No.

IN THE

Supreme Court of the United States

USP HOLDINGS, INC., SUBSTITUTED FOR UNIVERSAL STEEL PRODUCTS, INC.; PSK STEEL CORPORATION; DAYTON PARTS, LLC; BORUSAN MANNESMANN PIPE U.S. INC.; AND JORDAN INTERNATIONAL COMPANY, PETITIONERS

v.

UNITED STATES, JOSEPH R. BIDEN, JR., PRESIDENT OF THE UNITED STATES; GINA M. RAIMONDO, SECRETARY OF COMMERCE; AND TROY MILLER, SENIOR OFFICIAL PERFORMING THE DUTIES OF THE COMMISSIONER FOR UNITED STATES CUSTOMS AND BORDER PROTECTION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

The Court of Appeals for the Federal Circuit correctly held that the Secretary of Commerce's determination that steel imports threaten to impair national security under Section 232(b)(3)(A) of the Trade Expansion Act, was "final agency action" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 704, as it changed the legal landscape by providing the President with additional tariff authority usually held by Congress. However, the Panel erroneously ruled that the Secretary's action was *not* subject to judicial review under the APA's "arbitrary and capricious" standard set out in 5 U.S.C. § 706(2)(A). This latter ruling conflicts with precedents of this Court and other federal Courts of Appeals.

This petition presents two questions:

1. Did the Federal Circuit err in holding that the Secretary's "final agency action" which determined that imports of steel "threaten to impair the national security" is not subject to arbitrary and capricious review as prescribed by the APA?

2. Did the Federal Circuit correctly interpret the explicit Congressional requirement of Section 232 that the Secretary must find that imports "*threaten* to impair" national security?

PARTIES TO THE PROCEEDING

All the parties in this proceeding are listed in the caption.

STATEMENT OF RELATED CASES

None

CORPORATE DISCLOSURE STATEMENT

Petitioner USP Holdings, Inc. ("USP") is a Florida corporation. It has no parent company and no publicly held company owns 10% or more of the stock of USP.

Petitioner PSK Steel Corp. ("PSK") is an Ohio corporation. It has no parent company and no publicly held company owns 10% or more of the stock of PSK.

Petitioner Dayton Parts, LLC is a Delaware corporation and a wholly owned subsidiary of Dorman Products, Inc., a publicly traded company listed on the NASDAQ (symbol DORM).

Petitioner Borusan Mannesmann Pipe U.S. Inc. ("BMP") is a Delaware corporation which is controlled by or a wholly owned subsidiary of Borusan Mannesmann Boru Sanayi ve Ticaret A.S., a Turkish producer and exporter of steel pipe and tube products. No publicly held company owns 10% or more of the stock of BMP.

Petitioner Jordan International Company ("Jordan") is a Delaware corporation. It has no parent company and no publicly held company owns 10% or more of the stock of Jordan.

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The published Opinion of the United States Court of Appeals for the Federal Circuit in *USP Holdings, Inc., Substituted for Universal Steel Products, Inc. et al. v. United States et al.*, C.A. No. 2021-1726, decided and filed June 9, 2022, and reported at 36 F.4th 1359 (Fed. Cir. 2022), affirming rulings by the Court of International Trade which granted the government's motion for judgment on the pleadings on petitioners' claim that both the President and Secretary of Commerce violated the Trade Expansion Act of 1962, and denying petitioners' cross motion for partial summary judgment, is set forth in the Appendix hereto (App. 1-29).

The published Memorandum and Order of the United States Court of International Trade in *Universal Steel Products, Inc. et al. v. United States et al.*, Civil Action No. 19-00209, decided and filed February 26, 2021, and reported at 497 F. Supp.3d 1406 (Ct. Int'l Trade 2021), granting petitioners' unopposed motion for the issuance of a Rule 54(b) partial judgment, is set forth in the Appendix hereto (App. 30-35).

The published Memorandum and Order of the United States Court of International Trade in *Universal Steel Products, Inc. et al. v. United States et al.*, Civil Action No. 19-00209, decided and filed February 4, 2021, and reported at 495 F. Supp.3d 1336 (Ct. Int'l Trade 2021), holding that neither the

President nor the Secretary of Commerce violated the Trade Expansion Act of 1962 when the President imposed heightened tariffs on steel imports, is set forth in the Appendix hereto (App. 36-87).

The unpublished order of the United States Court of Appeals for the Third Circuit in *USP Holdings, Inc., Substituted for Universal Steel Products, Inc. et al. v. United States et al.*, C.A. No. 2021-1726, decided and filed August 18, 2022, denying petitioners' timely filed petition for panel rehearing is set forth in the Appendix hereto (App. 88-89).

JURISDICTION

The decision of the United States Court of Appeals for the Federal Circuit affirming the rulings of the United States Court of International Trade, was entered on June 9, 2022; and its order denying petitioners' timely filed petition for panel rehearing was decided and filed on August 18, 2022 (App. 1-29;88-89).

In addition, on November 1, 2022, petitioners submitted an Application to the Court for an Extension of Time to File Their Petition for Certiorari Until December 16, 2022. On November 7, 2022, the Chief Justice granted petitioners' motion (See Docket No. 22A403).

This petition for writ of certiorari is filed within the time allowed by this Court's rules, 28 U.S.C. § 2101(c), and by this Court's Order of November 7, 2022.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment V:

No person shall...be deprived of life, liberty, or property, without due process of law....

5 U.S.C. § 701(a) (The Administrative Procedure Act):

(a) This chapter applies, according to the provisions thereof, except to the extent that—
(1) statutes preclude judicial review; or
(2) agency action is committed to agency discretion by law.

5 U.S.C. § 704 (Actions Reviewable):

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.
Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application

for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. § 706 (Scope of Review):

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.
The reviewing court shall—
(1) compel agency action unlawfully withheld or unreasonably delayed; and
(2) hold unlawful and set aside agency action, findings, and conclusions found to be—
(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by law;
(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

19 U.S.C. § 1862(a)-(c) (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 President 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.

STATEMENT

On April 19, 2017, Wilbur L. Ross, the Secretary of Commerce ("the Secretary") initiated an investigation under Section 232(b) of the Trade Expansion Act of 1962, as amended (19 U.S.C. § 1862(b)) ("Section 232"), to determine whether steel was being imported under such circumstances as to "threaten to impair" national security. See *Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Steel*, 82 Fed. Reg. 19205 (April 26, 2017) (App. 5).

The investigation received hundreds of public comments. On January 11, 2018, the Secretary transmitted his report of the investigation to the President (*Id.*). A public version of the report was released to the public on February 16, 2018. A twenty-five page summary of the report was later published in the Federal Register (*Publication of a Report on the Effects of Imports of Steel on the National Security*, 85 Fed. Reg. 40202-40226 (Dept. Comm. July 6, 2020) (hereinafter "the Steel Report")).

The Secretary reported that domestic steel production is important for national security applications; that import penetration levels of steel products continue on an upward trend above 30 percent of domestic consumption; and that excessive quantities of imports has the effect of weakening the internal economy of the United States, threatening to impair the national security as defined in Section 232. *Id.* at

40203-40204. The Secretary recommended that "the President take immediate action by adjusting the level of these imports through quotas or tariffs" on all steel products covered by the investigation. *Id.* at 40205 .

The President concurred with the Secretary's findings and from March 8, 2018, to May 19, 2019, issued a series of Proclamations (*see* App. 6). The first, Proclamation 9705, issued on March 8, 2018, imposed a 25 percent tariff on steel imports from most countries, excluding Canada and Mexico, effective March 23, 2018. See *Proclamation 9705*, 83 Fed. Reg. 11625 (March 15, 2018) (App. 41-42).

Petitioners USP Holdings, Inc., PSK Steel Corporation, Dayton Parts, LLC, Borusan Mannesmann Pipe U.S. Inc., and Jordan International Company ("petitioners") are all entities which import steel into the United States from foreign countries and are subject to the steel tariffs as part of their respective businesses, tariffs which have had a substantial effect on their costs (App. 7;37). On December 11, 2019, petitioners brought this civil action against respondents seeking legal and equitable relief in the U.S. Court of International Trade ("the Trade Court") challenging the actions of both the President and the Secretary in imposing these tariffs (App. 7;36-37).

Positing jurisdiction of the Trade Court on 28 U.S.C. §§ 1581(i)(2) & (4), petitioners alleged that the Secretary's report and the President's Proclamations violated various requirements of Section 232 and the

Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* ("the APA") (App. 7;43-45). They claimed that the Secretary's Steel Report is a reviewable, final agency action which is procedurally deficient and therefore invalidates subsequent actions by the President; that both the Secretary and the President fundamentally misinterpreted Section 232 when they failed to base their determinations on an "impending threat;" that the President violated Section 232 in failing to set the duration of the action he chose; and that tariffs subsequently imposed on Canada, Mexico and EU member nations violated Section 232's timing provisions (App. 45).

On April 9, 2020, the government moved for judgment on the pleadings pursuant to Trade Court Rule 12(c) (App. 7;44). Petitioners, in response to an order by the Trade Court, filed a cross motion for partial summary judgment (*Id.*).The motions were argued on July 21, 2020 (*Id.*).

On February 4, 2021, a three-judge panel of the Trade Court issued its unanimous opinion granting the government's motion for judgment on the pleadings and denying petitioners' cross motion for partial summary judgment (App. 36-87). It concluded *inter alia* that the Secretary's determination was not a "final agency action" subject to judicial review under the APA (App. 46-52). The Trade Court rejected petitioners' claim that judicial review of the Steel Report is appropriate because it granted new authority to the President and that adverse legal consequences resulted, injuring

petitioners (App. 47-48). Instead, it agreed with the government's argument that the Secretary's report is purely advisory, does not affect the legal rights of the parties, and is not subject to judicial review under the APA (App. 48).

In reaching this result, the Trade Court saw the case controlled by this Court's decisions in *Dalton v. Specter*, 511 U.S. 462, 463;470 (1994) and *Franklin v. Massachusetts*, 505 U.S. 788, 797-798 (1992) which both addressed when agency action is final for purposes of judicial review. It rejected petitioners' contention that *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997) and *Corus Group PLC v. International Trade Commission*, 352 F.3d 1351, 1358-1359 (Fed. Cir. 2003) leads to the conclusion that the Steel Report, because it grants the President new authority to act to adjust imports, is a final agency action (App. 48-50). Because the President was not obligated to accept the Steel Report under Section 232, the Trade Court concluded that the case was "more akin" to *Dalton v. Specter*, *supra*.

The Trade Court also rejected petitioners' allegation that the Secretary violated Section 232 when he failed to find an "impending" threat to national security (App. 53-55). The President, the Trade Court ruled, was authorized by Congress "to take 'legislative action that is necessary or appropriate,... [and his] judgment... as to the existence of facts calling for that action is not subject to review'" (App. 54 quoting *United States v. George S. Bush & Co.*, 310 U.S. 371, 380 (1940). Nor was the President obligated to fix a

"duration" of time for these tariffs (App. 55-60). As the Trade Court wrote, "if Congress wanted to require a fixed temporal limit to the measures selected, it could have done so....[but] did not; and it is not the role of the court to direct otherwise" (App. 58).

The Trade Court accordingly granted the government's motion for judgment on the pleadings and denied petitioners' cross motion for partial summary judgment (App. 64). On February 26, 2021, it granted petitioners' unopposed motion to enter partial final judgment pursuant to Trade Court Rule 54(b) for the purposes of petitioners obtaining immediate appellate review of its prior rulings (App. 30-35).

Petitioners appealed and on June 9, 2022, a three-judge panel of the Federal Circuit issued its opinion (App. 1-29). Reversing the Trade Court on the "final agency action" issue, it ruled that the Secretary's threat determination under Section 232 is reviewable under the APA because "it is a predicate to the President's delegated authority to act under the statute" (App. 12-13). It rejected the Trade Court's reasoning that the President can reject the administrative determination under Section 232 while he could not do so under the enabling legislation in *Corus Group* (App. 12). As the Federal Circuit Panel ruled, "[t]hat supposed distinction does not exist" (*Id.*).

However, the Panel held that there is no ground for petitioners to argue that the Secretary's threat determination is unsupported by substantial evidence

because that determination "is *not* reviewable under the APA['s] arbitrary and capricious standard" (App. 15) (emphasis supplied). Instead, it ruled that the standard governing the Secretary's action is the same as for the President's action, i.e., whether the Secretary clearly misconstrued his statutory authority in implementing Section 232 (*Id.*). Moreover, the Panel saw no requirement in the statutory language that the threat be "imminent" (App. 13-14).

The Panel decided that the threat determinations of both the President and the Secretary are reviewed together as a single step using an identical test under the Court's decision in *United States v. George S. Bush & Co.*, 310 U.S. at 379-380 (App. 15). There the Court addressed the requirements of a statute similar to Section 232 where "the action of the Commission and President is but one stage of the legislative process" (*Id.* citing *Bush*, 310 U.S. at 379). Because the *Bush* Court applied the same deference to both the Tariff Commission's report and the President's determination, the Panel concluded that the same result should apply here, holding that "the Secretary's threat determination is not subject to review except to determine compliance with the statute" (*Id.*).

As to petitioners' allegations that the President in Proclamation 9705 failed to satisfy Section 232(c)(1)(A)'s requirement that he "determine the nature and duration of the action," the Panel reviewed the matter only to see whether his action complied with the statutory authority delegated to him by Congress

(App. 15-16). Following its prior decision in *Transpacific Steel LLC v. United States*, 4 F.4th 1306, 1319 (Fed. Cir. 2021), it ruled that the President has the authority under Section 232(c) to adjust tariffs over time, modify them at will and to impose them indefinitely until he determines they are no longer necessary (App. 17). The Panel thus held that the President's exercise of judgment in this regard "is beyond the scope of our review" (App. 18).

For these reasons, the Panel concluded that it had the authority to review the determinations of both the President and the Secretary that steel imports threaten national security and the President's further determination to set a steel tariff for an indefinite duration, *but only for violations of the statute rather than employing an"arbitrary and capricious" review under the APA* (App. 18). Having found no such statutory violations, it affirmed the Trade Court's rulings granting the government's motion for judgment on the pleadings and denying petitioners' cross motion for partial summary judgment (*Id.*).

In a concurring opinion, Chen, J., expressed the view that while the Secretary's threat determination under Section 232 is a judicially reviewable final agency action under the Federal Circuit's prior decision in *Corus Group*, 352 F.3d at 1359, he was concerned that this decision "is inconsistent with Supreme Court precedents on the non-finality of a Secretary's or Commission's tentative report and recommendation to the President" (App. 23-27 citing *Dalton v. Specter*, 511

U.S. at 469 and *Franklin v. Massachusetts*, 505 U.S. at 798-799).

Petitioners sought a rehearing arguing that the APA by its terms mandated judicial review at a minimum under the arbitrary and capricious standard. On August 18, 2022, the Panel denied petitioners' timely filed petition for panel rehearing (App. 88-89).

On November 1, 2022, petitioners submitted their Application to the Court for an Extension of Time to File Their Petition for Certiorari Until December 16, 2022. On November 7, 2022, the Chief Justice granted petitioners' motion (See Docket No. 22A403).

REASONS FOR GRANTING THE PETITION

In *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 559 (1976), this Court held that Section 232 is a constitutional delegation of legislative power to the President, relying in part on its "clear preconditions" for presidential action, including, importantly, the determination by the Secretary of Commerce that imports of an article "threaten to impair the national security." 19 U.S.C. § 1862(b)(3)(A). The Secretary's determination grants new authority to the President.

As such, the Secretary's affirmative threat determination is "final agency action" subject to judicial review under the APA. The Federal Circuit panel ruled correctly on this point.

In refusing to adhere to the standard of review in the APA, which is, at a minimum, the "arbitrary and capricious" standard found in 5 U.S.C. § 706(2)(A), the Federal Circuit erred. This Court has held that this standard of review which applies "in all cases." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413-414 (1971). The Federal Circuit failed to apply precedent from this Court which ensures that Section 232 is not an unconstitutional delegation of legislative authority. This Court held in *Algonquin* that the Secretary's determination is a "clear" precondition to presidential action. An arbitrary and irrational determination cannot supply that "precondition."

The decision of the Federal Circuit in this case is thus fundamentally at odds with *Algonquin* and the APA, as interpreted by *Overton Park* and other cases. The determination by the Secretary of Commerce, which gives the President new power to regulate imports, must be subject, at a minimum, to arbitrary and capricious review on the administrative record. In this sense, the reach of the APA as a tool to review administrative actions affects *all* cases where the President makes a decision that requires as a prerequisite an administrative determination.

The Federal Circuit, in rejecting arbitrary and capricious review under the APA of the Secretary's determination, "has decided an important question of federal law that has not been, but should be, settled by this Court" and "has decided an important federal question in a way that conflicts with relevant decisions

of this Court." Supreme Court Rule 10(c). This Court should therefore grant certiorari in order to determine whether the APA's arbitrary and capricious standard of review applies to the Steel Report. Failure to correct this error would substantially enlarge the President's authority to act even in the absence of a rational Commerce determination. In short, the Executive Branch could grant itself additional authority to limit imports, without meaningful oversight. This seminal separation of powers issue comes within the context of court oversight of administrative agencies, as Congress requires. Petitioners believe that it is an important issue which deserves review by the Court.

This Court should assure that judicial review under the APA is fairly conducted by remanding this case to the Trade Court for further proceedings. Based on this review, the Trade Court should determine whether the Secretary's report meets the requirements of minimum rationality under the APA. Thus far, the Secretary of Commerce's determination has avoided all scrutiny of its clearly controversial decision, pursuant to which the President determined to restrict imports that did injury to petitioners. This Court is the final tribunal to resolve and redress this exceptionally important issue of administrative law. Petitioners request an opportunity to demonstrate that the Secretary's threat determination cannot withstand scrutiny even under the APA's lenient arbitrary and capricious standard of review.

