Responses and Replies

1:18-cv-00152-CRK-JCG-GSK American Institute for International Steel, Inc. et al v. United States et al

U.S. Court of International Trade

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1:18-cv-00152-CRK-JCG-GSK Notice has been electronically mailed to:

Alan B. Morrison abmorrison@law.gwu.edu

Alan Hayden Price aprice@wileyrein.com, trade@wileyrein.com

Brady Warfield Mills bmills@mmmlaw.com, tradeservice@mmmlaw.com

Christopher Bright Weld cweld@wileyrein.com, trade@wileyrein.com

Donald Bertrand Cameron dcameron@mmmlaw.com, tradeservice@mmmlaw.com

Gary N. Horlick gary.horlick@ghorlick.com

Joshua Turner jturner@wileyrein.com

Joshua Ethan Kurland joshua.e.kurland@usdoj.gov, natcourts.dockets@usdoj.gov

Julie Clark Mendoza jmendoza@mmmlaw.com, tradeservice@mmmlaw.com

Maureen Elizabeth Thorson mthorson@wileyrein.com

Rudi Will Planert wplanert@mmmlaw.com, tradeservice@mmmlaw.com

Stephen Carl Tosini stephen.tosini@usdoj.gov, civil.itfoecf@usdoj.gov, natcourts.dockets@usdoj.gov, national.courts@usdoj.gov

Steve Charnovitz scharnovitz@law.gwu.edu

Tara Kathleen Hogan tara.hogan@usdoj.gov, civil.itfoecf@usdoj.gov, natcourts.dockets@usdoj.gov

Timothy Lanier Meyer tim.meyer@vanderbilt.edu

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IN THE UNITED STATES COURT OF INTERNATIONAL TRADE

AMERICAN INSTITUTE FOR INTERNATIONAL STEEL, INC., SIM-TEX, LP, and KURT ORBAN PARTNERS, LLC, Plaintiffs, v. UNITED STATES and KEVIN K. MCALEENAN, Commissioner, United States Customs and Border Protection, Defendants.	Before: Claire R. Kelly, Jennifer Choe-Groves, & Gary S. Katzmann, Judges Court No. 18-00152

RESPONSE MEMORANDUM IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS AND REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Alan B. Morrison
George Washington University Law School
2000 H Street, NW
Washington, D.C. 20052
(202) 994-7120
abmorrison@law.gwu.edu

Donald B. Cameron
R. Will Planert
Julie C. Mendoza
Brady W. Mills
MORRIS MANNING & MARTIN LLP
1401 Eye Street, NW, Suite 600
Washington, D.C. 20005
(202) 216-4811
dcameron@mmmlaw.com

Gary N. Horlick
Law Offices of Gary N. Horlick
1330 Connecticut Ave. NW, Suite 882
Washington, D.C. 20036
(202) 429-4790
gary.horlick@ghorlick.com

Timothy Meyer
Vanderbilt Law School
131 21st Avenue South
Nashville, TN 37203
(615) 936-8394
tim.meyer@law.vanderbilt.edu

Steve Charnovitz
George Washington University Law School
2000 H Street, NW
Washington, D.C. 20052
(202) 994-7808
scharnovitz@law.gwu.edu

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INTRODUCTION

The parties are in agreement that there are no material facts in dispute and that there are no standing or other procedural barriers that preclude the Court from deciding the case on the merits. They also agree that non-delegation claims must be decided based on whether the statute at issue has an "intelligible principle" to guide the official designated to implement the statute and that an element required for the statute is that it set some "boundaries" (Defs. Mem. at 22, quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)). But despite paying lip service to this dispositive issue to which Plaintiffs devoted a major portion of their summary judgment Memorandum, the Government does not refute (or even attempt to refute) Plaintiffs' analysis of section 232 which demonstrates that this law does not contain any boundaries on the President's authority and does not delineate any general policy that the President could faithfully implement. Defendants address the boundary issue in less than three pages (Defs. Mem. at 18-21), most of which merely describe the necessary procedures, such as the required report and the time frame for decisions, none of which present any meaningful limits on the President's discretion. What is most remarkable about Defendants' Memorandum, especially in light of Plaintiffs' detailed exposition of the open-ended invitation that section 232 provides and that the President utilized to the full extent of its permission, is that it fails to identify a single example where Plaintiffs overstate how section 232 permits the President to do whatever he pleases on imports of steel products.

This total absence of boundaries is reminiscent of the Supreme Court's decision in *United States v. Lopez*, 514 U.S. 549 (1995), in which the issue presented was whether there were any limits on Congress' use of the Commerce Clause. In concluding that there were boundaries beyond which the federal power under the Commerce Clause could not reach, the Court made

the connection between the limits under federalism at issue there and those under separation of powers at issue here:

> Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.

