No. 2020-2157

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

TRANSPACIFIC STEEL LLC, BORUSAN MANNESMANN BORU SANAYI VE TICARET A.S., BORUSAN MANNESMANN PIPE U.S. INC., THE JORDAN INTERNATIONAL COMPANY,
Plaintiffs-Appellees
v.
UNITED STATES, DONALD J. TRUMP, in his official capacity as President of the United States, UNITED STATES CUSTOMS AND BORDER PROTECTION, MARK A. MORGAN, in his official capacity as Senior Official Performing the Duties of the Commissioner of the United States Customs and Border Protection, DEPARTMENT OF COMMERCE, WILBUR L. ROSS, in his official capacity as Secretary of Commerce,
Defendants-Appellants

Appeal From The United States Court of International Trade in No. 19-0009, Judges Gary S. Katzmann, Claire R. Kelly, and Jane A. Restani

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CORRECTED BRIEF OF DEFENDANTS-APPELLANTS

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December 17, 2020

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STATEMENT PURSUANT TO RULE 47.5

Counsel for defendants-appellants is not aware of any other appeal in or from the same civil action or proceeding that previously was before this Court or any other appellate court under the same or similar title. Counsel is aware of the following cases pending in the United States Court of International Trade that challenge Presidential Proclamation 9772 and will be directly affected by this Court's decision in this appeal:

Tata Metals (American) Ltd v. United States, No. 20-19; *Acemar USA, LLC v. United States*, No. 20-129; *Intermetal Rebar LLC v. United States*, No. 20-167. Counsel is aware of approximately 15 other pending cases that may be directly affected, at least in part, by this Court's decision.

Counsel is not aware of any other case pending in this or any other court that may directly affect or be directly affected by this Court's decision in this appeal.

STATEMENT OF JURISDICTION

Pursuant to Rule 28(a)(5) of the Rules of this Court, counsel for defendants-appellants states that this Court's jurisdiction rests upon the following bases:

(a) The Court of International Trade possessed jurisdiction to entertain this action pursuant to 28 U.S.C. § 1581(i).

(b) The statutory basis for this Court's jurisdiction to entertain this appeal is 28 U.S.C. § 1295(a)(5).

(c) The United States Court of International Trade entered its final judgment in this case on July 14, 2020. Our appeal was timely filed on August 12, 2020, pursuant to Federal Rule of Appellate Procedure 4(a)(1)(B).

STATEMENT OF THE ISSUES

Section 232 of the Trade Expansion Act of 1962, as amended, 19 U.S.C. § 1862, directs the President to adjust imports of articles that threaten to impair national security. After complying with all procedural preconditions, the President established a 25 percent tariff on most steel article imports and announced that further action might be necessary. The President subsequently increased the tariff on imports from the Republic of Turkey to 50 percent. *Proclamation 9772 of August 10, 2018, Adjusting Imports of Steel into the United States*, 83 Fed. Reg. 40,429 (Aug. 15, 2018). The questions presented are:

1. Whether the President acted within his authority when he issued Proclamation 9772 after the 90- and 15-day time periods for concurrence and initial action set forth in 19 U.S.C. § 1862(c).
2. Whether the President's imposition of a higher rate of tariff on imports of steel articles from Turkey, as part of comprehensive action taken to address the threat of impairment to national security, is consistent with the Equal Protection Clause.

STATEMENT OF THE CASE

I. History Of Section 232, The National Security Provision

For over sixty years, Congress has authorized a procedure by which the President may "adjust the imports" of articles that threaten to impair "national security."

The procedure begins with an investigation conducted by the Secretary of Commerce (Secretary) "to determine the effects on the national security of imports of [an] article." 19 U.S.C. § 1862(b)(1)(A). The Secretary must consult with the Secretary of Defense on any "methodological and policy questions" "and if it is appropriate . . ., hold public hearings or otherwise afford interested parties an opportunity to [comment]." 19 U.S.C. § 1862(b)(2)(A). Within 270 days, the Secretary must submit to the President a report containing his findings "with respect to the effect of the importation of such article . . . upon the national security," as well as "recommendations" for presidential "action or inaction." 19 U.S.C. § 1862(b)(3). The statute then directs the President, if he concurs, to take the action that, in his judgment, is necessary to address the threat of impairment to national security.

This national security provision was first enacted as part of the Trade Agreement Extension Act of 1955. As originally enacted, upon a finding that an "article is being imported into the United States in such quantities as to threaten to

impair the national security," the President was directed to "take such action as he deems necessary to adjust the imports of such article to a level that will not threaten to impair the national security." 19 U.S.C. § 1862(b) (1955). Congress understood that "the authority granted to the President under this provision is a *continuing authority*." H.R. Rep. No. 745, 84th Cong. 1st Sess. 7 (1955) (emphasis added).

Although Congress made procedural revisions to the statute through the Trade Agreements Extension Act of 1958, Congress did not alter the scope of the delegation. Rather, Congress affirmed that it intended to provide "those best able to judge national security needs… [with] a way of taking whatever action is needed to avoid a threat to the national security through imports." H.R. Rep. No. 1761, 85th Cong., 2d Sess. 13 (1958). "When the national security provision next came up for re-examination, it was re-enacted without material change as § 232(b) of the Trade Expansion Act of 1962." *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 558 (1976).

Consistent with the understanding that the President's authority to adjust imports is continuing, Presidents have exercised their authority to modify action beyond the initial measures taken. Notably, in Proclamation 3279, President Eisenhower established the Mandatory Oil Import Program (MOIP), a system of restrictions or quotas on imports of petroleum and petroleum products

administered by the Secretary of the Interior. *Presidential Proclamation 3279, Adjusting Imports of Petroleum and Petroleum Products into the United States*, 24 Fed. Reg. 1781 (Mar. 12, 1959). That quota system was modified numerous times as Presidents sought to address growing domestic demand for oil. In each instance, the President modified the action taken without first receiving a new investigation or report.

"From the beginning of the MOIP in 1959 until the removal of quotas in 1973, 24 proclamations were issued, making numerous modifications in the original restrictions." United States Tariff Commission, WORLD OIL DEVELOPMENTS AND U.S. OIL IMPORT POLICIES, T.C. Publication 632 at 44 (1973). As an example of a significant alteration of remedial actions taken, President Nixon invoked his Section 232 authority to suspend existing quotas on oil imports and provide for a "gradual transition from the existing quota method of adjusting imports" to a "system of fees" to be paid by oil importers for import licenses. *Proclamation 4210, Modifying Proclamation 3279 Relating to Imports of Petroleum and Petroleum Products Through a System of License Fees and Providing For Gradual Reduction of Levels of Imports of Crude Oil, Unfinished Oils and Finished Products*, 38 Fed. Reg. 9645 (Apr. 19, 1973).

II. The 1988 Amendments

In 1988, Congress amended Section 232, as part of the Omnibus Trade and Competitiveness Act of 1988, Public Law No. 100-418 (Aug. 23, 1988).[1] Among other changes, Congress shortened the time for the Secretary's investigation, shortened the time for the President's submission of a written report to Congress, and set time frames for presidential concurrence and implementation.

The legislative history reflects Congress' intent to address what it perceived to be presidential inaction in the face of national security threats. Following a February 1984 finding by the Secretary that imports of machine tools threatened to impair the national security, President Reagan took no action until May 1986, when he announced that the United States would seek to enter into voluntary restraint agreements. President Reagan then took over six months to announce that the United States had entered into agreements with Japan and Taiwan. *See* U.S. General Accounting Office, INTERNATIONAL TRADE: REVITALIZING THE U.S. MACHINE TOOL INDUSTRY at 9 (July 1990).

Congress perceived that the President had acted with undue delay. Speaker of the House Wright commented that "[m]any of our trade problems can be directly traced to the delays, the abuses of discretion, and ill-considered policy

[1] Congress also amended the statute in 1975 and 1980. Those revisions are not germane to the issues in this appeal.

decisions by those officially appointed to carry out American policy. One of the worst delays was the machine tools case." Hearings Before the Committee on Ways and Means On H.R. 3 Trade and International Economic Policy Other Proposals Reform Act, 100th Cong., Part 1 at 199 (Feb. 5, 10, 18, 20, 1987). The Honorable Barbara Kennelly expressed concern that, absent a deadline for initial action, the President would "leave these cases to languish indefinitely," citing the "very real" problem of the machine tool case. *See* Hearings Before the Subcommittee on Trade of H. Comm. On Ways & Means, 99th Cong., 2d Sess. 1282 (1986).

Of relevance to this appeal, Congress revised Section 232 by including timeframes for the President to act after receiving the Secretary's report containing an affirmative finding. Within 90 days of receiving the report, the President must determine whether he concurs with the Secretary's finding. 19 U.S.C. § 1862(c)(1)(A). If he concurs, he must identify the "nature and duration of the action that, in the judgment of the President, must be taken to 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). The President is to implement such action within 15 days of concurrence. *Id*. § 1862(c)(1)(B). Congress also revised Section 232 to provide that if the President selects negotiations with foreign nations as the appropriate measure, and those negotiations are unsuccessful

or ineffective, the President must take alternative action to address the threat of impairment to national security. 19 U.S.C. § 1862(c)(3)(A).

III. The President Determines That Steel Imports Threaten To Impair National Security And Adjusts Imports

Following an investigation to determine the effect of imports of steel on the national security, the Secretary found that the present quantities and circumstances of steel imports "threaten to impair the national security of the United States." Appx148. The Secretary found that these imports are "weakening our internal economy" and undermining our "ability to meet national security production requirements in a national emergency." *Id*. The Secretary recommended that the President "take immediate action" to address this threat "by adjusting the level of these imports through quotas or tariffs." Appx149. The Secretary stated that "[b]y reducing import penetration rates to approximately 21 percent, U.S. industry would be able to operate at 80 percent of their capacity utilization," Appx201, a capacity utilization rate that would "enable U.S. steel mills to increase operations significantly in the short-term and improve the financial viability of the industry over the long-term." Appx202.

The President concurred in the Secretary's finding that "steel articles are being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security." *Proclamation 9705 of March 8, 2018, Adjusting Imports of Steel into the United States*, 83 Fed. Reg.

11,625, 11,627 (Mar. 15, 2018); Appx125-128. To address that threat, the President proclaimed a 25 percent tariff on imports of steel articles. Appx127.

In selecting a tariff as the appropriate measure, the President recognized that the United States "has important security relationships with some countries whose exports of steel articles to the United States weaken our internal economy and thereby threaten to impair the national security," and that there is "shared concern about global excess capacity, a circumstance that is contributing to the threatened impairment of the national security." Appx126. He proclaimed that "any country with which [the United States has] a security relationship" could discuss alternative ways to address the threatened impairment of our national security caused by imports from that country. *Id*.

In light of our national security relationship with Canada and Mexico, the President determined to continue ongoing discussions with those countries and to exempt steel imports from those countries for the time being. *Id*. The President left open the option to "remove or modify" restrictions on imports "[s]hould the United States and any such country arrive at a satisfactory alternative means to address the threat to the national security." *Id.* The President directed the Secretary to monitor steel imports and inform the President of "any circumstances that in the Secretary's opinion might indicate the need for further action." Appx128.

After reaching agreements with South Korea, Australia, Brazil, and Argentina, the President exempted, on a long-term basis, imports from those countries from the tariffs. Appx477. The President also ultimately allowed the enacted 25 percent tariff to take effect with respect to imports from Mexico and Canada.

On May 19, 2019, the President proclaimed that discussions with Canada and Mexico resulted in satisfactory alternative means to address the threatened impairment of the national security posed by steel imports from those countries, and excluded Canada and Mexico from the tariffs imposed in Proclamation 9705 on a long-term basis. *Proclamation 9894, Adjusting Imports of Steel into the United States*, 84 Fed. Reg. 23,987 (May 23, 2019).

IV. The President Subsequently Determines That An Increased Tariff On Imports From Turkey Is Required

On August 10, 2018, the President issued Proclamation 9772. Appx132-135. The President explained that he had received information from the Secretary showing that capacity utilization in the domestic steel industry, while improving, remained below the target capacity utilization level recommended in the Secretary's report. Appx132. The President further explained that the Republic of Turkey, a major steel exporter, was among the countries identified in the Secretary's report that should be subject to a higher tariff in the event the President chose to impose tariffs on only a subset of countries. *Id*. The President noted that

the Secretary's report listed Turkey as a major exporter of steel to the United States and therefore determined that, "[t]o further reduce imports of steel articles and increase domestic capacity utilization . . . it is necessary and appropriate to impose a 50 percent ad valorem tariff on steel articles imported from Turkey, beginning on August 13, 2018." *Id*.

The President subsequently returned the tariff for steel articles imported from Turkey to a 25 percent tariff rate, noting a significant decline in imports of steel articles since the imposition of the higher tariff rate and improvements in the domestic industry's capacity utilization. *Proclamation 9886 of May 16, 2019, Adjusting Imports of Steel into the United States*, 84 Fed. Reg. 23,421 (May 21, 2019).

V. The Court of International Trade Finds Proclamation 9772 To Be Issued Outside Of Delegated Authority And Unconstitutional

Transpacific Steel, an importer of steel articles from Turkey, filed suit in the Court of International Trade.[2] Transpacific alleged four errors: (1) that there was no nexus between the increased tariff on imports from Turkey and national security; (2) that the President committed a "serious procedural violation" by issuing Proclamation 9772 beyond the timeframes set forth in 19 U.S.C. § 1862(c);

[2] The court later granted the motions of three additional importers to intervene as plaintiffs. Appx064-065.

(3) that the President violated the Equal Protection Clause by increasing the tariff on articles from Turkey; and (4) that its due process rights were violated. Appx114-120. The importers sought a declaration that the 50 percent tariff imposed on steel articles from the Republic of Turkey was unlawful and a refund of the difference between the 50 percent tariff imposed on steel articles from Turkey and the 25 percent tariff imposed on steel articles from certain other countries. Appx120-121.

