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## Let's Tarriff Like It's 1773: The Intelligible Principles Are Coming! Section 232 Tariffs on Steel

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# Let's Tariff Like It's 1773: The Intelligible Principles Are Coming! Section 232 Tariffs on Steel

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## INTRODUCTION

Recent actions by President Donald Trump in the name of national and energy security may do more domestic economic harm than good.<sup>1</sup> In March 2018, President Trump instituted tariffs on steel and aluminum under Section 232 of the Tariff Act for alleged national security protection.<sup>2</sup> However, the tariffs could bring more negative economic

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1. See Donald J. Boudreaux, *Donald Trump's Tariffs Hurt American Workers and Ruin Relationships with Our Allies*, USA TODAY (June 6, 2018, 5:00 AM), <https://www.usatoday.com/story/opinion/2018/06/06/donald-trumps-tariffs-hurt-workers-and-weaken-national-security-column/670087002/> [<https://perma.cc/64V2-EJRL>].

2. U.S. DEP'T OF COMM., SECTION 232 INVESTIGATION ON THE EFFECT OF IMPORTS OF STEEL ON U.S. NATIONAL SECURITY, <https://www.commerce.gov/section-232-investigation-effect-imports-steel-us-national-security#factsheet232> [<https://perma.cc/ZB28-RG56>] (last visited Aug. 5, 2019).

effects than positive.<sup>3</sup> For example, for each steel production job in America, higher steel and aluminum prices negatively affect 80 jobs in downstream<sup>4</sup> sectors.<sup>5</sup> Although the law gives the President discretion to enact and carry out many orders in America, President Trump likely exceeded his constitutional and delegated power by unilaterally imposing Section 232 tariffs on account of national security.<sup>6</sup> President Trump's declaration of a national security threat and improper usage of Section 232 to place tariffs contravene the principles of separation of powers and system of checks and balances that the Constitution assures.<sup>7</sup>

Without any form of congressional check or judicial review on a president's true intentions, goals, and motivations, the president wields unauthorized national and world power. Although the president, as the Commander-in-Chief, should likely have discretion in defining national security threats, there should be a more quantitative analysis and collective agreement on trade and commerce as a national security threat, so the broad discretion cannot be abused.<sup>8</sup>

Since there is arguably no articulated intelligible principle in the Section 232 Tariff Act, Congress has delegated the U.S. President an improperly broad power. Therefore, a president should not be able to impose tariffs on countries based on national threats to the United States economy under Section 232 without amending the statute. This Comment addresses the way these tariffs were imposed and how Section 232 should be amended. It is likely President Trump improperly implemented the tariffs on steel imports through Section 232 of the Trade Act of 1962 under the guise of national security interests. Furthermore, as of now, there is no congressional check on presidents in this decision, which has significant and widespread impacts internally and externally of America's borders.

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3. David Fickling, *Trump's Tariffs Are Killing American Steel with Kindness*, BLOOMBERG (Jan. 18, 2019, 6:00 PM), <https://www.bloomberg.com/opinion/articles/2019-01-19/trump-tariffs-to-protect-u-s-steel-can-t-mask-poor-valuations> [<https://perma.cc/CB4R-UNBR>] (last visited Aug. 5, 2019).

4. While upstream is considered the phase of exploration and production for the oil and gas, downstream is usually considered to span from after the production phase to the point of sale of the product.

5. Boudreaux, *supra* note 1.

6. See *United States v. George S. Bush & Co., Inc.*, 310 U.S. 371, 380, 60 (1940).

7. *AIIS Lawsuit Challenging Constitutionality of Section 232 Steel Tariffs: Questions and Answers*, AIIS, [http://www.aiis.org/wp-content/uploads/2018/06/EMBARGOED\\_June\\_27\\_Lawsuit\\_Q\\_A\\_AIIS.pdf](http://www.aiis.org/wp-content/uploads/2018/06/EMBARGOED_June_27_Lawsuit_Q_A_AIIS.pdf) [<https://perma.cc/W5J6-WK4H>] (last visited Aug. 5, 2019).

8. See Edward T. Hayes, *United States*, 66 LA. B.J. 217, 218 (2018).

Part I explains the importance of energy security in America and how the executive and legislative branches have the power to protect the country through constitutional and delegated power. Part II presents the implications and effects of abusing power when given unconstitutional authority. It analyzes past and present presidential uses of Section 232 tariffs while challenging Congress's delegation of that power. Part III proposes amendments to Section 232 to provide an intelligible principle to reframe it in accordance with the Constitution.