A. The Standard of Review For "Final Agency Action" Is, At A Minimum, The APA's "Arbitrary and Capricious" Review.

The APA requires that final action of an agency be set aside if a reviewing court determines that the administrative action is "arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law." 5 U.S.C. § 706(2)(A). In this case, however, the Federal Circuit declined to apply the APA standard to the Secretary's Section 232 determination. But this Court's clear precedents all hold that judicial review under the "arbitrary and capricious" standard for review of final agency action under the APA must apply "in all cases." See, e.g., *Overton Park*, 401 U.S. at 413.

Petitioners have found *no* case construing the APA standard of review which squares with the Panel's holding here. For the first time, the Federal Circuit purports to find an implied exception to the APA's "arbitrary and capricious" standard of review. The Panel cites *no* authority for this implied exception under the APA except *United States v. George S. Bush & Co. Inc.*, 310 U.S. 371 (1940), a case that predated the passage of the APA by six years.

Numerous courts of appeal have held that judicial review under the APA is subject to the standards set forth in 5 U.S.C. § 706(2). *See, e.g., BP Am., Inc. v. FERC*, 52 F. 4th 204, 213 (5th Cir. 2022); *Community Fin. Servs. Ass'n of Am. v. Consumer Fin. Prot. Bureau*, 51 F. 4th 616, 629 (5th Cir. 2022); *Suncor*

Energy (U.S.A.), Inc. v. United States EPA, 50 F. 4th 1339 (10th Cir. 2022); *CBS v. FCC*, 454 F.2d 1018, 1028 (D.C. Cir. 1971). As explained *infra*, the role of the President in this case does *not* affect the applicable standard of review to be applied to final agency action. Therefore, the Panel's decision has created a conflict among the Circuits as well as a conflict with the decisions of this Court.

The APA contains only two explicit exceptions to judicial review for final agency action: first, where Congress expressly prohibits judicial review by statute; and second, where agency action is committed to that agency's discretion by law. 5 U.S.C. § 701(a). The Federal Circuit did not find that either statutory exception applied in this case. The Panel's decision creates a new exception to arbitrary and capricious review not mentioned in the APA and contrary to the teachings of several opinions of this Court. Yet the Panel, citing only *George S. Bush & Co.*, excuses the Secretary's determination from judicial review under the APA by declaring the Section 232 determination as "but one stage of the legislative process." *Bush*, 310 U.S. at 379.

This is *not* the law: "*In all cases* agency action must be set aside if the [administrative] action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' or if the action failed to meet statutory, procedural, or constitutional requirements." *Overton Park*, 401 U.S. at 413-14

(emphasis added). See also *FCC v. NextWave Pers. Commun. Inc.*, 537 U.S. 293, 300 (2003).

The APA means exactly what it says: the only circumstances precluding judicial review are the two expressly set forth in 5 U.S.C. § 701(a). "The APA, by its terms, provides a right to judicial review of all 'final agency action for which there is no other adequate remedy in a court,' 5 U.S.C. § 704, and *applies universally* 'except to the extent that--(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law,' § 701(a)." *Bennett v. Spear*, 520 U.S. 154, 175 (1997). Neither exception applies here. Thus, there clearly is "law to apply" respecting Section 232. Moreover, as *Overton Park* squarely held, if judicial review is available under the APA, the arbitrary and capricious standard of review applies "in all cases." *Overton Park*, *supra*.

The consequences of accepting the Panel's ruling are dire. Section 232 would permit the Secretary to make an arbitrary and illogical determination without a factual basis and so endow the President with the authority to restrict steel imports. This result would eviscerate the requirement for a "clear precondition" that was a major reason for the *Algonquin* Court to conclude that Section 232 was not an unconstitutional delegation of legislative authority to the Executive Branch. See *Algonquin*, 476 U.S. at 559. In short, the Panel's rejection of the APA's "arbitrary and capricious" review would allow the Executive Branch to grant to *itself* authority to restrict imports without meaningful

judicial oversight. This cannot be the law after *Algonquin* and *Overton Park*.

B. *Judicial Deference to Presidential Decision Making Does Not Apply Where, As Here, Congress Requires An Administrative "Precondition" to Presidential Power.*

The Panel made no mention of the application of the APA in asserting that *Bush's* holding trumped the APA standard of review. *Bush* was decided six years prior to the enactment of the APA under a different statute (Section 336 of the Tariff Act of 1930, 19 U.S.C. § 1336). The *Bush* Court did not decide whether the Tariff Commission's report constituted "final agency action," because no such provision existed in 1940. As petitioners showed *supra*, the APA has since dramatically changed the requirements for agency decision making, ensuring final agency action is rational by means of judicial review.

Arguably, the investigation by the Tariff Commission regarding relative costs of production between U.S. companies and foreign competitors was final agency action. But there are differences between Section 336 of the Tariff Act and Section 232 that are important, including, *inter alia*, that Congress delegated the authority to proclaim tariff changes directly to the President and that Congress placed strict limits on the amount a tariff could be increased or decreased.

This Court last dealt directly with Section 232 in *Algonquin*. That case, holding that Section 232 was not an unconstitutional delegation of legislative power, pointed specifically to the affirmative determination of the Secretary of Commerce (then the Secretary of the Treasury) that imports "threaten to impair" national security as one of several "clear preconditions to Presidential action." 426 U.S. at 559. By precluding judicial review under the APA's arbitrary and capricious standard, the Panel effectively eviscerated this precondition to Presidential action. Congress established this two-stage scheme in an effort to prevent the President from granting to himself the authority to regulate international commerce.

Clear language in the statute precludes regarding the Secretary's determination as "purely advisory." That determination is clearly "final agency action," as it is undeniably final action by an agency that changes the legal landscape by granting the President additional authority. Importantly, the congressional delegation of this authority was to the Secretary, *not* the President. The APA standard of review clearly applies to the Secretary's determination as "final agency action." The APA neither expressly nor implicitly precludes judicial review under the arbitrary and capricious standard. Accordingly, the Panel clearly erred.

The APA and decades of Supreme Court precedent require judicial review of the Steel Report to determine whether it was arbitrary and capricious, an

abuse of discretion, or otherwise contrary to law. This minimal review is necessary to ensure that Section 232 is neither an unconstitutional delegation of legislative power nor a loophole to allow the Executive Branch to unilaterally usurp Congressional authority to regulate international commerce. The Federal Circuit, by erroneously conflating the Secretary's determination with Presidential action, created this very loophole. Only APA review of the administrative record can provide assurance that the Executive branch did not abuse Section 232 to grant itself additional authority over international commerce.

This case does not mandate court review of the President's motives for his decision. Rather, it proceeds directly from the requirement that the *agency* decision that is a *prerequisite* to valid Presidential action is subject to judicial review. Whether the President acts upon this final agency action does not affect reviewability of the agency action. The additional authority is given to the President by the Secretary of Commerce via an affirmative report regardless of whether the President decides to act on it. In this case, however, it was clear that the President intended to act.

The law is clear that Presidential involvement in a decision making framework in no way precludes judicial review of the administrative determination that precedes it. Matters involving international trade often implicate Presidential review; but judicial review of agency decisions coexists with that Presidential review.

Some examples are:

- Section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337, dealing with actions to restrict imports that infringe intellectual property, provides for judicial review after a 60-day Presidential review period during which the President may reject the decisions of the agency. *See* 19 U.S.C. § 1337(j); and

- The Trade Act of 1974, 19 U.S.C. § 2252-2254, contains a period for Presidential review and modification of relief but permits judicial review of the International Trade Commission's administrative findings. See *Corus Group PLC v. International Trade Comm.*, *supra*.

More generally, agency determinations taken in response to Presidential decisions are not immune from judicial review simply because the President approves of them. *See, e.g.*, *Department of Homeland Sec. v. Regents of the Univ. of Calif.*, 591 U.S.___, ___, 140 S. Ct. 1891, 1905-07 (2020) (review of administrative decision to terminate DACA); *DOC v. New York*, 588 U.S. ___ , 139 S. Ct. 2551 (2019) (review of administrative decision to add citizenship question to census). In all these instances, presidential involvement does not remove from judicial scrutiny a final agency

action that alters the legal landscape, and it should not do so here.

Section 232 delegates to the Secretary of Commerce, who serves at the pleasure of the President, the authority to determine whether imports of an article "threaten to impair" the national security. Then and only then does the President have the power to act. This new Presidential authority is a decision with "direct and appreciable legal consequences." *Bennett v. Spear*, 520 154, 178 (1997). Therefore, the Secretary's Section 232 determination constitutes final agency action, a fact acknowledged by the Panel.

Having determined that the Secretary's determination was final agency action, the Panel then incongruously ruled that the "arbitrary and capricious" standard of review under the APA, 5 U.S.C. § 706(2)(A), was unavailable citing *Bush*. Yet *Bush* was decided six years before the APA was enacted in June of 1946. Therefore, it did not consider the applicable standard of review under the APA. This holding was novel, as *George S. Bush & Co.* had never before been used as authority to preclude judicial review of final agency action under the APA.

In this context, this Court's decision in *Overton Park* provides clear and controlling guidance on the proper standard of review of final agency action under the APA: "*In all cases* agency action must be set aside if the action was 'arbitrary, capricious, an abuse of

discretion, or otherwise not in accordance with law.'" 401 U.S. at 413-14 (emphasis added).

Petitioners submit that the APA compels judicial review of final agency action under the "arbitrary and capricious" standard at a minimum. This result would be consistent with past decisions of this Court, and is necessary to implement the congressional purpose behind Section 232. In this regard, Congress clearly delegated to the Secretary of Commerce, *not* the President, the task to determine, after an appropriate investigation, whether imports of an article "threaten to impair" the national security. Yet no court has yet reviewed the Steel Report, under the arbitrary and capricious standard.

If meaningful judicial review is precluded, the Executive Branch would gain the unfettered authority to limit imports, authority that belongs to Congress. Under the Panel's formulation, an administrative determination that lacks minimum rationality or lacks a logical connection between "facts found and choices made" would nevertheless affect rights and obligations of petitioners as well as many others and provide the President with additional authority without any meaningful scrutiny. *See Motor Veh. Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983). No previous case goes as far as the Federal Circuit went here, and petitioners contend that the APA does not permit it.

C. The Secretary's Determination Clearly Misconstrued The Statute.

In the course of arbitrary and capricious review, proper statutory construction is crucial. The Panel erred in deferring to respondents' interpretations of Section 232, in effect treating this case as though it were governed by *Chevron USA v. Natural Res. Def. Counsel*, 467 U.S. 837 (1984). No party in this case argued for *Chevron* deference, but, deferring to the government, the Panel construed words restricting both the Secretary and the President to be essentially meaningless, effectively reading words out of the statute. In undertaking judicial review, these questions should be decided in the first instance by the lower courts.

First, the Secretary's threat determination essentially ignored the meaning of the words "threaten to impair" as contained in the statute. The Panel declined to interpret these words in accord with their ordinary meaning, a basic precept in statutory construction. *Sandifer v. United States Steel Corp.*, 571 U.S. 220, 227 (2014). It resulted in a reading synonymous with the more precatory phrase "might impair national security," an extremely low bar which Congress surely would have employed if that was its intent, although it would raise issues of unconstitutional delegation of legislative authority.

Second, the Panel ignored nearly thirty instances in which Congress used the word "shall" in Section 232,

indicating mandatory action by the Secretary and the President, respectively. This mandatory language is used in connection with not only setting time limits for action, but also in setting forth requirements for a "determination" to be made by the Secretary and the President.

Third, the Secretary of Commerce made no reasonable connection between the facts found and the conclusions drawn (even assuming, dubiously, that the use of the words "threaten to" is the same as "might impair"). Petitioners submit that judicial review must explore the statutory language in accordance with the precedents of this Court, which the Panel demonstrably fails to do.

Petitioners raise these issues addressing Section 232's language in the belief that, should judicial review under the APA be ordered, as is appropriate, these questions of construction will be raised in the context of APA review under the arbitrary and capricious standard.

CONCLUSION

For all the reasons identified herein, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Federal Circuit, reverse the judgment, and declare that the threat determination by the Secretary of Commerce, which gives the President new power to regulate imports, must be subject, at a minimum, to the APA's arbitrary and capricious standard of review on the record, remanding the matter to the Trade Court for this purpose, or provide petitioners with such further relief as is fair and just in the circumstances of this case.

Respectfully submitted,

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36 F.4th 1359
United States Court of Appeals, Federal Circuit.

USP HOLDINGS, INC., Substituted for Universal Steel Products, Inc., PSK Steel Corporation, Dayton Parts, LLC, Borusan Mannesmann Pipe U.S. Inc., Jordan International Company, Plaintiffs-Appellants
v.
UNITED STATES, Joseph R. Biden, Jr., President of the United States, Gina M. Raimondo, Secretary of Commerce, Troy Miller, Senior Official Performing the Duties of the Commissioner for U.S. Customs and Border Protection, Defendants-Appellees

Attorneys and Law Firms

Lewis Leibowitz, The Law Office of Lewis E. Leibowitz, Washington, DC, argued for plaintiffs-appellants.

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Before Dyk, Mayer, and Chen, Circuit Judges.

Opinion

Opinion for the court filed by Circuit Judge DYK, in which Circuit Judge MAYER joins, and in which Circuit Judge CHEN joins except as to footnote 4.

Dyk, Circuit Judge.

The Trade Expansion Act of 1962 authorizes the President to adjust imports—if he concurs with a determination by the U.S. Secretary of Commerce ("Secretary") "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"—and to "determine the nature and duration" of the corrective action. 19 U.S.C. § 1862(c)(1)(A).

Based on an investigation under § 1862, the Secretary here determined that excessive steel imports threatened to impair the national security. The President concurred and issued a series of proclamations beginning with Proclamation 9705 on March 8, 2018. With those proclamations, the President imposed a twenty-five percent tariff on steel imports from a number of countries.

Appellants challenged the actions of both the President and the Secretary in the Court of International Trade ("Trade Court"), contending that the President's and Secretary's finding of a threat to national security and the President's imposition of a tariff for an indefinite duration conflicted with the statute. The Trade Court granted the government's motion for judgment on the pleadings. We affirm.

BACKGROUND

I

Section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862, authorizes the President to adjust imports that threaten national security. Section 1862 includes, as relevant here, three subsections.

Section 1862(b) directs the Secretary, on the request of an adversely affected party or an agency or department head, or on his own, to "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." § 1862(b)(1)(A). After the investigation is concluded, the Secretary must submit "a report on the findings of such investigation" to the President. § 1862(b)(3)(A). The report must include the Secretary's finding, if one is made, 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" and "the recommendations of the Secretary for action or inaction" regarding such a finding. *Id.*

Section 1862(c) provides that, thereafter, the President must determine if he agrees with the Secretary's threat finding and, if so, what action is necessary:

> [If] 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.

§ 1862(c)(1)(A).

Section 1862(d)[1] provides nonexclusive factors for the President and the Secretary to consider regarding the threat to national security determination:

> 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.

§ 1862(d) (emphasis added).

II

On April 19, 2017, the Secretary initiated an investigation under § 1862 to determine the effects of steel imports on national security. *See* Publication of a Report on the Effect of Imports of Steel on the National Security, 85 Fed. Reg. 40,208 (July 6, 2020). The Secretary provided his report and recommendation to the President on January 11, 2018. *See id.* at 40,202. The report included the Secretary's findings:

> The Secretary has determined that the displacement of domestic steel by excessive imports and the consequent adverse impact of those quantities of steel imports on the economic welfare of the domestic steel industry, along with the circumstance of global excess capacity in steel, are "weakening our internal economy" and therefore "threaten to impair" the national security as defined in Section 232.

Id. at 40,224 (emphasis added). In view of these findings, the Secretary made the following recommendation:

> Due to the threat of steel imports to the national security, as defined in Section 232, the Secretary recommends that the President take immediate action by adjusting the level of imports through

> quotas or tariffs on steel imported into the United States, as well as direct additional actions to keep the U.S. steel industry financially viable and able to meet U.S. national security needs. The quota or tariff imposed should be sufficient, after accounting for any exclusions, to enable the U.S. steel producers to be able to operate at about an 80 percent or better of the industry's capacity utilization rate based on available capacity in 2017.

Id. at 40,225.

The President concurred with the Secretary's threat finding and decided to take action in response. He announced those actions in multiple presidential proclamations between March 8, 2018, and May 19, 2019. The President issued Proclamation 9705 on March 8, 2018, and established a twenty-five percent tariff on imports of steel articles from all countries, except Canada and Mexico, to take effect March 23, 2018. Proclamation No. 9705, 83 Fed. Reg. 11,626–27 (Mar. 15, 2018). Proclamation 9705 also invited "[a]ny country with which [the United States] ha[s] a security relationship ... to discuss with the United States alternative ways to address the threatened impairment of the national security caused by imports from that country." *Id.* at 11,626.