The United States moved to dismiss the complaint, arguing that the President's authority to act included the authority to modify or adjust initial action and that the increased tariff on imports from Turkey did not violate the Equal Protection Clause. The United States also argued that the other two counts should be dismissed for failure to state a claim.

Sitting as a three-judge panel, the court found that the importers had alleged facts sufficient to defeat the motion to dismiss. *Transpacific Steel LLC v. United States*, 415 F. Supp. 3d 1267 (Ct. Int'l Trade 2019); Appx037-050. The court concluded that "the President lacked power to take new action" without a new investigation and finding from the Secretary. Appx050. The court found that Section 232 "cabins the President's power both substantively, by requiring the action to eliminate threats to national security caused by imports, and procedurally, by setting the time in which to act." Appx046-047.

The court found that the President did not follow the "procedural path" of "investigation, consultation, report, consideration, and action." Appx045. The court observed that the 1988 amendments "clarifie[d] that Congress wanted the President to do all that he thought necessary as soon as possible" and that the statutory deadline would be "meaningless" if "the President has the power to continue to act" beyond those time frames. Appx047.

The court also found that the importers had sufficiently alleged an Equal Protection claim. Although it did not dispute that targeting a higher-volume exporting country for a higher tariff would be rational, the court found that defendants had not explained what differentiated Turkey from other high-volume exporting countries in order to "justify" treating "importers of steel from Turkey as a class of one." Appx43.

Following dispositive motions, the court granted judgment in favor of the importers. Appx003-024. The court continued to find that the President could not issue Proclamation 9772 beyond the statutory timelines because those timelines serve as a "restriction that requires strict adherence." Appx010. Holding that it was required to give effect to the statute as amended in 1988, the court found that, by deleting the statutory phrase "for such time," Congress intended to withdraw the "power to continually modify Proclamations." Appx012. The court emphasized the statute's procedural safeguards as evidence that the delegation of authority was

constitutional. Appx015. Thus, the court concluded that the President could not increase the tariff without first obtaining a new investigation and report from the Secretary. Appx012-015.

The court also found that Proclamation 9772 violated the Equal Protection Clause. Appx016-022. The court accepted that any legitimate purpose would meet the rational basis test, but found no "persuasive evidence" that the President's proclamation "has a legitimate grounding in national security concerns." Appx019 (distinguishing *Trump v. Hawaii*, 138 S. Ct. 2392, 2421 (2018)). The court found that the President's explanation – a need to increase tariffs generally and that Turkey was among the highest volume exporters of steel articles – was not sufficient to distinguish imports from Turkey from imports from other high-volume exporting countries. Appx020. The court further observed that the President's measures were underinclusive. Appx020 n.16.

The court's judgment directed U.S. Customs & Border Protection to "refund . . . the difference between any tariffs collected on its imports of steel products pursuant to Proclamation No. 9772 and the 25% ad valorem tariff that would otherwise apply on these imports together with such costs and interest as provided by law." Appx001-002.[3]

[3] The United States subsequently moved the court to stay the judgment pending appeal, which the court denied. We moved this Court to stay the judgment pending appeal, which motion remains pending.

SUMMARY OF ARGUMENT

In holding Presidential Proclamation 9772 to be unlawful and unconstitutional, the Court of International Trade committed several errors, all of which require reversal. First, the President has authority to modify action taken under Section 232 to ensure the selected measures are effective in achieving the national security objective. The statute is best read as authorizing the President to engage in a continuing process of monitoring and modifying import restrictions with respect to the identified articles, as the national security demands.

Section 232's purpose, its historical implementation, and the flexibility inherent in the President's exercise of judgment to determine the "nature and duration" of measures all demonstrate that the President's authority to protect the national security includes the authority to take further action to ensure that the initial measures are effective in achieving that goal.

Congress has long intended that the President would monitor and review factual circumstances to determine whether a particular remedy is effective, without requiring a further report from Commerce to act. Congress did not withdraw this authority when it added timeframes for concurrence and implementation in 1988. Nor did Congress require a duplicative investigation before the President could further address developing conditions related to the identified national security objective. The trial court's constricted reading ignores

several canons of construction and the President's independent powers in directing the areas of national security and foreign affairs.

The court's Equal Protection holding must also be reversed. Elevating a President's statutory decision under section 232 to a question of constitutional significance simply because it "distinguishes between *imports* on the basis of country of origin" lacks any support in the law. Accepting that premise subjects almost every decision that affects our foreign trade partners to constitutional attack simply because importers are collaterally affected by it. That is not the law.

The court further erred by applying a heightened standard of review of the President's actions. This case raises no concerns related to political powerlessness or reinforcement of historic disadvantage that might otherwise warrant a more stringent standard than rational basis review. Under the correct, extremely deferential "rational basis" review test applicable to economic and national security regulation, the President's decision to impose additional tariffs on Turkish steel articles withstands any constitutional attack. By questioning the wisdom and tailoring of the President's classification, the court further compounded its error.

ARGUMENT

I. Standard of Review

This Court reviews matters of statutory or constitutional interpretation *de novo*. *GPX Int'l Tire Corp. v. United States*, 780 F.3d 1136, 1140 (Fed. Cir. 2015).

The Court may set aside Presidential action only upon a showing of "a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority." *Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1346 (Fed. Cir. 2018) (citation omitted).

II. The President Acted Within His Authority When He Adjusted His Selected Import Measures To Ensure The National Security Objective Would Be Met

The President did not violate any statutory procedure or act beyond his authority when he increased the tariff on steel articles from Turkey to 50 percent. Section 1862(c)'s timeframes for concurrence and implementation do not bar the President from modifying or amending his selected measures as necessary to further the identified national security objective. The purpose, structure, and history of Section 232 all show that Congress intended the President to take whatever action necessary to address the threat of impairment to national security posed by imports of particular articles, including by adjusting or modifying import restrictions previously imposed. Reading Section 1862(c)(1) as an absolute bar on further adjustment or modification of the remedies the President has selected, as the trial court did, would unduly hinder the President's ability to act and "cannot be rationalized with the language, purpose, and legislative history," of this provision. *Pitsker v. Office of Pers. Mgmt*, 234 F.3d 1378, 1383-84 (Fed. Cir. 2000).

A. The Statutory Framework Authorizes The President to Take Further Action

By its terms, Section 232 authorizes the President to adjust actions taken pursuant to the statute, as circumstances warrant. When the President concurs with the Secretary's finding of a threat to national security caused by the importation of an article, the statute directs the President to "determine the *nature and duration* of the action that, in the judgment of the President, must be taken to 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) (emphasis added).

"Nature and duration" are necessarily broad and flexible. Given this flexibility, it is reasonable to read the President's power to determine the "nature and duration" of his selected measures as encompassing making necessary adjustments during the remaining course of the action. Here, the President determined that the appropriate "nature and duration" of the action included directing the Secretary to monitor and to review the status of such imports with respect to the national security, as well as to inform him of any circumstances "that in the Secretary's opinion might indicate the need for further action" or of any circumstance "that in the Secretary's opinion might indicate that the increase in duty rate provided for in this proclamation is no longer necessary." Appx128.

Thus, at the outset, the President anticipated that adjustment might be necessary to address the threat of impairment to our national security. This course

of action was well within the President's broad statutory discretion to "determin[e] "the form of remedial action" necessary to address our national security needs. *Am. Inst. for Int'l Steel v. United States*, 376 F. Supp. 3d 1335, 1343 (Ct. Int'l Trade 2019).

In fact, the trial court recognized that the President's responsibility to determine the "nature and duration" of his action included taking subsequent action, such as the liberalizing of a measure, or the ongoing exclusion process administered by Commerce. Appx048. Nonetheless, without explanation, it declined to read the same language as encompassing the type of adjustment at issue here.

Subsection (d), which "articulates a series of specific factors to be considered by the President in exercising his authority," *Algonquin*, 426 U.S. at 559, provides further textual support for the President's power to take continuing action as necessary. Many of these factors, including the "domestic production needed for projected national defense requirements," the "capacity of domestic industries to meet such requirements," and "the impact of foreign competition on the economic welfare of individual domestic industries," are dynamic by nature and invite ongoing evaluation and, as necessary, course correction.

The court discounted this textual support for the President's actions and instead committed at least three errors in its statutory interpretation. ***First***, the

court held that the statute's direction that the President "shall" determine and implement action within 90 and 15 days from receipt of the Secretary's report necessarily operates as "temporal restrictions on the President's power." Appx010.

However, the command that the President "shall" implement action, standing alone, does not deprive the President of authority to make further adjustments as necessary beyond the initial, specified timeframe. "A statute directing official action needs more than a mandatory 'shall' before the grant of power can sensibly be read to expire when the job is supposed to be done." *Barnhart v. Peabody Coal Co*., 537 U.S. 139, 161 (2003). The Supreme Court has "held time and again, an official's crucial duties are better carried out late than never." *Nielsen v. Preap*, 139 S. Ct. 954, 967 (2019). The trial court's holding that the timeframes are restraints on power, particularly when the "shall" requires the President to take initial action, but does not speak to whether that action may be later modified—cannot be reconciled with this principle, which holds that mandatory time limits alone do not foreclose further action beyond them.

Second, the court cited 19 U.S.C. § 1862(c)(3) as evidence that, where Congress intended the President to act beyond the initial 90- and 15-day periods, it said so. Appx011. Subsection 1862(c)(3) provides specific directions when the President selects negotiation of an agreement with a foreign country as the appropriate remedy. In those circumstances, the President is directed to take

further action if, within 180 days, no agreement has been reached or the agreement proves ineffective. 19 U.S.C. § 1862(c)(3)(A)(ii).

Against the historic backdrop of President Reagan's negotiation of voluntary restraint agreements in the machine tools case, the specificity of the directions for further action if negotiations (which do not immediately have a restrictive effect on imports) have proven ineffective makes sense. But reading Section 1862(c)(3)(A) as the *only* circumstance in which the President may act beyond the initial time period highlights how illogical the trial court's interpretation is.

When the President determines that an international agreement to restrain imports is ineffective, Section 1862(c)(3)(A) directs the President to take further action, without regard to how much time has passed since the investigation. At the same time, if other selected measures prove ineffective, the trial court's reading prohibits the President from making those same remedial adjustments. If the trial court's interpretation were correct, the President could lawfully impose tariffs five years after concurrence in the Secretary's finding, if he elected to adjust imports by negotiating an agreement, but could not adjust the rate of tariff five months after concurrence if tariffs were the initial measure implemented. The statute does not demand that incongruous difference in the President's ability to identify the "nature and duration" of the remedy necessary to protect national security.

Because another interpretation, "consistent with the legislative purpose [is] available," the Court should reject this interpretation, which "would produce absurd results." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982).

The trial court mischaracterized a provision designed to spur presidential action as one precluding such action. Section 1862(c)(3)(A) would not preclude the President from taking additional action if negotiations had not yet failed, or if the negotiations had produced effective action, but the President nevertheless determined that additional action would further enhance the national security. In other words, both section 1862(c)(1)(B) and section 1862(c)(3)(A) set a baseline for presidential action, but neither is correctly viewed as prohibiting additional action should it be necessary or appropriate.

Third, the court observed that the pre-1988 version of the statute directed the President "to take such action, and for such time, as he deems necessary." 19 U.S.C. § 1862(b) (1982). The court viewed the replacement of the phrase "to take such action, and for such time," with the current language as evidence that Congress intended to restrict "the time under which the president can act to adjust imports." Appx012.

Neither the importers nor the trial court dispute that Congress, from the inception of Section 232, intended that the President exercise the authority to modify or take continuing action, or that the President historically and consistently

exercised Section 232 to take continuing actions. *See* Appx011-012; *supra* at p.3-5.[4] Congress, over that same period, repeatedly acquiesced in this historical understanding and practice by re-enacting section 232 on numerous occasions with only minor amendments. *See, e.g.*, Pub. L. No. 85-686, August 20, 1958, 72 Stat. 673 (1958 amendments); Pub. L. No. 87-794, October 11, 1962, 76 Stat. 872 (1962 amendments).

The 1988 legislative history shows that Congress did not view itself to be withdrawing or narrowing the scope of that delegation. The conference report accompanying the legislation describes the present law as requiring the President, if he concurs with the Secretary's finding, to "take such action for such time as he deems necessary to adjust the imports of such article and its derivatives." Conference Report to Accompany H.R. 3, Omnibus Trade and Competitiveness Act of 1988 (Apr. 20, 1988) at 710.[5] Accordingly, Congress' characterization of the revised statute indicates a desire merely to prompt the President to take initial action in a timely fashion, in direct response to what it perceived to be a delayed response in the machine tool case.

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[4] *See* Presidential Auth. to Adjust Ferroalloy Imports Under § 232(b) of the Trade Expansion Act of 1962, 6 U.S. Op. Off. Legal Counsel 557, 562 (1982); Restrictions on Oil Imports, 43 Op. Att'y Gen. 20, 21–23 (1975).

[5] The conference report is the "most authoritative" form of legislative history, because it "unequivocally represent[s] the will of both Houses as the joint legislative body." *Comm'r v. Acker*, 361 U.S. 87, 94 (1959).

Under the heading "Time limit for Presidential action," the conference report stated that the "[p]resent law provides no time limit after the Commerce Secretary's report for the President's decision on the appropriate action to take." *Id*. at 711. The Senate receded to the House bill that "requires the President to decide whether to take action within 90 days after receiving the Secretary's report, and to proclaim such action within 15 days." *Id*. at 712.

Nothing in the conference report shows that Congress intended to withdraw the continuing nature of the President's authority. In fact, with respect to the scope of the delegation, Congress confirmed that it intended to retain the broad delegation of authority. The conferees declined to adopt a provision that would have explicitly stated that the range of actions available to the President to adjust imports included the "negotiation and conclusion of any agreement restricting imports." *Id*. at 712. The conferees did so because they believed that such action was already encompassed by "the broad scope of current law, which authorizes the President to 'take such action, and for such time, as he deems necessary' to adjust imports." *Id*. In other words, Congress did not narrow or alter the President's flexibility to respond to a national security threat when it revised the statutory language.