## I. BACKGROUND

Tariffs have been utilized throughout United States history. Most recently, President Trump invoked Section 232 tariffs on steel and aluminum which have had adverse effects on energy industries and energy security. Under the law as it is currently written, any incumbent president has the potential to abuse this tariff power because Section 232 lacks an intelligible principle and sets out broad considerations for the president to weigh. As described below, the vague qualifications are stated as broadly as "any other relevant factors."<sup>9</sup>

### *A. Give Me Energy Security or Give Me Death*

The International Energy Agency (IEA) defines energy security as "the uninterrupted availability of energy sources at an affordable price."<sup>10</sup> The U.S. Department of State holds the position that national security and energy security are threatened when (1) U.S. allies cannot access affordable or diverse sources of energy; (2) foreign energy markets exclude U.S. businesses; (3) poor administration inhibits market-based resolutions; (4) conflicts arise from competing for energy leads; and (5) terrorists or dangerous regimes fund violence through exploiting energy resources.<sup>11</sup> Generally, long-term energy security considers investing in energy production paralleled with economic and environmental developments and needs.<sup>12</sup> Additionally, short-term energy security concentrates on the energy

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9. U.S. DEP'T OF COMM., SECTION 232 INVESTIGATIONS PROGRAM GUIDE: THE EFFECTS OF IMPORTS ON THE NATIONAL SECURITY (2007).

10. *What is Energy Security?*, INT'L ENERGY AGENCY, <https://www.iea.org/topics/energysecurity/whatisenergysecurity/> [<https://perma.cc/78J6-9KRG>] (last visited Aug. 5, 2019).

11. *Under Secretary for Economic Growth, Energy, and the Environment*, BUREAU OF ENERGY RES., <https://www.state.gov/e/enr/> [<https://perma.cc/PA8R-H4Q9>] (last visited Aug. 5, 2019).

12. *Id.*

system's capability to react quickly to abrupt changes in supply and demand.<sup>13</sup> Without energy security, countries face a higher likelihood of political and civil unrest, geopolitical instability, and reduced economic performance. This includes physically lacking energy and noncompetitive or volatile pricing.<sup>14</sup>

### *B. Delegation of Power from Congress and the Constitution*

The United States Constitution Article 1, Section 1 expressly and exclusively delegates all legislative power to Congress.<sup>15</sup> Congress then delegates many of its constitutional powers to agencies. Without this ability, Congress would be ineffective without the ability to delegate, consult, and rely on subject-matter experts in the agencies.<sup>16</sup> However, to properly delegate this constitutional power, Congress must include an intelligible principle in its legislative act to guide the agency that would implement and carry out the duty.<sup>17</sup> To be constitutionally sufficient, Congress must include an intelligible principle that "clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority."<sup>18</sup>

When an intelligible principle exists, Congress does not violate the non-delegation doctrine because Congress is not delegating legislative power to the executive branch.<sup>19</sup> The Constitution's purpose affords Congress the "flexibility and practicality" is essential to function properly.<sup>20</sup> Furthermore, the Supreme Court explained in *J.W. Hampton v. United States* that when Congress seeks aid from a separate branch, "the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the government co-ordination."<sup>21</sup>

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13. *Id.*

14. *Id.*

15. U.S. CONST. art. I, § 1. "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

16. *See* *Opp Cotton Mills, Inc. v. Administrator*, 312 U.S. 126, 145 (1941) ("In an increasingly complex society Congress obviously could not perform its functions if it were obliged to find all the facts subsidiary to the basic conclusions which support the defined legislative policy"); *see also* *United States v. Robel*, 389 U.S. 258, 274 (1967) (opinion concurring in result).

17. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928).

18. *Mistretta v. United States*, 488 U.S. 361, 372 (1989); *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105, 67 S. Ct. 133, 142, 91 L. Ed. 103 (1946).

19. *Mistretta*, 488 U.S. at 372.

20. *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 421 (1935).

21. *J.W. Hampton, Jr., & Co.*, 276 U.S. at 406.

The constitutional authority on international trade rests on a fine balance between the legislative and executive branches of government.<sup>22</sup> While the legislative branch exclusively controls both domestic and foreign commerce, the executive branch broadly oversees national security and matters of foreign affairs.<sup>23</sup> It is important to note, however, that while the Commerce Clause grants Congress extensive regulatory powers on domestic commerce in the United States, the Foreign Commerce Clause is regarded as giving a more expansive grant of authority to Congress.

Furthermore, the Trade Promotion Authority (TPA) legislation provides the executive branch with guidance for presidential trade actions as delegated by Congress.<sup>24</sup> Under the TPA, Congress reserved the right to review and vote on presidential trade agreements.<sup>25</sup> However, President Trump invoked Section 232 to authorize presidential trade actions rather than under the TPA.<sup>26</sup> As previously mentioned, Section 232 is not subject to congressional review or approval like the TPA, which makes Section 232 ripe for potential abuse if no intelligible principle is set forth.<sup>27</sup>

The American Institute for International Steel (AIIS) filed suit in June 2018 to challenge the sufficiency of an intelligible principle set forth in Section 232 and the appropriateness of a delegation of power.<sup>28</sup> The plaintiffs in *AIIS v. United States* objected to the constitutionality of Congress's delegation of power to the president and disputed the protection of the principles of separation of powers and the system of checks and balances.<sup>29</sup> The plaintiffs represent companies whose steel pipe and tube products are vital to the "production and distribution of oil and gas."<sup>30</sup> The tariffs on steel impede the production and transportation of oil and gas because domestic United States of Oil Country Tubular Goods (OTCG) producers do not manufacture sufficient supplies to satisfy the plaintiffs' needs.<sup>31</sup> While the steel products that the plaintiffs seek are

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22. Hayes, *supra* note 8.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. AIIS Complaint, *Am. Inst. for Int'l Steel v. United States*, No. 18-00152 (U.S. Ct. Int'l Trade June 27, 2018). This case was pending at the time this Comment was submitted.

