No. 21-721

In The
Supreme Court of the United States

TRANSPACIFIC STEEL LLC, et al.,

Petitioners,

v.

UNITED STATES, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Respondents raise three sets of objections to Petitioners' statutory arguments: (1) that requiring the President to abide by the express procedural requirements of the statute would foreclose the President's ability to modify section 232 duties in response to new information or changed circumstances; (2) that the "long-settled understanding" that section 232 permitted the President to modify at will previous actions under section 232 was not altered by the 1988 amendments; and (3) that this Court has held that the failure to perform a mandatory statutory duty within a specified time frame does not divest the agency charged with that duty of the power to do so later. Opp. 8-11.

With regard to Petitioners' non-delegation argument (Opp. 11-14), Respondents rely upon this Court's decision in *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976), but fail to identify any genuine limits or boundaries in the statute that limit the President's authority under section 232 as interpreted by the Federal Circuit. Nor do they take into account the various opinions in *Gundy v. United States*, 139 S. Ct. 2116 (2019) and subsequent cases that call for the Court to revisit the expansive way in which that doctrine has come to be applied. Finally, Respondents' attempt to rely on the President's foreign affairs powers is unavailing because the President has no foreign affairs power to tax imports or regulate international commerce absent congressional authorization. Opp. 14-15.

Section 232's Time Limits Do Not Prevent The President From Modifying Actions In Response To New Information

Respondents, like the Federal Circuit majority, insist that the term "action" must be understood as suggesting a "process" rather than a unitary act, such that section 232 must be read as empowering a "course of acts" over an indefinite period of time. Opp. 8. Consequently, Respondents argue the requirement that the President "shall" determine the nature and duration of "the action" that "must" be taken to adjust imports, 19 U.S.C. § 1862(c), means that the President need only determine the "general character" of a "plan" to act. Opp. 8-9. Similarly, Respondents assert that section 232's requirement that the President "shall" implement "that action by no later than the date that is 15 days" after the action was announced, 19 U.S.C. § 1862(c)(1)(B), Pet. App. 140, means only that the President must put his "plan" into effect in that time period but does not require him to put "each step" of that plan into effect. Opp. 10.

This reading of the statute fails for two reasons. First, it re-writes the actual words used by Congress, which direct the President within 90 days, after receiving the Secretary's report to announce, "*the* action" to be taken to adjust imports, and then directs the President within 15 days to implement "*that* action." 19 U.S.C. § 1862(c), Pet. App. 139-140. Congress chose to use the singular "action" rather than the plural and makes no reference to any "plan." Pet. App. 75 (dissenting opinion of Judge Reyna). Similarly, section 232

directs the President to announce the "duration" of the action, a requirement that lacks any meaning if the action can take the form of an unlimited "course of acts" to adjust imports. Opp. 8.

Second, Respondents contend that, unless "action" is interpreted as a plan or continuing course of action, the statutory purpose of section 232 would be frustrated because the President would be foreclosed from taking additional actions to adjust imports in response to changed circumstances or new information. Opp. 8. Respecting the time limits established by Congress would not preclude further presidential action in response to new information. To the contrary, the statutory time limits further the objective of acting in response to changed circumstances and new information by requiring the President to obtain a further updated report from the Secretary of Commerce before adopting a new action to adjust imports. Respondents admit that the Secretary was monitoring steel imports following the imposition of the steel import restrictions. Opp. 5. All that was required to comply with the statute would have been for the President to direct the Secretary to prepare a supplemental report advising whether steel imports continued to pose a threat to national security, and if so, recommending additional action. Nowhere do Respondents demonstrate that following the procedural requirements in 19 U.S.C. § 1862(b) and (c) would have prevented the President from taking further actions to remedy any continued or increased threat to national security from steel imports.

The 1988 Amendments Must Not Be Ignored

Respondents contend that, prior to the 1988 amendments that created, *inter alia*, the 90-day and 15-day time limits on action by the President, there was a "long-settled understanding" that Presidents had the "continuing authority" to modify initial actions under section 232. Opp. 10. Respondents argue that a court should not infer that the 1988 amendments altered that understanding without a clear statement of intent to do so, and that neither the text nor history of the 1988 amendments provides any clear indication that Congress intended to remove the President's "longstanding authority" to modify initial actions under section 232. *Id.*

This argument fails because the 1988 amendments expressly contradict any such "understanding." It is hard to imagine a clearer indication that a change was intended than what Congress did here: it added express deadlines to a statute that previously had none, and it stated those deadlines in clear, mandatory terms (within 90 days after receiving a report, the President "shall" determine the nature and duration of "the action" and "shall" implement that action "by no later than the date" that is 15 days later). 19 U.S.C. § 1862(c), Pet. App. 139-140. By enacting these time limits, Congress expressly conditioned the authority it delegated to the President on compliance with those deadlines. Whatever authority to modify section 232 actions the President may have exercised under the previous version of the statute is now subsumed within

these procedural requirements, which direct the President to act expeditiously and decisively.

