



Expired Authority?: Federal Court Suggests Some Limits to the President's Authority to Impose Tariffs

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In response to perceived unfair trade practices of other countries, the Trump Administration has imposed tariffs and other trade restrictions on billions of dollars of imported products using authority Congress delegated to the executive branch in various provisions of federal law. To justify the trade measures, the Administration has cited national security concerns, injury to competing domestic industries, and allegedly unfair trade practices of particular countries (e.g., China's practices with respect to intellectual property rights). Some industry groups and individual companies have challenged these tariff actions on constitutional and statutory grounds in U.S. courts but, until recently, federal courts have uniformly rejected these challenges. (This Sidebar does not discuss the challenges to certain tariffs currently pending before the World Trade Organization (WTO) or other international bodies.)

A November 15, 2019 decision by a three-judge panel of the U.S. Court of International Trade (CIT), however, marks a departure from this trend in the case law, which could have broader implications for the scope of the President's trade powers. In *Transpacific Steel LLC v. United States*, a U.S. company sought a partial refund of duties it paid on certain steel imports from Turkey. The imports were subject to tariffs the President imposed under Section 232 of the Trade Expansion Act. In a decision denying the United States' motion to dismiss the company's complaint, the CIT indicated that the President's power to impose tariffs under Section 232(b), while broad, is not unlimited. Specifically, the court suggested that the President must closely adhere to the procedural requirements of the statute when exercising such authority. This decision, which this Sidebar explores in more detail, could have implications for future tariff actions under Section 232 and similar statutes granting the President power over foreign commerce.

Section 232 Trade Measures

As discussed in this [CRS Report](#), [Section 232](#) authorizes the President to impose restrictions on certain imports based on the U.S. Department of Commerce's (Commerce's) affirmative determination that the product under investigation "is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security." The Act establishes deadlines that

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Commerce and the President must meet during each phase of the investigation and implementation of any resulting action.

Specifically, under the Act, Commerce must, within 270 days of initiating an investigation, consult with other federal agencies and submit to the President a report of its findings, including a determination of whether imports of the article under investigation threaten national security and a description of any recommendations to resolve the threat. If Commerce makes an affirmative determination of a threat, the President has 90 days after receiving the investigation report to determine whether he concurs with Commerce's findings. If the President concurs, he must also determine what actions to take to remove the threat to national security and implement any such action to "adjust imports" within 15 days.

In April 2017, the Secretary of Commerce initiated an investigation under Section 232 to determine the effect of steel and aluminum imports on national security. In January 2018, the Secretary timely submitted to the President a [report](#) finding that certain steel imports posed a threat to national security. On March 8, 2018, the President [proclaimed](#) a 25% tariff on imports of steel from nearly all U.S. trading partners, including Turkey, which took effect on March 23. In August 2018, the President proclaimed an [increase](#) in Section 232 tariffs from 25% to 50% only on Turkish steel imports. That increase was later [lifted](#) in May 2019.

The Transpacific Steel Decision

In *Transpacific Steel*, a U.S. company that imports steel products from various countries, including Turkey, seeks the refund of the allegedly excess duties it paid on imports of Turkish steel. The company argues that the President lacked authority to proclaim the subsequent increase in tariffs on steel imports from Turkey (i.e., from 25% to 50%) because it became effective five months after the [initial imposition](#) of steel tariffs and well beyond the statutory deadline for action in the underlying steel investigation. The company also maintains that the imposition of the tariffs lacked a sufficient national security rationale and violated the plaintiff's Fifth Amendment Due Process and Equal Protection rights because the action "creates an arbitrary distinction between importers of steel products from Turkey and importers of steel products from all other sources."

The government moved to dismiss the company's complaint for failure to state a claim. To survive such a motion, a plaintiff need only show that it has a "plausible" claim for relief, which [generally requires](#) proffering facts "plausibly suggesting (not merely consistent with) a showing that entitles the party to relief." In a decision denying the government's motion, the CIT determined that the company's allegation that the President failed to follow Section 232's procedural requirements when imposing the tariffs established a plausible claim for a partial refund of the duties. Specifically, the court concluded that the President lacked power to act beyond the deadline to impose *additional tariffs* without initiating a new investigation, deeming such an "expansive view of [presidential] power under section 232" to be "mistaken, and at odds with the language of the statute, its legislative history, and its purpose." The court also noted that, while the President retains significant discretion to impose duties under Section 232, Congress intended the President to adhere strictly to the "procedural safeguards that Congress provided, and which the President appears to have ignored."