29. *Id.* at 1.

30. *Id.* at 2.

31. *Id.* at 3.

accessible in the United States, the foreign prices for the same or higher quality products are more competitive and appealing.<sup>32</sup>

While the non-delegation doctrine has been considered a legal fiction, the fact that the Supreme Court granted a writ of certiorari in 2018 for *Gundy v. United States*<sup>33</sup> on the threshold issue as to the existence of an intelligible principle shows that the Supreme Court is willing to rule against violations of the non-delegation doctrine. The outcome of *Gundy* will speak to the future challenges to congressional delegations of power, specifically to Section 232. While *Gundy* is about the U.S. Attorney General unilaterally making law about registered sex offenders, the case has the potential to have a widespread effect on the federal government and its agencies depending on the scope of the Supreme Court's ruling.

If the non-delegation doctrine is revived and expanded in the *Gundy* decision, it has the potential to preclude the United States from carrying out "very basic environmental laws, among other things."<sup>34</sup> This expansion of the non-delegation doctrine would fundamentally limit the federal government.<sup>35</sup> It is also unclear if proponents of the non-delegation doctrine, like Justice Neil Gorsuch, would allow agencies to consider what is best for their industries or fields.<sup>36</sup> For example, proponents like Justice Gorsuch may not allow agencies like the Environmental Protection Agency (EPA) to operate under guidelines to decide what is "the best system of emission reduction" required by power plants since proponents likely would not consider such guidelines an intelligible principle.<sup>37</sup>

Even if *Gundy* is ruled to be a constitutional delegation of power or if the holding is confined to the facts of the case of the registered sex offenders, *Gundy* is important. While the Supreme Court has not struck down any laws in violation of non-delegation since 1935, the Supreme Court's undertaking of this type of issue shows its interest in the matter.<sup>38</sup>

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32. *Id.* at 4.

33. *Gundy v. United States*, 138 S. Ct. 1260 (2018). This case has been decided, since submission for publication, but Justices Alito, Gorsuch, Roberts, and Thomas expressed opinions that would imply a reconsideration of the non-delegation doctrine.

34. Ian Millhiser, *Want to Know How Badly Republicans on the Supreme Court Will Overreach? Watch This One Case*, THINK PROGRESS (Oct. 2, 2018), <https://thinkprogress.org/supreme-court-gundy-sorna-case-republican-overreach-fd7aa93ec82d/> [<https://perma.cc/3G64-A5W4>].

35. *Id.*

36. *Id.*

37. *Id.*

38. *Congress Must Do Its Own Job—Make Laws*, PAC. LEGAL FOUND., <https://perma.cc/8JNZ-G37W> (last visited Aug. 5, 2019).

This opportunity allows the AIIS and others to plead a successful case against Section 232 lacking an intelligible principle.

### *C. Tariffs and Constitutional Power*

Tariffs are essentially “a tax on imports”<sup>39</sup> that serve to: (1) stimulate economic development; (2) provide the government with revenue; and (3) protect the United States markets by forcing higher prices on the importation of foreign products.<sup>40</sup> Traditionally, tariffs have polarizing effects between those who believe in raising tariffs and those who believe in lowering them.<sup>41</sup> On one hand, there are protectionists who favor raising tariffs “to protect domestic industries and jobs.”<sup>42</sup> On the other hand, there are those who favor a free market, believing that lower tariffs increase prosperity.<sup>43</sup>

The United States Constitution sets out in its first article that “Congress shall have Power To lay and collect Taxes, Duties, Imports and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.”<sup>44</sup> Shortly after implementation of this article, in 1789, the first Congress expanded tariffs’ function to include “the encouragement and protection of manufactures.”<sup>45</sup> This “protective principle” for tariffs laid the foundation for debate that progressed over the next century and a half.<sup>46</sup> Since 1789, Congress has passed many tariffs, but the Smoot-Hawley Tariff Act in 1930 was one of great significance.<sup>47</sup> This tariff in particular created the highest protective level in U.S. history.<sup>48</sup> Thus, foreign countries reacted by employing retaliatory tariff

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39. RAJ BHALA, *INTERNATIONAL TRADE LAW: THEORY AND PRACTICE* 287 (2d ed. 2001).

40. 25 C.J.S. *Customs Duties* § 9 (2012).

41. Nadia Gire, *The Trans-Pacific Partnership Agreement: A Revival in United States Trade Policy Reform*, 20 *CURRENTS: INT’L TRADE L.J.* 60 (2012).

42. Ben Baumgartner, *Chewing It Over: Determining the Meaning of Edible in the Harmonized Tariff Schedule of the United States*, 64 *U. KAN. L. REV.* 293, 323 (2015).