Cases Relaxing Mandatory Time Limits On Government Action Do Not Apply To Section 232

Respondents rely on the decisions in *Barnhart v. Peabody Coal Co.*, 537 U.S. 149 (2003) and *Nielsen v. Preap*, 139 S. Ct. 954 (2019) to argue that, although section 232 imposes requirements on the President to act, the failure to act within the statutory deadlines does not deprive him of the power to act later. Opp. 10. First, it cannot be the case, as Respondents argue, that the word "shall" in 19 U.S.C. § 1862(c)(1)(A) and (c)(1)(B) must be read as mandatory with respect to the President's duty to act, but as only optional concerning time limits in which to carry out that duty.

Second, section 232 does not impose mandatory duties on the government in the same sense as in *Barnhart* and *Nielsen*. *Barnhart* concerned the Coal Industry Retiree Health Benefit Act of 1992 ("Coal Act"), 26 U.S.C. § 9706(a), which provides that the Commissioner of Social Security "shall, before October 1, 1993," assign each eligible coal industry retiree to an entity responsible for funding the benefits. 537 U.S. at 152. The Commissioner missed that deadline, but the Court concluded that the tardy assignment of retirees was nevertheless valid and binding on the entities responsible for paying the pension benefits. *Id.* A

contrary interpretation would have precluded ever meeting the deadline, a plainly draconian result.

Similarly, *Nielsen* involved a federal immigration statute that directed the Secretary of Homeland Security to detain aliens who had committed certain crimes or had connections to terrorist acts when "released" from custody on criminal charges. 139 S. Ct. at 959. Justices Alito, Roberts, and Kennedy concluded that the failure to detain such aliens immediately upon release from custody did not terminate the government's authority to do so later. As in *Barnhart*, the statute in *Nielsen* involved a mandatory duty to perform a specific act, and once the deadline was missed, could never be met, with the result of frustrating the statutory objective.

Section 232 is different. It does not direct any federal agency to do anything. Rather, it delegates authority to the President to take action he determines is necessary to adjust imports. The President is not obligated to act, even upon an affirmative report by the Secretary, except to the extent he concurs with the Secretary's findings that imports threaten national security. 19 U.S.C. § 1862(c), Pet. App. 139-140. And, also unlike *Barnhart* and *Nielsen*, the failure to take some particular action to adjust imports within the deadline does not forever preclude taking that action: the President retains the power to take additional action in response to changed circumstances, provided he obtains a new report from the Secretary.

Respondents Fail To Identify Any Limitations On Presidential Action Under Section 232

Respondents rely upon this Court's decision in *Algonquin* in arguing that section 232 does not violate the constitutional non-delegation doctrine. Opp. 11-13. Petitioners have demonstrated that, as interpreted by the Federal Circuit majority in this case, section 232 transfers to the President unlimited power to impose tariffs and regulate international trade whenever he pleases. Pet. 32-35. Respondents quote *Algonquin*'s conclusion that the President's authority is "far from unbounded," but they fail to identify any actual boundaries. Opp. 12.

Respondents also do not dispute that, by including matters affecting the economic welfare of the nation, as well as of individual domestic industries, "national security" as used in section 232 sweeps within it any economic effects of imports that the President may elect to address. That is why, during oral argument before the Court of International Trade during the *AIIS* litigation, government counsel was unable to state whether the President could impose duties on imports of peanut butter under section 232. Transcript of Oral Argument at 24, 33–34, 44, 51, *Am. Inst. for Int'l Steel v. United States*, No. 18-00152 (Ct. Int'l Trade Mar. 25, 2019), ECF No. 46.