Lopez, 514 U.S. at 552 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

Like this case, the Court, prior to *Lopez*, had not sustained a Commerce Clause challenge to a federal law in almost 60 years. Like this case, *Lopez* was about boundaries: are there any limits on what Congress can sweep within its Commerce Clause powers? In concluding that the statute at issue in *Lopez* exceeded Congress's admittedly extensive power under the Commerce Clause, the Court repeatedly emphasized the failure by the dissent and the United States to identify an argument for upholding the statute that would still result in limits:

> Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power . . . if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.
>
> Although Justice BREYER argues that acceptance of the Government's rationales would not authorize a general federal police power, he is unable to identify any activity that the States may regulate but Congress may not.

Lopez, 514 U.S. at 564.

That same limits question is at the heart of this case: if this delegation by Congress is not excessive, what would be? Article I, Section 1 of the Constitution vests "[a]ll legislative [p]owers"—which includes the power to impose tariffs and quotas—in Congress, not the President, and the Supreme Court has repeatedly reaffirmed that there are some limits beyond which Congress may not constitutionally go in delegating its powers to the President. Defendants do not challenge that fundamental proposition. Moreover, they fail, just as the Government failed in *Lopez*, to identify a single action that the President has taken or might take

under section 232 with regard to imports of steel products that would be outside the boundaries of that law. And that is because there are no boundaries in section 232, merely the mechanical requirements of a Department of Commerce report and recommendation, a deadline for any presidential action, and the sending of a report to Congress on what the President has already ordered.

Nor does the mere invocation of the term "national security" transform an unconstitutionally limitless delegation into a constitutional one. As Plaintiffs explained in their opening Memorandum at 5-6, the term "national security," as augmented exponentially by the inclusion in section 232(d) of any impacts on the national economy, has virtually no relation to national security as that term is used in cases relied on by Defendants, such as *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), which upheld a ban on material support to terrorist organizations. And once the President has concluded that imports of a product like steel have some adverse impact on any aspect of the national economy, there is nothing he cannot do through tariffs, quotas, and similar remedies to bring about whatever result he thinks desirable, for any reason whatsoever. Section 232 is precisely the same sort of "blank check" that Justice Thomas concluded would result if the Government's position in *Lopez* were sustained. *Lopez,* 514 U.S. at 602 (Thomas, J., concurring). In short, the President is left without a roadmap and without a compass.

The Government's failure to identify any adverse economic effect that is outside the scope of "national security" as defined in section 232, or any remedy that the President is precluded from utilizing, is central to this challenge to section 232. Just as in *Lopez,* where the lack of boundaries was fatal to the Government's defense of that law, so here the lack of boundaries requires the Court to strike down section 232 as a violation of the non-delegation

doctrine and the principles of separation of powers that are fundamental to the Constitution. Put another way, if section 232 does not violate the non-delegation doctrine, then it is difficult to imagine any statute that would.

ARGUMENT

I. *FEDERAL ENERGY ADMINISTRATION V. ALGONQUIN* DOES NOT "FORECLOSE" THIS CHALLENGE.

Defendants contend (Defs. Mem. at 13) that this non-delegation challenge is "foreclosed" by the decision in *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976). Defendants do not argue, because they cannot, that *Algonquin* is controlling legal authority that dictates the outcome of this case. If that were true, there would have been no need for the Government to write a 35-page response brief.

As Plaintiffs' prior memoranda on the Three Judge Panel Motion and Summary Judgment show, there are two reasons why *Algonquin* does not dictate the outcome of this lawsuit. First, the challenge in *Algonquin* was a narrow, *statutory* one: whether the particular remedy that the President chose in that case—import licensing fees—was authorized by section 232. In order to bolster their statutory claim, the plaintiffs argued that, if the statute were interpreted to permit the chosen remedy, that interpretation would raise "a serious question of unconstitutional delegation of legislative power" by allowing the President to pick and choose the method by which to remedy the uncontested finding that imports of petroleum were causing harm to U.S. national security. *Algonquin*, 426 U.S. at 559 (quoting respondents' brief at 42). The D.C. Circuit opinion that the Supreme Court reviewed, and which the Government cites (Defs. Mem. at 18), characterized the plaintiffs' claim this way:

> [Plaintiffs] . . . argue that the license fee program instituted by Presidents Nixon and Ford was *beyond their statutory authority under section 1862(b).* Pointing to the statutory directive to "adjust imports", they assert that the legislative intent behind this provision was to grant authority to impose only direct import controls,

> such as quotas. Further, appellants rely heavily on [several Supreme Court decisions], arguing both that authority to impose license fees may not be implied without a clear statutory directive and *that the statute should be interpreted to exclude such power to avoid constituting an unconstitutional delegation*.[1]

Algonquin SNG , Inc. v. Fed. Energy Admin., 518 F.2d 1051, 1055 (D.C. Cir. 1975) (emphasis added). In other words, the plaintiffs invoked the non-delegation doctrine not as an independent challenge to the constitutionality of section 232, but rather, as an additional ground for adopting the narrower interpretation of the statute they preferred. The Court was not faced with a claim that the entire remedial provision in section 232, as well as its capacious definition of national security, exceeded the bounds of a proper delegation. Nor was the Court presented with facts remotely like these in which, for instance, the President—with nothing in section 232 to constrain him—chose to impose a 25% tariff on all steel imports, without having to justify that number in any way, and then to double that tariff for steel imports from Turkey simply because he could.