Given the clarity of Congress' intent that the President exercise continuing power (and the decades of congressional acquiescence to the exercise of such

power), the court erred by assuming that Congress silently withdrew the President's authority to modify his actions. *Cf. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 393-94 (1982) (declining to "assume that Congress silently withdrew" an existing enforcement tool in light of long history of Congress strengthening the regulations governing commodities futures); *United States v. O'Brien*, 560 U.S. 218, 231-32 (2010) (rejecting argument that Congress altered, *sub silentio*, the meaning of a statutory term).

B. The Court Ignored The President's Inherent Authority

The court's holding that the statute's timeframes for concurrence and implementation operate as temporal restrictions on the President's power is wrong for another reason. Beyond the lack of any legislative text or history evidencing Congress' intent to alter its longstanding delegation to the President to take continuing action, the court's interpretation of the timeframes as restraints on the President's power fails to account for the President's authority to reconsider his actions.

The power to reconsider or modify is inherent in an official's power to act, "regardless of whether they possess explicit statutory authority to do so." *Erwin Hymer Grp. N. Am. v. United States*, 930 F.3d 1370, 1376 (Fed. Cir. 2019) (citation omitted); *see Gratehouse v. United States*, 206 Ct. Cl. 288, 298 (1975). Thus, even when a statute does not specify how and when an official may

reconsider or modify, courts do not assume, as the trial court did here, that an official lacks authority to take further action.

The President's authority to take continuing action is at its strongest when the President is exercising powers that are quintessentially executive in nature. "[I]n the areas of foreign policy and national security . . . congressional silence is not to be equated with congressional disapproval." *Haig v. Agee*, 453 U.S. 280, 291 (1981). In those circumstances, the "failure of Congress specifically to delegate authority does not, 'especially . . . in the areas of foreign policy and national security,' imply 'congressional disapproval' of action taken by the Executive." *Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981) (citation omitted).

The trial court found its restrictive reading justified by nondelegation doctrine concerns. Appx012-013. The court's contention that a delegation without time limits would be "improper" is wrong. Appx011 n.7. The Supreme Court, interpreting the earlier version of Section 232, which contained no timeframe for the President's concurrence and implementation, concluded that Section 232's delegation was constitutional. *Algonquin*, 426 U.S. at 559-60.

Further, to the extent that the nondelegation doctrine plays any role, that doctrine confirms that delegations may be less restrictive in circumstances in which the President exercises independent constitutional authority. *United States*

v. Curtiss-Wright Export Corp., 299 U.S. 304, 319–22 (1936); *see also Gundy v. United States*, 139 S. Ct. 2116, 2137 (2019) (Gorsuch, J., dissenting) (observing that "when a congressional statute confers wide discretion to the executive, no separation-of-powers problem may arise if 'the discretion is to be exercised over matters already within the scope of executive power'"). By suggesting that the nondelegation doctrine would limit the President from exercising delegated authority in matters of national security, the trial court erred. Appx011 n.7.

C. The Court's Reading Frustrates The National Security Purpose Of The Statute

The Court must interpret the statutory text "in light of the purposes Congress sought to serve." *Chapman v. Houston Welfare Rights Org*., 441 U.S. 600, 608 (1979). The trial court's interpretation subverts the substantive purpose of the statute, which is to protect national security.

Section 232 is a congressional mandate to ensure ongoing and appropriate adjustments to imports necessary to protect national security. *Algonquin,* 426 U.S. at 561. Congress enacted Section 232 to provide "those best able to judge national security needs . . . [with] a way of taking whatever action is needed to avoid a threat to the national security through imports." H.R. Rep. No. 1761, 85th Cong., 2d Sess. 13 (1958). Because national security considerations necessarily evolve and change, the flexibility to modify action is critical if the President is to be effective in averting the threat of impairment to national security.

The 1988 amendments did not alter the statute's fundamental purpose of ensuring redress against imports of articles detrimental to national security. The purpose of the timeframes enacted in 1988 was to avoid delayed action after the Secretary completes the investigation, not to foreclose the President from taking follow-up action that in his judgment is needed. The trial court stated that "Congress wanted the President to do all that he thought necessary as soon as possible." Appx047. Even so, Congress' desire for prompt action based on the facts at hand is neither inconsistent with, nor undermines, its long-standing authorization to the President to take further action as circumstances change. Reading Section 1862(c)(1) as providing the President "one shot" to act in a 15-day window necessarily impedes his ability to determine the "nature and duration of the action" needed "so that such imports will not threaten to impair the national security."

Consideration of the statute's purpose takes on special force here because "[s]tatutes granting the President authority to act in matters touching on foreign affairs are to be broadly construed . . . ." *B-West Imps., Inc. v. United States*, 75 F.3d 633, 636 (Fed. Cir. 1996); *Am. Ass'n of Exps. and Imps.-Textile & Apparel Group v. United States*, 751 F.2d 1239, 1247 (Fed. Cir. 1985) (stating that, in the international field, "congressional delegations are normally given broad construction"). The President could not timely address the ongoing threat to

national security if the Secretary were required to complete a new investigation every time the President determined that his selected remedies needed to be fine-tuned. While the trial court discounted requiring a new investigation as not "an insurmountable burden," Appx015 n.9, it is a burden not required by Congress. The judgment should be reversed.

III. The Trial Court Erred By Granting Judgment On The Importers' Equal Protection Claim

The trial court's conclusion that Proclamation 9772 violated the Equal Protection Clause requires reversal. The court erroneously concluded that the Equal Protection Clause is implicated by the President's proclamation. The Equal Protection Clause does not apply to geographic distinctions among foreign countries, or to distinctions based on imported products. Even assuming Equal Protection review were applicable, a more than conceivable state of facts exists here to justify the President's actions: Turkey is one of the largest exporters of steel to the United States, and imposing tariffs on one of the largest foreign exporters is rationally related to ensuring the viability of the domestic steel industry. Appx132. That should have been sufficient to dismiss the importers' claim.[6]

[6] The court's conclusion that the President exceeded his statutory authority should have been sufficient to avoid reaching this claim altogether. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other

A. The Equal Protection Clause Does Not Forbid The Differential Treatment Of Foreign Nations, Or Exports From Those Nations

The Equal Protection Clause forbids laws that "abridge the privileges or immunities of citizens of the United States" or that "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. AMEND. XIV.[7] Importantly, its protections apply to laws that discriminate against "persons or classes of persons," *Missouri* v. *Lewis*, 101 U.S. 22, 30-31 (1880), such as laws that classify individuals on the basis of personal traits such as race, sex, or age. *E.g.*, *Loving v. Virginia*, 388 U.S. 1 (1967) (race); *Obergefell v. Hodges*, 556 U.S. 14 (2015) (sex); *Vance v. Bradley*, 440 U.S. 93 (1979) (age). Its protections do not apply to foreign nations, much less to "imports" from foreign nations. *Cf. Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 140 S. Ct. 2082, 2086 (2020) (*AOSI*) ("[I]t is long settled as a matter of American constitutional law that foreign citizens outside U.S. territory do not possess rights under the U.S. Constitution.").

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a question of statutory construction or general law, the Court will decide only the latter."); *Hagans v. Lavine*, 415 U.S. 528, 547 (1974) (constitutional claim could only be considered if the statutory claim was rejected).

[7] Although the Fifth Amendment does not contain an equal protection clause, the Supreme Court has recognized that it contains an implicit protection against "discrimination that is so unjustifiable as to be violative of due process." *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1686 n.1 (2017) (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975)). That protection is treated "precisely the same as equal protection claims under the Fourteenth Amendment." *Id.* (citations and internal quotation marks omitted).

Despite these limitations, the court declared Proclamation 9772 constitutionally invalid because it "distinguishes between *imports* on the basis of country of origin." Appx018 (emphasis added). There are three independent reasons why that decision is incorrect.

First, the court's view that the Equal Protection clause is implicated because the President's section 232 action differentially affects foreign nations results in a revolutionary expansion of Equal Protection jurisprudence. The Supreme Court has long held that the Equal Protection Clause does not apply to geographic distinctions among different areas *within* the United States. *See Griffin v. County School Bd.*, 377 U.S. 218, 231 (1964); *McGowan v. Maryland*, 366 U.S. 420, 427 (1961); *Salsburg v. Maryland*, 346 U.S. 545, 552 (1954); *Ocampo* v. *United States*, 234 U.S. 91, 98 (1914). Accordingly, it cannot be correct that the Clause applies to geographic distinctions among products from *foreign countries*. *Cf. AOSI*, 140 S. Ct. at 2086.

Take the President's action here, for instance. The increased tariff on imports of Turkish steel articles did not stand alone, but was one of many complementary actions that the President took to address the national security threat. Those actions included a 25 percent *ad valorem* tariff on steel articles imported from most countries, temporary exemptions from those tariffs on imports from Canada, Mexico, and the European Union pending negotiations, and other

agreed-upon measures for imports from South Korea, Brazil, and Argentina. Each action, individually, resulted in the differential treatment of at least some countries for some period of time. But the fact that the President would differentially treat certain trade partners, or even "single[] out" a particular country, Appx038, is unremarkable; indeed, the conduct of foreign policy, including the regulation of trade, routinely involves differential treatment of like conduct involving different foreign countries.

If the trial court is correct that differentially treating imports from foreign nations is sufficient to trigger the requirements of the Equal Protection clause, then every one of the President's Proclamations—each of which resulted in differential treatment to some nations over others—would now be susceptible to Equal Protection scrutiny. Such a rule defies the Supreme Court's instruction to exercise the "greatest caution" before imposing "rule[s] of constitutional law that would inhibit the flexibility of the political branches to respond to changing world conditions…." *Mathews v. Diaz*, 426 U.S. 67, 81-82 (1970). It cannot be the case that the Equal Protection Clause speaks to every one of these decisions simply because they "distinguish[] between *imports* on the basis of country of origin," Appx018. To do so would subject each individual aspect of the President's trade

and national security strategy that collaterally impacts domestic importers to Equal Protection scrutiny.[8]

Second, even if the Equal Protection Clause applies to distinctions between foreign countries, it does not apply to distinctions based on *products* from foreign countries. The Equal Protection Clause textually limits its application to discriminatory treatment against U.S. "citizens" and "persons or classes of persons" in U.S. territories. *See Plyler v. Doe*, 457 U.S. 202, 215 (1982) (defining application of Clause as to "persons"). The court's holding that the Equal Protection Clause must apply to the President's action against Turkey because of the Proclamation's differential treatment of "imports on the basis of country of origin," Appx018, or because it "[s]ingl[es] out [] products from Turkey[,]" Appx020, has no footing in the law. *See Totes Isotoner Corp. v. United States*, 594 F.3d 1346, 1359-60 (Fed. Cir. 2010) (concluding plaintiffs fail to plead an Equal Protection issue because differential tariff rate "distinguishes on the basis of products, not natural people." (J. Prost, concurring)). The court did not identify a

[8] This Court has previously recognized the challenge of identifying judicially manageable standards in the area of trade. *See Totes Isotoner*, 594 F.3d at 1357 (explaining that "Congress in classifying goods for the imposition of tariffs" takes into account a variety of "trade policy objectives" beyond just "a desire to raise revenue."); *Rack Room Shoes v. United States*, 718 F.3d 1370, 1378 (Fed. Cir. 2013) (recognizing that tariff rates are sometimes "the result of multilateral international trade negotiations and reflect reciprocal trade concessions and particularized trade preferences.").

single case expanding the Equal Protection clause to foreign "imports" or "products," nor are we aware of any.

We acknowledge that this Court has implicitly recognized that the Equal Protection Clause could apply to classifications among products where the classification has disparate impact on a protected class. *Totes-Isotoner*, 594 F.3d at 1354. But the importers have not alleged disparate impact here. Other courts have expressly held that the Equal Protection Clause does not apply to the regulation of domestic "things," even if "citizens" or "persons or classes of persons" are affected by them. *E.g.*, *Olympic Arms v. Magaw*, 91 F. Supp. 2d 1061, 1070 (E.D. Mich. 2000) (denying Equal Protection claim because regulation classified firearms, not persons or classes of persons), *aff'd sub nom. Olympic Arms, et al. v. Buckles*, 301 F.3d 384 (6th Cir. 2002).

Third, the court erred by absolving claimants of their burden to show, as part of their *prima facie* case, an intent to discriminate. Appx017. "'Proof of ... discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.'" *Rack Room Shoes*, 718 F.3d at 1376 (quoting *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265 (1977)). Because an Equal Protection claim is, at its heart, a constitutionally-based claim of discrimination, a claimant cannot succeed unless it can show "that the decisionmaker . . . selected a particular course of action 'because of,' not merely

'in spite of,' . . . its adverse impact upon an identifiable group." *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 278 (1979). The court rejected this principle, concluding that we were mistaking a "sufficient" condition for one that was "necessary" to succeed on an Equal Protection claim. Appx017-018.