43. *Id.*

44. U.S. CONST. art. I, § 8, cl. 1.

45. Tariff Act of 1789, § 1, 1 Stat. at 24.

46. Daniel K. Tarullo, *Law and Politics in Twentieth Century Tariff History*, 34 *UCLA L. REV.* 285 (1986).

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

48. Marcos Valadao & Nara Galeb Porto, *MERCOSUR, NAFTA, FTAA and its Effects in Federal Taxation of International Transactions Between the United States and Brazil: A Comparative Study*, 10 *LAW & BUS. REV. AM.* 705, 715 n.47 (2004).

acts as a result of the Tariff Act of 1930,<sup>49</sup> which worsened the Great Depression.<sup>50</sup>

*1. What in Tar(iff)nation! Section 232: Procedure and Considerations*

For the president to act under Section 232, there is a lengthy procedure and inquiry. First, the Secretary of Commerce shows 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.”<sup>51</sup> Then, Section 232(b) of the Act authorizes the President to “take such action, and for such time, as he deems necessary to adjust the imports of [the] article and its derivatives so that . . . imports [of the article] will not so threaten to impair the national security.”<sup>52</sup>

The Commerce Department considers certain criteria under Section 705.4 of the Investigations Program Guide to determine the effects of imports on national security, starting with the quantity of the article.<sup>53</sup> As noted in the Section 232 of the Investigation Program Guide, the Commerce Department also inquires into domestic production, capacity, and growth requirements needed for projected national defense, as well as “any other relevant factors.”<sup>54</sup>

With respect to the economy and the national requirements for United States security, the Commerce Department also considers (1) the effect of foreign competition on domestic industries vital to U.S. national security; (2) displacement of U.S. products that cause a decrease in employment, government revenue, specialized skills and investments; and (3) “[a]ny other relevant” present or future factors that cause America’s national economy to weaken.<sup>55</sup>

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49. *Id.*

50. John Brinkley, *Trump Loves Tariffs, But No One Else Does*, FORBES, <https://www.forbes.com/sites/johnbrinkley/2018/08/08/trump-loves-tariffs-but-no-one-else-does/#1dc46b75662e> [<https://perma.cc/X5HZ-DXEN>] (last visited Aug. 5, 2019).

51. 19 U.S.C. § 1862 (Westlaw through Pub. L. No. 116-41) (corresponds to Trade Expansion Act of 1962 § 232(b)).

52. *Id.*

53. U.S. DEP’T OF COMM., *supra* note 9.

54. *Id.*

55. *Id.*

## II. IMPLICATIONS OF AN ABUSE OF POWER

As previously stated, presidents can misuse Section 232 since it lacks an intelligible principle. Below is how U.S. Presidents have used Section 232 and how President Trump's improper invocation of it affects energy security.

### *A. All it Takes is a President's John Hancock: Presidential Use of Section 232*

Presidents who have invoked Section 232 tariffs include: Dwight D. Eisenhower, John F. Kennedy, Lyndon B. Johnson, Richard Nixon, Gerald Ford, Jimmy Carter, Ronald Reagan, and Donald Trump.<sup>56</sup> While each president in the past used the Section 232 tariffs for restricting or modifying oil imports, President Trump arguably manipulated Section 232 to influence international trade by imposing a tariff on steel and aluminum under the guise of national security.<sup>57</sup> However, President Trump is not the first president who invoked Section 232 tariffs that ironically created a larger threat to energy security which it sought out to protect.<sup>58</sup> After President Eisenhower established the Mandatory Oil Import Program (MOIP), the Organization of Petroleum Exporting Countries (OPEC) arose in response and later posed a strong threat to America's energy security.<sup>59</sup>

President Trump's use of Section 232 calls for a constitutional inquiry since the boundlessness of the structure and its effects are more apparent. For example, President Ford's use of Section 232 provided compelling triggers and limits.<sup>60</sup> After a full-scale investigation on imported oil under Section 232, President Ford found that not only did the United States depend on imported oil, but also that its dependence on supply from foreign oil importers was growing.<sup>61</sup> Thus, that dependence and growing

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56. Jeffrey P. Bialos, *Oil Imports and National Security: The Legal and Policy Framework for Ensuring United States Access to Strategic Resources*, 11 U. PA. J. INT'L BUS. L. 235, 243 (1989).

57. See Luke Basset & Ned Price, *Abuse of Power: Debunking the Trump Administration's National Security Argument for Coal*, CTR. FOR AM. PROGRESS, (Aug. 16, 2018, 9:00 AM), <https://www.americanprogress.org/issues/green/news/2018/08/16/454866/abuse-power-debunking-trump-administrations-national-security-argument-coal/> [<https://perma.cc/6EZ3-YKPN>].