Moreover, unlike the order in *Algonquin*, the President here has exempted some countries from the tariff and has treated all steel imports as fungible, despite the manifold reasons that were provided to the Secretary of Commerce as to why that made no sense, for either those on the import or on the use side. And no one argued that the licensing fee at issue in *Algonquin* had negative consequences for large segments of the U.S. economy. By contrast here, Plaintiffs argue that there are very significant adverse impacts outside the steel industry that section 232

[1] The plaintiffs' brief before the Supreme Court also makes clear that their claim was a statutory one. *See* Brief for Respondents, Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548 (1976) (No. 75-382) 1976 WL 181335, at *9 ("The President's imposition of license fees on imported oil was beyond the scope of authority delegated to him by 19 U.S.C. 1862(b). Well-established principles of statutory construction, legislative history, and the dire implications of the broad and unprecedented powers asserted by the President all establish that § 1862(b) authorizes adjustment of imports through use of direct mechanisms such as quotas, but not through indirect mechanisms such as license fees.").

neither authorizes nor precludes the President from taking into account. Instead, Congress left that question up to the President's personal preferences unmoored to anything in section 232. Because of the narrowness of the statutory claim in *Algonquin*, as compared to the facial constitutional claim being made here, the decision in *Algonquin* does not "foreclose" this action from proceeding.

In this sense, the relationship of the present case to *Algonquin* is very similar to the relationship of *Gundy v. United States*, No. 17-6086 (S. Ct. argued Oct. 2, 2018), the non-delegation case currently pending at the Supreme Court (which Defendants failed to mention in their Memorandum), and *Reynolds v. United States*, 565 U.S. 432 (2012). *Reynolds* and *Gundy* both deal with a provision of the Sex Offender Registration and Notification Act (SORNA) that grants the Attorney General the authority to determine whether SORNA's registration requirements apply retroactively. In the first case, *Reynolds*, the Court interpreted the statute not to apply until the Attorney General decided to apply its requirements to pre-enactment convictions. In so doing, the Court rejected an argument, made by Justice Scalia in dissent, *Reynolds*, 565 U.S. at 450, that the statute should be construed in a way to avoid non-delegation concerns. But the Court obviously did not think that *Reynolds* foreclosed a facial non-delegation attack on the statute—the issue on which it granted certiorari in *Gundy*—just as *Algonquin* does not foreclose a facial non-delegation attack on section 232. Rather, by interpreting the statutes to grant the executive branch incredibly broad power, both *Reynolds* and *Algonquin* set the table for the facial non-delegation challenges that followed.

Second, having rejected the constitutional avoidance argument in *Algonquin*, the Court proceeded to decide the merits of the statutory claim there that the President had chosen a remedy that was not within the authority of section 232. It did so because no one even argued

that the President's choice of remedy was not subject to judicial review, as it might under *United States v. George S. Bush & Co.*, 310 U.S. 371 (1940). The response would have been that Algonquin sued the enforcement agency, not the President and that the suit was not over the President's discretionary decision, but the legality of his choice of remedies.

But sixteen years after *Algonquin*, in *Franklin v. Massachusetts*, 505 U.S. 788 (1992), and then again in *Dalton v. Specter*, 511 U.S. 462 (1994), the Court made clear that the bar to suing the President when he makes discretionary determinations, as he did in those cases and as he has done here, cannot be circumvented by suing an official who either made findings that led to the President's decisions or were charged with implementing his orders. Under those rulings, unlike what was allowed in *Algonquin*, if a front door suit challenging a presidential determination of the kind made in these Proclamations on steel imports is barred, then so is a suit via the back door against other officials with any role in the process. That includes suits challenging the validity of the tariff under section 232 itself brought against the Secretary of Commerce, in whose finding the President concurred, or the Commissioner of Customs and Border Protection, who is responsible for collecting the tariff. As explained in Point III, *infra*, the absence of judicial review now, in contrast to its availability in 1976, provides a second reason why the analysis of non-delegation issues raised in the context of statutory claims in *Algonquin* is not dispositive of the facial non-delegation claim presented in this action, and why the delegation here is unconstitutional.[2]

[2] Because the President was not bound by any findings of the Secretary except his ultimate conclusion of adverse impact, and because there is no judicial review of anything that the Secretary found or concluded, the lengthy discussion of what the Secretary concluded on pages 4-7 of Defendants' Memorandum is of no significance. Moreover, as the Supreme Court made clear in *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457, 473 (2001), nothing that an agency does can save an otherwise unconstitutional delegation.