From March 22, 2018, to May 19, 2019, the President issued a series of additional proclamations excluding various countries from the twenty-five percent tariff, again including Canada and Mexico. *See* Proclamation No. 9711 of March 22, 2018, 83 Fed. Reg. 13,361–62 (Mar. 28, 2018); Proclamation No. 9740 of April 30, 2018, 83 Fed. Reg. 20,683–84 (May 7, 2018);

Proclamation No. 9759 of May 31, 2018, 83 Fed. Reg. 25,857–58 (June 5, 2018); Proclamation No. 9777 of August 29, 2018, 83 Fed. Reg. 45,025–26 (Sept. 4, 2018); Proclamation No. 9894 of May 19, 2019, 84 Fed. Reg. 23,987 (May 23, 2019). Many other countries remained subject to the tariff.[2]

Appellants USP Holdings, Inc., PSK Steel Corporation, Dayton Parts, LLC, Jordan International Company, and Borusan Mannesmann Pipe U.S. Inc. (collectively, "USP" or "Appellants") are all U.S. corporations primarily engaged in the import of steel products. USP filed suit with the Trade Court seeking a determination that the President's and the Secretary's threat determinations violated § 1862, that the imposition of the tariff was therefore unlawful, and that the indefinite duration of the tariff also violated § 1862. As to the threat determination, USP argued that the statute required a finding of an "impending threat," a finding neither the Secretary nor the President made. J.A. 17. As to the President's determination to impose a tariff indefinitely, USP challenged only the President's action because the Secretary did not make any finding or recommendation as to the duration. USP argued that the statutory requirement that the President "determine the nature and duration of the action," § 1862(c)(1)(A)(ii) (emphasis added), required the President to set a termination or end date, which he failed to do. Appellants alleged they had paid the steel tariffs the President imposed in various amounts ranging from $500,000 to nearly $35 million.

The government moved for judgment on the pleadings, which the Trade Court granted. *See Universal Steel Prods., Inc. v. United States*, 495 F. Supp. 3d 1336 (Ct. Int'l Trade 2021). The Trade Court held that Proclamation 9705 and the subsequent

proclamations imposing tariffs did not violate § 1862. However, the court also held that the Secretary's report was not a final, reviewable action under the Administrative Procedure Act ("APA"). Judge Katzmann, joined by Judge Gordon, concurred separately. Judge Baker concurred in part and dissented in part, arguing that the court should dismiss the President as a party because it did not have jurisdiction "to enter relief against the President" directly. *Id.* at 1360–61. USP subsequently filed an unopposed motion for entry of partial judgment under Rule 54(b), which the Trade Court granted.

USP appeals. We have jurisdiction under 28 U.S.C. § 1295(a)(5).

DISCUSSION

On appeal, "[w]e review a judgment on the pleadings from the Court of International Trade *de novo*." *Forest Lab'ys, Inc. v. United States*, 476 F.3d 877, 881 (Fed. Cir. 2007).

I

We first address the determinations by the President and the Secretary that steel imports threaten to impair the national security. USP challenges both determinations. We consider the reviewability of this determination as to both the President and the Secretary.

Under the Constitution, Congress has exclusive authority to regulate international commerce. U.S. Const. art. I, § 8, cl. 3. However, Congress is permitted to delegate that authority to the Executive under appropriate circumstances. *See, e.g., A.L.A. Schechter*

Poultry Corp. v. United States, 295 U.S. 495, 529–30, 55 S.Ct. 837, 79 L.Ed. 1570 (1935). The Supreme Court has considered the specific delegation of authority to control imports in § 1862 and upheld the statute. *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 559, 96 S.Ct. 2295, 49 L.Ed.2d 49 (1976). Approving the delegation to the President, the Supreme Court noted that § 1862 satisfies the "intelligible principle" requirement because "[i]t establishes clear preconditions to Presidential action—*inter alia*, a finding by the Secretary ... '[that imports] threaten to impair the national security.' " *Id.* (quoting § 1862(b)(3)(A)).

The Supreme Court has held that the "President's actions may [ ] be reviewed for constitutionality." *Franklin v. Massachusetts*, 505 U.S. 788, 801, 112 S.Ct. 2767, 120 L.Ed.2d 636 (1992). But USP does not assert a constitutional challenge here because "claims simply alleging that the President has exceeded his statutory authority are not 'constitutional' claims, subject to judicial review under the exception recognized in *Franklin*." *Dalton v. Specter*, 511 U.S. 462, 473–74, 114 S.Ct. 1719, 128 L.Ed.2d 497 (1994).

Nonetheless, claims that the President's actions violated the statutory authority delegated to him in § 1862 are reviewable. Such review is available to determine whether the President "clear[ly] misconstru[ed]" his statutory authority. *Corus Grp. PLC v. Int'l Trade Comm'n*, 352 F.3d 1351, 1356 (Fed. Cir. 2003); *see Motions Sys. Corp. v. Bush*, 437 F.3d 1356, 1361 (Fed. Cir. 2006) (en banc) (explaining that courts may consider whether "the President has violated an explicit statutory mandate").[3]

Although we conclude the President's actions beyond his statutory authority are reviewable, we must

also consider the appropriateness of bringing suit against the President directly. The Trade Court held that the President himself could be named as a defendant in the complaint because no relief was sought against him. As noted in Judge Baker's concurrence at the Trade Court, the President cannot be sued directly to challenge his threat determination under the statute. As we held in *Corus*, the jurisdictional statute here, 28 U.S.C. § 1581(i), "does not authorize proceedings directly against the President." *Corus*, 352 F.3d at 1359. The Trade Court should have dismissed the President. Nonetheless, we have jurisdiction to consider challenges to the President's actions in suits against subordinate officials who are charged with implementing the presidential directives, such as the Secretary of Commerce and Customs. *See Corus*, 352 F.3d at 1359–60.

USP also alleges that the Secretary's action violated the statute. USP argues that the Secretary's threat finding constitutes a final agency action that is subject to review under the APA. *See* 5 U.S.C. § 704. The Trade Court held that the Secretary's report was not a final, reviewable action under the APA because the "imposition of tariffs, which is the action that gave rise to the legal consequences that Plaintiffs challenge, was an action taken by the President, and not by the Secretary," such that the report did not carry legal consequences itself. J.A. 23.

The Trade Court's decision in this respect is incorrect. We have held that "an agency recommendation is subject to judicial review" if it constitutes a final agency action, i.e., "if 'the action ... mark[s] the consummation of the agency's decisionmaking process,' and 'the action [is] one by which rights or obligations have been determined, or

from which legal consequences will flow.' " *Corus*, 352 F.3d at 1358 (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997)). In reference to the first prong, the government does not appear to dispute that the Secretary's threat determination is the consummation of the agency's decisionmaking process.

As to the second (legal consequences) prong, we addressed in *Corus* a statute where "the President does not have complete discretion under the statute" and his authority to act under the statute only arose "if the Commission [made] 'an affirmative finding regarding serious injury.' " *Corus*, 352 F.3d at 1359 (quoting 19 U.S.C. § 2253(a)(1)(A)). Because the agency report with an affirmative finding of a serious injury was a predicate to the President's authority to act in that case, we concluded that there were sufficient legal consequences for a reviewable, final agency action. *Id.* That conclusion was driven in large part by the Supreme Court's decision in *Bennett*, where the Court held that an opinion by the Fish and Wildlife Service that had "powerful coercive effect," "alter[ed] the legal regime" and had "direct and appreciable legal consequences." 520 U.S. at 158–59, 169, 178, 117 S.Ct. 1154.

Here, the Supreme Court held that an earlier version of § 1862 "establishes clear preconditions to Presidential action" that include the Secretary's finding that imports threaten to impair national security. *Algonquin*, 426 U.S. at 549, 96 S.Ct. 2295. And in the specific context of § 1862 as relevant here, we have explained:

> The statute indisputably incorporates a congressional judgment that an affirmative

> finding of threat by the Secretary is the predicate for presidential action, while also incorporating a congressional judgment that how to address the problem identified in the finding is a matter for the President, whose choices about remedy are not constrained by the Secretary's recommendations.

Transpacific, 4 F.4th at 1323 (emphasis added). This precondition to presidential action brings this case within *Corus*.[4]

The Trade Court's effort to distinguish *Corus*—on the ground that 19 U.S.C. § 2253(a)(1)(A) in *Corus* "does not give the President the option to accept or reject the finding of the Commission" but § 1862(c)(1)(A) (at issue here) does—is not well taken. *Universal Steel*, 495 F. Supp. 3d at 1345. That supposed distinction does not exist. Section 2253, like § 1862, gives the President the option to take no action, as demonstrated by the requirement that the President send a report to Congress when he decides not to act. *See* § 2253(b)(2). Thus, here as in *Corus*, the President is not compelled to act upon the recommendation of the Secretary, but an affirmative threat finding is a predicate to the President's authority to act under the statute. *See* § 1862(c)(1)(A); § 2253(b)(2); *Corus*, 352 F.3d at 1359. The fact that the Secretary's determination is not reviewable if the President takes no action does not defeat review of the Secretary's determination when the President does act based on the Secretary's report finding a threat to national security.[5]

Other cases have acknowledged that a predicate affirmative agency finding of an injury or threat, as in *Corus*, is reviewable. In *Silfab Solar*, we distinguished

the International Trade Commission's "affirmative finding regarding serious injury or the threat thereof," which was a "condition necessary for the President to take action" that was reviewable under *Corus*, from a remedy recommendation that was not a predicate to the President's authority to act and was not reviewable. *Silfab Solar*, 892 F.3d at 1346.

16The situation here, where the Secretary's affirmative finding of a national security threat is a predicate to presidential authority, is distinguishable from the cases where the relevant statute lacked this type of condition on presidential action. *See, e.g., Dalton*, 511 U.S. at 465–66, 114 S.Ct. 1719; *Franklin*, 505 U.S. at 791–92, 112 S.Ct. 2767. In the former, the agency action is reviewable; in the latter, it is not.

We conclude that the Secretary's threat determination under § 1862 is a reviewable final action because it is a predicate to the President's delegated authority to act under the statute.

II

USP argues that the threat determination by both the President and the Secretary was contrary to the clear language of § 1862.[6] USP argues the "threat" must be "imminent" or "near at hand" and "likely to happen soon." Appellants' Br. at 31, 35–36. In other words, USP argues that the threat determination "inherently requires a serious risk near in time." Reply Br. at 11. USP relies on dictionary definitions to argue that the ordinary meaning of the term "threat" encompasses a "sense of likely harm" that is impending and does not include "improbable, slight or remote risk[s]." Appellants' Br. at 30–31 (citing Merriam-Webster Online Dictionary, https://www.merriam-

webster.com/dictionary/threat; Collins Dictionary, https://www.collinsdictionary.com/dictionary/english/threaten).

Section 1862 imposes no imminence requirement. The factors that the President and Secretary are directed to consider in making their determinations do not mention imminence but focus instead on long term health of and adverse effects on the relevant domestic industry. § 1862(d). The identification of such factors in § 1862 is inconsistent with the notion that the threat must be imminent.

USP relies on *Goss Graphics Systems, Inc. v. United States*, 216 F.3d 1357, 1362 (Fed. Cir. 2000), and *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 983 (Fed. Cir. 1994), both of which recognized an imminence requirement. Appellants' Br. at 31. But those cases involved a different statute, which specifically required that "the threat of material injury is real and that actual injury is imminent." *Suramerica*, 44 F.3d at 983 (quoting 19 U.S.C. § 1677(7)(F)(ii) (1993)); *Goss*, 216 F.3d at 1362. That statute has no relevance here. If anything, it shows that when Congress wanted to impose an imminence requirement, it said so explicitly.

Because § 1862 provides no basis to impose an imminence requirement, USP's argument that the President's and the Secretary's determinations violated the statute is unsupported.

USP does not challenge the President's determination for any reason other than the alleged statutory violation.[7] Nor could it because § 1862 commits to the President the discretion to "determine whether [he] concurs" with the Secretary's threat finding. § 1862(c)(1)(A)(i). Such determinations committed to the President's discretion are beyond our

jurisdiction to review. *See Dalton*, 511 U.S. at 474, 114 S.Ct. 1719; *United States v. George S. Bush & Co.*, 310 U.S. 371, 379–80, 60 S.Ct. 944, 84 L.Ed. 1259 (1940); *Silfab Solar*, 892 F.3d at 1349. Because § 1862(c) grants the President discretion, how he "chooses to exercise the discretion Congress has granted him is not a matter for our review." *Dalton*, 511 U.S. at 476, 114 S.Ct. 1719.

USP separately criticizes the Secretary's threat determination as unsupported by substantial evidence. But the Secretary's threat determination is not reviewable under the APA arbitrary and capricious standard. This is so because the standard governing the Secretary's action is the same as for the President's action (i.e., the existence of a "threat"), and the President's action is only reviewable for compliance with the statute. Under such circumstances, the threat determinations of the President and the Secretary are reviewed together as a single step using an identical test under the Supreme Court's decision in *Bush*. As explained in *Bush*, where the Court addressed the requirements of a statute similar to § 1862, "the action of the Commission and the President is but one stage of the legislative process." 310 U.S. at 379, 60 S.Ct. 944. The Supreme Court in *Bush* applied the same deference to both the Tariff Commission's report and the President's determination. *Id.* at 380, 60 S.Ct. 944. We must do so here as well. The Secretary's threat determination is not subject to review except to determine compliance with the statute.

III

USP alleges that the President failed to satisfy the "nature and duration" requirement in § 1862(c)(1)(A) with Proclamation 9705. Unlike the threat

determination, which included the Secretary's predicate finding, the nature and duration of the action is committed to the President, and the Secretary plays no part. § 1862(c). Thus, we review only the President's action. As discussed above, we review the President's action for compliance with the statutory authority delegated to him by Congress.

The statute here grants the President discretion to "determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports" to address imports that threaten national security. § 1862(c)(1)(A)(ii).[8] USP argues that the President's action failed to satisfy the requirements of § 1862(c)(1)(A) because "Proclamation 9705 did not indicate any kind of time period during which these import adjustments would last" and failed to set an end date or other criteria. Appellants' Br. at 29. The statute includes no limits on the duration of the action.

This court recently addressed the President's authority to act under § 1862(c) in *Transpacific*. There, following the same investigation, report, and Proclamation 9705 for steel imports at issue here, the President issued a later proclamation that doubled the tariff on steel imports from Turkey. *Transpacific*, 4 F.4th at 1309–10. Transpacific challenged whether the timing requirements in § 1862(c)(1) "permit[ ] the President to announce a continuing course of action within the statutory time period and then modify the initial implementing steps in line with the announced plan of action by adding impositions on imports to achieve the stated implementation objective." *Id.* at 1318–19. This court upheld the increased tariff on Turkish steel and explained:

> [W]e conclude that the best reading of the statutory text of § 1862 ... is that the authority of the President includes authority to adopt and carry out a plan of action that allows adjustments of specific measures, including by increasing import restrictions, in carrying out the plan over time.

Id. at 1319 (emphasis added). Thus, under *Transpacific*, § 1862(c)(1)(A) permits the President to adjust actions after taking the "first step" in a continuing course of action. 83 Fed. Reg. 11,625, ¶ 11.

Given our holding that the President has the "authority to adopt and carry out a plan of action" and to adjust his ongoing approach under § 1862(c), we see no reason why the duration requirement in § 1862(c)(1)(A) must be fixed by an end date or termination criteria. *Transpacific*, 4 F.4th at 1319. If the President has authority to undertake a plan of action that includes adjusting tariffs over time, then the President must also have authority to undertake a plan of action that includes imposing a tariff indefinitely and removing it at a later time once the President determines that it is no longer necessary. Section 1862 commits the determination of the "nature and duration of the action" to the "judgment of the President." § 1862(c)(1)(A)(ii). And Congress intended that authority to be "continuing." H.R. Rep. No. 84-745, at 7 (1955). The statute does not limit the President's authority to establishing a set term, and the proclamations here do not violate the statute. The amendments to § 1862 in 1988 imposing strict time limits on the President's action were enacted in response to prior failures to act decisively and in a timely manner and do not suggest

that the President lacks authority to revise his actions at a later time.

USP does not argue that the President's action, if consistent with the statute, is impermissible. Again, this is a matter committed to the President's discretion, and the President's exercise of his judgment to "determine the nature and duration" of the action he believes necessary is beyond the scope of our review. *See Dalton*, 511 U.S. at 474, 114 S.Ct. 1719; *Bush*, 310 U.S. at 379–80, 60 S.Ct. 944; *Transpacific*, 4 F.4th at 1319; *Silfab Solar*, 892 F.3d at 1349.

CONCLUSION

We have authority to review the determinations by both the President and the Secretary that steel imports threaten national security and the determination by the President to set a steel tariff for an indefinite duration. We find no violations of the statute.

AFFIRMED

COSTS

No costs.

Footnotes

1The statute includes two instances of subsection (d), which is a typographical error. We refer to the first instance of subsection (d).

2On August 10, 2018, the President issued Proclamation 9772 increasing the tariffs for steel from Turkey from twenty-five to fifty percent. Proclamation No. 9772, 83 Fed. Reg. 40,429, ¶ 6 (Aug. 15, 2018). That

increase was the subject of *Transpacific Steel LLC v. United States*, 4 F.4th 1306 (Fed. Cir. 2021).

3But the scope of this review is limited. *Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1346 (Fed. Cir. 2018) ("[T]here are limited circumstances when a presidential action may be set aside if the President acts beyond his statutory authority, but such relief is only rarely available."); *Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 89 (Fed. Cir. 1985) ("For a court to interpose, there has to be a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority.").

4Judge Chen suggests that the decision in *Corus* is inconsistent with *Franklin* and *Dalton*. There is no inconsistency. The Supreme Court itself in *Bennett* (where the deciding authority could not act without a recommendation) explicitly distinguished *Franklin* and *Dalton* as resting on the advisory nature of the recommendations:

> [T]he Biological Opinion and accompanying Incidental Take Statement alter the legal regime to which the action agency is subject, authorizing it to take the endangered species if (but only if) it complies with the prescribed conditions. In this crucial respect the present case is different from the cases upon which the Government relies, *Franklin v. Massachusetts*, 505 U.S. 788, 112 S.Ct. 2767, 120 L.Ed.2d 636 (1992), and *Dalton v. Specter*, 511 U.S. 462, 114 S.Ct. 1719, 128 L.Ed.2d 497 (1994). In the former case, the agency action in question was the Secretary of Commerce's presentation to the President of a report tabulating the results of the decennial census; our holding that this did not constitute

> "final agency action" was premised on the observation that the report carried "no direct consequences" and served "more like a tentative recommendation than a final and binding determination." 505 U.S., at 798, 112 S.Ct. 2767. And in the latter case, the agency action in question was submission to the President of base closure recommendations by the Secretary of Defense and the Defense Base Closure and Realignment Commission; our holding that this was not "final agency action" followed from the fact that the recommendations were in no way binding on the President, who had absolute discretion to accept or reject them. 511 U.S., at 469–471, 114 S.Ct. 1719. Unlike the reports in *Franklin* and *Dalton*, which were purely advisory and in no way affected the legal rights of the relevant actors, the Biological Opinion at issue here has direct and appreciable legal consequences.