But there was no mistake on our part. In *Rack Room Shoes*, this Court affirmed that threshold principle when it explained that "in equal protection cases[,] [e]ven if a neutral law has a disproportionately adverse effect upon a protected class, it is unconstitutional under the Equal Protection Clause *only if* that impact can be traced to a discriminatory purpose." 718 F.3d at 1377 (quoting *Feeney*, 442 U.S. at 272) (emphasis added); *see Totes-Isotoner*, 594 F.3d at 1357 ("In the area of customs duties, even more than in the area of taxation, it is hazardous to infer [for purposes of Equal Protection] discriminatory purpose from discriminatory impact.").[9]

In light of that principle, an Equal Protection claim against Proclamation 9772, which is neutral on its face, must fail. Although Proclamation 9772 does classify and distinguish Turkey and its exported merchandise—neither of which

[9] *Feeney*, which articulated this principle, is "extant precedent," *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009), and its principle has been repeatedly affirmed by the Supreme Court. *E.g.*, *Columbus Bd. of Ed. v. Penick*, 443 U.S. 449, 464 (1979) ("disparate impact and foreseeable consequences, without more, do not establish a constitutional violation."); *Ricci v. DeStefano*, 557 U.S. 627 (2009) ("The Equal Protection Clause, this Court has held, prohibits only intentional discrimination; it does not have a disparate impact component.") (J. Ginsburg, dissenting).

are entitled to constitutional protection—it makes no distinction *between importers*, meaning the law applies neutrally to all domestic entities that choose to do business with Turkish steel entities. Because these are the hallmarks of a non-discriminatory, neutral law, the court should have dismissed the Equal Protection claim. *See Totes-Isotoner*, 594 F.3d at 1358 ("We hold that because the challenged [tariff classifications] . . . are not facially discriminatory, [plaintiff] is required to allege facts sufficient to establish a governmental purpose to discriminate between male and female users," which it has not done).

B. The Trial Court Erroneously Applied A Heightened Standard Of Review

Even if this Court were to find that the Equal Protection Clause applies, the trial court still erred. "If discrimination is based on a classification other than race, national origin, or gender, the classification 'must be upheld against [an] equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Serv. Women's Action Network v. Sec'y of Veterans Affairs*, 815 F.3d 1369, 1378 (Fed. Cir. 2016) (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)).[10] This Court applies this standard to

[10] The trial court stated that "whether any conceivable reasonable purpose would suffice here is an open question" because this case involves a challenge to a presidential proclamation rather than a legislative act. Appx019, n.14. We are aware of no cases that suggest this is an "open question." Courts routinely apply this standard in challenges to presidential action. *E.g., Int'l Refugee Assistance Project v. Trump*, 961 F.3d 635, 651 (4th Cir. 2020); *Gomez v. Trump*, No. 20-

classifications in international trade. *E.g., SKF USA, Inc. v. U.S. Customs & Border Prot.*, 556 F.3d 1337, 1360 (Fed. Cir. 2009); *Almond Bros. Lumber Co. v. United States*, 721 F.3d 1320, 1328 (Fed. Cir. 2013). This deferential standard of review has "'particular force'" in cases that overlap with the area of national security. *Hawaii*, 138 S. Ct. at 2419 (quoting *Kerry v. Din*, 576 U.S. 86, 104 (2015) (Kennedy, J., concurring)). "'Any rule of constitutional law that would inhibit the flexibility' of the President 'to respond to changing world conditions should be adopted only with the greatest caution,' and the trial court's inquiry into matters of . . . national security is highly constrained." *Id.* at 2419-20 (quoting *Diaz*, 426 U.S. at 81).

Disregarding these principles, the trial court instead conducted a searching analysis of the President's actions, concluding that, "to survive rational basis review, Proclamation 9772 must be a *rational way of achieving* a legitimate government purpose." Appx019 (emphasis added). Applying that standard, the court concluded "[s]ingling out steel products from Turkey is not *a rational means of addressing*" the national security concerns identified in the Secretary's report. Appx020 (emphasis added). This holding must be reversed because the court applied the wrong standard.

01419, 2020 WL 5367010, at *25 (D.D.C. Sept. 4, 2020), *amended in part*, No. 20-01419, 2020 WL 5886855 (D.D.C. Sept. 14, 2020).

The court cited *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 441 (1985), in support of its contention that Proclamation 9722 "must be a rational way of achieving," as well as a "rational means to serve," a legitimate government purpose. Appx018-019. *City of Cleburne* does not support the court's "searching inquiry" in a classification among imports of foreign merchandise.

In *City of Cleburne*, the Supreme Court had to decide what standard of scrutiny applied to a law that classified the developmentally disabled. 473 U.S. at 435. The "serve a legitimate end" language quoted by the trial court is in a portion of the Court's opinion discussing a situation "where individuals in the group affected by a law have *distinguishing characteristics*," such as individuals with developmental disabilities, "relevant to interests the State has the authority to implement . . . ." *Id.* at 441 (emphasis added). Some courts have read cases like *City of Cleburne* "to suggest that rational basis review should be more demanding when there are 'historic patterns of disadvantage suffered by the group adversely affected by the statute.'" *See Windsor v. United States*, 699 F.3d 169, 180-81 (2d Cir. 2012), *aff'd*, 570 U.S. 744 (2013) (lawsuit dealing with a statute that treated same-sex couples differently from heterosexual couples).

Although the Supreme Court has not explicitly sanctioned this "second order" form of rational-basis review, *see City of Cleburne*, 473 U.S. at 458 (O'Connor, J., concurring in part), to the extent a "more searching form" of

rational basis review exists, it has been applied *only* in cases involving laws that "desire to harm a politically unpopular group," *Lawrence v. Texas,* 539 U.S. 558, 580 (2003) (O'Connor, J., concurring).

There is no justification for applying a more "searching form" of rational basis review. As the trial court recognized, "[t]he Proclamation at issue here distinguishes between imports on the basis of country of origin." Appx018. "Imports on the basis of country of origin" is not a politically unpopular group, nor does this case involve a group with a history of suffered disadvantages. In areas of economic policy, such as the President's proclamations, all that is required is that "any reasonably conceivable state of facts" exist that could provide a rational basis for the classification. *F.C.C. v. Beach Commc'ns, Inc*., 508 U.S. 307, 315 (1993).

C. The Trial Court Erred By Inquiring Into The Efficacy Of The President's Chosen Measures

The rational basis test calls on the Court only to look for a conceivable basis for the law, not to examine the law's actual basis or demand evidence of its efficacy. "Any reasonably conceivable state of facts" "may be based on 'rational speculation unsupported by evidence or empirical data.'" *Briggs v. Merit Sys. Prot. Bd*., 331 F.3d 1307, 1318 (Fed. Cir. 2003) (quoting *Beach Commc'ns*, 508 U.S. at 313).

Proclamation 9772 meets this undemanding standard. The President's adjustment of imports unquestionably bears a conceivable rational relationship to

national security, which the trial court conceded is a legitimate government purpose. Appx019. The President sought to "increase domestic capacity utilization" to "ensure the viability of the domestic steel industry." Appx132. To meet these objectives, and because Turkey was "among the major exporters of steel to the United States," the President imposed additional tariffs on Turkish imports as "a significant step toward ensuring the viability of the domestic steel industry," one which supported our "national security interests[.]" *Id*. Because it was conceivable that increasing the tariff on imports from a high-volume exporter of steel could achieve the increased capacity utilization objective, the trial court should have ended its inquiry there.

Instead, the trial court inquired into the efficacy of the increased tariff, suggesting it was underinclusive. Appx020. But this line of inquiry is irrelevant to rational basis review. Instead, "[w]here rationality is the test, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 316 (1976); *see, e.g.*, *Minnesota v. Clover Leaf Creamery Co*., 449 U.S. 456, 466 (1981) ("Whether *in fact* the Act will promote more environmentally desirable milk packaging is not the question: the Equal Protection Clause is satisfied by our conclusion that the Minnesota Legislature *could rationally have decided* that its

ban on plastic nonreturnable milk jugs might foster greater use of environmentally desirable alternatives.") (emphasis in original)

The trial court erroneously required the defendants to prove the President's measures were effective. The court stated that, "[g]iven the presence of larger steel exporters in the market, targeting Turkish steel products alone would not appear to be an effective means of remedying the national security concerns." Appx020 n.16. But the court's view that the President did not choose the best means to accomplish the national security objective is not a violation of the Equal Protection Clause. *See Murgia*, 427 U.S. at 316; *Clover Leaf Creamery*, 449 U.S. at 466. Indeed, "[e]ven if the court is convinced" that the President "has made an improvident, ill-advised, or unnecessary decision, it must uphold the act if it bears a rational relation to a legitimate governmental purpose." *Cash Inn of Dade, Inc. v. Metro. Dade Cty.*, 938 F.2d 1239, 1241 (11th Cir. 1991).

Citing the Secretary's report, which "evaluated the collective impact of global steel imports on national security," the court found that the President did not have a rational basis to increase the tariff only on imports from Turkey. Appx020. This contention has no basis in fact or law. The Secretary and the President indisputably considered the impact of global imports of steel products, which

included imports from Turkey.[11] But the President was not required to either impose tariffs on all similarly situated countries or none at all because "legislatures need not burden the most responsible party to survive rational basis review." *Me. Yankee Atomic Power Co. v. United States*, 271 F.3d 1357, 1359 (Fed. Cir. 2001); *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955) (same). Because Turkey was "among the major exporters of steel to the United States," an increased tariff on steel articles from Turkey was a rational, "significant step" the President took towards increasing domestic production capacity. Appx132. By reviewing Proclamation 9772 in isolation, the trial court ignored the President's "leeway to approach a perceived problem incrementally." *Beach Commc'ns*, 508 U.S. at 316.

The court concluded that "[u]nlike the determination made by the Court in *Trump v. Hawaii*, there is no 'persuasive evidence' here to support that the President's proclamation 'has a legitimate grounding in national security concerns.'" Appx019 (quoting *Hawaii*, 138 S. Ct. at 2421). But the President has no obligation to produce evidence to sustain the rationality of a classification that treats imports differently on the basis of country of origin. *See Heller*, 509 U.S. at 320; *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996) ("To sustain the validity of its policy, the government is not required to provide empirical

[11] The Secretary specifically analyzed the top 20 sources of U.S. imports of steel products, noting that between 2011 and 2017, imports from Turkey had increased 238 percent. Appx171.

evidence."). Moreover, even if the court determined that the President took action against Turkish imports because of a reason not permitted by Section 232, taking action against importers of Turkish steel for foreign policy reasons plainly satisfies rational basis review. *Cf. Dalton v. Specter*, 511 U.S. 462, 472 (1994) ("Our cases do not support the proposition that every action by the President . . . in excess of his statutory authority is *ipso facto* in violation of the Constitution.").

Indeed, the trial court's demand for persuasive evidence suggests that it was judging the "wisdom, fairness, or logic" of the President's judgment, which is precluded under rational basis review. *Heller*, 509 U.S. at 308 (internal citations omitted). The court's disagreement with the President's choices was not a basis to set aside the Proclamation. *Cf. Florsheim Shoe Co., Div. of Interco, Inc. v. United States*, 744 F.2d 787, 795 (Fed. Cir. 1984) (stating that the President's fact-finding and subjective motivations are beyond the scope of judicial review).

The court's final error was finding this case to be "materially indistinguishable" from *Allegheny Pittsburgh Coal Co. v. Cty. Comm'n of Webster Cty., W. Va.*, 488 U.S. 336 (1989). Appx021. There, the Court held that tax assessments on real property by a West Virginia county violated the equal protection clause for two reasons unique to the facts of that case. *Allegheny*, 488 U.S. at 338. First, the Court acknowledged that a state may divide different kinds of property into classes and assign to each class a different tax burden, but West

Virginia's Constitution had explicitly disavowed such a system. *Id.* at 344-45. A local county assessor, "apparently on her own initiative," applied the tax laws in a fashion contrary to that of the guide published by the West Virginia Tax Commission. *Id.* at 345. Second, the relative undervaluation of comparable property in the specific county was unreasonable because the county's adjustment system did not "equalize the differences in proportion between the assessments of a class of property holders" over time. *Id.* at 343, 346.

Allegheny "was the rare case where the facts *precluded any plausible inference* that the reason for the unequal assessment practice was to achieve the benefits of an acquisition-value tax scheme." *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992) (emphasis added). Characterizing it as "[t]he one exception," the Court has explained that *Allegheny* "involved a clear state law requirement clearly and dramatically violated." *Armour v. City of Indianapolis*, 566 U.S. 673, 687 (2012).

This case presents nothing like the "rare" set of facts in *Allegheny*. Proclamation 9772 does not involve a domestic taxation scheme, but foreign trade, an area in which foreign countries and products are routinely afforded differing treatment.[12] As we have demonstrated, there is no such presumption of equal treatment in the areas of foreign trade and national security.

[12] For example, the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (TPA) authorizes the President to negotiate trade agreements on a preferential basis. 19 U.S.C. § 4201 *et seq*. Many trade statutes

On that point, the trial court was simply wrong to invoke 19 U.S.C. § 1881 for the proposition that "[t]he status quo under normal trade relations is equal tariff treatment of similar products irrespective of country of origin." Appx021. For multiple reasons, this provision does not provide a guarantee of uniform treatment similar to what *Allegheny Pittsburgh* found embedded in the state constitution. First, Section 1881 relates to an expired trade negotiation authority. Second, the statute expressly carves out import restrictions imposed under Section 232:

> *Except as otherwise provided in this title [Title II of the Trade Expansion Act of 1962]*, in section 350(b) of the Tariff Act of 1930, or in section 401(a) of the Tariff Classification Act of 1962, any duty or other import restriction or duty-free treatment proclaimed in carrying out any trade agreement under this title or section 350 of the Tariff Act of 1930 shall apply to products of all foreign countries, whether imported directly or indirectly.

19 U.S.C. § 1881 (emphasis added). In citing this provision, the court ignored its express carve out of Title II of the Trade Expansion Act of 1962, which includes Section 232. Thus, Section 1881 actually supports the opposite conclusion than the one drawn by the court, and expressly confirms that the President's decisions under Section 232 need not be applied equally to all foreign countries and products.

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authorize the executive branch to provide differential tariff treatment for certain goods on the basis of country of origin. *See, e.g.*, Section 301 of the Trade Act of 1974; Section 201 of the Trade Act of 1974; Title V of the Trade Act of 1974 (Generalized System of Preferences).

CONCLUSION

For these reasons, we respectfully request that this Court reverse the judgment and direct the United States Court of International Trade, on remand, to enter judgment in favor of the defendants.