II. NONE OF THE CASES CITED BY DEFENDANTS SUPPORT THE UNCONSTITUTIONAL DELEGATION IN SECTION 232.

The parties agree that the standard by which section 232 must be judged is whether Congress has provided an "intelligible principle" to guide the actions of the President. According to the Defendants,

> Section 232 contains intelligible principles, including general policy guidance, delineates the respective roles and duties of the Secretary and the President, and establishes deadlines, and boundaries for actions taken pursuant to the delegated authority.

Defs. Mem. at 13. Plaintiffs agree that section 232 does delineate the roles of the Secretary and the President and that it includes deadlines. Defendants are wrong, however, when they assert that "Plaintiffs do not dispute that Congress has identified the general policy: to safeguard national security by ensuring that imports of articles do not threaten to impair the national security." Defs. Mem. at 22. In fact, Plaintiffs have argued the exact opposite: that in section 232, Congress fails to identify or proclaim any policy guidance that could be called intelligible. Rather, Congress has written a standardless delegation that does not give the President any discernable policy guidance on the essential questions that must be addressed in implementing section 232. The term "national security" is used in such an expansive manner that it permits consideration of any effect on the national economy, and there are no boundaries in section 232 that constrain the President in how he chooses to respond to a finding that the imports of a given article will have an adverse impact on national security.

Defendants cite a plethora of cases that they claim support the constitutionality of section 232, and they quote from general language affirming that the test has been met in those cases. But, by definition, the answer to the intelligible principle question must be determined by the statute at issue. Plaintiffs have reviewed each of those cases, and except for *Algonquin*, they all involve other statutes that are very different from section 232 in the two important respects in

which section 232 is open-ended: (1) the trigger for invoking it—that imports of an article "threaten to impair the national security" which includes the economic impacts under section 232(d)—and (2) the available remedy—authorizing the President to take such action that "in the judgment of the President" will "adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security." 19 U.S.C. § 1862(c)(1)(A)(ii).

Turning first to the triggers in the cases that Defendants cite, this is how the Supreme Court in *Algonquin* described the limited trigger in the statute in the case that announced the intelligible principle test: "In *Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928), this Court upheld the constitutionality of a provision empowering the President to increase or decrease import duties *in order to equalize the differences between foreign and domestic production costs for similar articles*." *Algonquin*, 426 U.S. at 559 (emphasis added) (citation omitted). Production costs are an objectively verifiable fact, which provide a concrete limit on when duties can be increased. A similar limitation on the reach of the statute being challenged in another case relied on by Defendants, *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), was that the law at issue applied only to "chain broadcasting," a term that Congress had expressly defined and directed the FCC to regulate. *Id.* at 194, n.1. And in *Yakus v. United States*, 321 U.S. 414 (1944), the statute permitted the agency to control prices of particular commodities during World War II if "prices 'have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act.'" *Yakus*, 321 U.S. at 420 (quoting relevant executive order). Another comparable example is *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 297 (1933), where an increase in the rate of duty on sodium nitrite was permitted, but only "to equalize the differences in the costs of production in the United States and the principal competing country . . . ." The delegation at issue in *United States v. Yoshida*

Intern., Inc., 526 F.2d 560 (C.C.P.A. 1975), was limited by another means: it could be invoked only in a time of war or if the President declared a national emergency. To be sure, not all statutes sustained as containing an intelligible principle are as narrow as these, but there is no statute in any of Defendants' cited cases—and Defendants have pointed to none—in which the trigger comes close to approaching the threat from imports to "national security" in section 232, which includes the virtually limitless expansion in section 232(d), including its twice-specified catch-all, "without excluding other [relevant] factors."[3]

On the remedy issue, in many cases, such as where the trigger depends on an objective factor such as using tariffs to equalize the costs of production between domestic and foreign products, there is a self-limiting feature of the remedy: the tariff can be used only to bring equality to the competition and not to foster other goals, such as was used here to support the steel industry without any showing of inequality or unfair trade practices by another country.

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[3] Section 232(d), which Defendants never quote, provides as follows:

> For the purposes of this section, the Secretary and the President 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.

(emphases added).