Bennett, 520 U.S. at 178, 117 S.Ct. 1154. The Secretary's finding here is not merely advisory. As the Supreme Court held in *Algonquin*, the Secretary's threat finding is a "clear precondition[ ] to Presidential action." 426 U.S. at 559, 96 S.Ct. 2295.

Nor is this a situation where the challenge is based on procedural flaws in Commerce's approach. The absence of such procedural flaws was not a condition of presidential action in *Dalton*:

> The President's authority to act is not contingent on the Secretary's and Commission's fulfillment of all the procedural requirements imposed upon them by the 1990 Act. Nothing in [the relevant

> statute] requires the President to determine whether the Secretary or Commission committed any procedural violations in making their recommendations, nor does [the relevant statute] prohibit the President from approving recommendations that are procedurally flawed.

511 U.S. at 476, 114 S.Ct. 1719. *See Silfab Solar*, 892 F.3d at 1347 (confirming that presidential action is not invalidated by procedural problems in a recommendation); *Michael Simon Design, Inc. v. United States*, 609 F.3d 1335, 1341 (Fed. Cir. 2010) (same); *see also Motions Sys.*, 437 F.3d at 1362 ("[B]ecause the acts of the Trade Representative were not final actions, the Court of International Trade also lacked jurisdiction to review those acts. Instead, the Trade Representative's actions were analogous to those of the Secretary in *Franklin*, a case in which the Secretary's report was 'like a tentative recommendation' or 'the ruling of a subordinate official' because it was the President who carried the responsibility of transmitting the final report to Congress.").

5As noted in *Silfab Solar*, review does not extend to cover procedural violations in the Secretary's determinations. *Silfab Solar*, 892 F.3d at 1347 (noting that "[n]othing in [the relevant statute] requires the President to determine whether the Secretary or Commission committed any procedural violations in making their recommendations, nor does [the relevant statute] prohibit the President from approving recommendations that are procedurally flawed") (alterations in original) (quoting *Dalton*, 511 U.S. at 476, 114 S.Ct. 1719).

6In its brief, USP also argued at length regarding the timing requirements imposed on the Secretary and President in § 1862. However, at oral argument, USP's counsel admitted that the timing requirements were complied with. Oral Arg. at 1:42–2:51.

7The President's actions "are not reviewable under the APA" because "the President is not an 'agency.' " *Dalton*, 511 U.S. at 470, 114 S.Ct. 1719; *see Franklin*, 505 U.S. at 796, 112 S.Ct. 2767 ("We hold that the final action complained of is that of the President, and the President is not an agency within the meaning of the Act. Accordingly, there is no final agency action that may be reviewed under the APA standards."); *Motions Sys. Corp.*, 437 F.3d at 1359 ("Motion Systems acknowledges that it cannot challenge the President's actions under the APA because the President is not an 'agency.' ").

8USP suggests that the change in the statutory text in 1988 from "take such action, and for such time" to "determine the nature and duration of the action" indicates an intention to restrict the President's authority. Appellants' Br. at 20–28; Appellees' Br. at 30. In *Transpacific*, we held that this change was "stylistic." 4 F.4th at 1326, 1329 (quoting *Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 343 n.3, 125 S.Ct. 694, 160 L.Ed.2d 708 (2005)).

Chen, Circuit Judge, additional views.

As to the question of whether the Commerce Secretary's threat determination under 19 U.S.C. § 1862 is a judicially reviewable final agency action, I agree with the panel's decision because the relevant facts are essentially the same as facts in *Corus Group. Corus Grp. PLC v. Int'l Trade Comm'n*, 352 F.3d 1351, 1359 (Fed. Cir. 2003). However, I write separately to express concern that *Corus Group* is inconsistent with Supreme Court precedents on the non-finality of a Secretary's or Commission's tentative report and recommendation to the President.

The "core question" for determining finality is "whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Dalton v. Specter*, 511 U.S. 462, 470, 114 S.Ct. 1719, 128 L.Ed.2d 497 (1994) (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 797, 112 S.Ct. 2767, 120 L.Ed.2d 636 (1992)). In both *Franklin* and *Dalton*, the Supreme Court held that the Secretary's or Commission's report and recommendations to the President did not constitute final agency action, reviewable under the APA, because those recommendations were not themselves binding actions that directly affected the parties.

In *Franklin*, the Commerce Secretary's decennial census report had "no direct effect on reapportionment until the President [took] affirmative steps to calculate and transmit the apportionment to Congress." 505 U.S. at 799, 112 S.Ct. 2767. The President was not bound by the data in the Secretary's report; rather, the decennial census was a "moving target" subject to correction by the President. *Id.* at 797, 112 S.Ct. 2767. The Court observed that the report,

therefore, "carrie[d] no direct consequences for the reapportionment of Representatives" and "serve[d] more like a tentative recommendation than a final binding determination," like a "ruling of a subordinate official." *Id.* at 798, 112 S.Ct. 2767 (internal quotation marks omitted). The Court distinguished the situation from *Japan Whaling Ass'n v. American Cetacean Soc.*, where the Secretary's certification "automatically triggered sanctions ... regardless of any discretionary action the President himself decided to take." *Id.* at 798–99, 112 S.Ct. 2767 (citing 478 U.S. 221, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986)). Under *Franklin*, a Secretary's report and recommendation to the President is not reviewable final agency action if presidential action is necessary to cause the ultimate entitlement or impact on rights and where the President has discretion to revise the Secretary's findings.

In *Dalton*, the Supreme Court again found that recommendations to the President were not reviewable final agency action. With the Defense Base Closure and Realignment Act of 1990, Congress designed an elaborate selection process for the fair and timely closure and realignment of military bases. *Dalton*, 511 U.S. at 464, 114 S.Ct. 1719. The process involved the Defense Base Closure and Realignment Commission submitting a report that recommended base closings and realignments. *Id.* at 465, 114 S.Ct. 1719. The President was required to either approve or disapprove the Commission's recommendations "in their entirety." *Id.* If the President disapproved, the Commission could prepare a new report to submit to the President. *Id.* If the President again disapproved, no bases could be closed that year. *Id.* In *Dalton*, the Commission had recommended closing the Philadelphia Naval Shipyard

and the President approved. *Id.* at 466, 114 S.Ct. 1719. The Supreme Court held that the Commission's report was unreviewable because, as in *Franklin*, the report carried "no direct consequences for base closings." *Id.* at 469, 114 S.Ct. 1719. The Court found "immaterial" the fact that the President was constrained to either entirely approving or disapproving the Commission's recommendation. *Id.* at 470–71, 114 S.Ct. 1719. The Court emphasized: "Without the President's approval, no bases are closed under the Act" and, furthermore, "the Act, in turn, does not by its terms circumscribe the President's discretion to approve or disapprove the Commission's report." *Id.* at 470, 114 S.Ct. 1719. "[M]ore fundamentally," with regard to the action that "will directly affect the parties," it is "the President, not the Commission, [who] takes the final action that affects the military installations." *Id.* (internal quotation marks omitted). *Dalton*, in short, reaffirmed that a report or recommendation to the President is not a final agency action if no direct consequences occur without the President's action and if the President has discretion in whether to take action.

Setting aside *Corus Group*, our case would be a straightforward application of *Franklin* and *Dalton*. Before any action "to adjust the imports of the article and its derivatives" is taken, the President must concur with the Secretary of Commerce's finding that the imported article threatens to impair the national security and determine the appropriate duration or action. 19 U.S.C. § 1862(c)(1)(A). But the President can choose to disagree with the Secretary's findings and refuse to take action. *Id.* § 1862(c)(1)(A)(i) ("whether the President concurs with the finding of the Secretary"); *id.* § 1862(c)(1)(A)(ii) ("if the President concurs"); *id.* § 1862(c)(2) ("the President shall submit

to the Congress a written statement of the reasons why the President has ... refused to take action"). In which case, there are no direct consequences from the Secretary's report and recommendation regarding the imported article and the imposition of tariffs. Further, even when the President concurs and takes action, there are almost no limits to the President's discretion except that the President give consideration to certain factors—more discretion than the President had in *Dalton*. *See* Oral Arg. 17:30–17:49; 19 U.S.C. § 1862(d) (listing factors the President "shall ... give consideration to"). Because the Secretary's report and recommendation by themselves carry no direct consequences for or effect on any party, under *Franklin* and *Dalton*, the report and recommendation should constitute unreviewable, non-final agency action.

But in *Corus Group*, this court held that the Commission's report and recommendation under a very similar statute, 19 U.S.C. § 2253, was reviewable because "the statute only gives the President authority to impose a duty if the Commission makes 'an affirmative finding regarding serious injury.' " *Corus Grp.*, 352 F.3d at 1359 (quoting 19 U.S.C. § 2253(a)(1)(A)). The court held that this "affirmative finding" prerequisite to presidential action meant the Commission's report and recommendation had "direct and appreciable legal consequences" and the President's action was nondiscretionary, thus making the Commission's report and recommendation reviewable. *Id.* at 1358–59. Because *Corus Group* held as such, and because the statute in this case is identically structured, where the Commerce Secretary must make an affirmative finding of a threatened impairment to national security before the President can act, I join the panel opinion. Nevertheless, by

treating one particular type of Secretary or Commission recommendation report differently from all other Secretary or Commission recommendation reports for purposes of reviewability, I view *Corus Group*'s reasoning inconsistent with the analysis in *Dalton* and *Franklin*. *Dalton*, in particular, demonstrates the fact that the President lacks the authority to act (to close bases) absent prerequisite findings and recommendation by a Secretary or Commission is immaterial to determining whether the Secretary's or Commission's findings and recommendation is a final action. 511 U.S. at 470–71, 114 S.Ct. 1719. The Supreme Court's test of whether the action "will directly affect the parties" does not involve looking at whether the President's authority to act is affected. *Id.* at 469, 114 S.Ct. 1719.

Nor does the Supreme Court's *Bennett* decision, which *Corus Group* relied on, suggest otherwise. *Corus Grp.*, 352 F.3d at 1359 ("We conclude also that this case is controlled by *Bennett*, rather than by *Dalton* and *Franklin* ...."). Unlike *Franklin* and *Dalton*, *Bennett* did not involve an agency making a tentative recommendation to the President but a determination of one agency's entitlement by another. In *Bennett*, the Fish and Wildlife Services (FWS) issued a determination on another agency's actions and their impact on threatened and endangered species of animals. FWS's determination created a legal burden and specific liabilities that, thereby, determined the other agency's rights and obligations. *Bennett v. Spear*, 520 U.S. 154, 169–70, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) (explaining that once a biological opinion issues, the agency subject to the opinion "bears the burden of 'articulating in its administrative record its reasons for disagreeing with the conclusions of a biological opinion'

" and though free to disregard the biological opinion, the agency "does so at its own peril" subject to substantial civil and criminal penalties including imprisonment); *id.* at 178, 117 S.Ct. 1154 (finding the action is "one by which rights or obligations have been determined" because the "Biological Opinion and accompanying Incidental Take Statement alter the legal regime to which the action agency is subject, authorizing it to take the endangered species if (but only if) it complies with the prescribed conditions"). Accordingly, the Supreme Court found that FWS's determination was a final agency action, specifically distinguishing it from the reports and recommendations to the President in *Franklin* and *Dalton*, which were "more like a tentative recommendation than a final and binding determination." *Id.* at 177–78, 117 S.Ct. 1154 (internal quotation marks omitted).

We have applied *Franklin* and *Dalton*, in other cases involving tentative reports and recommendations to the President, to find that the reports and recommendations are non-final and thus unreviewable. In our en banc decision in *Motions Systems*, we held that the acts of the Trade Representative under 19 U.S.C. § 2451, involving recommendations on the prevention or remedy of market disruption, which the President had ultimate discretion over, were not final actions. *Motions Sys. Corp. v. Bush*, 437 F.3d 1356, 1359, 1362 (Fed. Cir. 2006) (en banc). Similarly, in *Michael Simon Design*, the International Trade Commission's report and recommendations to the President regarding modifications to the Harmonized Tariff Schedule of the United States (HTSUS) were non-final and unreviewable. *Michael Simon Design, Inc. v. United States*, 609 F.3d 1335, 1338–40 (Fed. Cir. 2010). Like in our case, the report and

recommendations were "purely advisory" and did not "contain terms or conditions that circumscribe the President's authority to act," "limit the President's potential responses," nor "directly modify the HTSUS" and, therefore, did not "directly impact legal rights or alter any legal regime"—even if 19. U.S.C. § 3006 required the President to receive recommendations from the Commission before proclaiming any modification. *Id.* at 1336, 1339–40; 19 U.S.C. § 3006(a) ("The President may proclaim modifications, based on the recommendations by the Commission ....").

Accordingly, although I agree that this panel is bound by *Corus Group*, I write to express concern that *Corus Group* was, and our decision in this case is, incorrectly decided under Supreme Court precedents *Franklin* and *Dalton*.

497 F.Supp.3d 1406
United States Court of International Trade.

UNIVERSAL STEEL PRODUCTS, et al., Plaintiffs,

v.

UNITED STATES, et al., Defendants.

Slip Op. 21-25Court No. 19-00209
February 26, 2021

Attorneys and Law Firms

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Meen Geu Oh, Trial Attorney, and Ann C. Motto, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendants. With them on the brief were Brian M. Boynton, Acting Assistant Attorney General, Jeanne E. Davidson, Director, Tara K. Hogan, Assistant Director, and Stephen C. Tosini, Senior Trial Attorney.

Before: GARY S. KATZMANN, M. Miller Baker, and LEO M. GORDON, Judges

MEMORANDUM and ORDER

PER CURIAM: Recently we issued an opinion granting Defendants' motion for judgment on the pleadings and denying Plaintiffs' cross-motion for summary judgment challenging Presidential Proclamation 9705, and its subsequent modifications,

issued pursuant to Section 232 of the Trade Expansion Act of 1962, as amended, 19 U.S.C. § 1862 ("Section 232"). See 2021 WL 401283 (CIT Feb. 4, 2021) ("Opinion").

In the Opinion, we rejected the amended complaint's claims (1) that the challenged proclamations were invalid because the Secretary violated Section 232's procedural requirements (Count One); (2) that the President "fundamentally misinterpreted Section 232 by failing to base his determination upon a finding of an impending threat to impair the national security of the United States" (Count Three); (3) that the "duration" set forth in Proclamation 9705 violated the requirements of Section 232 (Count Two); and (4) that the proclamation of tariffs on imports from Mexico, Canada, and the European Union countries pursuant to Proclamation 9759 violated certain mandatory timing provisions of Section 232 (Count Four, ¶ 70). See Am. Compl., ECF No. 11.

However, we noted that we would continue to stay consideration of the amended complaint's allegations that Proclamation 9772, which increased tariffs on steel imports from Turkey to 50 percent, violated other mandatory timing provisions of Section 232 ("Count Four ¶ 71 claim"). See Opinion at nn. 4, 18 & 21; see also Am. Compl. ¶ 71; Scheduling Order, Mar. 10, 2020, ECF No. 26 ("Ordered that consideration of Plaintiffs' challenge to Presidential Proclamation 9772, as pleaded in Count Four of the Amended Complaint, Am. Compl. ¶ 71, is stayed pending the final disposition of Transpacific Steel, LLC v. United States, Ct. Int'l Trade No. 19-0009").

Plaintiffs now move the court to enter partial judgment pursuant to USCIT Rule 54(b). See Pls.' Mot. for Entry of R. 54(b) Judgment in Part, Feb. 17, 2021,

ECF No. 59. Defendants do not oppose Plaintiffs' motion. Id. at 4. For the reasons set forth below, we grant Plaintiffs' unopposed motion and enter a Rule 54(b) partial judgment.

Rule 54(b) provides in part that:

> [w]hen an action presents more than one claim for relief—whether as a claim, counterclaim, cross-claim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay.

USCIT R. 54(b).

Rule 54(b)'s "requirements are threefold: (1) partial finality; (2) separateness; and (3) an express finding that there is 'no just reason for delay.' " Federal Appellate Practice § 2.3 D(1) (3d ed. 2018). Rule 54(b) requires we "make an express statement" as to the requirements of the Rule. Spraytex, Inc. v. DJS&T, 96 F.3d 1377, 1379 (Fed. Cir. 1996) (citing W.L. Gore & Assocs., Inc. v. Int'l Med. Prosthetics Rsch. Assocs., Inc., 975 F.2d 858 (Fed. Cir. 1992)). We consider each of these elements in turn.

Rule 54(b)'s first requirement, partial finality, refers to "an ultimate disposition of an individual claim entered in the course of a multiple claims action." Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 436, 76 S.Ct. 895, 100 L.Ed. 1297 (1956). Here, the court has reached a final decision with respect to all of Plaintiffs' claims other than the Count Four ¶ 71 claim relating to Proclamation 9772, thereby providing "an ultimate disposition" as to those claims—meaning that the

litigation is at an end for those claims and there is "nothing left for the court to do but execute the judgment." Weed v. Soc. Sec. Admin., 571 F.3d 1359, 1361 (Fed. Cir. 2009) (quoting Allen v. Principi, 237 F.3d 1368, 1372 (Fed. Cir. 2001)).