58. Bialos, *supra* note 56.

59. *Id.*

60. *See id.*

61. *Id.*

reliance on foreign suppliers created a national security threat that could leave the American economy susceptible to both a supply reduction and price increase.<sup>62</sup> The Treasury Department's analysis offered compelling reasons why national security was threatened.<sup>63</sup>

### *B. Tariff Effects on Energy Security*

Tariffs on steel may do more domestic economic harm.<sup>64</sup> These tariffs may actually weaken the United States by protecting jobs in inefficient industries, inhibiting job growth in economical industries, and damaging U.S. relations with its allies.<sup>65</sup> The U.S. steel industry is healthy and does not need tariffs to protect it. In fact, since U.S. steel mills are operating at only 30% of their capacity, they could readily meet the military's elevated demands if a war broke out.<sup>66</sup> Furthermore, the United States leads the world in steel imports, purchasing 35.6 million tons of steel in 2017 alone.<sup>67</sup> Canada is the next biggest importer of steel in the world, only accounting for 16.7% of the United States' total steel imports.

As a whole, pipelines serve an important role in energy security.<sup>68</sup> Pipelines are the safest, most effective method of transporting oil and

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62. *Id.*

63. *Id.* at 247.

The analysis stressed that the OPEC embargo caused the price of oil imports to quadruple from approximately \$2.50 per barrel to more than \$10.00 per barrel and had devastating effects on the overall economy, including a reduction in GNP by some \$10 to \$20 billion, a 0.5% increase in the unemployment rate in just 6 months (i.e., approximately 500,000 people lost jobs), and a significant increase in the Consumer Price Index. The study also noted that the sharp price rise caused by the OPEC embargo substantially increased the total U.S. oil bill and, hence, significantly eroded the U.S. balance of payments.

64. Boudreaux, *supra* note 1.

65. *Id.*

66. *Id.*

67. *Factbox: Top Steel Exporters to the United States*, REUTERS (Mar. 2, 2018), <https://www.reuters.com/article/us-usa-trade/factbox-top-steel-exporters-to-the-united-states-idUSKCN1GE10I> [<https://perma.cc/KG8C-VXBA>].

68. See Mark Green, *Here's Why U.S. Energy Sector Opposes Tariffs on Steel*, AM. PETROLEUM INST. (June 1, 2018), <https://www.api.org/news-policy-and-issues/blog/2018/06/01/why-united-states-energy-sector-opposes-tariffs-on-steel> [<https://perma.cc/P8JV-TY74>].

natural gas.<sup>69</sup> The oil and natural gas industry in America depends on importing specialty steel because of the lack of quality and quantity of American products necessary for “drilling, pipelines, LNG export facilities, refineries, and petrochemical operations.”<sup>70</sup> Removing this specialty steel increases the possibility of delays and cancellation of current and prospective U.S. energy projects.<sup>71</sup> Restricting the steel supply suspends or interrupts the manufacture and construction of steel, which suspends and interrupts investment projects in critical energy infrastructure projects. Ultimately, restricting steel supply disrupts the transportation of natural gas and oil within the United States.<sup>72</sup> Natural gas power plants depend on pipelines to deliver fuel for their operations.<sup>73</sup> In other words, delaying steel means energy production gets delayed.<sup>74</sup>

Moreover, tariffs do not compel U.S. steel producers to increase production and conform to the needs of the oil and natural gas producers who rely on the importation of specialty steel.<sup>75</sup> Accordingly, American steelmakers have good reason to not incur the costs.<sup>76</sup> The steel producers are not ensured an increase in long-term demand as the current or next administration could simply remove the tariffs.<sup>77</sup> The steel producers can hardly justify expanding and upgrading the plants as it would cost “tens of millions of dollars per facility.”<sup>78</sup>

The Trump Administration’s unprompted and improper invocation of “national security threats” dilutes and politicizes the very safeguard that the Section 232 tariff purportedly seeks to protect.<sup>79</sup> By using defense arguments to favor certain electricity generators needs above others, the Trump Administration ignores competitive energy market rules.<sup>80</sup> Moreover, if national security and energy security are truly the concern for President Trump, then other measures would also have been taken.<sup>81</sup>

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69. See DIANA FURCHTGOTT-ROTH, MANHATTAN INSTI. FOR POLICY RESEARCH, PIPELINES ARE SAFEST FOR TRANSPORTATION OF OIL AND GAS (2013), <https://www.manhattan-institute.org/html/pipelines-are-safest-transportation-oil-and-gas-5716.html> [<https://perma.cc/2RSH-2LQH>].

70. Green, *supra* note 68.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. Green, *supra* note 68.

77. *Id.*

78. *Id.*

79. Basset & Price, *supra* note 57.

80. *Id.*

81. *Id.*

Severe weather, strength of energy infrastructure, and dependence on railways to ship energy commodities pose equal or more serious threats to energy and national security.<sup>82</sup>

President Trump revealed what is likely the true intention behind the tariffs—international negotiation power. On March 5, 2018, he tweeted how the tariffs would “come off” if Mexico and Canada negotiated a “fair” new deal moving forward on the North American Free Trade Agreement (NAFTA).<sup>83</sup> Similarly, on September 17, 2018, President Trump tweeted how the “[t]ariffs have put the U.S. in a very strong bargaining position.”<sup>84</sup> The tweet continued to state, “If countries will not make fair deals with us, they will be ‘Tariffed!’”<sup>85</sup> These tweets indicate that the tariffs were not wholly intended for national security grounds, but for the President’s ulterior motives, namely bargaining power in the North American Free Trade Agreement (NAFTA) negotiations and leverage on trade negotiations with China and the European Union. Under the United States-Mexico-Canada Agreement (USMCA) in December 2018, the United States failed to exempt Mexico and Canada from Section 232 tariffs on steel and aluminum.<sup>86</sup>