Other forms of control over remedy are exemplified in cases such as *Opp Cotton Mills, Inc. v. Adm'r of Wage & Hour Div. of Dep't of Labor*, 312 U.S. 126 (1941), where wage increases could be authorized, but the hourly wage was capped at 40 cents, from the existing base of 30 cents an hour. Similarly, in *Florsheim Shoe Co. v. United States*, 744 F.2d 787, 795 (Fed. Cir. 1984), the President's authority was "limited—although he may withdraw preferential treatment entirely, he may not adjust rates of duty." Or in *Star-Kist Foods, Inc. v. United States*, 275 F.2d 472 (C.C.P.A. 1959), the increases or decreases were limited to 50% of the duty previously specified, the same limitation that applied in *Hampton*, 276 U.S. at 401. As the court explained in *Star-Kist*, a meaningful limitation on the President's authority to select a remedy is necessary for a constitutionally valid delegation:

> [B]ecause Congress cannot abdicate its legislative function and confer carte blanche authority on the President, it must circumscribe that power in some manner. This means that Congress must tell the President what he can do by prescribing a standard which confines his discretion and which will guarantee that any authorized action he takes will tend to promote rather than flout the legislative purpose. It is not necessary that the guides be precise or mathematical formulae to be satisfactory in a constitutional sense.

Star-Kist, 275 F.2d at 481.

Again, not all statutes that have been found to contain an intelligible principle had specific limits on remedies such as these. But in most cases, even with more general provisions describing what an agency or the President could do, the triggering event had already narrowed the available choices, or the statute was enacted against a background of prior regulation that effectively limited what could lawfully be done. *See Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO v. Connally*, 337 F. Supp. 737, 748 (D.D.C. 1971) (three judge court) ("The context of the 1970 stabilization law includes the stabilization statutes passed in 1942, and the stabilization provisions in Title IV of the Defense Production Act of 1950 . . . those laws and their implementation do provide a validating context as against the charge that the

later statute stands without any indication to the agencies and officials of legislative contours and contemplation."). And in every one of these cases, objections to the legality of what had been ordered were available through robust judicial review.

The contrast between the statutes in the cases cited by Defendants and section 232 could not be starker, as evidenced by the range of unencumbered choices that the President has under section 232. He can impose tariffs, quotas, or licensing fees or all of them. He can also impose some remedies on some products or countries, with different restrictions for some of the others. The rate of tariffs (or extent of quotas) is not confined in any respect, as illustrated here by the arbitrary choice of 25%. The President is also not limited to imports that affect national security (even as broadly defined). Section 232 merely authorizes the President to take "action . . . to adjust the imports" of a product that threatens to impair the national security. 19 U.S.C. § 1862(c)(1)(A)(ii). Such action could include regulating products whose importation is not a threat to national security if doing so resulted in an adjustment to the imports of the products that do threaten national security.[4]

The President is also not required to apply his chosen remedy to imports from all countries, but Congress has also not decided that he may be selective, which has enabled the President to pick and choose a remedy, most recently by doubling the tariff on steel imports from Turkey with no national security justification beyond that which is applicable to steel imports from other countries. Proclamation 9772, Exhibit 15. Moreover, and perhaps most significant of all, there is not a word from Congress as to how, if at all, the President is to take into account in fashioning his remedy under section 232 the inevitable impacts that massive tariffs such as this

[4] Despite the purported national security justification, the Department of Defense, as required by section 232, was asked whether there was a national defense need for restrictions on imports, and it concluded that none was shown. Exhibit 8.

one will have on the many industries, workers, consumers, and communities that will be adversely affected by the tariff whose beneficiaries are limited to a single, albeit significant, industry. *Compare Florsheim*, 744 F.2d at 795 (citing to note 8 (quoting relevant statutes listing factors that "the President must consider" before taking action)). Congress has not directed the President to balance those competing interests or to disregard one set while benefitting the other; it is all up to him in his unbridled discretion, just as it would be up to Congress if it enacted this tariff, after undergoing the full legislative process of approval by both Houses and the President. No decision of any court, let alone the Supreme Court, has sanctioned a delegation of this breadth.

In an effort to save section 232, Defendants invoke the power of the President in the area of foreign affairs and rely on various trade cases to support that proposition. Plaintiffs note, however, that the focal point of section 232 is the protection of the domestic economy of the United States. Indeed, in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952), the Supreme Court held specifically that the President's foreign affairs powers do not entail the "power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities." In other words, the President's foreign affairs powers do not give him constitutional *carte blanche* to set domestic economic policy, such as through taxing imports.

The prior discussion has dealt with most of the cases Defendants cite, but not *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892). The law at issue there applied where:

> [T]he government of any country producing and exporting [five enumerated products] imposes duties or other exactions upon the agricultural or other products of the United States, which in view of the free introduction of such [products] into the United States [the President] may deem to be reciprocally unequal and unreasonable, he shall have the power, and it shall be his duty, to

> suspend, by proclamation to that effect, the provisions of this act relating to the free introduction of such [products] for such time as he shall deem just.