Rule 54(b)'s second requirement, separateness, is not satisfied by the mere fact that a party's pleading nominally denominates claims as separate counts or claims for relief. See, e.g., Lloyd Noland Found., Inc. v. Tenet Health Care Corp., 483 F.3d 773, 780 (11th Cir. 2007) ("[E]ven if a district court has adjudicated one count of a complaint, but another count seeks substantially similar relief, the adjudication of the first count does not represent a 'final judgment' because both counts are functionally part of the same claim under Rule 54(b)").

Conversely, a nominally denominated single count or claim for relief might (or might not) represent two or more claims for Rule 54(b) purposes. For example, in this case, Count Four asserts two challenges—one that contends that the President issued Proclamation 9759 too early because he failed to negotiate with other countries for a full 180 days before issuing it, and another that contends that the President issued Proclamation 9772 too late because he issued it after the expiry of Section 232's deadlines. See Am. Compl. ¶¶ 70, 71. Our Opinion decided the former of these challenges and, as noted above, left the latter subject to the stay.

Regardless of how a pleading denominates claims for relief, for Rule 54(b) purposes the key questions are whether the relevant claims "involve at least some different questions of fact and law and could be separately enforced." Advanced Magnetics, Inc. v. Bayfront Partners, Inc., 106 F.3d 11, 21 (2d Cir. 1997).

Here, Plaintiffs seeks a Rule 54(b) partial judgment as to their challenges to Proclamation 9705 and various of its modifications, including Proclamation 9772, that we rejected in the Opinion. Plaintiffs' unresolved challenge to Proclamation 9772, though related to challenges adjudicated in our Opinion, involves different questions of fact and law.[1] Because those challenges resolved in our Opinion are factually and legally distinct from Plaintiffs' stayed challenge to Proclamation 9772, we hold that the former satisfy the separateness requirement of Rule 54(b).

Rule 54(b)'s third and final requirement for issuance of a partial judgment is that we must "expressly determine[ ] that there is no just reason for delay." USCIT R. 54(b). As previously noted, the court stayed consideration of the Count Four ¶ 71 claim as it is substantially identical to the claims in Transpacific, which is currently before the Federal Circuit (Fed. Cir. No. 20-2157). Therefore, there is nothing for this court to do with the Count Four ¶ 71 claim until the Federal Circuit disposes of Transpacific.

The entry of a Rule 54(b) partial judgment would serve the interests of the parties and the administration of justice by bringing these adjudicated claims to a conclusion before this court and providing Plaintiffs an opportunity to immediately appeal all issues other than the Count Four ¶ 71 claim. Delaying Plaintiffs' appeal of their challenges that we adjudicated in the Opinion until the Federal Circuit resolves the Transpacific appeal would serve no rational purpose. There is no threat of piecemeal judicial review as resolution of the Transpacific appeal will not resolve any of the issues adjudicated in our Opinion or moot Plaintiffs' challenges to the various Proclamations other than (possibly) Proclamation 9772.

Therefore, the court has no just reason to delay issuance of a Rule 54(b) partial judgment.

Accordingly, it is hereby

ORDERED that Plaintiffs' unopposed motion for the issuance of a USCIT Rule 54(b) partial judgment is granted.

/s/ GARY S. KATZMANN
Judge GARY S. KATZMANN
/s/ M. MILLER BAKER
Judge M. MILLER BAKER
/s/ LEO M. GORDON
Judge LEO M. GORDON

Footnote

1Plaintiffs' stayed challenge to Proclamation 9772 in Count Four ¶ 71 turns on the fact that the President imposed duties on Turkish steel imports allegedly in violation of the relevant statutory deadline. That fact is not relevant to Plaintiffs' challenges that we adjudicated in the Opinion. Likewise, the legal question at issue in Plaintiffs' challenge to Proclamation 9772 is whether the statute permits the President to take such action. That question is not implicated by the challenges we adjudicated in the Opinion.

495 F.Supp.3d 1336
United States Court of International Trade.

UNIVERSAL STEEL PRODUCTS, INC., et al.,
Plaintiffs,
v.
The UNITED STATES, et al., Defendants.

Slip Op. 21-12Court No. 19-00209
February 4, 2021

Gary S. Katzmann, J., filed concurring opinion in which Leo M. Gordon, J., joined.
M. Miller Baker, J., filed opinion concurring in part and dissenting in part.

Attorneys and Law Firms

Lewis E. Leibowitz, the Law Office of Lewis E. Leibowitz, of Washington, DC, argued for plaintiffs.

Meen Geu Oh, Trial Attorney and Ann C. Motto, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With them on the brief were Joseph H. Hunt, Assistant Attorney General, Jeanne E. Davidson, Director, Tara K. Hogan, Assistant Director, and Stephen C. Tosini, Senior Trial Attorney.

OPINION and ORDER

Per Curiam:[1]

The primary question before us is whether Proclamation 9705 and a series of subsequent modifications to it issued by the President, imposing heightened tariffs on steel imports on the grounds that

they threaten to impair the national security of the United States, violate Section 232 of the Trade Expansion Act of 1962, codified as amended at 19 U.S.C. § 1862 ("Section 232"). We conclude that Proclamation 9705 and its subsequent modifications do not violate that statute.

Universal Steel Products, Inc., PSK Steel Corporation, The Jordan International Company, Dayton Parts, LLC, and Borusan Mannesman Pipe U.S. Inc. (collectively, "Plaintiffs") are U.S. corporations that import steel from foreign nations and claim injury based on tariffs imposed by the President under Section 232. Am. Compl. at 1, Dec. 11, 2019, ECF No. 11. Plaintiffs brought this action against naming as defendants the United States, and various officers of the United States in their official capacities (the President of the United States, the Secretary of Commerce, and the Acting Commissioner of Customs and Border Protection) (collectively, "the Government"), seeking equitable and legal relief for tariffs on certain steel products. Am. Compl. at 1. To defeat Plaintiffs' challenge to these Proclamations, the Government moved for judgment on the pleadings. Def.'s Mot. for J. on the Pleadings at 7, Apr. 9, 2020, ECF No. 32 ("Def.'s Br."). Plaintiffs oppose this motion. Pls.' Br. in Opp'n to Def.'s Mot. for J. on the Pleadings, Apr. 28, 2020, ECF No. 35 ("Pls.' Br."). Plaintiffs have also filed a cross-motion for partial summary judgment. Pls.' Cross-Mot. for Summ. J., Oct. 12, 2020, ECF No. 56.

BACKGROUND

I. Legal and Regulatory Framework for Action Under Section 232 Generally

With its genesis in the Cold War, Section 232 was enacted by Congress in 1962, authorizing the President to adjust imports that pose a threat to the national security of the United States. Section 232 directs that, upon receipt of a request from the head of a department or agency, upon application of an interested party, or sua sponte, the Secretary of Commerce is to conduct an "appropriate investigation to determine the effects on the national security of imports of the article which is the subject of such request." 19 U.S.C. § 1862(b)(1)(A). The Secretary shall, "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." 19 U.S.C. § 1862(b)(2)(A)(iii). The Secretary of Commerce must "provide notice to the Secretary of Defense" of the investigation's commencement and, in the course of the investigation, "consult with the Secretary of Defense regarding the methodological and policy questions raised[.]" 19 U.S.C. § 1862(b)(1)(B); 19 U.S.C. § 1862(b)(2)(A)(i). The Secretary of Commerce must also "(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." 19 U.S.C. § 1862(b)(2)(A)(ii)–(iii).

The statute provides that, within 270 days of commencing the investigation, the Secretary shall

submit a report to the President summarizing the investigation's findings and offering recommendations for action or inaction; in addition, if the Secretary concludes the subject article's imports are in quantities or under circumstances that "threaten to impair the national security," the report shall indicate that finding. 19 U.S.C. § 1862(b)(3)(A). If the Secretary finds a threat to national security, the President then has ninety days from his receipt of the report to determine whether he concurs with the Secretary's finding. 19 U.S.C. § 1862(c)(1)(A)(i). If the President concurs, he must "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). If the President elects to take such action, the statute provides he shall "implement" that action within fifteen days after the day on which he decides to act. 19 U.S.C. § 1862(c)(1)(B). If the action chosen by the President is to negotiate an agreement with a foreign nation, and no such agreement is entered into before the date that is 180 days after the date on which the President made the determination to negotiate, or if the agreement is not being carried out or is ineffective, 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." 19 U.S.C. §§ 1862(c)(3)(A)(i)–(ii). Finally, section (d) lists the following factors that the Secretary and the President are to consider when acting pursuant to the statute:

(d) **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.

19 U.S.C. § 1862(d).

II. Facts and Procedural History

On April 19, 2017, the Secretary of Commerce, Wilbur L. Ross, initiated a Section 232 investigation to determine the effects of steel imports on national security. See Publication of a Report on the Effect of Imports of Steel on the National Security, 85 Fed. Reg. 40,202, 40,208 (Dep't Commerce July 6, 2020) ("Steel Report").[2] The Secretary issued his report and recommendation to the President on January 11, 2018, within 270 days of initiation of the investigation, as required by 19 U.S.C. § 1862(b)(3)(A). See id. The Secretary found that the availability of steel manufactured by a healthy domestic industry is important to national defense, that steel "[i]mports in such quantities as are presently found adversely impact the economic welfare of the U.S. steel industry, that the displacement of domestic steel by excessive quantities of imports has the serious effect of weakening our internal economy, and that global excess steel capacity is weakening the domestic economy." Id. at 40,210. In light of these findings, the Secretary recommended that the President act to adjust the level of imports through quotas or tariffs on steel imported into the United States. Id. at 40,225.

The President, Donald J. Trump, concurred with the Secretary's findings and issued a series of Proclamations from March 8, 2018 to May 19, 2019. The first, Proclamation 9705, announced measures aimed at "adjusting imports of steel into the United States," and

established a twenty-five percent tariff on imports of steel articles from all countries except Canada and Mexico, effective March 23, 2018. Proclamation 9705 of March 8, 2018, Adjusting Imports of Steel Into The United States, 83 Fed. Reg. 11,625, cl. 9 (Mar. 15, 2018) ("Proclamation 9705"). Additionally, the President declared in Proclamation 9705 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.

Thereafter, the President modified Proclamation 9705 on several occasions. On March 22, 2018, the President issued Proclamation 9711 that temporarily exempted imports from Argentina, Australia, Brazil, the countries of the European Union ("EU"), and the Republic of Korea, in addition to Canada and Mexico, from the twenty-five percent tariff imposed by Proclamation 9705, pending negotiations with those countries. Proclamation 9711 of March 22, 2018, Adjusting Imports of Steel Into the United States, 83 Fed. Reg. 13,361, ¶¶ 6–9 (Mar. 28, 2018) ("Proclamation 9711"). On April 30, 2018, the President issued Proclamation 9740 that continued exempting imports from Canada, Mexico, and the EU and replaced the tariff on steel imports from the Republic of Korea with quotas. Proclamation 9740 of April 30, 2018, Adjusting Imports of Steel Into the United States, 83 Fed. Reg. 20,683, ¶ 5 (May 7, 2018) ("Proclamation 9740"). The President issued Proclamation 9759 on May 31, 2018 that imposed quotas on Brazil and Argentina based on agreements with those countries but did not mention any satisfactory alternative agreement with Canada, Mexico, or the EU. Proclamation 9759 of May 31, 2018, Adjusting Imports of Steel Into the United States, 83

Fed. Reg. 25,857 (June 5, 2018) ("Proclamation 9759"). The temporary exemption on the imposition of tariffs on Mexico, Canada, and the EU was allowed to expire on June 1, 2018, and the twenty-five percent tariffs on steel imports from those countries, as set forth in Proclamation 9705, took effect. See Proclamation 9711, ¶ 11; Proclamation 9740, ¶ 7; Proclamation 9705, cl. 2. On August 10, 2018, the President further amended Proclamation 9705, based on a recommendation from the Secretary, and determined that certain countries should be subject to a higher tariff because of the need to further reduce steel imports from major foreign exporters, Turkey in particular. Accordingly, the President increased the tariffs for steel imports from Turkey from twenty-five to fifty percent. See Proclamation 9772 of August 10, 2018, Adjusting Steel Imports Into the United States, 83 Fed. Reg. 40,429, ¶ 6 (Aug. 15, 2018). Shortly thereafter, the President issued Proclamation 9777 that authorized the Secretary to permit specific exclusions to countries subject to quotas under previous Proclamations and authorized other modifications to the product exclusion process. Proclamation 9777 of August 29, 2018, Adjusting Imports of Steel Into the United States, 83 Fed. Reg. 45,025 (Sept. 4, 2018) ("Proclamation 9777"). Finally, on May 19, 2019, the President permanently excluded Mexico and Canada from these tariffs because of the conclusion of the United States-Mexico-Canada Agreement. Proclamation 9894 of May 19, 2019, Adjusting Imports of Steel Into the United States, 84 Fed. Reg. 23, 987 (May 23, 2019).[3]

Plaintiffs filed a four-count amended complaint on December 11, 2019, alleging that the Secretary's report and the President's Proclamations violated various procedural requirements of Section 232 and the

Administrative Procedure Act ("APA"). See Am. Compl., Dec. 11, 2019, ECF No. 11.[4] The Government filed a motion for judgment on the pleadings pursuant to USCIT Rule 12(c) on April 9, 2020. Def.'s Br. at 2. Plaintiffs responded in opposition to the Government's motion on April 29, 2020. Pls.' Br. at 9–10. The Government filed a corrected reply brief on May 20, 2020. Def.'s Corr. Reply, May 20, 2020, ECF No. 39 ("Def.'s Corr. Reply"). Prior to oral argument, we issued questions to the parties, to which they filed written responses. See Pls.' Resp. to Questions from the Ct., July 17, 2020, ECF No. 45; Def.'s Resp. to Ct.'s Order, July 17, 2020, ECF No. 44 ("Def.'s Resp."). We held oral argument on July 21, 2020. ECF No. 46. Subsequently, in response to an order from the court, ECF No. 55, Plaintiffs filed a cross-motion for partial summary judgment. Pls.' Cross-Mot. for Summ. J., Oct. 12, 2020, ECF No. 56;[5] see also Ct. Letter, Sept. 25, 2020, ECF No. 49; Pls.' Resp., Oct. 4, 2020, ECF No. 51; Def.'s Resp., Oct. 5, 2020, ECF No. 54.

JURISDICTION and STANDARD OF REVIEW

We have jurisdiction under 28 U.S.C. §§ 1581(i)(2) and (4), which provide that this court "shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for ... tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue" and "administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection."

We may review a President's action pursuant to Section 232 for a "clear misconstruction of the

governing 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). Such non-statutory review of Presidential action for violation of a statute is "only rarely available." Silfab Solar, Inc. v. United States, 892 F.3d 1340, 1346 (Fed. Cir. 2018).

"Judgment on the pleadings is appropriate where there are no material facts in dispute and the party is entitled to judgment as a matter of law." Forest Labs., Inc. v. United States, 476 F.3d 877, 881 (Fed. Cir. 2007) (citation omitted). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." USCIT R. 56(a).

DISCUSSION

Plaintiffs allege the following: (1) the Steel Report is a reviewable, final agency action, is procedurally deficient, and invalidates subsequent Presidential action; (2) both the Secretary and the President fundamentally misinterpreted the statute by failing to base their determinations on an "impending threat;" (3) the President violated Section 232 by failing to set the duration of the action he chose; and (4) tariffs imposed on Canada, Mexico, and EU member nations violated Section 232's timing provisions. Am. Compl. ¶¶ 56–70; Pls.' Br. at 5–46. The Government responds that (1) the Steel Report is not final agency action and is therefore not reviewable, but even if it were, the Secretary followed all procedural requirements; (2) the statute does not require the Secretary or President to identify an "impending threat;" (3) the President is not

required by the "duration" language of Section 232 to establish an end to the action at its outset; and (4) no timing provisions of Section 232 were contravened, but even if they were, the President has the discretion to do so. Def.'s Br. at 2–4. We hold that Plaintiffs' claims fail on the pleadings.[6]

I. The Steel Report is Not Final Agency Action and Thus Is Not Subject to Judicial Review Under the APA.[7]

In Count One, Plaintiffs allege that the Secretary's Steel Report is a reviewable, final agency action, is procedurally deficient, and invalidates subsequent Presidential action. Count Two, paragraph 64, echoes the allegations of Count One except that it fails to allege that the Secretary's report is reviewable.[8] We find that the Steel Report is not reviewable as final agency action under the APA; thus, the Government is entitled to judgment as a matter of law as to these claims.

The APA provides that "agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. Two conditions must be satisfied for an agency action to be final. First, the action must mark the "consummation" of the agency's decision-making process -- it must not be of a merely tentative or interlocutory nature. Bennett v. Spear, 520 U.S. 154, 177–78, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997); see also Franklin v. Massachusetts, 505 U.S. 788, 112 S.Ct. 2767, 120 L.Ed.2d 636 (1992). Second, the action must be one by which "rights or obligations have been determined" or

from which "legal consequences will flow." Bennett, 520 U.S. at 177–78, 117 S.Ct. 1154.

In Franklin, the Supreme Court articulated the meaning of final agency action through a challenge to the method by which Congress apportioned seats in the U.S. House of Representatives based on a recommendation of the Secretary of Commerce, which was reviewed and approved by the President before taking effect. 505 U.S. 788, 112 S.Ct. 2767, 120 L.Ed.2d 636. The Court found that the Secretary of Commerce's recommendation was not reviewable "final agency action" under the APA. Id. At 799. In reaching its conclusion, the Court evaluated the "core question" of whether "the agency ha[d] completed its decision-making process, and whether the result of that process [was] one that will directly affect the parties." Id. at 797, 112 S.Ct. 2767. Because the President had to submit the Secretary of Commerce's recommendation to Congress and had the opportunity to alter it before doing so, the Court held that the agency action "serve[d] more like a tentative recommendation than a final and binding determination." Id. at 798, 112 S.Ct. 2767. The test was again articulated and used in Bennett, where the Court found that agency action pursuant to the Endangered Species Act was final and reviewable because the report in question "altere[ed] the legal regime to which the action agency is subject" and therefore had "direct and appreciable legal consequences." 520 U.S. at 178, 117 S.Ct. 1154.