The court also determined that the company established a plausible argument that the Executive violated constitutional guarantees of equal protection protected by the Fifth Amendment's Due Process Clause when imposing, without a rational basis, the additional steel tariffs only on imports from Turkey. The court observed that while the equal protection standard is "forgiving" in the context of economic regulation, the government had not offered a sufficient justification for treating imports of steel from Turkey differently than those of other countries.

Implications of the Decision

The CIT's decision in *Transpacific Steel* suggests that, for the first time during the Trump Administration, courts may impose at least some limits on the President's use of statutory tariff authorities. However, there are limits to the reach of the decision. While the decision suggested various potential limits on the President's authority to impose tariffs, it was issued in the context of a narrow factual situation: tariffs imposed on imports of steel from one country after the statutory deadline for action had passed. Thus, although the three-judge panel decision [amounts](#) to binding precedent in future CIT cases, some of the broader statements in the court's opinion regarding the President's authority under Section 232 may constitute nonbinding dicta because they are not essential to resolving the specific dispute at issue in the case. Furthermore, the court's decision could later be overturned on appeal to the Federal Circuit Court of Appeals.

Nonetheless, the decision suggests several avenues by which courts could limit the President's use of tariff authorities. While courts have previously [rejected challenges](#) to the President's fact-finding and selection of a remedy under various trade statutes, the decision in *Transpacific Steel* indicates that courts might scrutinize whether the executive branch has followed the proper procedures, including meeting statutory deadlines. Presidential action that does not follow these statutory procedures may be deemed in excess of the President's authority. In addition, the court indicated that, under Section 232, the President lacks the authority to adjust national security tariffs after the deadline unless Commerce conducts a new investigation and issues a new report recommending action.

In addition, some possibility exists that the federal judiciary will determine that some of the statutes granting expansive trade authority to the President are unconstitutional. In a concurring opinion in *Transpacific Steel*, Judge Gary Katzmann repeated some of the concerns he raised in an earlier constitutional challenge to the President's Section 232 actions. In *American Institute for International Steel*, the CIT rejected an argument that Section 232 was an unconstitutional delegation of legislative power. In a separate dubitante opinion, Judge Katzmann concluded that, although the CIT was bound by a 1976 holding of the Supreme Court, it might be time to revisit the assumptions of that holding because it has become clear that Section 232 "provides virtually unbridled discretion to the President with respect to the power over trade that is reserved by the Constitution to Congress." After the Supreme Court [declined to grant certiorari](#) to hear a direct appeal of the CIT's decision in *American Institute* and potentially reconsider its earlier [precedent](#) on the constitutionality of Section 232, an appeal of the CIT's decision [remains pending](#) at the U.S. Court of Appeals for the Federal Circuit.

The *Transpacific Steel* decision may also have legal implications for future tariff actions. One legal commentator has [argued](#) that the President lacks authority to impose Section 232 national security tariffs on imports of automobiles and automotive parts pursuant to an [earlier investigation](#) because the President missed the statutory deadline for action. However, [others](#) have suggested that the President might rely upon language in [Section 232\(c\)\(3\)](#) that appears to authorize the President to take additional actions to adjust imports (e.g., impose tariffs) if he unsuccessfully attempts to negotiate an agreement to resolve concerns about imports that threaten national security within 180 days of determining to take action under the law. President Trump had [directed](#) U.S. negotiators to reach agreements with the European Union and Japan to address auto imports; however, no such agreements have been finalized. (Other [trade authorities](#) may also provide the executive branch with authority to impose tariffs on automobiles.)

Although it is possible that the federal courts will further clarify the scope of the President's authority to impose national security tariffs, Congress could also consider enacting legislation to alter or clarify the executive branch's existing authority under Section 232. Several [bills](#) introduced in the 116th Congress address concerns about Section 232, including expanding, limiting, or revising existing authority.

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