Nor do Respondents point to any limits in the actions the President may take to "adjust" imports. They do not dispute that under section 232 the President

may impose tariffs of any amount and for any duration, as well as quotas, embargoes, license requirements, or any combination thereof. And, as interpreted by the Federal Circuit, having once obtained a report by the Secretary identifying a threat from imports to national security, the President may thereafter continue to impose new measures forevermore. For example, the Respondents did not disagree with Petitioners that the current President, or any future President, is authorized under section 232 to impose tariffs or other restrictions on imports of uranium or titanium sponge based on affirmative findings of the Secretary during the previous administration that were not acted on within the applicable time limits. Pet. 31-32.

Respondents argue that, because the Court affirmed the constitutionality of section 232 under the non-delegation doctrine when there were no relevant time limits in the statute, the Federal Circuit majority's evisceration of those time limits does not provide grounds for a reconsideration of *Algonquin*. They further contend that Petitioners have otherwise failed to identify any "special justification" for overruling it. Opp. 13.

Respondents admit that prior to the steel tariffs at issue here, section 232 had been used by the President only five times, each one in connection with petroleum imports, and not at all since 1982. Opp. 3-4. Under President Trump, however, section 232 was used to impose billions of dollars of tariffs on imports of steel and aluminum. Proclamation 9705, 83 Fed. Reg. 11,625 (Mar. 15, 2018), Pet. App. 148-156; Proclamation 9704,

83 Fed. Reg. 11,619 (Mar. 15, 2018). Thus, the full scope of the President's authority under section 232 is now on display in a way that was not apparent at the time *Algonquin* was decided. And, as discussed, by reading out of the statute the time limits set by Congress, the Federal Circuit's decision would appear to permit the President to revive dormant section 232 investigations on uranium and titanium sponge without seeking a new report from the Secretary.

Finally, a majority of the current Court has indicated an interest in revisiting the non-delegation doctrine as a means of ensuring adherence to the constitutional separation of powers. *Gundy*, 139 S. Ct. at 2130-31 (2019) (Alito, J., concurring); *id*. at 2131-48 (Gorsuch, J., dissenting, joined by Roberts, C.J., and Thomas, J.); *Paul v. United States*, 140 S. Ct. 342 (2019) (Kavanaugh, J., concurring in denial of certiorari); *National Federation of Independent Business v. Department of Labor*, 142 S. Ct. 661, 667-69 (2022) (Gorsuch, J., concurring, joined by Thomas, J., and Alito, J.). If Respondents were correct (which they are not) that a "special justification" is needed to revisit *Algonquin*, this renewed interest by at least five Justices in the non-delegation doctrine provides it.

The Foreign Affairs Powers Of The President Cannot Overcome The Express Language In Section 232

Respondents seek to support their expansive reading of section 232 by citing the powers of the President

in the realm of foreign affairs. Opp. 14-15. That reliance is misplaced for several reasons.

First, the President has no express or implied powers to do what he did here: impose over $10 billion in tariffs on steel imports. U.S. CUSTOMS AND BORDER PROTECTION, TRADE STATISTICS (as of Feb. 24, 2022).[1] The power to regulate imports belongs exclusively to Congress under Article I, section 8, clauses 1 and 3, which give Congress, not the President, the power to "lay and collect Taxes, Duties, Imposts and Excises," and to "regulate Commerce with foreign Nations."

Second, the Court in *Algonquin* never mentioned, let alone relied on, any constitutional powers of the President in its decision. That is consistent with section 232's focus on the impact of imports on the domestic economy, rather than on diplomatic relations with foreign countries. The Presidential proclamation imposing the steel tariffs references only the powers delegated in section 232 and does not purport to exercise any Article II powers. Pet. App. 148-156.

Third, the foreign affairs discussion from *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), cited by Respondents (Opp. 14), was severely limited in *Zivotofsky v. Kerry*, 576 U.S. 1, 20-21 (2015), although in *Zivotofsky* the Court recognized the President's exclusive power to recognize foreign states.

But, to the extent that the Constitution gives Congress some leeway in delegating authority to the

[1] Available at https://www.cbp.gov/newsroom/stats/trade.

President in the field of foreign affairs, this case is not close. The unbounded authority Respondents urge on this Court cannot be sustained because, as the concurring judge in the Court of International Trade in *AIIS* observed, "If the delegation permitted by section 232, as now revealed, does not constitute excessive delegation in violation of the Constitution, what would?" *Am. Inst. for Int'l Steel, Inc. v. United States*, 376 F. Supp. 3d 1335, 1352 (Ct. Int'l Trade 2019), *aff'd*, 806 Fed. App'x 982 (Fed. Cir. 2020), *cert. denied*, 141 S. Ct. 133 (2020).

CONCLUSION

For the reasons set forth above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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