Id. at 680 (quoting applicable statute). The Court then cited the decision in *The Aurora*, 11 U.S. (7 Cranch) 382 (1813), which sustained a similar delegation and discussed a number of prior acts of similar import. *Id*. at 682-89. It then described these laws as those enacted "for the protection of the interests of our people against the unfriendly or discriminating regulations established by foreign governments," a far narrower category than is covered by section 232. *Id*. at 691.

The Court then explained why the statute did not delegate legislative power to the President, an explanation that demonstrates the vast gulf between the statute at issue there and section 232:

> [C]ongress itself determined that . . . the free introduction of such articles, should be suspended as to any country . . . that imposed exactions and duties on the agricultural and other products of the United States, which the president deemed, that is, which he found to be, reciprocally unequal and unreasonable. Congress itself prescribed, in advance, the duties to be levied, collected and paid [on the enumerated products] from such designated country while the suspension lasted. Nothing involving the expediency or the just operation of such legislation was left to the determination of the president. The words 'he may deem,' in the third section, of course implied that the president would examine the commercial regulations of other countries producing and exporting [those products] and form a judgment as to whether they were reciprocally equal and reasonable, or the contrary, in their effect upon American products. But when he ascertained the fact that duties and exactions [were] reciprocally unequal and unreasonable . . . it became his duty to issue a proclamation declaring the suspension, as to that county [sic] . . . He had no discretion in the premises except in respect to the duration of the suspension so ordered. . . . As the suspension was absolutely required when the president ascertained the existence of a particular fact, it cannot be said that in ascertaining that fact, and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws.

Id. at 692-93.

On page 28 of their Memorandum, Defendants refer to page 691 in *Field* to support their argument (page 27) that "The President's Authority To Act In The Realms of Foreign Affairs And National Security" reinforces the constitutionality of section 232. However, that portion of

Field makes no mention of any of the powers of the President as support for the delegation, but simply observes that Congress has frequently made such delegations to the executive branch. Nor does the existence of the President's authority in the areas of foreign affairs and national security have any bearing on the question presented in this case, which is whether the delegation made by Congress violates separation of powers, not whether the President has any residual powers in this area. This case is not, in other words, a case like *Youngstown* that directly challenges an act of the President; rather, it is a facial challenge to an act of Congress.

But even if presidential powers were relied on here, they would be of no avail. Under Article I, section 1, "All legislative [p]owers herein granted shall be vested in a Congress," which specifically includes in section 8, the "[p]ower [t]o lay and collect [t]axes, [d]uties, [i]mposts and [e]xcises" and in Clause 3 thereof, the power to "regulate [c]ommerce with foreign [n]ations." By contrast, the role assigned to the President in Article II, Section 3 is to "take [c]are that the [l]aws be faithfully executed . . . ." As the Court observed in *Youngstown*, 343 U.S. at 587, "[i]n the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." Or as the Court of Customs and Patents Appeals observed in *Yoshida Intern.*, 526 F.2d at 572, with specific reference to the powers at issue here: "It is nonetheless clear that no undelegated power to regulate *commerce*, or to set tariffs, inheres in the Presidency" (emphasis in original).

In their opening Memorandum (Pls. Mem. at 39-42), Plaintiffs discussed at length two Supreme Court decisions, post-*Algonquin*, which struck down statutes under analogous constitutional principles to those at issue here. In both cases, Congress had abdicated its responsibility to determine the law, leaving it in the first case, *Clinton v. City of New York*, 524 U.S. 417 (1998), to the President, and in the second, *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018),

to prosecutors and the courts. Defendants did not mention *Dimaya* at all, and cited *City of New York* (Defs. Mem. at 29) for a proposition regarding presidential discretion over foreign affairs that has no relevance to this non-delegation challenge. Neither case controls the outcome here, but both are very strong support for Plaintiffs' basic separation of powers argument that it is the duty of Congress to make the law and of the courts to enforce that requirement.

Finally, Plaintiffs wish to make it clear that they are not urging the Court to reject or even modify the intelligible principle requirement first set forth in *Hampton.* Their position is that requiring an intelligible principle is a statement of the standard that a statute must meet, not a mechanical formula that can be applied to determine whether a challenged statute is sufficiently definite to overcome a non-delegation challenge. In Plaintiffs' view, the only way to answer that question is by examining the specific provisions of the law at issue, not seeking to gain wisdom from quotations in opinions about different statutes. To help focus that inquiry, Plaintiffs urge the Court to divide the statute into (at least) two parts: (1) the trigger, that is what must be found by the President or others, and how specific must that finding be, to make the remedy available, and (2) if the statute can be invoked, is the remedy defined in such a way that the choices are reasonably confined and/or the statute provides guidance on how to resolve the likely options?