### C. President Trumps Use of Section 232 Tariffs

Although the Constitution grants Congress the power to govern foreign trade under Article I, § 8, clause 1, Congress allocated the authority to impose tariffs to the president through Section 232 of the Trade Expansion Act of 1962.<sup>87</sup> Therefore, the president has the power to impose

82. *Id.*

83. Donald Trump (@realDonaldTrump), TWITTER (Mar. 5, 2018, 3:47 AM), <https://twitter.com/realdonaldtrump/status/970626966004162560?lang=en> [<https://perma.cc/KC9N-CQBS>].

84. Donald Trump (@realDonaldTrump), TWITTER (Sept. 17, 2018, 3:11 AM), <https://twitter.com/realdonaldtrump/status/1041630722413527040> [<https://perma.cc/Y696-AXZZ>]. “Tariffs have put the U.S. in a very strong bargaining position, with Billions of Dollars, and Jobs, flowing into our Country - and yet cost increases have thus far been almost unnoticeable. If countries will not make fair deals with us, they will be ‘Tariffed!’”

85. *Id.*

86. Stephen Barlas, *USMCA Trade Deal Fails to Address Tariffs*, FABRICATOR (Dec. 11, 2018) <https://www.thefabricator.com/blog/usmca-trade-deal-fails-to-address-tariffs> [<https://perma.cc/7WAU-ERE7>].

87. Scott Suttell, *The China-to-Case Western Reserve University Pipeline Is Flowing at Full Speed*, CRAIN’S CLEVELAND BUS. (Aug. 28, 2018, 12:54 PM), <http://www.crainscleveland.com/scott-suttell-blog/china-case-western-reserve-university-pipeline-flowing-full-speed> [<https://perma.cc/AQ8X-JWM7>].

tariffs once the Commerce Department shows that certain imports harm U.S. national security.<sup>88</sup> However, President Trump is likely using Section 232 with free rein for protectionist purposes. The Commerce Department found that the steel and aluminum imports posed a national security threat to the U.S. Notably, Section 232 has not been invoked since the World Trade Organization (WTO) was formed in 1995.<sup>89</sup> However, it cannot be overlooked that the U.S. government considered and denied Section 232 action in 1991 and 2001.<sup>90</sup>

Conforming to Section 232 of the Trade Expansion Act of 1962,<sup>91</sup> President Trump delivered two presidential proclamations to impose tariffs on steel and aluminum on March 8, 2018, which became effective March 23, 2018.<sup>92</sup> The proclamations were procedurally preceded by the U.S. Department of Commerce's finding that the national security of the United States was impaired by certain steel and aluminum imported products.<sup>93</sup> This report led President Trump to impose a 25% import tariff on steel and a 10% import tariff on aluminum worldwide.<sup>94</sup>

The report showed that the United States is the largest importer of steel in the world, with imports that are nearly four times that of its exports.<sup>95</sup> Additionally, it was reported that since 2000, six basic oxygen furnaces and four electric arc furnaces have been shut down. Furthermore, since 1998, employment in the steel industry has dropped by 35%. Currently, there is only a single U.S. producer remaining for certain types of steel used for electrical transformers.<sup>96</sup> China is the largest producer, exporter, and source of steel in the world.<sup>97</sup> Notably, China's excess capacity itself surpasses the total U.S. steel-making capacity, and their average monthly production of steel equals almost as much steel that the United States

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88. 19 U.S.C.A. § 1862 (Westlaw through Pub L. No. 116-41).

89. Tom Miles, *Trump's Extraordinary Tariffs*, REUTERS (Mar. 5, 2018), <https://www.reuters.com/article/us-usa-trade-explainer/trumps-extraordinary-tariffs-idUSKBN1GH2IR> [<https://perma.cc/LC3A-CTJH>].

90. *Id.*

91. 19 U.S.C. § 1862 (Westlaw through Pub. L. No. 116-41).

92. Hayes, *supra* note 8.

93. *Id.*

94. *Id.*

95. U.S. DEPT. OF COMMERCE, SECRETARY ROSS RELEASES STEEL AND ALUMINUM 232 REPORTS IN COORDINATION WITH WHITE HOUSE (2018), <https://www.awpa.org/wp-content/uploads/2018/02/Section-232-Press-Release-DOC.pdf> [<https://perma.cc/36PV-UD53>] (last visited Aug. 16, 2019) [hereinafter STEEL AND ALUMINUM 232 REPORTS].