Respectfully submitted,

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December 17, 2020

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ADDENDUM OF REQUIRED DOCUMENTS AND RELEVANT STATUTES

UNITED STATES COURT OF INTERNATIONAL TRADE

TRANSPACIFIC STEEL LLC, **Plaintiff,** **BORUSAN MANNESMANN BORU SANAYI VE TICARET A.S., ET. AL** **Intervenor Plaintiffs,** **v.** **UNITED STATES ET AL.,** **Defendants.**	**Before: Claire R. Kelly, Gary S. Katzmann, and Jane A. Restani, Judges** **Court No. 19-00009**

JUDGMENT

This case having been duly submitted for decision; and the court, after due deliberation, having rendered a decision herein; now therefore, in conformity with said decision it is hereby:

ORDERED, ADJUDGED, and DECREED that judgment is entered in favor of Plaintiff and Plaintiff-Intervenors; and it is further

ORDERED that Proclamation No. 9772 of August 10, 2018, 158 Fed. Reg. 40,429 (Aug. 15, 2018) ("Proclamation 9772"), is declared unlawful and void; and it is further

ORDERED that United States Customs and Border Protection refund Plaintiff and Plaintiff-Intervenors the difference between any tariffs collected on its imports of steel products pursuant to Proclamation No. 9772 and the 25% ad valorem tariff that would

otherwise apply on these imports together with such costs and interest as provided by law.

/s/ Jane A. Restani
Jane A. Restani, Judge

/s/ Claire R. Kelly
Claire R. Kelly, Judge

/s/ Gary S. Katzmann
Gary S. Katzmann, Judge

Dated: July 14, 2020
New York, New York

Slip Op. 20-98

UNITED STATES COURT OF INTERNATIONAL TRADE

TRANSPACIFIC STEEL LLC, **Plaintiff,** **BORUSAN MANNESMANN BORU SANAYI VE TICARET A.S., ET. AL** **Intervenor Plaintiffs,** **v.** **UNITED STATES ET AL.,** **Defendants.**	**Before: Claire R. Kelly, Gary S. Katzmann, and Jane A. Restani, Judges** **Court No. 19-00009**

OPINION

[Proclamation 9772 imposing additional § 232 duties on Turkish steel violates statutorily mandated procedures and the Constitution's guarantee of equal protection under law]

Dated: July 14, 2020

Matthew M. Nolan and Russell A. Semmel, Arent Fox LLP, of Washington, DC, argued for plaintiff Transpacific Steel LLC. With them on the brief were Aman Kakar, Andrew A. Jaxa-Debicki, Diana Dimitriuc-Quaia, and Jason R. U. Rotstein.

Julie C. Mendoza, Brady W. Mills, Donald B. Cameron, Eugene Degnan, Mary S. Hodgins, and Rudi W. Planert Morris, Manning, & Martin, LLP, of Washington, DC, for intervenor plaintiff Borusan Mannesmann Boru Sanayi ve Ticaret A.S., et. al.

Lewis Evart Leibowitz, the Law Office of Lewis E. Leibowitz, of Washington, DC, for intervenor plaintiff the Jordan International Company.

Tara K. Hogan, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, Stephen C. Tosini, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, and Meen Geu Oh, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC, argued for defendants. With them on the brief were Joseph

H. Hunt, Assistant Attorney General, Jeanne E. Davidson, Director, and Joshua E. Kurland, Trial Attorney.

Restani, Judge: The question before us is whether President Trump issued Proclamation No. 9772 of August 10, 2018, 158 Fed. Reg. 40,429 (Aug. 15, 2018) ("Proclamation 9772") in violation of the animating statute and constitutional guarantees. We hold that he did. Proclamation 9722 is unlawful and void.

Plaintiff Transpacific Steel LLC ("Transpacific"), a U.S. importer of steel, requests a refund[1] of the additional tariffs it paid pursuant to Proclamation 9772 on certain steel products from the Republic of Turkey ("Turkey").[2] See Proclamation No. 9705 of March 8, 2018, 83 Fed. Reg. 11,625 (Mar. 15, 2018) ("Proclamation 9705") (imposing a 25 percent tariff duty on steel products from several countries); Proclamation 9772 (imposing a 50 percent tariff duty on steel products from Turkey alone); Am. Compl., ECF No. 19, ¶¶ 2, 4 (Apr. 2, 2019) ("Am. Compl."). Plaintiffs argue that Proclamation 9772 is unlawful because it lacks a nexus to national security, was issued without following mandated

[1] Transpacific asserts that it paid over $2.8 million as a result of the additional tariffs. See Am. Compl. at Ex. 3.

[2] After we issued our decision denying the government's motion to dismiss, Borusan Mannesmann Boru Sanayi ve Ticaret A.Ş. ("BMB"), a steel pipe producer in Turkey and non-resident U.S. importer and Borusan Mannesmann Pipe U.S. Inc. ("BMP") (collectively "Borusan") and the Jordan International Company ("Jordan") were granted leave to intervene as Plaintiff-Intervenors. Order Granting Borusan's Mot. to Intervene, ECF No. 39 (Dec. 10, 2019); Order Granting Jordan's Mot. to Intervene, ECF No. 46 (Dec. 13, 2019). Borusan, Jordan, and Transpacific jointly submitted a motion and brief for judgment on the agency record. Pl. Transpacific & Pl.-Intervenors. Borusan, et al.'s 56.1 Mot. for J. on the Agency R., ECF No. 51 (Jan. 21, 2020) ("Pl. Br."). For ease of reference, we refer to Transpacific, Borusan, and Jordan collectively as "Plaintiffs."

statutory procedures, and singles out importers of Turkish steel products in violation of Fifth Amendment Equal Protection and Due Process guarantees.

BACKGROUND

During the Cold War, Congress enacted Section 232 of the Trade Expansion Act of 1962, which authorized the President to adjust imports that pose a threat to the national security of the United States. See Trade Expansion Act of 1962, Pub. L. No. 87-794, Title II, § 232, 76 Stat. 872, 877 (1962) (codified as amended 19 U.S.C. § 1862) ("Section 232"). Since its original passage, there have been several amendments of the statute of varying magnitude including: altering the agency responsible for advising the president, shortening the time limit for investigation, and adding a congressional override for presidential actions taken to adjust petroleum imports. See generally, Trade Act of 1974, Pub. L. No. 93-618, Title I, § 127, 88 Stat. 1978, 1993–94 (1974); Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223, Title IV, § 402, 94 Stat. 229, 301–02 (1980). The most recent substantive change to Section 232 occurred in 1988, when the statute was altered to add time limits on the President's ability to act pursuant to the Secretary of Commerce's affirmative finding that investigated imports are a threat to national security. See Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, Title I, § 1501, 102 Stat. 1107, 1257–60 (1988). As it currently stands, the process to adjust imports under Section 232 is as follows.

First, the Secretary of Commerce ("Secretary"), in consultation with the Secretary of Defense, initiates an investigation "to determine the effects on the national security of imports of the article[s]." 19 U.S.C. § 1862(b)(1)(A). No later than "270 days after the date on which an investigation is initiated, the Secretary shall submit to the President a

report on the findings" that will advise the President if articles being imported into the United States threaten to impair national security and recommend appropriate action. Id. § 1862(b)(3)(A). Second, after receiving the Secretary's report, the President "[w]ithin 90 days," must determine whether he or she concurs with the Secretary and, if so, "determine the nature and duration of the action" to "adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security."[3] Id. § 1862(c)(1)(A). In making this assessment, the President "shall" consider various non-exhaustive factors listed in § 1862(d). Id. §1862(d). The President "shall implement that action" no later than 15 days from his or her decision to take such action.[4] Id. § 1862(c)(1)(B). Finally, within 30 days after making any determination, the President must submit to Congress a written statement of reasons for taking that action. Id. § 1862(c)(2). Notably, the time limits described were added as part of the 1988 amendments. See Omnibus Trade and Competitiveness Act of 1988 § 1501. President Trump's recent proclamations are the first issued pursuant to Section 232 since the passage of these amendments. See CONG. RESEARCH SERV., R45249, SECTION 232 INVESTIGATIONS: OVERVIEW AND ISSUES FOR CONGRESS, App'x B (Apr. 7, 2020) ("CRS 232 Overview").

[3] This timeline is altered if the chosen action is to negotiate an agreement limiting importation into or exportation to the United States. 19 U.S.C. §1862(c)(3)(A); see also Transpacific Steel LLC v. United States, 415 F. Supp. 3d 1267, 1276 n.15 (CIT 2019) ("Transpacific I").

[4] While termination of proclamations is provided for in 19 U.S.C. § 1885(b), piecemeal increases to existing 232 duties would interfere with the carefully designed statutory scheme, including the right of Congress to know the reasons for and to react to the duties imposed. See 19 U.S.C. § 1862(c)(2).

On April 19, 2017, the Secretary initiated an investigation into the effect of imported steel on national security. See Notice Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Steel, 82 Fed. Reg. 19,205 (Dep't Commerce Apr. 26, 2017). On January 11, 2018, the Secretary issued his report and recommendation to the President. See The Effect of Imports of Steel on the National Security, (Dep't Commerce Jan. 11, 2018) ("Steel Report").[5] In response, on March 8, 2018, President Trump issued Proclamation 9705, which imposed a 25 percent ad valorem tariff on imports of steel products[6] effective March 23, 2018. See Proclamation 9705. On August 10, 2018, the President issued Proclamation 9772, which imposed a 50 percent ad valorem tariff on steel products imported from Turkey, effective August 13, 2018. See Proclamation 9772. The additional tariffs on Turkish steel products remained in place until the President issued Proclamation 9886, which removed the additional tariffs on Turkish steel products, effective May 21, 2019. See Proclamation No. 9886 of May 16, 2018, 84 Fed. Reg. 23,421 (May 21, 2019) ("Proclamation 9886").

JURISDICTION AND STANDARDS OF REVIEW

The court has jurisdiction under 28 U.S.C. §§ 1581(i)(2) and (4). A President's action under Section 232 may be reviewed for a "clear misconstruction of the governing

[5] A summary of the Steel Report was not published in the Federal Register until July 6, 2020, even though 19 U.S.C. § 1862(b)(3)(B) requires that "any portion of the report submitted by the Secretary . . . which does not contain classified information or proprietary information shall be published in the Federal Register." 19 U.S.C. § 1862(b)(3)(B); see also Publication of a Report on the Effect of Imports of Steel on the National Security, 85 Fed. Reg. 40,202 (Dep't Commerce July 6, 2020). Plaintiffs do not raise this issue and we do not rely on it.

[6] Proclamation 9705 applied to all countries except Canada and Mexico. See Proclamation 9705, ¶ 8.

statute, a significant procedural violation, or action outside delegated authority." See Maple Leaf Fish Co. v. United States, 762 F.2d 86, 89 (Fed. Cir. 1985). In evaluating an equal protection claim involving neither fundamental rights nor a suspect classification, the court will apply the rational basis test, which asks "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." Armour v. City of Indianapolis, 566 U.S. 673, 680 (2012) (quotations and citations omitted). In evaluating a Due Process challenge, the court considers whether there was a deprivation of a constitutionally protected life, liberty, or property interest and, if so, whether the necessary procedures were followed. See Board of Regents of State Colleges v. Roth, 408 U.S. 564, 570–74, 76–77 (1972).

DISCUSSION

I. Whether the President Violated Section 232's Procedural Requirements

Plaintiffs argue that the President violated statutorily mandated temporal conditions, and investigation and report procedures in issuing Proclamation 9772. Pl. Br. at 22–28. In their view, to avoid delegation of powers concerns, the President is bound by these statutory restrictions. Id. at 22–24. Plaintiffs note that the statute requires the President to make a decision based on the Secretary's report and recommendation within 90 days and then implement any chosen action another 15 days after that decision. Id. at 25 (citing 19 U.S.C. § 1862(c)(1)(A)-(B)). Insofar as the government argues that Proclamation 9772 is a modification of the earlier, timely Proclamation 9705, Plaintiffs assert that there is no statutory basis for a purported modification of a previous proclamation and that allowing this interpretation would render the timelines meaningless. Id. at 26. Further, Plaintiffs argue that Proclamation 9772 was issued not following a

formal report as required by the statute, but following informal information the President had later received from the Secretary. Id. at 26–28.

The government responds that Congress "inten[ded] to confer continuing authority and flexibility on the President to counter the threat identified" as confirmed by the "language, long-standing congressional understanding, and the purpose of the statute . . ." Defs.' Resp. in Opp'n to Pls.' Mot. for J., ECF No. 55 at 16 (Mar. 9, 2020) ("Gov. Br."). In its view, to require the President to strictly abide by the time restraints in the statute would frustrate its statutory purpose. Id. at 17. The government takes an expansive reading of the statutory terms "nature," "duration," and "implement" and finds that these terms indicate that the President has authority to revisit and modify previous actions taken under Section 232. Id. at 17–19 (citing congressional statements from 1955). Although the government acknowledges that the 1988 amendments intended to accelerate the 232 process, it contends that nothing in those amendments intended to prevent the President from making modifications to earlier Proclamations. Id. at 19–22. The government further contends that requiring the President to act within the temporal windows in the statute would undermine the purpose of Section 232 and would "convert the time-deadlines into impermissible sanctions," when those deadlines are in fact "directory, not mandatory." Id. at 22–27.

The language of the statute is clear, however. After receiving a report from the Secretary, "[w]ithin 90 days," and if the President concurs, he or she shall "determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports." 19 U.S.C. § 1862(c)(1)(A). Then the President "shall implement that action by no later than the date that is 15 days after" the determination to take action is

made. Id. § 1862(c)(1)(B). As noted in our previous decision, Proclamation 9772 was issued far beyond this temporal window. Transpacific I, 415 F. Supp. 3d at 1273–74. The government continues to argue that the President is permitted to modify his previous proclamation, but as we have already said, "[t]he President's expansive view of his power under section 232 is mistaken, and at odds with the language of the statute, its legislative history, and its purpose." Id. at 1274–75 (citing legislative history undermining the contention that the President can take under Section 232 outside the prescribed time limits).

