targeted tariffs and expressed concern about imposing trade restrictions on historical allies.[153] The broader remedy was a major source of criticism. Therefore, only the BCTAA's requirement that the entire action be approved by Congress is sufficient to ensure that the tariffs imposed are a reflection of the actual threat to national security. The BCTAA also adds the Department of Defense to the Section 232 process.[154] While the BIS has expertise in the intersection of trade and national security, the Department of Defense focused more on military readiness. Both the Department of Commerce and the Department of Defense should conduct investigations and submit reports to the President.

One downside of requiring Congress to pass a joint resolution of approval for Section 232 action to take effect is that it can be used politically, especially in an election year. Within statutory boundaries, the President controls the timing around when an investigation is initiated and when the action is submitted to Congress. An incumbent President could force members of Congress running in opposition to put a vote on trade and national security on the record in an election year. This would be an especially potent tactic to use, for example, against a Republican branded as a "free trader" and a "defense hawk" because it forces a conflict between imposing tariffs and acknowledging a threat to national security. But these concerns should not derail the best option to ensure that Section 232 is used only for genuine threats to impair the national security.

CONCLUSION

A wide range of domestic and foreign stakeholders has criticized the Trump Administration's recent use of Section 232, designed to protect against imports that "threaten to impair the national security." This note analyzed why the use of

151. Bicameral Congressional Trade Authority Act of 2019, S. 287, 116th Cong. (2019).
152. Promoting Responsible and Free Trade Act, H.R. 6923, 115th Cong. (2018).
153. Memorandum from James Mattis, *supra* note 43.
154. Bicameral Congressional Trade Authority Act of 2019, at §2(b), S. 287, 116th Cong. (2019).

Section 232 where no threat to national security exists harms the United States, its allies, and the international rules-based trading system.

This note then examined several possible institutions that might be well-positioned to challenge the President's determination that certain imports are a threat to impair national security. It first determined that WTO restrictions through an amendment to the GATT or by a decision of the Appellate Body would be politically unfeasible because they would face backlash from the United States. Second, it found that judicial review would fail because presidential action is not subject to the APA and courts have not actively ensured that Congress does not delegate its legislative authority. Third, this note considered potential legislative solutions, including: (1) involving the ITC in determining threats to national security, (2) extending congressional mechanisms for rescinding administrative action, and (3) requiring congressional approval of executive branch determinations. This note concludes that the Bicameral Congressional Trade Authority Act requiring a joint resolution of approval by Congress is the best way to ensure that the tariffs imposed reflect real threats to national security.