96. *Id.*

97. *Id.*

produces in an entire year.<sup>98</sup> “As of February 15, 2018, the U.S. had 169 antidumping and countervailing duty orders in place on steel, of which 29 are against China, and there are 25 ongoing investigations.”<sup>99</sup> It is important to note that although national security was the purported justification, the Department of Defense concluded there was no national defense need to impose restrictions on imports.<sup>100</sup>

Moreover, the United States implemented two methods to properly obtain exclusions or exemptions.<sup>101</sup> First, the U.S. Department of Commerce can grant product-specific exclusions.<sup>102</sup> Second, the U.S. Trade Representative and White House have discretion to allow country-wide exemptions.<sup>103</sup> Accordingly, the United States immediately granted Canada and Mexico temporary exemptions. Furthermore, some countries such as Australia, Argentina, South Korea, and Brazil were given temporary exemptions.<sup>104</sup>

However, not all large countries received the benefit of exemption. In response, retaliatory tariffs on the United States began when China imposed \$3 billion worth of import tariffs on April 2, 2018. China’s tariffs on assorted U.S. commodities, such as wine, fresh fruit, dried fruit and nuts, steel pipes, modified ethanol, and ginseng were implemented with the purpose and intent to send a message to various “politically sensitive jurisdictions.”<sup>105</sup> China also responded with its request to the World Trade Organization for a dispute-settlement consultation, and its contention that the U.S. tariffs violate the World Trade Organization Agreement on Safeguards.<sup>106</sup>

Arguably, this tariff would never have passed in the first place if Congress had been able to vote on it, as evidenced by the proposed legislation following President Trump’s invocation of Section 232 in March 2018. Six additional proposals occurred in 2018 between the House and the Senate to amend Section 232 “[t]o provide for congressional review of the imposition of duties and other trade measures by the executive branch, and for other purposes”<sup>107</sup> and further “to require the Secretary of Defense to initiate investigations and to provide for

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98. *Id.*

99. *Id.*

100. *Id.*

101. Hayes, *supra* note 8.

102. *Id.*

103. *Id.*

104. STEEL AND ALUMINUM 232 REPORTS, *supra* note 95.

105. Hayes, *supra* note 8.

106. *Id.*

107. H.R. 5760, 115th Cong. (2017).

congressional disapproval of certain actions, and for other purposes.”<sup>108</sup> All six recent proposals were made within five months between March 14, 2018, when President Trump initially implemented the tariffs, and August 1, 2018.<sup>109</sup>

### III. SOLUTION

Section 232 arguably provides an unconstitutional, limitless grant of power to the president, and calling upon “national security” does not simply convert the tariff into a constitutional power.<sup>110</sup> In a concurring opinion,<sup>111</sup> Justice Rehnquist noted that the intelligible principle requirement, “ensures that courts . . . reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards.”<sup>112</sup>

To rectify Section 232’s lack of an intelligible principle, this section could be amended in numerous ways to provide guidance to presidents who invoke it. Totally repealing Section 232 would not be advisable because the government, whether directly from Congress or as delegated to an agency or the president, should retain the means to protect the country from serious and actual national security threats. While Congress could technically still impose tariffs without 232’s grant to the president, this process could take longer and be less efficient. There are benefits to the president retaining this power, such as a faster reaction time to national security threats, instead of having to pass through Congress.

To begin, the first obvious action to rectify Section 232 is to ratify the proposals already made to Section 232. The House and the Senate should ratify the proposals to remove the Commerce Department from the investigation of national-security trade threats and replace the Commerce Department with the Defense Department. The Defense Department’s mandated function and purpose is to protect national security.<sup>113</sup> Once the Defense Department identifies a national security threat, the Commerce Department and the U.S. Trade Representative would then formulate a

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108. S. 3329, 115th Cong. (2017).

109. *Id.*

110. Response Memorandum 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, *AIIS v. United States*, 376 F. Supp. 3d 1335 (2019) (No. 18-00152).

111. *Indus. Union Dept., AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 686 (1980).

112. *Id.*

113. Suttell, *supra* note 87.

remedy.<sup>114</sup> While the president would determine the appropriate remedy, Congress would have the right to review and oppose his judgment “with a joint resolution in the House and Senate.”<sup>115</sup> Thus, approving the amendment would expand Congress’s role in Section 232 cases.<sup>116</sup>

This proposal, however, might reach too far to totally remove the Commerce Department from the investigation. Another solution to amending Section 232 would be to simply add the Defense Department alongside the Commerce Department to investigate and make recommendations to the president. Present and future threats to commerce can endanger the nation’s economy and overall security, so Congress arguably should not completely remove the Commerce Department from the assessment of national security threats under Section 232, as the currently proposed legislation recommends.

Congress should balance competing interests and attempt to compromise; it should not chase one goal to the exclusion and detriment of every other goal.<sup>117</sup> As Section 232 is written, the president does not have to consider the consumers or any domestic economic harms that the tariffs can produce. Furthermore, to include an intelligible principle, there should be a requirement to differentiate the countries that the United States imposes a tariff on the grounds of national security needs. Section 232 does not require the president to consider America’s allies. Canada, and by extension Mexico, should be considered separately as they are “safe and reliable source[s] of supply.”<sup>118</sup> There is little evidence to show that Canada and Mexico would not aid America in supplying steel if America was threatened. Additionally, relief under Section 232 can still be attained without applying it to the countries that share borders with America.<sup>119</sup>

To restore the deficiencies of an intelligible principle, more specific guidelines should be enlisted in Section 232. As Section 232 is currently written, it includes the “virtually limitless”<sup>120</sup> catch-all phrase, “without

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114. *Id.*

115. *Id.*

116. *Id.*

117. *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017).