There have always been, and there will continue to be, no clear dividing lines between permitted and forbidden delegations, and it may be that a broader delegation on the trigger can be compensated for by a narrow set of remedies, or vice versa. Plaintiffs recognize the inevitability of some "legal uncertainty" by any test that results in upholding some statutes but not others. However, as the Supreme Court observed in *Lopez*, 514 U.S. at 566, "[a]ny possible benefit from eliminating this 'legal uncertainty' would be at the expense of the Constitution's system of enumerated [or in this case, separated] powers."

III. THE ABSENCE OF JUDICIAL REVIEW OVER THE PRESIDENT'S DISCRETIONARY DETERMINATIONS UNDER SECTION 232 RESOLVES ANY DOUBTS ABOUT ITS LACK OF AN INTELLIGIBLE PRINCIPLE.

The Supreme Court has repeatedly "reaffirmed our longstanding principle that so long as Congress provides an administrative agency with standards guiding its actions such that a court could ' "ascertain whether the will of Congress has been obeyed," ' no delegation of legislative authority trenching on the principle of separation of powers has occurred." *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 218 (1989) (quoting *Mistretta v. United States*, 488 U.S. 361, 379 (1989)); *see also Yakus v. United States*, 321 U.S. 414, 425 (1944) (judicial review is used to "ascertain whether the will of Congress has been obeyed"). As Justice Rehnquist in *Indus. Union Dept., AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 686 (1980) noted in his concurring opinion, which Defendants do not address, the intelligible principle requirement "ensures that courts . . . reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards." Indeed, Defendants omitted the following observation, in *American Power & Light Co.*, 329 U.S. at 105, on which Defendants rely extensively, on the importance of judicial review in assessing the constitutionality of a delegation by Congress: "Private rights are protected by access to the courts to test the application of the policy in the light of these legislative declarations. Such is the situation here."[5]

Section 232 contains no provision for judicial review. The President, who imposed the tariff at issue in this case, is not an agency, and hence his decisions are not subject to review under the Administrative Procedures Act (APA). *Franklin v. Massachusetts*, 505 U.S. 788, 801

[5] Plaintiffs also noted that other procedural protections against unlawful or arbitrary executive branch action were also not present (Pls. Mem. at 7-8). They never suggested that these were required for a statute to pass the non-delegation test, but only as a recognition that some other procedural devices might offset the lack of judicial review and provide some modest checks on executive power.

(1992). There are at least some circumstances, such as where he is alleged to have violated a specific mandate in section 232 or acted in violation of the Constitution, in which actions by the President are subject to judicial review. *See Trump v. Hawaii*, 138 S. Ct. 2392 (2018). Thus, if the President had imposed the tariff at issue here without the report and recommendation of the Secretary of Commerce, a court would have the authority to overturn it on that basis. Or if section 232 had a percentage limit on how much an increase was permitted (which it does not), and the President disregarded it, that too would be reviewable. For this reason, Defendants' suggestion (Defs. Mem. at 33) that Plaintiffs contend that the absence of APA review eliminates all judicial review of Presidential actions is mistaken.

Defendants are also incorrect that Plaintiffs contend that the presence of judicial review of the most significant determinations made under delegated authority is essential for a statute to be sustained against a delegation challenge. It is correct, as Defendants state (Defs. Mem. at 32) that "[p]laintiffs identify no case in which the constitutionality of a delegation turned on the presence or absence of judicial review, and we are aware of none." On the other hand, in virtually every case in which there has been a delegation challenge, judicial review of the merits of the substantive objections have been available in that case or in a subsequent proceeding. For instance, in *Touby v. United States*, 500 U.S. 160, 168-69 (1991), the petitioners argued that a statute violated the non-delegation doctrine because it barred judicial review. Tellingly, the Court did not reject the idea that the availability of judicial review is important in non-delegation cases. Rather, it rejected the claim because it found that the statute in question *did* authorize judicial review and that fact was "sufficient to permit a court to ' "ascertain whether the will of Congress has been obeyed." ' " *Id*. at 168-69 (quoting *Skinner*, 490 U.S. at 218). Moreover, there is no case in which judicial review of the significant discretionary determinations, such as

those made by the President under section 232, has been precluded and a court has concluded that such preclusion is of no significance.