Plaintiffs, relying primarily on Corus Group PLC v. International Trade Commission, 352 F.3d 1351, 1358 (Fed. Cir. 2003), argue that judicial review of the Secretary's Steel Report is proper because the Steel Report affected rights and obligations of the President and legal consequences resulted. See Pls.' Br. at 18. The

Government responds, contending that an agency action is not final if it is purely advisory and does not affect the legal rights of the parties, and that the Steel Report falls "squarely within the bounds of an advisory action." Def.'s Br. at 19 (quoting Franklin, 505 U.S. at 798, 112 S.Ct. 2767). We agree with the Government that the issue is not controlled by Corus Group, as Plaintiffs contend, but by Franklin and Bennett. Moreover, this case is similar to other cases that held that agency recommendations to the President were not final action subject to judicial review. See generally Dalton v. Specter, 511 U.S. 462, 114 S.Ct. 1719, 128 L.Ed.2d 497 (1994) (holding that an agency's recommendation of military bases for closure was not a final decision and was not reviewable under the APA); Michael Simon Design, Inc. v. United States, 609 F.3d 1335 (Fed. Cir. 2010) (holding that the International Trade Commission's act of recommending that the President modify HTSUS was not final agency action); Motions Systems Corp. v. Bush, 437 F.3d 1356 (Fed. Cir. 2006) (holding that the Trade Representative's recommendations for presidential action pursuant to the Trade Act of 1974 were not final actions). These cases, viewed together, suggest that the determinative factor is whether the recommendation itself carries direct consequences, or if a form of approval from the President is necessary before any consequences attach. See, e.g., Michael Simon Design, 609 F.3d at 1339; Motions Systems Corp., 437 F.3d at 1362.

In Corus Group, the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") held that a recommendation made by the U.S. International Trade Commission ("the Commission") to the President pursuant to the Trade Act of 1974 was reviewable because "the President does not have complete

discretion under the statute, and the Commission's report had 'direct and appreciable legal consequences.' " 352 F.3d at 1359. While the relevant statutory provision of the Trade Act of 1974 and Section 232 are strikingly similar, there is a key distinction: the Trade Act of 1974 does not give the President the option to accept or reject the finding of the Commission. 19 U.S.C. § 2253(a)(1)(A). Rather, if an affirmative finding is issued by the Commission, the President is required to take action, although he may use his discretion in choosing the nature of the action. Id. The statute provides:

> After receiving a report under section 2252(f) of this title containing an affirmative finding regarding serious injury, or the threat thereof, to a domestic industry, the President shall take all appropriate and feasible action within his power which the President determines will facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs.

19 U.S.C. § 2253(a)(1)(A). In contrast, under Section 232, when the Secretary makes an affirmative finding of a threat, the President is to first determine "whether [he] concurs with the finding of the Secretary" before acting, as the relevant portion of the statute states:

> 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.

19 U.S.C. §§ 1862(c)(1)(A)(i)–(ii). The statute at issue in Corus Group requires the President to take action if an affirmative finding is issued. 352 F.3d at 359. Therefore, the court's holding in Corus Group that the Commission's recommendation was reviewable is not determinative here.

Section 232 gives the President the discretion to disagree with the Secretary's recommendation and not take any action. This case is thus more akin to Dalton v. Specter, 511 U.S. 462, 114 S.Ct. 1719, 128 L.Ed.2d 497 (1994). In Dalton, the Supreme Court held that recommendations for military base closures, made by the Secretary of Defense pursuant to the Defense Base Closure and Realignment Act of 1990, did not constitute final agency action because the President had to review and submit a certificate of approval of those recommendations to Congress before they took effect. 511 U.S. at 463, 114 S.Ct. 1719. The Court highlighted that "without the President's approval, no bases are closed under the act" and that "what is crucial is the fact that the President, not the [agency], takes the final action that affects the military installations." Id. at 470, 114 S.Ct. 1719. Even though that statute limited the President's discretion significantly in that he could only

accept or reject the recommendations in its entirety, the determinative fact, the Court found, was that the President's approval was the final, necessary step before any action occurred. Id. ("That the president cannot pick and choose among bases, and must accept or reject the entire package offered by the Commission, is immaterial. What is crucial is the fact that '[t]he President, not the [agency], takes the final action that affects' the military installations.").

Similarly, in Michael Simon Design, the Federal Circuit heard a challenge to modifications that were made to the Harmonized Tariff Schedule based on the Commission's recommendations and held that the recommendations were not final, but it was the President's proclamation adopting the proposed modifications that constituted the final action. 609 F.3d at 1341. Examination of the relevant statutory language reveals that, similar to the language of Section 232, the President had the option of choosing not to accept the recommendations at all: "the President may proclaim modifications, based on the recommendations by the Commission under section 3005 of this title, to the Harmonized Tariff Schedule if the President determines that the modifications -- (1) are in conformity with United States obligations under the Convention; and (2) do not run counter to the national economic interest of the United States." 19 U.S.C. § 3006(a). Elaborating upon why the recommendations were not final, the Federal Circuit stated that the recommendations "[did] not contain terms or conditions that circumscribe the President's authority to act; [they did] not limit the President's potential responses, and ... [did] not directly modify the HTSUS."[9] Michael Simon Design, 609 F.3d at 1339.

Finally, in Motions Systems Corp., the Federal Circuit held that the Commission and the U.S. Trade Representative's recommendations to the President were not final. 437 F.3d at 1359. The relevant statute in that case provides that if the Commission and the Trade Representative find a threat to the United States economy, they must submit a report to the President. 19 U.S.C. § 2451. The statute provides that, within fifteen days of receiving the report, the President must "provide import relief ... unless the President determines that provision of such relief is not in the national economic interest of the United States." 19 U.S.C. § 2451(k)(1). This statutory provision cabins the President's authority to reject the recommendations more than Section 232 does because Section 232 does not articulate any criteria upon which the President must base his decision. Notably, and pertinent to the case now before us, the court still held that the agency's actions were only recommendations for Presidential action, and thus not reviewable. Motions Systems, 437 F.3d at 1362. Like the recommendations to the President in Dalton, Michael Simon Design, and Motions Systems, the Secretary's findings and recommendations at issue here did not require the President to take any action; rather, Section 232 left to the President's discretion whether to concur with the findings and recommendations. The imposition of tariffs, which is the action that gave rise to the legal consequences that Plaintiffs challenge, was an action taken by the President, and not by the Secretary. In conclusion, the Steel Report is not reviewable under the APA, and the Government is entitled to judgment on the pleadings as to Count One and Count Two, Paragraph 64, of the amended complaint.[10]

II. "Impending Threat" and the Validity of the President's Actions[11]

Plaintiffs allege that the President "fundamentally misinterpreted Section 232 by failing to base his determination upon a finding of an impending threat to impair the national security of the United States." Am. Compl. ¶ 68; Pls.' Br. at 32–34. Plaintiffs challenge the President's action after he concurred with the Secretary's recommendations, contending that the President's failure to find an "impending" threat violated the statute. Id.[12]

As Plaintiffs correctly indicate, Section 232 requires the President to concur with a finding by the Secretary 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" before the President may take action. Pls.' Br. At 32; 19 U.S.C. §§ 1862(b)(3)(A); (c)(1)(A)(ii).[13] Plaintiffs contend that the ordinary meaning of the word "threat" is "something impending," and further, that this is the only definition that can apply to "imports." Pls.' Br. at 33–34 (citing Threat, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/threat (last visited Jan. 27, 2021)). Plaintiffs further argue that "in the context of Section 232, the 'threat' of impairment of national security cannot be distant in time or conjectural -- it must be both genuine and 'impending.' " Id.

Section 232, however, grants the President latitude in evaluating whether imports threaten the national security. The statutory language makes clear that the list of factors to be considered in determining whether a threat exists is nonexclusive. 19 U.S.C. §

1862(d) ("the President shall, in the light of the requirements of national security and without excluding other relevant factors ...").

An examination of Proclamation 9705 and its subsequent modifications reveals that the President made findings after considering recommendations from the Secretary that addressed data relevant to the factors provided by the statute, such as the domestic production needed for projected national defense requirements, the capacity of domestic industries to meet such requirements, and the serious effects resulting from the displacement of any domestic products by excessive imports. See Def.'s Br., Exh. 1 at 25–53 (The Effect of Imports of Steel on the National Security. U.S. Dep't of Commerce (Jan. 11, 2018)). Generally, the President's exercise of discretion is not open to scrutiny. See United States v. George S. Bush & Co., 310 U.S. 371, 60 S.Ct. 944, 84 L.Ed. 1259 (1940) (challenging a Presidential Proclamation issued pursuant to Section 336(c) of the Tariff Act of 1930). In exercising his discretion to impose import restrictions, the President concurred with the Secretary's findings that current import levels could impair the country's national security. Where Congress, as in this case, has authorized the President to take "legislative action that is necessary or appropriate ... the judgment of the [President] as to existence of facts calling for that action is not subject to review." Id. at 380, 60 S.Ct. 944 (citations omitted); see also Am. Inst. for Int'l Steel, Inc. v. United States, 43 CIT ——, ——, 376 F. Supp. 3d. 1335, 1341–43 (2019), aff'd, 806 Fed. App'x 982 (Fed Cir. 2020), cert. denied, —— U.S. ——, 141 S. Ct. 133, 207 L.Ed.2d 1079 (2020) (reviewing cases involving unreviewability of discretionary Presidential actions). Because Plaintiffs' claim that the President failed to

identify an "impending threat" is not reviewable, the Government is entitled to judgment on the pleadings as to Count Three of the Complaint.[14]

III. The Duration As Set Forth in Proclamation 9705 Does Not Violate Section 232.[15]

Under Section 232, if the President concurs with a finding of the Secretary in his report that imports "threaten to impair national security," 19 U.S.C. § 1862(c)(1)(A)(i), the President "shall" "determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports ... so that such imports will not threaten to impair the national security." 19 U.S.C. § 1862(c)(1)(A)(ii) (emphasis added). Plaintiffs contend that the President violated the statute by not "setting a termination date or by [not] specifying circumstances that would end the threat to impair national security." Pls.' Br. at 38 (emphasis added).

In Proclamation 9705, the President "concur[s] in the Secretary's finding that steel articles are being imported into the United States in such quantities and circumstances as to threaten to impair the national security of the United States." Proclamation 9705, ¶ 5. He states that in his "judgment" a twenty-five percent tariff on steel articles imported from all countries except Canada and Mexico is "[u]nder current circumstances ... necessary and appropriate to address the threat that imports of steel articles pose to the national security." Id. ¶ 8.[16] Proclamation 9705 states that the twenty-five percent tariff rate on most steel imports would be effective from "March 23, 2018, and shall continue in effect, unless such actions are expressly reduced, modified, or terminated." Id. at cl.

5(a). The Government contends that the President satisfied this requirement in Proclamation 9705 by stating that the twenty-five percent tariff rate on most steel imports would remain in effect from March 23, 2018 "until and unless such actions are expressly reduced, modified, or terminated." Def.'s Br. at 26 (quoting Proclamation 9705, 83 Fed. Reg. 11,628, cl. 5(a)). The Government believes that stating that the tariffs will remain in effect until the President says otherwise is a sufficient way for the President to "determine the ... duration" of the action.

In ascertaining the meaning of "duration" in Section 232, we are informed by fundamental principles of statutory construction: we look to the plain meaning of the statute, legislative history as may be necessary to provide context, and caselaw. See Cook v. Wilkie, 908 F.3d 813, 817 (Fed. Cir. 2018) ("Accordingly, we will ascertain the best meaning of § 7107(b) 'by employing the traditional tools of statutory construction; we examine the statute's text, structure, and legislative history, and apply the relevant canons of interpretation.' ") (quoting Delverde, SrL v. United States, 202 F.3d 1360, 1363 (Fed. Cir. 2000)); see generally Robert Katzmann, Judging Statutes (2014). We conclude that more finite terms than the Proclamation provides in this case are not necessary.

The plain meaning of the word "duration" is straightforward. Duration is defined as "(1) [t]he length of time something lasts, [and] (2) [a] length of time or continuance in time." Duration, Black's Law Dictionary (11th ed. 2019); see also Duration, Ballentine's Law Dictionary (3d ed. 2010) ("The period of existence, ... continuance in time; the portion of time during which anything exists."). The word "determine" is equally clear, meaning "[t]o terminate; to cease; to end[, t]o put

an end to controversy by deciding the issue or issues." Determine, Ballentine's Law Dictionary (3d ed. 2010); see also Determine, Oxford English Dictionary, https://www.oed.com/view/Entry/51244?redirectedFrom=determine#eid (last visited Feb. 2, 2021) ("[t]o put an end or limit to; to come to an end."). In light of these definitions, when the President is required to "determine the ... duration" of the action, he must state and decide at that time the action's continuance in time, or the time for which the action will last. There are multiple ways that the President could feasibly do so, especially because the statute explicitly states that he shall make the determination "in his judgment." 19 U.S.C. § 1862(c)(1)(A)(ii). For example, he could identify a date by which he believes the action will no longer be necessary, or he could identify criteria or conditions which, if met, would end the action's continuance. Either of these options is consistent with the plain meaning of the word "duration" and allows the President a great deal of flexibility, as he may determine the duration based solely on his judgment.

Here, the President did specify the "duration" of his selected measures. Proclamation 9705 specifies when the duties would first be collected -- the President ordered that the twenty-five percent tariff rate on most steel article imports would begin on March 23, 2018. The Proclamation then states it would remain in effect until and "unless such actions are expressly reduced, modified or terminated," 83 Fed. Reg. at 11628, cl. 5(a), with further instruction to the Secretary to "inform the President 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." Id. at cl. 5(b). In our view, the President thus explained that the measures he was placing on

steel article imports would continue until the problems he had identified were alleviated. That is the "duration" the President believed, in [his] "judgment," addressed the national security concerns that he had specified. Accordingly, the President's pronouncement falls within the plain reading of the statute.

Plaintiffs contend that the President must "state a finite duration" of his action at the outset because the word "duration" "communicates Congress' intention that if subsequent events require a reassessment of the measures needed to end the threat to impair the national security, further investigation and fact-finding would be necessary." Pls.' Br. at 38–40. The Government counters that interpreting the word "duration" in the way Plaintiffs suggest "would not only constrict the President's authority to make ongoing national assessments, but it would allow foreign governments and producers to evade the President's predetermined limits by simply waiting out the measures, undermining the central purpose of Section 232 assessments." Def.'s Corr. Reply at 18–19. We need not wade into the differing policy perspectives evidenced by these two dueling views: what cannot be disputed is that if Congress wanted to require that the President proclaim a fixed temporal limit to the measures selected, it could have done so. It did not; and it is not the role of the court to direct otherwise. As to Plaintiffs' concern that the measures imposed could persist indefinitely, the court notes that there is a distinction between the indefinite and the undefined. Here, as noted, even if the duration may be unlimited, it is not undefined, but bounded by whether, in the President's judgment, the threat to impair national security exists.

Noting that in 1988 Congress revised Section 232, Plaintiffs urge that those amendments support their interpretation of the word "duration." Prior to the 1988 amendments, Section 232 provided in relevant part:

> 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 he shall so advise the President 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) (1980) (emphasis added).

The 1988 amendments changed "the President shall take such action and for such time, as he deems necessary" to the President shall "determine the nature and duration of the action that, in the judgment of the President, must be taken ...." 19 U.S.C. § 1862(c)(1)(A)(ii) (emphasis added); see also H. Rep. No. 100-578 at 161 (1988). Plaintiffs contend that Congress added the word "duration" for "a reason," namely to remove the "option to declare import restrictions for an indefinite period." Pls.' Br. at 37. We are not persuaded. If the 1988 amendments removed such Presidential authority, we would expect that Congress would have made such a change explicitly. "Here, the applicable principle is that Congress does not enact substantive changes sub silentio." United States v. O'Brien, 560 U.S. 218, 231, 130 S.Ct. 2169, 176 L.Ed.2d 979 (2010) (citing Dir. of Revenue of Mo. v. CoBank ACB, 531 U.S. 316, 323 (2001)). There is no evidence in the legislative

history that the word "duration" was meant to connote an exact time period. Contemporaneous reports summarizing the 1988 amendments provide no evidence that Congress intended to require that the President proclaim the duration of the measures with more specificity than he did in Proclamation 9705. See H. Rep. No. 100-576 at 709–13; S. Rep. No. 100-71 at 21, 135–36 (summarizing the amendments to Section 232). The absence of legislative history regarding "duration" can be contrasted with the abundant legislative history relating to the other Section 232 amendments, which evinced Congressional concern with Presidential delay in taking Section 232 action.[17] We conclude that the change from "for such time" to "the ... duration" was stylistic and not substantive. Therefore, we will grant the Government's motion for judgment on the pleadings as to Count Two, paragraph 66, of the amended complaint.

IV. Mandatory Timing Conditions and Tariffs Imposed Upon the EU, Canada, and Mexico[18]

Finally, alleging that the President violated certain mandatory timing parameters of Section 232, Am. Compl. ¶ 70, Plaintiffs challenge Proclamation 9759, which modified previous Proclamations to impose tariffs on imports from Canada, Mexico, and the European Union, and imposed quotas on Brazil and Argentina based on agreements with those countries. Am. Compl. ¶ 49. Plaintiffs make the following allegations: (1) Section 232 precluded the President from letting the temporary exemption on tariffs for imports from Canada, Mexico, and the EU expire "earlier than 180 days after the announcement of the President's decision"; and (2) the President violated

Section 232 by extending the exemptions for one month after the fifteen-day period that the President had to act, after he concurred with the Secretary's findings, but before the 180-day negotiation period had expired.