118. *See* U.S. DEP’T OF COMM., BUREAU OF INDUS. & SEC. OFFICE OF TECH. EVALUATION, THE EFFECT OF IMPORTS OF ALUMINUM ON THE NATIONAL SECURITY 29 (2018), <http://cifer.pbcfs.tsinghua.edu.cn/uploadfile/2018/1129/20181129100939306.pdf> [<https://perma.cc/W7AZ-LBCD>].

119. *Id.*

120. *AIIS v. United States*, 18-00152, at 10 (Oct. 5, 2018), Response Memorandum Support of Plaintiffs’, Opposition to Defendants’ motion for Judgment on the Pleadings and Reply Memorandum in Support of Plaintiffs’ Motion for Summary Judgment.

excluding other relevant factors.”<sup>121</sup> The phrase “national security” serves no guidance because it remains an ill-defined, expansive, and boundless consideration. As opposed to the long line of cases dismissing the notion of the non-delegation doctrine, Section 232 is open-ended regarding what triggers imports as national security threats and the scope of the remedy.<sup>122</sup>

One way to limit the otherwise unlimited scope of the president’s power under Section 232 is to create an objective trigger. The intelligible principle could simply be satisfied if used for the objective purpose of “[equalizing] the differences between foreign and domestic production costs for similar articles.”<sup>123</sup> This would give proper oversight to review challenges to Section 232—a criterion to precisely mark an abuse of power. Thus, the tariff would only be used for a set purpose and could not be manipulated to advance hidden agendas to support specific industries

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121. Section 232(d) states:

For purposes of this section, the Secretary [of Commerce] and the President [of the United States] shall, in the light of the requirements of national security and without excluding other relevant factors, give consideration to domestic production needed for projected national defense requirements, the capacity of domestic industries to meet such requirements, existing and anticipated availabilities of the human resources, products, raw materials, and other supplies and services essential to the national defense, the requirements of growth of such industries and such supplies and services including the investment, exploration, and development necessary to assure such growth, and the importation of goods in terms of their quantities, availabilities, character, and use as those affect such industries and the capacity of the United States to meet national security requirements. In the administration of this section, the Secretary and the President shall further recognize the close relation of the economic welfare of the Nation to our national security, and shall take into consideration the impact of foreign competition on the economic welfare of individual domestic industries; and any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports shall be considered, without excluding other factors, in determining whether such weakening of our internal economy may impair the national security.

122. *AIS v. United States*, 18-00152, at 9 (Oct. 5, 2018), Response Memorandum Support of Plaintiffs’, Opposition to Defendants’ motion for Judgment on the Pleadings and Reply Memorandum in Support of Plaintiffs’ Motion for Summary Judgment.

123. *Algonquin SNG, Inc. v. Fed Energy Admin*, 518 F.2d 1051 (D.C. Cir. 1975, *rev’d* 426 U.S. 548 (1976)) (citing *Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928)).

“without any showing of inequality or unfair trade practices.”<sup>124</sup> This would further check the president’s political and economic preferences and monitor his intentions and motivations for imposing tariffs.

Section 232 has no duration or guideline to bring an end to the tariffs it imposes. Therefore, the tariffs should be constructed more like Section 201 of the Trade Act of 1974<sup>125</sup> and be more temporary in nature. As Section 201 is focused on restoring U.S. industries back to health,<sup>126</sup> Section 232 should be amended so that its tariffs cease when the threat no longer remains.

### CONCLUSION

The tariffs on imports to the United States under Section 232 have been implemented under the guise of national security protection. President Trump’s true intention seems to be more focused on positioning himself with greater negotiating power in other matters. Accordingly, there should be some type of check on the president’s intentions as well as guidelines for the president to follow for such a tariff since it has substantial effects on the United States, the energy industry, and the world.

As it stands, Section 232 lacks an intelligible principle to guide present and future presidents on how to identify and manage national security threats. By creating structure and implementing objective triggers within Section 232, it can become constitutional and less vulnerable to presidential abuse.

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124. *See* *AIS v. United States*, 18-00152, at 10 (Oct. 5, 2018), Response Memorandum Support of Plaintiffs’, Opposition to Defendants’ motion for Judgment on the Pleadings and Reply Memorandum in Support of Plaintiffs’ Motion for Summary Judgment.

125. 19 U.S.C. § 2252 (Westlaw through Pub. L. No. 116-41).

126. CONG. RESEARCH SERV., SECTION 232 OF THE TRADE EXPANSION ACT OF 1962 (2018), <https://fas.org/sgp/crs/misc/IF10667.pdf> [<https://perma.cc/JM7Y-R2X6>].

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