



# Legal Policy Bulletin

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## Trump's Ad Hoc Administrative State

BY WILLIAM YEATMAN

A hallmark of the Trump administration has been its creation of significant administrative programs on the fly, based on ambiguous or implied textual authorities, and without any public input. This paper discusses four such initiatives involving almost \$40 billion in benefits and dispensations from more than \$400 billion in tariffs. The programs discussed in this paper were launched after summary notices amounting to a total of 28 pages in the *Federal Register*. Rarely, if ever, has so much administrative policy been rendered in so few words. Far from reflecting the mere execution of the law, these programs instead take on the attributes of core congressional prerogatives—namely, the power to spend public funds and regulate international commerce. To date, Congress has acquiesced to these developments. If lawmakers remain passive, future presidents will build on Trump's template, which reflects an unfortunate innovation in executive power.

### BLACK BOX BENEFITS AND VEILED VARIANCES: THE PROGRAMS

By “ad hoc administrative state,” this paper refers to exercises of discretionary economic authority that are performed without undertaking procedural safeguards. Four such programs are discussed below, and they may be divided into two categories. The first two programs enumerated below involve the systematic consideration of individual requests for exclusion from various tariffs in the president's trade war. The third and fourth programs entail the distribution of direct payments to agricultural producers.

### Commerce Department's Exclusions from “National Security” Tariffs

In 2018, President Trump imposed so-called national security tariffs on imports of steel (25 percent) and aluminum (10 percent), covering almost \$40 billion in goods.<sup>1</sup>

At face value, the tariffs made little sense: these “national

1. Proclamation no. 9704 of March 8, 2018, “Adjusting Imports of Aluminum into the United States,” 83 Fed. Reg. 11,619 (March 15, 2018) (“Aluminum Proclamation”); Proclamation no. 9705 of March 8, 2018, “Adjusting Imports of Steel into the United States,” 83 Fed. Reg. 11,625 (March 15, 2018) (“Steel Proclamation”); and Simon Lester and Huan Zhu, “Closing Pandora's Box: The Growing Abuse of the National Security Rationale for Restricting Trade,” Cato Institute Policy Analysis no. 874, June 25, 2019.

security” measures target North Atlantic Treaty Organization (NATO) allies, among others.<sup>2</sup> Yet these import duties were doubly dubious because they also advanced the power of dispensation, or the discretion to pick and choose which importers must comply with the national security tariffs. Without any statutory or constitutional basis, Trump gave the Department of Commerce 10 days to provide tariff relief where an alternative good is “not reasonably available” or where there needs to be “specific national security considerations.”<sup>3</sup>

Shortly after the president’s direction, the Commerce Department published an interim final rule setting forth an administrative process to pick companies that would be excused from import duties.<sup>4</sup> Though the agency was empowered to give categorical waivers, it instead granted itself the latitude to consider applications on a case-by-case basis, based on the criteria set forth by the president’s proclamations. The exclusion mechanism took effect once it was announced and, subsequently, has been updated repeatedly in response to changes to the tariff regime by the president.

According to data compiled by the Mercatus Center at George Mason University, parties have filed nearly 94,000 steel exclusion requests. More than 47,000 have been granted and more than 13,000 have been denied, while the rest remain pending. Commerce also has received more than 13,000

aluminum exclusion requests, with almost 6,500 exclusions granted and 900 denied, while the remaining requests are pending.<sup>5</sup>

### The U.S. Trade Representative’s Product Exclusions from the Section 301 Unfair Trade Practices Tariff

After an investigation prompted by Trump, the U.S. Trade Representative has applied almost \$375 billion in Section 301 tariffs on China for unfair trade practices.<sup>6</sup> Although exercise of this authority is far from unprecedented, the scale of the current trade war is historic, and it includes—for the first time—a program to exempt certain U.S. importers otherwise subject to Section 301 tariffs.

To be clear, the statute does not stipulate a process for determining product exclusions, nor does the statute require the U.S. Trade Representative to establish one. As a result, the agency created a program from scratch. Forgoing public comment, the agency announced several nonexclusive criteria to weigh an applicant’s request for a variance—including product availability, potential economic harm, and strategic factors—on a product-by-product basis.<sup>7</sup> When the U.S. Trade Representative issues an exclusion, it is generally valid for one year.

According to the Congressional Research Service, the U.S.

2. Canada, for example, is not only a North Atlantic Treaty Organization ally but is actually incorporated into the industrial base for purposes of Defense Department planning. See generally, “National Defense Technology and Industrial Base, Defense Reinvestment, and Defense Conversion,” 10 U.S.C. 148.

3. Proclamation no. 9704, cl. 3; and Proclamation 9705, cl. 3.

4. U.S. Department of Commerce, “Requirements for Submissions Requesting Exclusions from the Remedies Instituted in Presidential Proclamations Adjusting Imports of Steel into the United States and Adjusting Imports of Aluminum into the United States; and the Filing of Objections to Submitted Exclusion Requests for Steel and Aluminum,” 83 Fed. Reg. 12,106 (March 19, 2018).