Plaintiffs have misinterpreted Section 232 in contending that subsection (c)(3)(A) requires the President to wait 180 days before determining that efforts at negotiation have been unsuccessful and choosing an alternative method of action. The relevant portion of the statute provides:

> If—
> (i) the action taken by the President ... is the negotiation of an agreement which limits or restricts [ ] import[s] ... to, the United States of the article that threatens to impair national security, and ...
> (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 ...
> 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.

19 U.S.C. § 1862(c)(3)(A).

Plaintiffs suggest that "the only rational construction of [19 U.S.C. § 1862(c)(3)(A)] requires the President to negotiate for the entire 180-day period." Pls.' Br. at 43. However, consideration of the plain meaning of the statute's text along with the legislative history of the 1988 amendments reveals that Plaintiffs are incorrect that this provision sets 180 days as a minimum amount of time that the President must wait

before taking alternative action, rather than the maximum amount of time that he can wait. First, it is likely that Congress would have chosen language that more clearly required the President to negotiate for 180 days before choosing alternate action if that were Congress's intention. For example, the statute might have stated, "If no agreement has been reached once 180 days have passed, the President may then consider taking other such actions ..." or, perhaps, used even more explicit language such as: "The President must wait 180 days before choosing an alternative form of action." By contrast, the language used, read plainly, does not suggest that waiting 180 days before modifying the action is a requirement. See 19 U.S.C. § 1862(c)(A)(3). Furthermore, the 1988 amendments to Section 232 were motivated by a desire to prevent Presidential inaction and inefficiency under Section 232.[19] When viewed in this context, it would be contrary to Congressional intent and the overarching goal of the 1988 amendments to require the President to wait 180 days before acting if he found that attempts at negotiations were ineffective. Therefore, Plaintiffs' argument on this aspect of the claim fails.

The remainder of Plaintiffs' argument on this claim also turns upon their understanding of the 180-day provision as a minimum, not maximum, timing requirement. Plaintiffs argue that entering into negotiations pursuant to subsection (c)(3)(A) is the exclusive means of deferring action past the fifteen-day period after concurring with the Secretary's finding. Pls.' Br. at 43 ("... without meeting the terms of the (c)(3)(A) exception, there are no exceptions to the 90-day and 15-day deadlines."). Plaintiffs argue that, therefore, Proclamation 9711, which exempted the EU and other countries from the twenty-five percent tariff,

and Proclamation 9740, which extended the exemption on Canada, Mexico, and the EU for one month until June 1, 2018, were impermissible attempts to bypass the statutory time limits of Section 232. Id.; Proclamation 9711; Proclamation 9740. However, Plaintiffs' claims fail because, in fact, the President declared that he planned to negotiate with Mexico, Canada, and the EU within fifteen days of concurring with the Secretary's finding. See Proclamation 9705; Proclamation 9711. Proclamation 9705, in which the President concurred with the Secretary's finding and established a twenty-five percent tariff on steel imports from most countries, was issued on March 8, 2018. See Proclamation 9705, ¶¶ 8–11. Proclamation 9705 excluded Canada and Mexico from these tariffs, stating that instead the United States would attempt to negotiate with those countries. Id. Fourteen days later, on March 22, 2018, the President issued Proclamation 9711, which announced that the United States would attempt negotiations[20] with a number of other nations, including the EU, and thus that those countries would be temporarily exempted from the steel tariff along with Canada and Mexico. See Proclamation 9711, ¶¶ 6–9. This action was taken within fifteen days of the President concurring with the Secretary's finding, and thus complied with the statutory requirements of 19 U.S.C. § 1862(c)(1)(B) ("the President shall implement that action no later than the date that is 15 days after the day on which the President determines to take action under subparagraph (A)"). Given that the action that the President chose with respect to those countries was to attempt negotiations, the statute grants him the authority to modify that action if negotiations fail to be successful within 180 days. 19 U.S.C. § 1862(c)(3)(A)(ii)(I). Because the tariffs that the

President imposed upon Mexico, Canada, and the EU took effect on June 1, 2018, which was well within 180 days of March 8, 2018, these measures were not in violation of the statute. Hence, Count Four, insofar as it relies on the alleged failure to comply with Section 232's timing provision, is not meritorious.

CONCLUSION

For the foregoing reasons, upon consideration of Plaintiffs' challenges to Proclamation 9705 and its subsequent modifications, we conclude that the Government is entitled to judgment as a matter of law. Therefore, we grant the Government's motion for judgment on the pleadings and deny Plaintiffs' cross-motion for partial summary judgment.[21] Accordingly, it is hereby

ORDERED that Defendants' motion for judgment on the pleadings is granted; and it is further

ORDERED that Plaintiffs' cross-motion for partial summary judgment is denied.

/s/ GARY S. KATZMANN
GARY S. KATZMANN, Judge
/s/ M. MILLER BAKER
M. MILLER BAKER, Judge
/s/ LEO M. GORDON
LEO M. GORDON, Judge

Footnotes

1Judge Baker joins all but footnotes 6 and 14 and Section III of this opinion.

2Although the Secretary initially issued the Steel Report in 2018, see The Effect of Imports of Steel on the National Security (Dep't Commerce Jan. 11, 2018),

publication in the Federal Register was delayed until 2020.

3We note that subsequent modifications of Proclamation 9705 followed. See, e.g., Proclamation 10060 of August 6, 2020, Adjusting Imports of Aluminum Into the United States, 85 Fed. Reg. 49,921 (Aug. 14, 2020). However, we limit our discussion and decision to the Proclamations referenced in the amended complaint. See Am. Compl. ¶¶ 45–55, Dec. 11, 2019, ECF No. 11.

4At the request of the parties, we stayed Count Four's challenge to Proclamation 9772 pending final resolution of an identical challenge in a separate case. Am. Compl. ¶ 71; Joint Status Report (and Proposed Briefing Schedule, Mar. 5, 2020, ECF No. 25; Scheduling Order, Mar. 10, 2020, ECF No. 26 ("Ordered that consideration of Plaintiffs' challenge to Presidential Proclamation 9772, as pleaded in Count Four of the Amended Complaint, Am. Compl. ¶ 71, is stayed pending the final disposition of Transpacific Steel, LLC v. United States, Ct. Int'l Trade No. 19-0009").

5We directed that Plaintiffs' Cross-Motion for Partial Summary Judgment incorporate by reference Plaintiffs' response and revised response to Defendants' Motion for Judgment on the Pleadings, ECF Nos. 33, 35, as its memorandum in support of the cross-motion, and also directed, upon the filing of the cross-motion, that the Office of the Clerk deem Defendants' memorandum in support of their Motion for Judgment on the Pleadings, plus the attachment thereto, ECF Nos. 32, 32-1, and Defendants' Reply, ECF No. 36, as Defendants' response to Plaintiffs' cross-motion.

6In his separate opinion, Judge Baker argues sua sponte that the President in his official capacity should

be dismissed from this litigation entirely, even for actions not arising under the APA. Judges Katzmann and Gordon do not share that view. Their position can be stated as follows:

> The Government has not raised this issue, nor has it asserted under any theory that dismissal of the President in his official capacity is warranted. We do not construe the amended complaint to be asserting claims against the President. Rather, the claims are directed against the Proclamations themselves, not the President, against whom no remedy is sought. Plaintiffs do not ask that we enjoin the President, but rather seek to enjoin the Secretary and the Acting Commissioner, U.S. Customs and Border Protection. Moreover, there is no dispute as to whether the court has jurisdiction to entertain the requested relief -- to declare that the Proclamations are contrary to law and invalid, to enjoin the enforcement of any quota, and to order refunds of any duties. See Am. Compl. ¶ 72. We simply note that it does. Accordingly, we do not think it necessary for the court sua sponte to dismiss the President in his official capacity from this litigation.

7This section corresponds to Count One and Count Two, paragraph 64, of Plaintiffs' amended complaint. Am. Compl. ¶¶ 56–62, 64.

8Although Count Two, paragraph 64, arguably alleges a nonstatutory review claim -- which by definition is outside of the APA -- based on the Secretary's Steel Report, Plaintiffs' briefing does not argue that their challenge to the report is reviewable outside of the

APA. Moreover, Plaintiffs have expressly clarified that their challenge to the Steel Report is limited to "whether the [Steel Report] is subject to judicial review[,] and ... if so, whether the [Steel Report] violated the Administrative Procedure Act." Resp. to the Ct.'s Letter of Sept. 25, 2020 on Behalf of Pls. at 2, Oct. 4, 2020, ECF No. 51. Accordingly, we do not consider whether Plaintiffs' allegations against the Steel Report are reviewable outside of the APA, and we treat Count Two, paragraph 64, as duplicative of Count One's APA claim.

9As noted, Dalton makes clear that even if the President's potential responses were limited by the recommendations, that would not mean that the agency action is final in itself. See Dalton v. Specter, 511 U.S. at 470, 114 S.Ct. 1719. Because the President's discretion to act is not limited under Section 232 in the way it was by the statute at issue in Dalton, this suggests a fortiori that the agency's action was not final.

10Even if Plaintiffs' challenge to the Steel Report were reviewable (under the APA or otherwise) and even if the court were to find that the Steel Report was procedurally flawed, precedent reveals that such a finding would not allow the court to invalidate the subsequent Presidential action. See Silfab Solar, Inc. v. United States, 892 F.3d 1340, 1345 (Fed. Cir. 2018). In Silfab Solar, the Federal Circuit plainly rejected the contention that failure of the Commission to comply with procedural statutory obligations when reporting to the President invalidates subsequent Presidential action. Id. When nothing in the relevant statute requires the President to determine whether procedural violations were committed by the agency making a recommendation to the President, or

prohibits the President from approving recommendations that are procedurally flawed, courts have repeatedly held that the court cannot overturn the resulting Presidential action on the basis of such a procedural violation. See Michael Simon Design, 609 F.3d at 1342–43; see also Dalton, 511 U.S. at 476, 114 S.Ct. 1719. Section 232 does not contain any requirements to that effect, and thus, even a concrete finding of a procedural violation by the Secretary would not enable the court to overturn the President's actions. See generally 19 U.S.C. § 1862.

11This section corresponds to Count Three of Plaintiffs' amended complaint. Am. Compl. ¶¶ 67–68.

12Plaintiffs similarly allege the Secretary similarly violated the statute in failing to find an impending threat, but that claim -- as one aspect of Plaintiffs' broader APA claim -- is not reviewable for the reasons provided above.

13Section 1862(b)(3)(A) refers to the Secretary's duties and provides that: "[i]f 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." Section 1862(c)(1)(A)(ii) refers to the President's duties, and provides: "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."

14Even if reviewable, Plaintiffs' textual argument also fails. First, Plaintiffs focus mostly on the word "impending," which is not found anywhere in the statute, but rather comes from the Plaintiffs-provided definition of "threat." Moreover, the word "threat" does

not appear in this provision of the statute, either. The word used in the statute is the transitive verb "threaten," which, as the Government notes, has a different set of definitions than "threat." Def.'s Corr. Reply at 17. These definitions include: "to utter threats against," "to give signs or warning of," "to hang over dangerously," "to announce as intended or possible," and "to cause to feel insecure or anxious." Threaten, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/threaten (last visited Jan. 27, 2021). Plaintiffs chose not to consider any of these definitions and instead rely solely upon Merriam-Webster's third-provided definition of "threat," which is "an indication of something impending." The court disagrees that the plain text of the statute supports Plaintiffs' preferred reading.

As noted, Plaintiffs make much of the word "impending," suggesting that the circumstances hypothesized about the inability of the United States to defend itself due to levels of steel imports if it were to enter a war is nothing more than a "fanciful scenario," and not concrete enough to justify action pursuant to Section 232. Pls.' Br. at 35. However, the Government is correct in contending that the statute does not require identification of an "impending" threat, and that "threaten to impair" and "impending threat" are not identical. Def.'s Br. at 30. Furthermore, in this case, the President concurred with the Secretary's finding that a threat to impair already existed, not that it was "on the distant horizon." See Def.'s Br. at 31; see also Proclamation 9705, ¶ 2 (The President noting that "steel articles are being imported into the United States in such quantities ... as to threaten to impair the national security of the United States," not that they may be in the distant future.). Section 232 is written in

the present tense ("... an article is being imported into the United States in such quantities," 19 U.S.C. § 1862(b)(3)(A) (emphasis added)); in determining the meaning of any act of Congress, words used in the present tense include the future as well as the present. See Carr v. United States, 560 U.S. 438, 448, 130 S.Ct. 2229, 176 L.Ed.2d 1152 (2010). Furthermore, Plaintiffs conceded at oral argument that the statute allows the President to act to address present threats as well as future ones. Oral Arg. at 11:43. Thus, even if the statute did require an impending threat, that condition was met by the President's finding here.

15This section corresponds to Count Two, Paragraph 66, of Plaintiffs' amended complaint. Am. Compl. ¶ 66.

16The President states that the tariff is

> necessary and appropriate in light of the many factors I have considered, including the Secretary's report, updated import and production numbers for 2017, the failure of countries to agree on measures to reduce global excess capacity, the continued high level of imports since the beginning of the year, and special circumstances that exist with respect to Canada and Mexico. This relief will help our domestic steel industry to revive idled facilities, open closed mills, preserve necessary skills by hiring new steel works, and maintain or increase production, which will reduce our Nation's need to rely on foreign producers for steel and ensure that domestic producers can continue to supply all the steel necessary for critical industries and national defense.

Proclamation 9705, ¶ 8.

17The history of the 1988 amendments reveals that the amendments were motivated in no small part by a desire to accelerate Presidential action pursuant to Section 232. Congress had been frustrated by perceived undue Presidential delay in taking timely or effective action pursuant to the Secretary's report that machine tools threatened to impair the national security. At the amendment hearings, Speaker of the House James Wright commented that "many of our trade problems can be directly traced back to the delays by those officially appointed to carry out American policy" and pointed to the "machine tools case" as an example. Hearings Before the Committee on Ways and Means on H.R. 3 Trade and International Economic Policy Other Proposals Reform Act, 100th Cong. (1987). The resulting amendments to Section 232 added various timing provisions to the statute, requiring the President to act within certain timeframes as a way to prevent "languishing negotiations" and undue delay. See Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, Title I, § 1501, 102 Stat. 1107, 1257–60.

18This section corresponds to Count Four of Plaintiffs' amended complaint, except for paragraph 71 for which consideration was stayed. Am. Compl. ¶¶ 69–71.

19See Sect. III, supra, for discussion of the legislative history of the 1988 amendments.

20Plaintiffs suggest that the President also failed to announce the intention to negotiate an agreement with the member nations of the European Union, but just announced "continuing discussions" with these countries to discuss "satisfactory alternative means" to address the threatened impairment to national security. Pls.' Br. at 45. This argument does not hold water because "continuing discussions to discuss satisfactory

alternative means" is in essence the definition of negotiation. Merriam-Webster's online dictionary defines "negotiate" as "to confer with another so as to arrive at the settlement of some matter." Negotiate, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/negotiate (last visited Jan. 27, 2021).

21Count Four, paragraph 71, will continue to be stayed pursuant to the court's previous order. See Scheduling Order, Mar. 10, 2020, ECF No. 26; Nt. 3, supra.

KATZMANN, Judge, with whom GORDON, Judge joins, concurring:

Even in the early days of the Republic, the question of the connection between international trade and national defense was very much part of the public discourse. Two days after Congress first achieved a quorum, on April 8, 1789, James Madison introduced a bill to levy duties on imports, with the goal of generating revenue for the new nation.[1] Stating that he was a "friend to the very free system of commerce," he admitted to three exceptions: revenue, navigation for foreign vessels whose home countries discriminated against American vessels, and national defense.[2] With respect to the national defense exception, though skeptical of its long-term applicability as the new nation grew stronger, Madison agreed with the principle that "each nation should have within itself, the means of defense independent of foreign supplies."[3] In January 1790, President Washington observed that the safety and interest of a free people "require that they should promote such manufactories as tend to render them independent of others for essential, particularly military supplies."[4] On January 15, 1790, the House of Representatives directed that the Secretary of the Treasury "appl[y] his attention ... to the subject of Manufactures, and particularly to the means of promoting such as will tend to render the United States independent on foreign nations for military and other essential supplies[.]"[5] In response, on December 5, 1791, Alexander Hamilton submitted the landmark Report on Manufactures. Therein he wrote:

> Not only the wealth, but the independence and security of a country, appear to be materially

> connected with the prosperity of manufactures. Every nation, with a view to these great objects, ought to endeavor to possess within itself all the essentials of national supply. These compromise the means of subsistence, habitation, clothing and defence.[6]

Hamilton noted that "[t]he want of a navy, to protect our external commerce, as long as it shall continue, must render it a peculiarly precarious reliance for the supply of essential articles, and must serve to strengthen prodigiously the arguments in favor of manufactures."[7] Concluding that "[t]he manufactures of [iron] are entitled to pre-eminent rank[,]" "[t]he only further encouragement of manufactories of this article, the propriety of which may be considered as unquestionable, seems to be an increase of the duties on foreign rival commodities."[8]

Since the 1940's, national defense has been imagined more broadly and robustly as "national security."[9] Today, international trade and national security are inextricably linked.[10] That truth, of course, is evidenced by the statute before us -- Section 232 -- which authorizes the President to make adjustments on imports, including the tariffs at issue here, upon a determination that they threaten to impair national security. Section 232 was born during the Cold War.[11] In its first decades, on the few occasions when it was invoked by a President, it was for the most part to deal with the energy crisis facing America and to address the dangers to American self-sufficiency flowing from dependence on foreign oil.[12] In 2018, after some thirty-two years of dormancy,[13] Section 232 was invoked by the President, concurring with the recommendation of the Secretary of Commerce, to apply tariffs on certain

imports of steel and aluminum upon the Secretary's determination that the quantities and circumstances of the imports threatened to impair the national security. The revival of Section 232, as reflected in the various Proclamations noted in this opinion, and in the adjudication before the courts, has occasioned argument and commentary focusing on conceptions of Presidential and Congressional power.