Indeed, while it may be the current position of the Department of Justice that the absence of judicial review is of no significance, that was not always the case. In its reply brief in support of certiorari in *Department of the Interior v. South Dakota*, 519 U.S. 919 (1996) (No. 95-1956), 1996 WL 33438671, the Solicitor General, in a case involving a non-delegation challenge, defended its proposed remand to allow the court of appeals to assess a recent regulation that had added a right to judicial review, on the apparent ground that it would lessen the impact of the broad delegation there: "As Judge Murphy explained, Pet. App. 16a-17a, the availability of judicial review can be an important factor in the non-delegation inquiry. *See* Pet. 23-24." *Id.* at *7-8.[6]

The reason that judicial review of significant discretionary determinations is important in delegation challenges is that the non-delegation doctrine exists, as Defendants recognize (Defs. Mem. at 34), to guard against "unchecked" power. One way to provide that protection is through judicial review, not only of the requirement that the Secretary (who serves at the pleasure of the President) makes the necessary finding and the President acts within the 90 days provided by law, but to be sure that Congress has made the major policy decisions, or at least told the President on what basis he should make them. Judicial review can thus be an important means of enforcing the "boundaries" that Defendants concede are an essential ingredient of the non-delegation doctrine and a means to assure that the official designated to implement the law adheres to the directions given by Congress.

[6] The dissenters from the grant of review and a remand in that case objected to reliance on the possibility of judicial review largely because it was "accorded only at the discretion of the agency" and not included as a right under the statute. *Department of the Interior v. South Dakota*, 519 U.S. 919, 922 (1996).

Here, however, the lack of judicial review only underscores the absence of any boundaries in the statute itself. Indeed, even if there were an express provision for judicial review, the courts would be assigned an impossible task. If a party objected to the choice of tariffs instead of quotas, nothing in section 232 would limit in any way the President's choice. Similarly, if a plaintiff argued that 25% was unjustified, and that no tariff in excess of 10% was permitted, there is nothing in the statute that would enable a court to answer that question either way. The same is true as to whether the President may pick and choose among steel products in his selection of remedies or whether he must treat them all the same. Again, section 232 has no answers or even a framework for deciding such questions. And finally, the most vexing question of all, as is true in many legislative debates, is how to balance conflicting interests, here of the domestic steel industry against those of users of imported steel, consumers of products containing steel (whether imported or not), industries that depend on imports for their livelihoods, and individual workers whose wages and even jobs will be injured by these tariffs. Rarely, if ever, does Congress pursue one goal or purpose to the exclusion of all others, but rather balances those competing interests and attempts to find a proper compromise. *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017): "[I]t is quite mistaken to assume . . . that 'whatever' might appear to 'further[ ] the statute's primary objective must be the law.' Legislation is, after all, the art of compromise, the limitations expressed in statutory terms often the price of passage, and no statute yet known 'pursues its [stated] purpose[ ] at all costs'" (alterations in original) (citations omitted). But in section 232, Congress has abdicated all those responsibilities and delegated them wholesale to the President, enabling him to make whatever tradeoffs he chooses, with no statutory or judicial check to restrain him.

Put another way, if Congress had specified judicial review for section 232 determinations, there would be nothing for courts to review because there are no boundaries and no intelligible principles to guide them, just as there are none to guide the President. The absence of judicial review is not so much a defect in the statute, but an implicit recognition by Congress that there is nothing in section 232 that would enable a court to perform its judicial function if Congress had directed it to do so.

CONCLUSION

For the forgoing reasons and those set forth in Plaintiffs' Motion for Summary Judgment, their Motion should be granted, and the Court should enter Plaintiffs' Proposed Order declaring section 232 unconstitutional and enjoining Defendants from enforcing the 25% tariff on imported steel products based on it.

Respectfully submitted,

/s/Donald B. Cameron
Donald B. Cameron
R. Will Planert
Julie C. Mendoza
Brady W. Mills
MORRIS MANNING & MARTIN LLP
1401 Eye Street, NW, Suite 600
Washington, D.C. 20005
(202) 216-4811
dcameron@mmmlaw.com

/s/Alan B. Morrison
Alan B. Morrison
George Washington University Law School
2000 H Street, NW
Washington, D.C. 20052
(202) 994-7120
abmorrison@law.gwu.edu

/s/Gary N. Horlick
Gary N. Horlick
Law Offices of Gary N. Horlick
1330 Connecticut Ave., NW, Suite 882
Washington, D.C. 20036
(202) 429-4790
gary.horlick@ghorlick.com

/s/Timothy Meyer
Timothy Meyer
Vanderbilt Law School
131 21st Avenue South
Nashville, TN 37203
(615) 936-8394
tim.meyer@law.vanderbilt.edu

/s/ Steve Charnovitz
Steve Charnovitz
George Washington University Law School
2000 H Street, NW
Washington, D.C. 20052
(202) 994-7808
scharnovitz@law.gwu.edu

Counsel to Plaintiffs

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing memorandum complies with the Standard Chambers Procedures of the U.S. Court of International Trade in that it contains 7,255 words including text, footnotes, and headings and excluding the table of contents, table of authorities and counsel's signature block, according to the word count function of Microsoft Word 2010 used to prepare this memorandum.

/s/ Donald B. Cameron