National security is dependent on sensitive and ever-changing dynamics; the temporal restrictions on the President's power to take action pursuant to a report and recommendation by the Secretary is not a mere directory guideline, but a restriction that requires strict adherence. To require adherence to the statutory scheme does not amount to a sanction, but simply ensures that the deadlines are given meaning and that the President is acting on up-to-date national security guidance. The President is, of course, free to return to the Secretary and obtain an updated report pursuant to the statute. As the government acknowledges, the 1988 Amendments were passed against the backdrop of President Reagan's failing to take timely action in response to the Secretary's report finding that certain machine tools threatened to impair national security and Congress's resulting frustration. Gov. Br. at 20–21 (citing Hearings Before the Committee on Ways and Means on H.R. 3 Trade and International Economic Policy Other Proposals Reform Act, 100th Congr. (1987); Hearings Before the Subcommittee on Trade of H. Comm. On Ways & Means, 99th Cong., 2d Sess. 1282 (1986)). The purpose and legislative history support that the time limits here were very much intended to require presidential action in

a timely fashion, not just encourage it.[7] See Transpacific I, 415 F. Supp. 3d at 1275 (citing legislative history from the 1988 Amendments). Finally, as we noted previously, when Congress means to allow action outside of a set temporal window, it provides for it. See id. at 1276 n.15 (citing 19 U.S.C. § 1862(c)(3)).

Contrary to the government's contention, there is nothing in the statute to support the continuing authority to modify Proclamations outside of the stated timelines. The government offers no citation to the statute nor to the recent legislative history to support this theory. Instead, the government relies on legislative history prior to the 1988 amendments. See Gov. Br. at 18–19. As originally enacted, Section 232 may have allowed for the President to modify previous Proclamations as a form of continuing authority. See H.R. Rep. No. 84-745, at 8158 (1955). The court is also aware that prior to the recent amendments, several Presidents modified President Eisenhower's Proclamation No. 3279 of March 10, 1959, 24 Fed. Reg. 1781 (Mar. 12, 1959)

[7] The government cites several cases for the proposition that when a statute does not specify a consequence for failing to meet a deadline, the deadline is merely directory. See Barnhart v. Peabody Coal Co., 537 U.S. 149, 159 (2003); Hitachi Home Electronics (America), Inc. v. United States, 661 F.3d 1343, 1345-46 (Fed. Cir. 2011); Gilda Industries, Inc. v. United States, 622 F.3d 1358, 1365 (Fed. Cir. 2010); Canadian Fur Trappers Corp. v. United States, 884 F.2d 563, 566 (Fed. Cir. 1989). Such cases do not address delegation to the President in an area normally belonging to Congress, i.e. import duties. As discussed infra, without meaningful limits such delegation is improper. Further, the resulting consequences of finding that the deadlines in these cases were mandatory would have had greater permanence than simply requiring the President to return to the Secretary for a current report. Barnhart, 537 U.S. at 160 (deadline was directory as otherwise the consequence would be to "shift financial burdens from otherwise responsible private purses to the public fisc."); Hitachi, 661 F.3d at 1348 (deadline was directory and failing to meet that deadline did not strip Customs of its power to allow or deny a protest); Canadian Fur, 884 F.2d at 566 (deadline was directory and failure for Customs to meet a deadline did not result in liquidation); Gilda, 662 F.3d at 1365 (failure of the United States Trade Representative to timely comply with notice obligations did not mean a retaliatory action would not terminate.).

("Proclamation 3279") on Petroleum and Petroleum Products with the latest "modification" occurring under President Reagan in Proclamation No. 4907 of March 10, 1982, 47 Fed. Reg. 10,507 (Mar. 10, 1982). But the statutory scheme has since been altered, and the court must give meaning to those alterations. The 1988 amendments prescribed time limits, as described above, but also deleted language that could be read to give the President the power to continually modify Proclamations. See Omnibus Trade and Competitiveness Act of 1988 § 1501. Prior to the 1988 amendments, the relevant provision read "and the President shall take such action, and for such time, as he deems necessary to adjust the imports of such article and its derivatives so that such imports will not threaten to impair the national security." 19 U.S.C. § 1862(b) (1982). The current relevant provisions omit the clause "and for such time." See 19 U.S.C. § 1862(b),(c) (2018). These changes appear to further restrict the time under which the president can act to adjust imports under 19 U.S.C. § 1862. Until the current administration, no President had issued a Proclamation after the 1988 changes, so there was no occasion to consider whether modifying an existing Proclamation remained an allowable exercise. See CRS 232 Overview, App'x B. Given the changes in the statute, the court holds that regardless of whether modifications were permissible before, "modifications" of existing Proclamations under the current statutory scheme, without following the procedures in the statute, are not permitted.

In Federal Energy Administration v. Algonquin SNG, Inc., the Court stressed the importance of the procedural safeguards in holding that Section 232 was not an impermissible delegation of congressional authority over imports. 426 U.S. 548, 559 (1976). As we stated previously, "[i]f the President could act beyond the prescribed time

limits, the investigative and consultative provisions would become mere formalities detached from Presidential action." Transpacific I, 415 F. Supp. 3d at 1276. Section 232 grants the President great, but not unfettered, discretion. The President exceeded his authority in issuing Proclamation 9772 outside of the temporal limits required by Section 232.

II. Whether the President Exceeded His Authority by Issuing a Proclamation Purported to Lack a Nexus to National Security

Plaintiffs contend that the President exceeded his authority in issuing Proclamation 9772 because the Proclamation lacked a nexus to Section 232's national security objective, which would render the Proclamation ultra vires. Pl. Br. at 14–22. Accordingly, they contend that the court may review whether the issuance of the Proclamation 9772 falls within the authority granted to the President under the statute. Id. at 14–16. Citing various D.C. Circuit Court opinions, Plaintiffs argue that this court should engage in such review to determine whether the President acted in conformity with Section 232. See id. at 14–16 (citing Independent Gasoline Marketers Council, Inc. v. Duncan, 492 F. Supp. 614 (D.D.C.1980); AFL-CIO v. Kahn, 618 F.2d 784 (D.C. Cir. 1979) (en banc); United States Chamber of Commerce v. Reich, 74 F.3d 1322 (D.C. Cir. 1996)). Turning to the facts at hand, Plaintiffs argue that Proclamation 9772 was not motivated by proper national security considerations, such as those listed in 19 U.S.C. § 1862(d), but was issued to employ "diplomatic leverage against a foreign government."[8] See id. at 18–22.

[8] Plaintiffs ask the court to consider President Trump's tweet regarding the detainment of Pastor Andrew Brunson in Turkey and his tweet roughly two weeks later declaring: "I have just authorized a doubling of Tariffs on Steel and Aluminum with respect to Turkey as their currency, the Turkish Lira, slides rapidly downward against our very strong Dollar!

They further contend that because imports of Turkish steel products comprise only a comparatively small percentage of steel products imported into the United States, doubling tariffs on those products would have too remote an effect to address national security concerns detailed in the Steel Report. Id. at 21.

The government responds that any analysis of whether Proclamation 9772 has a nexus to Section 232's national security purpose requires the court to engage in an improper inquiry into the President's fact-finding. Gov. Br. at 12–16. It contends that the court cannot analyze the President's action beyond inquiring whether the action taken was "of a type permitted by the statute." Id. at 13. In the government's view, any evaluation of the President's motivations is foreclosed. Id. at 13–15.

The court declines to consider proffered evidence of the President's "true motive" or question his fact-finding. Even if warranted, such an inquiry is unnecessary to the disposition of this matter. What is evident is that the President acted beyond the procedural limitations set forth in the statute in issuing Proclamation 9772, rendering his action ultra vires. In addition to acting outside of the time limitations as noted above, he acted without a proper report and recommendation by the Secretary on the national security threat posed by imports of steel products from Turkey. See Proclamation 9772.

Aluminum will now be 20% and Steel 50%. Our relations with Turkey are not good at this time!." See Pl. Br. at 19 (citing Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 10, 2018, 8:47 AM), twitter.com/realdonaldtrump/status/1027899286586109955; Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2018, 11:22 AM), twitter.com/realdonaldtrump/status/1022502465147682817). Plaintiffs further cite tweets and statements issued after Proclamation 9772 went into effect in which the President appears to threaten to destroy the Turkish economy. See id. at 19–20. Because we do not review the President's fact-finding, we decline to consider this evidence in relation to Plaintiffs' statutory challenge. See Florsheim Shoe Co., Div. of Interco, Inc. v. United States, 744 F.2d 787, 796 (Fed. Cir. 1984).

The Steel Report assesses the impact of steel imports in the aggregate on national security and makes no finding regarding Turkey specifically. See generally, Steel Report. Other than the Steel Report, Proclamation 9772 mentions informal discussions between the President and the Secretary regarding the changes to capacity utilization in the domestic steel industry after Proclamation 9705 and how additional tariffs on steel products from Turkey would be "a significant step toward ensuring the viability of the domestic steel industry." See Proclamation 9772 ¶¶ 4, 6. The President is not authorized to act under Section 232 based on any off-handed suggestion by the Secretary; the statute requires a formal investigation and report.[9] See 19 U.S.C.A. § 1862(b), (c). To clarify, the court does not decide that there was not a national security threat meriting new duties, but instead simply holds that there was no procedurally proper finding of that

[9] President Ford's modification of Proclamation 3279, with Proclamation No. 4341 of January 23, 1975, 40 Fed. Reg. 3965 (January 27, 1975) ("Proclamation 4341"), the Proclamation at issue in Algonquin, was issued only after the Secretary issued a report pursuant to 19 U.S.C. § 1862(b). See Algonquin, 426 U.S. 548, 554 (1976). The Court's decision that Section 232 was not an improper delegation was based, in part, on the required precondition that the Secretary make a finding and issue a report. Id. at 559. Allowing the President to skirt this precondition would potentially pose delegation concerns. Further, it is not an insurmountable burden to require that the President return to the Secretary and obtain a new report prior to taking action under Section 232. As noted in a memorandum opinion by the then Assistant Attorney General in the Office of Legal Counsel, the report issued prior to Proclamation 4341 was "completed in only ten days." See Mem. Op. for the Deputy Att'y Gen. "The Presidents Power to Impose a Fee on Imported Oil Pursuant to the Trade Expansion Act of 1962," 6 Op. O.L.C. 74, at 80 (Jan. 14, 1982).

threat.[10] Thus, the President was not empowered under Section 232 to issue Proclamation 9772.[11]

III. Equal Protection

In addition to their statutory claims, Plaintiffs raise a Fifth Amendment Equal Protection challenge to Proclamation 9772. Pl. Br. at 28–38. Their basic contention is that the Proclamation discriminates between similarly situated importers based on the origin of their imports without rational justification. Id. at 28–34. Plaintiffs argue that the government has offered no sensible reason for targeting imports from Turkey and that no reasonable rationale is apparent. Id. at 30–34. Although Plaintiffs acknowledge that Turkey is named in the Steel Report, they argue that the Secretary's determination was based on the import of steel products in the aggregate and that nothing in the Steel Report supports additional duties on Turkish steel products alone.[12] Id. at 31–34. At base,

[10] The court is respectful of separation of powers and does not opine on the wisdom of the President's foreign policy. Our role here is to decide whether the statute at issue has been followed.

[11] The court does not foreclose the possibility that a future action could arise that, although procedurally sound, nonetheless is devoid of any discernable national security objective and thus subject to court review. See Am. Inst. for Int'l Steel, Inc. v. United States, 376 F. Supp. 3d 1335, 1344 (CIT 2019) ("To be sure, section 232 regulation plainly unrelated to national security would be, in theory, reviewable as action in excess of the President's section 232 authority.").

[12] Plaintiffs also cite a report from Commerce indicating that there has recently been a greater reduction of steel product imports from Turkey when compared to several other countries listed in the Steel Report. Pl. Br. at 32 (citing DEP'T OF COMMERCE, INT'L TRADE ADMIN., Global Steel Trade Monitor, Steel Imports Report: United States at 3 (June 2018) (noting that between 2017 and 2018, steel imports from Turkey decline by 59 percent by volume and 49 percent by value, whereas most top import source countries increased their exports of steel to the United States).

Plaintiffs argue that that Proclamation 9772 drew an arbitrary and irrational distinction by doubling the tariff rate on Turkish steel products and was based on an impermissible purpose.[13] Id. at 34–38.

The government responds that to succeed on their equal protection claim, Plaintiffs must first show that the government "intended to discriminate against the claimant or group," and then show that the classification lacks a connection to an "identifiable state interest." Gov. Br. at 28. Because the Plaintiffs cannot show that the President intended to discriminate against any importers of Turkish steel products, the government argues that the Plaintiffs' equal protection claim fails. Id. at 28–34. The government further argues that levying additional tariffs on Turkish steel products alone was a reasonable step towards the legitimate purpose of national security, even if it was just an incremental step towards that purpose. Id. at 34–39. Finally, it contends that Plaintiffs unjustifiably attempt to make a statutory interpretation case into a constitutional one. Id. at 38–40. In reply, Plaintiffs argue that the government has overstated their "burden to prove their equal protection claim." Pl. Reply to Def's Resp. to Pl.s' Mot. for J. on the Agency R., ECF No. 60 at 14 (Apr. 9, 2020) ("Pl. Reply"). They further point out that discrimination in this case "is clear on the face of the proclamation," and that the cases cited by the government involved facially neutral policies. Pl. Reply at 15–16.