In this case, we have been tasked, inter alia, with the interpretation of "duration" in Section 232. We have concluded that Proclamation 9705, though indefinite temporally, is defined and thus provides the "duration" required by the statute in that the higher tariffs remain in effect until the President determines that the threat to national security caused by steel imports no longer exists. What of the potential for abuse, namely that the tariffs may be continued in effect even when the conditions underlying their imposition -- a threat to national security posed by importation -- no longer exists? That concern, which in theory, may be a valid one, has not been squarely presented to us nor is there a claim in fact of overreaching by the President. Because no such claim of abuse has been asserted, it is not before the court. Nor do we consider whether it would be subject to our review. Nevertheless, there are certain observations that can be made.

The Supreme Court has stated that "[n]ational-security policy is the prerogative of the Congress and President." Ziglar v. Abbasi, ––– U.S. ––––, 137 S. Ct. 1843, 1861, 198 L.Ed.2d 290 (2017) (citing U.S. Const. art. I, § 8, art. II, § 1, § 2). See generally David Barron, Waging War: The Clash Between Presidents and Congress, 1976 to ISIS (2016). "Judicial inquiry into the national-security realm raises 'concerns for the separation of powers in trenching on matters

committed to the other branches.' " Ziglar, 137 S. Ct. at 1861 (quoting Christopher v. Harbury, 536 U.S. 403, 417, 122 S.Ct. 2179, 153 L.Ed.2d 413 (2002)). While, as noted below, the Presidential authority over international trade is largely statutory, the President does possess some independent constitutional authority over national security and dealings with foreign nations. See, e.g., id. (national security); Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 415, 123 S.Ct. 2374, 156 L.Ed.2d 376 (2003) (executive agreements). "Although the source of the President's power to act in foreign affairs does not enjoy any textual detail, the historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations.' " Am. Ins. Ass'n, 539 U.S. at 414, 123 S.Ct. 2374 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11, 72 S.Ct. 863, 96 L.Ed. 1153 (1952) (Frankfurter, J. concurring)). "[C]ourts have shown deference to what the Executive Branch 'has determined ... is essential to national security.' " Ziglar, 137 S. Ct. at 1861 (alteration in original) (quoting Winter v. Nat. Res. Def. Council, 555 U.S. 7, 24, 26, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008)). "[U]nless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." Dep't of Navy v. Egan, 484 U.S. 518, 530, 108 S.Ct. 818, 98 L.Ed.2d 918 (1988) (citations omitted). Flexibility can be allowed the President in the conduct of foreign affairs, see United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 324–27, 57 S.Ct. 216, 81 L.Ed. 255 (1936), although that power is not unbounded, even in times of crisis. See Hamdi v. Rumsfeld, 542 U.S. 507, 535–36, 124 S.Ct. 2633, 159

L.Ed.2d 578 (2004) ("[W]e necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances.... Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.") (citing Mistretta v. United States, 488 U.S. 361, 380, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426, 54 S.Ct. 231, 78 L.Ed. 413 (1934)). See generally Harold Koh, The National Security Constitution: Sharing Power after the Iran-Contra Affair (1990). Ultimately, however, this case does not present the question of the review of the exercise of constitutional power that may be lodged in the Executive.

Trade statutes occupy a distinct place in the constellation of legislation. Under the Constitution, the power over trade is lodged solely in the Congress. Article I, Section 1 of the U.S. Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I § 1. Section 232 was enacted pursuant to the power granted exclusively to Congress by Article I, Section 8 of the Constitution, which provides: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises," as well as "To regulate Commerce with foreign Nations." U.S. Const. art. I § 8. There is no provision in the Constitution that vests in the President the same "Power To Lay and collect ... Duties." As one commentator has observed, "[t]he president has no similar grant of substantive authority over economic policy, international or domestic.

Consequently, international trade policy differs substantially from other foreign affairs issues, such as war powers, where the president shares constitutional authority with Congress. Where international trade policy is concerned, the president's authority is almost entirely statutory."[14] In 1976, in the seminal case, the Supreme Court held that the President's leeway under Section 232 was "far from unbounded," and that the statute was a constitutionally permissible delegation of legislative power to the President, stating that Section 232(b) "establishes clear preconditions to Presidential action" in that Section 232(c) "articulates a series of specific factors to be considered by the President in exercising his authority under [Section 232(b)]." Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 559, 96 S.Ct. 2295, 49 L.Ed.2d 49 (1976). See generally Am. Inst. for Int'l Steel, Inc. v. United States, 43 CIT –––, ––––, 376 F. Supp. 3d 1335, 1346–53 (2019) (Katzmann, J., dubitante) (reviewing cases involving challenges to trade legislation raising the question of unconstitutional delegation of legislative power); Transpacific Steel LLC v. United States, 43 CIT ––––, –––, 415 F. Supp. 3d 1267, 1277–78 (2019) ("Transpacific Steel I") (Katzmann, J., concurrence). Forty-three years later -- in a case where the President, invoking Section 232, imposed by proclamation a twenty-five percent tariff on certain imported steel products -- this court bound by Algonquin, rejected a challenge to Section 232 based on the claim that it was an unconstitutional delegation of legislative power in violation of the separation of powers. Am. Inst. for Int'l Steel, 376 F. Supp. 3d 1335, aff'd, 806 Fed. App'x 982 (Fed. Cir. 2020) (citing Algonquin as controlling precedent), cert. denied, ––– U.S. ––––, 141 S. Ct. 133, 207 L.Ed.2d 1079 (2020). More recently, construing the

statutory requirements under the scheme set forth in Section 232, the court determined that Proclamation 9772 was unlawful and void because it was issued without following statutory procedures mandated by Section 232, including that the President acted outside the temporal investigative and consultative limits required by Section 232, and singled out imports of Turkish steel products in violation of the Equal Protection guarantees of the Fifth Amendment. Transpacific Steel LLC v. United States, 44 CIT ——, ——, 466 F. Supp. 3d 1246, 1260 (2020). See also Transpacific Steel I, 415 F. Supp. 3d at 1275–76 ("The procedural safeguards in section 232 [including temporal deadlines for Presidential actions] do not merely roadmap action; they are constraints on power" which, per Algonquin, 426 U.S. at 559, 96 S.Ct. 2295, enable Section 232 to "avoid[ ] running afoul of the non-delegation doctrine because it establishes 'clear preconditions to Presidential action.' ").

In sum, in this case we construe a domestic statute pertaining to international trade, a domain in which -- unlike other foreign affairs issues, such as war powers, where the President shares constitutional authority with Congress -- Congress has exclusive constitutional authority. Congress has delegated power under Section 232 to the Executive. If nothing else, precedent affirms that in enacting such statutes, Congress can restrict the actions of the President in the delegation of its power of trade to the Executive; indeed, the constitutionality of that legislation is informed by restraints on that power. We have concluded that the duration as indicated in Proclamation 9705 -- defined by the end of the threat to national security but indefinite in temporal span -- comports with the statute. It can be noted that with

respect to Section 232 as currently written, that conclusion does not render meaningless the system of checks and balances -- a system of differentiated institutions sharing power which undergirds our government. "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." Youngstown Sheet & Tube, 343 U.S. at 635, 72 S.Ct. 863 (Jackson, J., concurring); see also Mistretta, 488 U.S. at 381, 109 S.Ct. 647 (quoting the same). There have been proposals put forward suggesting greater Congressional oversight, including hearings, or statutory amendments which would expand Congress's role in the implementation and review of tariffs.[15] Ultimately, of course, these are policy matters that fall within the province of the legislative branch; it is not the role of the court to opine about them. See Silfab Solar, Inc. v. United States, 892 F.3d 1340, 1349 (Fed. Cir. 2018) ("If Congress desires to eliminate these tariffs or to cabin the President's authority, that is a matter for Congress to address in future legislation, not a matter for this court on this appeal"). We do not do so now.

/s/ GARY S. KATZMANN
GARY S. KATZMANN, Judge
/s/ LEO M. GORDON
LEO M. GORDON, Judge

Footnotes
1Douglas A. Irwin, Clashing Over Commerce: A History of US Trade Policy 73 (2017).

2Id. at 74–75 (quoting 12 Papers of James Madison, Congressional Series 70–71 (William T. Hutchinson and William M.E. Rachel eds., 1979)).

3Id. at 75 (quoting 12 Papers of James Madison, supra, at 71–72).

4Id. at 80.

5Alexander Hamilton, Report on Manufactures: Made to Congress December 5, 1791, In His Capacity as Secretary of the Treasury 5 (Home Market Club, 1892).

6Id. at 45–46.

7Id. at 46.

8Id. at 63, 64.

9See Andrew Preston, Monsters Everywhere: A Genealogy of National Security, 38 Diplomatic Hist. 477 (2014). According to one historian, the term "national security," already rare, between World War I and 1931, was "uttered only four times, by two presidents, and mostly as rhetorical flourish." Id. at 487. It was President Franklin Roosevelt, in his December 29, 1940 Fireside Chat specifically on national security, who "linking the Depression's economic insecurity with the geopolitical insecurity spurred by World War II, announced the need for domestic mobilization, and reiterated his support for Great Britain." Dexter Fergie, Geopolitics Turned Inwards: The Princeton Military Studies Group and the National Security Imagination, 43 Diplomatic Hist. 640, 649 (2019). President Roosevelt told the nation:

> This is not a fireside chat on war. It is a talk on national security .... [N]o nation can appease the Nazis .... [A] dictated peace would be no peace at all. It would be only another armistice, leading to the most gigantic armament race the most devastating trade wars in all history .... We must

> be the great arsenal of democracy. For us this is an emergency as serious as war itself .... I have the profound conviction that the American people are now determined to put forth a mightier effort than they have every yet made ... to meet the threat to our democratic faith.

Fireside Chat, December 29, 1940, The Public Papers and Addresses of Franklin D. Roosevelt, 1940 Volume, 633, 638–39, 643–44 (1941). Two years after the end of World War II, the term "national security" was given institutional infrastructure when President Truman signed the National Security Act of 1947, ch. 343, 61 Stat. 495 (1947).

10See generally Kathleen Claussen, Trade's Security Exceptionalism, 72 Stan. L. Rev. 1097 (2020).

11Cong. Rsch. Serv., R45279, Section 232 Investigations: Overview and Issues for Congress 2 (2020), https://crsreports.congress.gov/product/pdf/R/R45249/26.

12Id. at 4. Prior to 2018, presidents took action six times under Section 232 after determinations by Commerce that certain imports threatened to impair national security. Id.

13Prior to 2018, a president last imposed tariffs or other trade restrictions under Section 232 in 1986, based on a 1983 probe into imports of machine tools. Id.

14Timothy Meyer, Trade, Redistribution, and the Imperial Presidency, 44 Yale J. Int'l L. Online 21 (2018), https://cpb-us-w2.wpmucdn.com/campuspress.yale.edu/dist/8/1581/files/2019/02/3_Meyer_YJIL-Symposium_Redistribution-and-Imperial-Presidency_12.04.18-1zj65ya.pdf (footnotes omitted); see also Timothy Meyer & Ganesh

Sitaraman, Trade and the Separation of Powers, 107 Cal. L. Rev. 583 (2019).

15Cong. Rsch. Serv., R45529, Trump Administration Tariff Actions: Frequently Asked Questions 36–38 (2019), https://crsreports.congress.gov/product/pdf/R/R45529/2.

BAKER, Judge, concurring in part and dissenting in part:

I join the *per curiam* opinion except as to footnotes 6 and 14 and Section III. I write separately to explain my view that (1) we have no jurisdiction to review the duration of Section 232 action set by the President and (2) we should dismiss the President from the case.

I.

Plaintiffs allege that the President violated Section 232 by failing "to specify the duration of" Proclamation 9705 and its subsequent modifications. Amended Complaint Count Two, ECF 11, at 16 ¶ 66. In their briefing, Plaintiffs elaborate on this claim, contending that the President acted unlawfully in failing to "set[ ] a termination date or ... *specify[ ] circumstances that would end the threat to impair national security.*" ECF 35, at 45 (emphasis added).

The *per curiam* opinion rejects this claim on the merits. *Ante* at 1348-52. I would reject it for lack of jurisdiction and not reach the merits.

Here, Plaintiffs' briefing makes clear that their objection is not that the President failed to set a duration for the challenged import restrictions. After all, he *did* set a duration. Proclamation 9705 states that liability for duties on designated imports commenced on March 23, 2018, "and shall continue in effect, unless such [duties] are expressly reduced, modified, or terminated" by the President. Proclamation 9705 of March 8, 2018, *Adjusting Imports of Steel into the United States*, 83 Fed. Reg. 11,625, 11,627–28 (Mar. 15, 2018).[1]

Plaintiffs instead object to the President's choice of the condition or contingency that terminates those restrictions—his discretionary determination that such restrictions are no longer necessary. In effect, Plaintiffs contend that the President acted arbitrarily by reserving to himself the discretion to determine when to end import restrictions imposed by Proclamation 9705 and its modifications.

The problem with Plaintiffs' argument is that nonstatutory review of Presidential action for violation of a statute is "only rarely available." *Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1346 (Fed. Cir. 2018). Among other things, such review "is not available when the statute in question commits the decision to the discretion of the President." *Motions Sys. Corp. v. Bush*, 437 F.3d 1356, 1360 (Fed. Cir. 2006) (en banc) (cleaned up) (quoting *Dalton v. Specter*, 511 U.S. 462, 474, 114 S.Ct. 1719, 128 L.Ed.2d 497 (1994)).

Section 232 leaves the determination of the "duration" of action to the President's "judgment." 19 U.S.C. § 1862(c)(1)(A)(ii). To say—as Plaintiffs in effect say here—that the President acted arbitrarily in setting the duration of import restrictions is to say that he abused his discretion, and "[h]ow the President chooses to exercise the discretion Congress has granted him is not a matter for [federal court] review." *Dalton*, 511 U.S. at 476, 114 S.Ct. 1719; *see also Motions Sys.*, 437 F.3d at 1361 (stating that the Supreme Court in *Dalton* and earlier decisions "insulated Presidential action from judicial review for abuse of discretion despite the presence of some statutory restrictions on the President's discretion"). We have no authority to review the President's discretionary choice among conditions or contingencies that might terminate import restrictions.

II.

I have previously explained at length my view that our Court lacks subject matter jurisdiction to enter relief against the President, and that we should dismiss him as a party when he is named as a defendant in our Court. *See* *PrimeSource Bldg. Prods., Inc. v. United States*, Ct. No. 20-00032, Slip Op. 21-8, at 64–74, ––– F.Supp.3d ––––, 2021 WL 276338 (CIT Jan. 27, 2021) (Baker, J., concurring in part and dissenting in part). Although today we deny any relief against Defendants—including the President—by dismissing all but the stayed claim, *see ante* at 1354, the President remains in the case as to that claim. I therefore respectfully dissent from our failure to *sua sponte* raise the jurisdictional question and dismiss the President from what is left of this case.[2]

/s/ M. Miller Baker
M. Miller Baker, Judge

Footnotes

1The ensuing modifications to Proclamation 9705 used the same formulation for setting the applicable end date.

2In footnote 6 of the *per curiam* opinion, my colleagues respond to my dissent on this jurisdictional point. *See ante* at 1343 n.6. I would counter that Plaintiffs in this case *do* seek injunctive relief against the President. *See* Amended Complaint, ECF 11, at 17 (requesting as relief—without any disclaimer as to the President—"[a] permanent injunction against the enforcement of any quota or levying of any tariff imposed pursuant to the Report and the Proclamations"); *see also* Proposed Order, Plaintiffs' Cross-Motion for Summary Judgment,

ECF 56, at 2 (ordering without qualification "that Defendants are hereby enjoined from assessing or collecting duties from any Plaintiff pursuant to the purported authority of the Proclamations"). In addition, I acknowledge we have jurisdiction to enter the requested relief as to the *other* defendants, but the question I raise is whether we have jurisdiction to grant *any* relief against the President. If we don't, then we should dismiss him from the case. Beyond that, my reply to my colleagues in *PrimeSource* applies with equal force here. *See* *PrimeSource*, Slip Op. 21-8, at 64 n.9, —— F.Supp.3d at —— n.9

United States Court of Appeals, Federal Circuit.

USP HOLDINGS, INC., Substituted for Universal Steel Products, Inc., PSK Steel Corporation, Dayton Parts, LLC, Borusan Mannesmann Pipe U.S. Inc., Jordan International Company, Plaintiffs-Appellants

v.

UNITED STATES, Joseph R. Biden, Jr., President of the United States, Gina M. Raimondo, Secretary of Commerce, Troy Miller, Senior Official Performing the Duties of the Commissioner for U.S. Customs and Border Protection, Defendants-Appellees

2021-1726

Appeal from the United States Court of International Trade in No. 1:19-cv-00209-GSK-MMB-LMG, Senior Judge Leo M. Gordon, Judge Gary S. Katzmann, Judge M. Miller Baker. _

ON PETITION FOR PANEL REHEARING

Before DYK, MAYER, and CHEN, Circuit Judges.

PER CURIAM.

ORDER

Borusan Mannesmann Pipe U.S. Inc., Dayton Parts, LLC, Jordan International Company, PSK Steel Corporation and USP Holdings, Inc. filed a petition for panel rehearing. Upon consideration thereof, IT IS ORDERED THAT: The petition for panel rehearing is denied. The mandate of the court will issue August 25, 2022.

August 18, 2022
Date

FOR THE COURT
s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court