5. Christine McDaniel and Joe Brunk, “Section 232 Steel and Aluminum Tariff Exclusion Requests Continue Apace,” The Bridge, Mercatus Center, George Mason University, January 21, 2020.

6. Memorandum for the U.S. Trade Representative of August 14, 2017, Executive Office of the President, “Addressing China’s Laws, Policies, Practices, and Actions Related to Intellectual Property, Innovation, and Technology,” 82 Fed. Reg. 39,007 (August 17, 2017); for more on Section 301 tariffs, see Scott Lincicome, “Chinese Intellectual Property Policies Demand a Smart U.S. Trade Policy Response—One President Trump Doesn’t Appear to be Considering,” *Cato at Liberty* (blog), Cato Institute, January 2, 2018; and the U.S. Trade Representative maintains a webpage with all its Section 301 tariff actions pursuant to the investigation initiated by the president’s memorandum. See “China Section 301-Tariff Actions and Exclusion Process,” Office of the U.S. Trade Representative.

7. The Section 301 tariffs have been administered in four tranches. The exclusion process was established contemporaneously with the first tranche. See Office of the U.S. Trade Representative, “Procedures to Consider Requests for Exclusion of Particular Products from the Determination of Action Pursuant to Section 301: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation,” 83 Fed. Reg. 32,181 (July 11, 2018); and subsequent tranches have maintained the product exclusion process. See Christine McDaniel and Joe Brunk, “The Latest Data on China Tariff Exclusions Shows Only a Small Number of Requests Approved,” The Bridge, Mercatus Center, George Mason University, February 10, 2020.

Trade Representative received a total of 52,746 exclusion requests through January 31, 2020. Of these, 6,537 (12 percent) have been granted; 44,252 (84 percent) have been denied; and 1,957 (4 percent) are under review.<sup>8</sup>

### The Agriculture Department's Market Facilitation Program

Tariffs invite retaliation, which is how trade wars start. In a predictable response, our trade partners slapped duties on, among other things, almost 800 agricultural goods exported by the United States, worth roughly \$26 billion.<sup>9</sup> To assist “great patriot” farmers thus harmed, the Trump administration turned to the Commodity Credit Corporation (CCC).<sup>10</sup>

Dating to the New Deal, the CCC entails a \$30 billion revolving credit line (from the Treasury Department) that is available to the secretary of agriculture to support commodities. By law, the CCC receives an annual appropriation equal to the amount of the previous year's net realized loss.<sup>11</sup>

In 2018, Secretary of Agriculture Sonny Perdue tapped the CCC for \$14.5 billion in direct payments to agricultural producers harmed by the trade war.<sup>12</sup> Although Perdue had said the 2018 payments were a one-time deal, he expanded

the program again in 2019 to make another \$10 billion in direct payments.<sup>13</sup>

To administer this “trade aid,” the U.S. Department of Agriculture created the Market Facilitation Program. Other than the secretary's broad mandate to support commodities with funds tapped from the CCC, the statute provided no direction, so the agency created the Market Facilitation Program from whole cloth—and without inviting the public to participate in its formulation.<sup>14</sup> Rather than case-by-case determinations, the secretary sets overall parameters for how the aid is calculated, and the funds are then distributed to applicants according to the agency's formula. In 2018, applicants could receive up to \$125,000 in payments; this was increased to \$250,000 in 2019.<sup>15</sup>

### The Agriculture Department's Coronavirus Food Assistance Program

In late March 2020, Congress passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act to stimulate markets rendered moribund by the global pandemic.<sup>16</sup> The CARES Act gives the Department of Agriculture about \$10 billion in emergency spending to “provide support to agricultural producers.”<sup>17</sup> Beyond that, there's little direction.

8. Andres B. Schwarzenberg, *Section 301: Tariff Exclusions on U.S. Imports from China* (Washington: Congressional Research Service, July 17, 2020).

9. William Yeatman, “Trump's ‘Trade Aid’ Takes Road to Serfdom Paved by Congress,” *Cato at Liberty* (blog), Cato Institute, May 29, 2019.

10. Donald Trump (@realDonaldTrump), “Our great Patriot Farmers will be one of the biggest beneficiaries of what is happening now. Hopefully China will do us the honor of continuing to buy our great farm product, the best, but if not your Country will be making up the difference based on a very high China buy. . .” Twitter post, May 14, 2019, 7:29 a.m.; and “Specific Powers of Corporation,” 15 U.S.C. § 714c.

11. Pub. L. No. 87-155, § 2, 75 Stat. 391 (August 17, 1961); and 15 U.S.C. § 713a-11. Annual appropriations are authorized for each fiscal year, commencing with 1961, to reimburse the Commodity Credit Corporation for net realized losses. The Omnibus Budget Reconciliation Act of 1987 amended Public Law No. 87-155 to authorize that the agency be reimbursed for its net realized losses by means of a current, indefinite appropriation as provided in annual appropriations acts.