At the outset, the government mistakes a factor sufficient to result in an Equal Protection violation for one necessary to succeed on such a claim. An intent to

[13] As described in supra note 8, Plaintiffs highlight statements made by the President that supposedly indicate that Proclamation 9772 was motivated by Turkey's detention of Pastor Andrew Brunson. Pl. Br. at 36–38. In their view, the President's action was guided by impermissible animus against Turkey. Id.

discriminate or "bare desire to harm a politically unpopular group" will result in a violation of the Constitution's Equal Protection clause as it "cannot constitute a legitimate government interest," Romer v. Evans, 517 U.S. 620, 634 (1996) (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)) (quotation marks omitted), but this does not mean discriminatory motive is required to find a violation. The disparate impact cases cited by the government are inapposite as they do not focus on the central issue here–whether the challenged action was rationally related to a legitimate government purpose. See McCleskey v. Kemp, 481 U.S. 279, 293, 298–99 (1987) (Georgia death penalty statute disproportionately used against Black defendants); Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 273 (1979) (gender-neutral statute that had disproportionately adverse effects on women); Washington v. Davis, 426 U.S. 229, 237–39 (1976) (police officer examination that had disproportionately adverse effects on Black applicants).

The Constitution's Equal Protection guarantees apply to actions taken by the federal government through the Fifth Amendment. See Bolling v. Sharpe, 347 U.S. 497, 499 (1954). The fundamental question is whether the government's action is justified by sufficient purpose. See Romer, 517 U.S. at 635 ("[A] law must bear a rational relationship to a legitimate governmental purpose."). The Proclamation at issue here distinguishes between imports on the basis of country of origin. See Proclamation 9772. Disparate treatment alone, however, does not violate the Equal Protection Clause, if "(1) a rational purpose underlies the disparate treatment, and (2) [the governmental decisionmaker] has not achieved that purpose in a patently arbitrary or irrational way." Belarmino v. Derwinski, 931 F.2d 1543, 1544 (Fed. Cir. 1991) (citing United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 177 (1980). Because the purpose need not be articulated at the time, any

legitimate purpose is sufficient.[14] See Nordlinger v. Hahn, 505 U.S. 1, 15 (1992) ("[T]his Court's review does require that a purpose may conceivably or may reasonably have been the purpose and policy of the relevant governmental decisionmaker.") (citation and quotation marks omitted); see also Trump v. Hawaii, 138 S.Ct. 2392, 2420 (2018) (considering plaintiffs' extrinsic evidence, but upholding a challenged presidential proclamation "so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds."). Thus, to survive rational basis review, Proclamation 9772 must be a rational way of achieving a legitimate government purpose.

National security is a legitimate purpose, see Trump v. Hawaii, 138 S.Ct. at 2421, so the court must assess whether additional tariffs on imported steel products from Turkey is a "rational means to serve" this "legitimate end." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 442 (1985). Unlike the determination made by the Court in Trump v. Hawaii, there is no "persuasive evidence" here to support that the President's proclamation "has a legitimate grounding in national security concerns." 138 S.Ct. at 2421.[15] In that case, the "Proclamation explain[ed], in each case the determinations were

[14] In prior cases, the Court has not required that the "purpose" of the law be the actual purpose because the legislature is not required to offer a rationale when enacting a statute. See F.C.C. v. Beach Comm, Inc., 508 U.S. 307, 315 (1993) ("Moreover, because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature."). It is unclear whether this reasoning applies with equal force to the situation before us today, as the challenge is to a presidential proclamation, rather than a legislative act, and the President is required to state his reasons for acting pursuant to Section 232. See 19 U.S.C. §§ 1862(c)(2), (c)(3)(A), (c)(3)(B). Accordingly, whether any conceivable reasonable purpose would suffice here is an open question.

[15] The government relies heavily on Trump v. Hawaii for the proposition that an Equal Protection challenge cannot succeed without evidence of animus. See Oral Argument at

justified by the distinct conditions in each country." Id. In contrast, here, Proclamation 9772 is purportedly based on the Steel Report, which evaluated the collective impact of global steel imports on national security, and not the impact of imports from Turkey individually. See Proclamation 9772 ¶ 1; see also Steel Report at 55–57 (concluding that the global excess capacity of steel and imports into the United States "threaten[s] to impair" national security). The national security concerns were characterized as "[t]he displacement of domestic steel by imports," and the resulting effect on the United States economy, and the ability to "meet national security requirements." See Steel Report at 57. Singling out steel products from Turkey is not a rational means of addressing that concern. Section 232 does not ban the President from addressing concerns by focusing on particular exporters, but the decision to increase the tariffs on imported steel products from Turkey, and Turkey alone, without any justification, is arbitrary and irrational.[16]

57:40–58:25; see also Gov Br. at 32. Trump v. Hawaii was a case dealing with the First Amendment's Establishment Clause in the context of border security in which a Proclamation was issued with a "legitimate grounding in national security concerns." Id. at 2421. That case does not stand for the proposition asserted by the government. See Trump v. Hawaii, 138 S.Ct. at 2420 (stating that rational basis review "considers whether the entry policy is plausibly related to the Government's stated objective"). A successful Equal Protection claim, at least in the context of taxes and duties, does not require a showing of animus. See Allegheny Pittsburgh Coal Co. v. County Com'n of Webster County, 488 U.S. 336, 345 (1989).

[16] The choice is underinclusive. The Steel Report ranks Turkey as the sixth largest exporter of steel products to the United States. See Steel Report at 28, Fig. 2. Given the presence of larger steel exporters in the market, targeting Turkish steel products alone would not appear to be an effective means of remedying the national security concerns outlined in the Report. The decision may be overinclusive as well. Transpacific contends that some of the steel slated to be imported from Turkey was destined for Puerto Rico to aid in the "rebuilding in the aftermath of Hurricanes Irma and Maria," and that Transpacific is "one of the largest importers of steel into Puerto Rico." See Am. Compl. ¶ 10, Ex. 3 (Declaration of Jules Levin, CEO of Transpacific). Given the broad view of national security articulated in the Steel Report, the failure to consider the potential impact on the

This case is materially indistinguishable from Allegheny Pittsburgh Coal Co. v. Cnty Com'n of Webster Cnty, 488 U.S. 336 (1989). In that case, the Court declared irrational a county tax assessor's use of differing methods to assess property value that had been recently sold from property that had not. Id. at 338. The result was that generally "comparable properties" were assessed at vastly different rates depending on the last date of sale. Id. at 341. The Court found that the tax assessor's practice was arbitrary and that the "relative undervaluation of comparable property" denied the petitioners in that case equal protection. Id. at 346. The Court noted that the West Virginia Constitution establishes a general principle of uniform taxation, and held that the tax assessor's practice did not accord with the West Virginia Constitution and violated the United States Constitution's Equal Protection Clause. Id. at 345 ("The equal protection clause. . . protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class.") (quoting Hillsborough v. Cromwell, 326 U.S. 620, 623 (1946)). The situation before the court here is no different. There is no apparent reason to treat importers of Turkish steel products differently from importers of steel products from any other country listed in the Steel Report. The status quo under normal trade relations is equal tariff treatment of similar products irrespective of country of origin. See 19 U.S.C. § 1881. Although deviation from this general principle is allowable, such deviation cannot be arbitrarily and irrationally

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Puerto Rican recovery in issuing Proclamation 9772, and to exempt those shipments, may make the action overinclusive. Mot. to Dismiss. Hearing Tr., at 14, ECF No. 41 (Dec. 12, 2019). Under rational basis review, even significant over or underinclusiveness can be tolerable in some instances, see Vance v. Bradley, 440 U.S. 93, 108 (1979), but here this mismatch, particularly based on underinclusion, between Proclamation 9772's purported national security purpose and the chosen action to address that purpose is simply too great.

enforced in a way that treats similarly situated classes differently without permissible justification. Proclamation 9772 denies Plaintiffs the equal protection of the law.

IV. Constitutional Due Process

The Constitution's Due Process Clause provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. For Plaintiffs to succeed on their procedural due process claim, the court must first determine that a protected property interest exists. See Town of Castle Rock v. Gonzales, 545 U.S. 748, 756 (2005) ("To have a property interest in a benefit, a person clearly must have more than an abstract need or desire") (citing Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972)). The court looks to "existing rules or understandings that stem from an independent source such as state law," in ascertaining whether a protected property interest exists. Id. (citing Paul v. Davis, 424 U.S. 693, 709) (1976)). If an interest exists, the court must then ascertain what process is required under the circumstances. See Matthews v. Eldridge, 424 U.S. 319, 335 (1976).

Plaintiffs contend that Proclamation 9772 violates the Constitution's guarantee of Due Process. Pl. Br. at 38–43. They identify the property interest as "simply that the plaintiff-imports paid large amounts of duties to the U.S. Government and incurred numerous other expenses associated with the dislocation attendant to the imposition of 50% tariffs on Turkey."[17] Id. at 38. They further identify the process owed as "at least a basic level of protection under these circumstances." Id. at 39. The government responds

[17] Later in their brief, Plaintiffs instead characterize the property interest as "a freedom from the interference with existing contracts and business relationships, an expectation of a benefit, a level playing field, and the freedom from malignant stigma." Pl. Br. at 41.

that Plaintiffs have failed to identify a constitutionally protected property interest. Gov. Br. at 40–43. Because Plaintiffs do not point to an independent source that gives rise to a property interest, the government contends that the only process owed to Plaintiffs is "whatever the statute or regulation provides." Id. at 43. Because, in the government's view, that process was afforded here, there is no violation. Id. at 43–44.

Plaintiffs have failed to fully articulate a property interest beyond various nebulous notions and do so without reference to any independent source establishing that a concrete, protected property interest exists. Further, the process Plaintiffs request is simply that the government be made to comply with the procedures laid out in the statute. Because we hold that Plaintiffs are entitled to that process under the statute, we need not also answer whether any constitutional guarantees of Due Process were violated. See Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936) (Brandeis, J., concurring) (noting that a court "will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of"). The court does not foreclose the possibility that a constitutionally-protected property interest may exist,[18] but declines to identify one here. Whatever constitutional minimum process might be owed, it is satisfied by requiring that the President abide by the statute's procedures.

[18] At oral argument, the court questioned whether "the statutory provision for Normal Trade Relations at 19 U.S.C. § 1881 and the Harmonized Tariff Schedule of the United States, which is a statute, see 19 U.S.C. §§ 1202, 3004(c), combine together to create a legitimate expectation to a certain rate that would be sufficient to trigger procedural due process protections[.]" Issues for Oral Argument, ECF No. 63 (May 26, 2020).

CONCLUSION

For the foregoing reasons, the court grants Plaintiffs' motion for judgment upon the agency record. Proclamation 9772 is in violation of mandated statutory procedures and in violation of the Fifth Amendment's Equal Protection guarantees. Judgment will enter accordingly.

/s/ Jane A. Restani
Jane A. Restani, Judge

/s/ Claire R. Kelly
Claire R. Kelly, Judge

/s/ Gary S. Katzmann
Gary S. Katzmann, Judge

Dated: July 14, 2020
New York, New York

PART III—REQUIREMENTS CONCERNING NEGOTIATIONS

§§ 1841 to 1846. Repealed. Pub. L. 93–618, title VI, § 602(d), Jan. 3, 1975, 88 Stat. 2072

Section 1841, Pub. L. 87–794, title II, § 221, Oct. 11, 1962, 76 Stat. 874, made provision for the giving of advice by the Tariff Commission [now the United States International Trade Commission] concerning trade agreements. See section 2151 of this title.

Section 1842, Pub. L. 87–794, title II, § 222, Oct. 11, 1962, 76 Stat. 875, made provision for the giving of advice by other sources concerning trade agreements. See section 2152 of this title.

Section 1843, Pub. L. 87–794, title II, § 223, Oct. 11, 1962, 76 Stat. 875, provided for public hearings in connection with proposed trade agreements. See section 2153 of this title.

Section 1844, Pub. L. 87–794, title II, § 224, Oct. 11, 1962, 76 Stat. 875, set out prerequisites for offers for modification or continuance of duties or other import restrictions, or continuance of duty-free or excise treatment. See section 2154 of this title.

Section 1845, Pub. L. 87–794, title II, § 225, Oct. 11, 1962, 76 Stat. 876, provided for the reservation of articles from trade negotiations. See section 2137 of this title.

Section 1846, Pub. L. 87–794, title II, § 226, Oct. 11, 1962, 76 Stat. 876, provided for the transmission of agreements to Congress. See section 2212 of this title.

PART IV—NATIONAL SECURITY

§ 1861. Repealed. Pub. L. 93–618, title VI, § 602(d), Jan. 3, 1975, 88 Stat. 2072

Section, Pub. L. 87–794, title II, § 231, Oct. 11, 1962, 76 Stat. 876; Pub. L. 88–205, pt. IV, § 402, Dec. 16, 1963, 77 Stat. 390, covered products of Communist countries or areas.

§ 1862. Safeguarding national security

(a) Prohibition on decrease or elimination of duties or other import restrictions if such reduction or elimination would threaten to impair national security

No action shall be taken pursuant to section 1821(a) of this title or pursuant to section 1351 of this title to decrease or eliminate the duty or other import restrictions on any article if the President determines that such reduction or elimination would threaten to impair the national security.

(b) Investigations by Secretary of Commerce to determine effects on national security of imports of articles; consultation with Secretary of Defense and other officials; hearings; assessment of defense requirements; report to President; publication in Federal Register; promulgation of regulations

(1)(A) Upon request of the head of any department or agency, upon application of an interested party, or upon his own motion, the Secretary of Commerce (hereafter in this section referred to as the ''Secretary'') shall immediately initiate an appropriate investigation to determine the effects on the national security of imports of the article which is the subject of such request, application, or motion.

(B) The Secretary shall immediately provide notice to the Secretary of Defense of any investigation initiated under this section.

(2)(A) In the course of any investigation conducted under this subsection, the Secretary shall—

(i) consult with the Secretary of Defense regarding the methodological and policy questions raised in any investigation initiated under paragraph (1),

(ii) seek information and advice from, and consult with, appropriate officers of the United States, and

(iii) if it is appropriate and after reasonable notice, hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to such investigation.

(B) Upon the request of the Secretary, the Secretary of Defense shall provide the Secretary an assessment of the defense requirements of any article that is the subject of an investigation conducted under this section.

(3)(A) By no later than the date that is 270 days after the date on which an investigation is initiated under paragraph (1) with respect to any article, the Secretary shall submit to the President a report on the findings of such investigation with respect to the effect of the importation of such article in such quantities or under such circumstances upon the national security and, based on such findings, the recommendations of the Secretary for action or inaction under this section. If the Secretary finds that such article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, the Secretary shall so advise the President in such report.

(B) Any portion of the report submitted by the Secretary under subparagraph (A) which does not contain classified information or proprietary information shall be published in the Federal Register.

(4) The Secretary shall prescribe such procedural regulations as may be necessary to carry out the provisions of this subsection.

(c) Adjustment of imports; determination by President; report to Congress; additional actions; publication in Federal Register

(1)(A) Within 90 days after receiving a report submitted under subsection (b)(3)(A) in which the Secretary finds that an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, the President shall—

(i) determine whether the President concurs with the finding of the Secretary, and

(ii) if the President concurs, determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security.

(B) If the President determines under subparagraph (A) to take action to adjust imports of an article and its derivatives, the President shall implement that action by no later than the date that is 15 days after the day on which the President determines to take action under subparagraph (A).

(2) By no later than the date that is 30 days after the date on which the President makes any determinations under paragraph (1), the Presi-

dent shall submit to the Congress a written statement of the reasons why the President has decided to take action, or refused to take action, under paragraph (1). Such statement shall be included in the report published under subsection (e).

(3)(A) If—

(i) the action taken by the President under paragraph (1) is the negotiation of an agreement which limits or restricts the importation into, or the exportation to, the United States of the article that threatens to impair national security, and

(ii) either—

(I) no such agreement is entered into before the date that is 180 days after the date on which the President makes the determination under paragraph (1)(A) to take such action, or

(II) such an agreement that has been entered into is not being carried out or is ineffective in eliminating the threat to the national security posed by imports of such article,

the President shall take such other actions as the President deems necessary to adjust the imports of such article so that such imports will not threaten to impair the national security. The President shall publish in the Federal Register notice of any additional actions being taken under this section by reason of this subparagraph.

(B) If—

(i) clauses (i) and (ii) of subparagraph (A) apply, and

(ii) the President determines not to take any additional actions under this subsection,

the President shall publish in the Federal Register such determination and the reasons on which such determination is based.

(d)[1] Domestic production for national defense; impact of foreign competition on economic welfare of domestic industries

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.

(d)[1] Report by Secretary of Commerce

(1) Upon the disposition of each request, application, or motion under subsection (b), the Secretary shall submit to the Congress, and publish in the Federal Register, a report on such disposition.

(2) Omitted.

(f) Congressional disapproval of Presidential adjustment of imports of petroleum or petroleum products; disapproval resolution

(1) An action taken by the President under subsection (c) to adjust imports of petroleum or petroleum products shall cease to have force and effect upon the enactment of a disapproval resolution, provided for in paragraph (2), relating to that action.

(2)(A) This paragraph is enacted by the Congress—

(i) as an exercise of the rulemaking power of the House of Representatives and the Senate, respectively, and as such is deemed a part of the rules of each House, respectively, but applicable only with respect to the procedures to be followed in that House in the case of disapproval resolutions and such procedures supersede other rules only to the extent that they are inconsistent therewith; and

(ii) with the full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner, and to the same extent as any other rule of that House.

(B) For purposes of this subsection, the term ''disapproval resolution'' means only a joint resolution of either House of Congress the matter after the resolving clause of which is as follows: ''That the Congress disapproves the action taken under section 232 of the Trade Expansion Act of 1962 with respect to petroleum imports under _____ dated _____.'', the first blank space being filled with the number of the proclamation, Executive order, or other Executive act issued under the authority of subsection (c) of this section for purposes of adjusting imports of petroleum or petroleum products and the second blank being filled with the appropriate date.

(C)(i) All disapproval resolutions introduced in the House of Representatives shall be referred to the Committee on Ways and Means and all disapproval resolutions introduced in the Senate shall be referred to the Committee on Finance.

(ii) No amendment to a disapproval resolution shall be in order in either the House of Representatives or the Senate, and no motion to suspend the application of this clause shall be in order in either House nor shall it be in order in either House for the Presiding Officer to entertain a request to suspend the application of this clause by unanimous consent.

[1] So in original. There are two subsecs. designated (d). Second subsec. (d) probably should be designated (e).

(Pub. L. 87–794, title II, §232, Oct. 11, 1962, 76 Stat. 877; Pub. L. 93–618, title I, §127(d), Jan. 3, 1975, 88 Stat. 1993; Pub. L. 96–223, title IV, §402, Apr. 2, 1980, 94 Stat. 301; Pub. L. 100–418, title I, §1501(a), (b)(1), Aug. 23, 1988, 102 Stat. 1257, 1259.)

REFERENCES IN TEXT

Section 232 of the Trade Expansion Act of 1962, referred to in subsec. (f)(2)(B), is classified to this section.

CODIFICATION

Subsection (d)(2), which required the President to submit an annual report to Congress on the operation of this section, terminated, effective May 15, 2000, pursuant to section 3003 of Pub. L. 104–66, as amended, set out as a note under section 1113 of Title 31, Money and Finance. See, also, page 28 of House Document No. 103–7.

AMENDMENTS

1988—Subsec. (b). Pub. L. 100–418, §1501(a)(3), in adding subsec. (b) and striking out former subsec. (b) relating to similar subject matter, changed structure of subsec. (b) from a single unnumbered par. to one consisting of pars. (1) to (4).

Subsec. (c). Pub. L. 100–418, §1501(a)(2), (3), added subsec. (c) and redesignated former subsec. (c) as (d).

Subsec. (d). Pub. L. 100–418, §1501(b)(1), redesignated subsec. (e), as redesignated by section 1501(a)(2) of Pub. L. 100–418, as subsec. (d) and amended it generally. Prior to amendment, subsec. (d) read as follows: ''A report shall be made and published upon the disposition of each request, application, or motion under subsection (b) of this section. The Secretary shall publish procedural regulations to give effect to the authority conferred on him by subsection (b) of this section.''

Pub. L. 100–418, §1501(a)(2), redesignated subsec. (c), relating to domestic production for national defense and the impact of foreign competition on economic welfare of domestic industries, as (d). Former subsec. (d), relating to reports on investigations by Secretary of Commerce, redesignated (e).

Subsec. (e). Pub. L. 100–418, §1501(b)(1), redesignated subsec. (e), as redesignated by section 1501(a)(2) of Pub. L. 100–418, as subsec. (d) and amended it generally.

Pub. L. 100–418, §1501(a)(2), redesignated subsec. (d), relating to reports on investigations by Secretary of Commerce, as (e). Former subsec. (e) redesignated (f).

Subsec. (f). Pub. L. 100–418, §1501(a)(1), (2), redesignated subsec. (e) as (f), and substituted reference to subsec. (c) of this section for reference to subsec. (b) of this section in pars. (1) and (2)(B).

1980—Subsec. (e). Pub. L. 96–223 added subsec. (e).

1975—Subsec. (b). Pub. L. 93–618, §127(d)(1)–(3), substituted ''Secretary of the Treasury (hereinafter referred to as the 'Secretary')'' for ''Director of the Office of Emergency Planning (hereinafter in this section referred to as the 'Director')'', substituted ''advice from, and shall consult with, the Secretary of Defense, the Secretary of Commerce, and other appropriate officers of the United States'' for ''advice from other appropriate departments and agencies'', inserted provision for public hearings by the Secretary as part of his investigation, inserted requirement that the Secretary report to the President when he recommends inaction in the same way that a report to the President is required when he recommends action under this section, and placed a 1-year time limit on the Secretary's investigation before making his recommendation to the President.

Subsecs. (c), (d). Pub. L. 93–618, §127(d)(4), substituted ''Secretary'' for ''Director''.

EFFECTIVE DATE OF 1988 AMENDMENT

Pub. L. 100–418, title I, §1501(d), Aug. 23, 1988, 102 Stat. 1259, provided that:

''(1) Except as otherwise provided under this subsection, the amendments made by this section [amending this section and repealing section 1863 of this title] shall apply with respect to investigations initiated under section 232(b) of the Trade Expansion Act of 1962 [19 U.S.C. 1862(b)] on or after the date of enactment of this Act [Aug. 23, 1988].

''(2) The provisions of subsection (c) of section 232 of the Trade Expansion Act of 1962, as amended by this section, shall apply with respect to any report submitted by the Secretary of Commerce to the President under section 232(b) of such Act after the date of enactment of this Act.

''(3) By no later than the date that is 90 days after the date of enactment of this Act, the President shall make the determinations described in section 232(c)(1)(A) of the Trade Expansion Act of 1962, as amended by this section, with respect to any report—

''(A) which was submitted by the Secretary of Commerce to the President under section 232(b) of such Act before the date of enactment of this Act, and

''(B) with respect to which no action has been taken by the President before the date of enactment of this Act.''

PETROLEUM IMPORT ADJUSTMENT PROGRAM; OIL IMPORT FEE OF APRIL 2, 1980; CESSATION OF FORCE AND EFFECT OF PRESIDENTIAL ACTION

Pub. L. 96–264, §2, June 6, 1980, 94 Stat. 439, provided that: ''Notwithstanding any other provision of law, the action taken by the President under section 232(b) of the Trade Expansion Act of 1962 (19 U.S.C. 1862(b)) with respect to petroleum imports under Proclamation 4744, dated April 2, 1980, as amended [formerly set out below], shall cease to have force and effect upon the date of the enactment of this Act [June 6, 1980].''

PROCLAMATION NO. 3279

Proc. No. 3279, Mar. 10, 1959, 24 F.R. 1781, as amended by Proc. No. 3290, Apr. 30, 1959, 24 F.R. 3527; Proc. No. 3328, Dec. 10, 1959, 24 F.R. 10133; Proc. No. 3386, Dec. 24, 1960, 25 F.R. 13945; Proc. No. 3389, Jan. 17, 1961, 26 F.R. 507; Ex. Ord. No. 11051, Sept. 27, 1962, 27 F.R. 9683; Proc. No. 3509, Nov. 30, 1962, 27 F.R. 11985; Proc. No. 3531, Apr. 19, 1963, 28 F.R. 4077; Proc. No. 3541, June 12, 1963, 28 F.R. 5931; Proc. No. 3693, Dec. 10, 1965, 30 F.R. 15459; Proc. No. 3779, Apr. 10, 1967, 32 F.R. 5919; Proc. No. 3794, July 17, 1967, 32 F.R. 10547; Proc. No. 3820, Nov. 9, 1967, 32 F.R. 15701; Proc. No. 3823, Jan. 29, 1968, 33 F.R. 1171; Proc. No. 3969, Mar. 10, 1970, 35 F.R. 4321; Proc. No. 3990, June 17, 1970, 35 F.R. 10091; Proc. No. 4018, Oct. 16, 1970, 35 F.R. 16357; Proc. No. 4025, Dec. 22, 1970, 35 F.R. 19391; Proc. No. 4092, Nov. 5, 1971, 36 F.R. 21397; Proc. No. 4099, Dec. 20, 1971, 36 F.R. 24203; Proc. No. 4133, May 11, 1972, 37 F.R. 9543; Proc. No. 4156, Sept. 18, 1972, 37 F.R. 19115; Proc. No. 4175, Dec. 16, 1972, 37 F.R. 28043; Proc. No. 4178, Jan. 17, 1973, 38 F.R. 1719; Ex. Ord. No. 11703, Feb. 7, 1973, 38 F.R. 3579; Proc. No. 4202, Mar. 23, 1973, 38 F.R. 7977; Proc. No. 4210, Apr. 18, 1973, 38 F.R. 9645; Proc. No. 4227, June 19, 1973, 38 F.R. 16195; Ex. Ord. No. 11743, Oct. 23, 1973, 38 F.R. 29459; Ex. Ord. No. 11775, Mar. 26, 1974, 39 F.R. 11415; Ex. Ord. No. 11790, June 25, 1974, 39 F.R. 23185; Proc. No. 4317, Sept. 27, 1974, 39 F.R. 35103; Proc. No. 4341, Jan. 23, 1975, 40 F.R. 3965; Proc. No. 4355, Mar. 4, 1975, 40 F.R. 10437; Proc. No. 4370, Apr. 30, 1975, 40 F.R. 19421; Proc. No. 4377, May 27, 1975, 40 F.R. 23429; Proc. No. 4412, Jan. 3, 1976, 41 F.R. 1037; Proc. No. 4543, Dec. 27, 1977, 42 F.R. 64849; Ex. Ord. No. 12038, Feb. 3, 1978, 43 F.R. 4947; Proc. No. 4629, Dec. 8, 1978, 43 F.R. 58077; Proc. No. 4655, Apr. 6, 1979, 44 F.R. 21243; Proc. No. 4702, Nov. 12, 1979, 44 F.R. 65581; Proc. No. 4744, Apr. 2, 1980, 45 F.R. 22864; Proc. No. 4766, June 19, 1980, 45 F.R. 41899; Proc. No. 4907, Mar. 10, 1982, 47 F.R. 10507, which set forth regulations governing the licensing of imports of petroleum and petroleum products, was revoked by Proc. No. 5141, Dec. 22, 1983, 48 F.R. 56929, set out below.

PROCLAMATION NO. 4744

Proc. No. 4744, Apr. 2, 1980, 45 F.R. 22864, as amended by Proc. No. 4748, Apr. 11, 1980, 45 F.R. 25371; Proc. No. 4751, Apr. 23, 1980, 45 F.R. 27905, which related to the pe-

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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