12. U.S. Department of Agriculture, “USDA Announces Details of Assistance for Farmers Impacted by Unjustified Retaliation,” news release no. 0167.18, August 27, 2018.

13. Humeyra Pamuk, “U.S. Agriculture Chief Says No Plan to Extend Farm Aid to Offset Tariffs,” Reuters, October 29, 2018; and U.S. Department of Agriculture, “USDA Announces Support for Farmers Impacted by Unjustified Retaliation and Trade Disruption,” press release no. 0078.19, May 23, 2019.

14. Commodity Credit Corporation and Farm Service Agency, U.S. Department of Agriculture, “Market Facilitation Program,” 83 Fed. Reg. 44,173, 44,175 (August 30, 2018); and Commodity Credit Corporation, Agricultural Marketing Service, Food and Nutrition Service, and Farm Service Agency, U.S. Department of Agriculture, “Trade Mitigation Program,” 84 Fed. Reg. 36,456, 36,459 (July 29, 2019).

15. 83 Fed. Reg. 44,173, 44,174; and 84 Fed. Reg. 36,456, 36,458.

16. CARES Act, Pub. L. No. 116-136, H. R. 748.

17. CARES Act, Pub. L. No. 116-136, H. R. 748, Division B, Title 1.

Thus empowered (and unfettered), the agriculture secretary combined the agency's CARES Act appropriation with its remaining discretionary funds in the CCC—about \$6 billion—to create the Coronavirus Food Assistance Program.<sup>18</sup> Because the agency found “good cause,” the novel program went into effect with its announcement and there was no opportunity to solicit the public's input.

All told, the Department of Agriculture will make about \$16 billion in direct payments to agricultural producers. As with the Market Facilitation Program, the key to the agency's discretion is its determination of the math behind the payments. That is, the administration sets the formula to estimate harm due to the pandemic, pursuant to which payments will be made. Payments max out at \$250,000 per person.

## THE PERILS OF AD HOC ADMINISTRATIVE POLICY

These programs were created on the fly, and it shows. All took effect when they were announced, and public input was considered, if at all, only *after* these endeavors were up and running. Given the multiyear scope of most of the policies described above, it's unclear why agencies felt there was no time for deliberation.

Inadequate planning likely contributed to the evident uncertainty surrounding these programs. For example, there have been widespread reports about the arbitrariness of the Commerce Department's exclusion process for the national security steel and aluminum tariffs.<sup>19</sup> During a 2018 hearing, House Ways and Means Trade Subcommittee Chair David Reichert (R-WA) lamented that the process was “broken.”<sup>20</sup> Rep. Jackie Walorski (R-IN) spoke of “multiple instances of

companies whose requests for the same tariff line only differed in dimensions, yet one was approved, the other one was denied.”<sup>21</sup>

Such confusion is no less evident in the U.S. Trade Representative's process for dispensing exclusions from tariffs targeting unfair trade practices. There, too, no one seems to understand the criteria used by the government.<sup>22</sup> After studying the program, the Congressional Research Service concluded that “it is not entirely clear . . . how the process works internally.”<sup>23</sup> If a government entity can't figure out the standards, it stands to reason that regulated parties are similarly baffled.

Turning from dispensations to benefits, the Department of Agriculture's Market Facilitation Program has been grossly uneven. Between 2018 and 2019, the department made significant changes to the formula it employs to determine benefits. In 2018, payments were skewed toward soybean growers in the midwestern Corn Belt, while in 2019 the winning regions were cotton and sorghum farmers in the eastern Sun Belt. Either way, the program has been lambasted by congressional Democrats for its perceived bias in favor of conservative states.<sup>24</sup>

At best, these programs demonstrate operational problems. At worst, there's the possibility they're being used to play political games. Yet it's impossible to know for sure due to their lack of transparency.

In some instances, the administration seems recalcitrant to oversight. In October 2019, for example, the inspector general (IG) of the Commerce Department issued a management alert warning of “a lack of transparency that contributes to the appearance of improper influence in decision-making for [national security] tariff exclusion requests.”<sup>25</sup> Though the IG proposed specific

18. U.S. Department of Agriculture, “Coronavirus Food Assistance Program,” 85 Fed. Reg. 30,825 (May 21, 2020).

19. Richard Lardner and Larry Fenn, “Hundreds of Companies Excused from Steel Tariff,” Associated Press, February 15, 2019; Bryan Gruley and Joe Deaux, “The Biggest Fan of Trump's Steel Tariffs Is Suing over Them,” *Bloomberg*, February 12, 2020; and Ed Crooks and Fan Fei, “Trade War Winners and Losers Grapple with Trump Tariff Chaos,” *Financial Times*, July 23, 2018.

20. *Hearing on Product Exclusion Process for Section 232 Tariffs on Steel and Aluminum: Hearing before the Subcommittee on Trade of the Ways and Means Committee*, 115th Cong. (July 24, 2018).

21. *Hearing on Product Exclusion Process for Section 232 Tariffs on Steel and Aluminum*.

22. Lydia DePillis, “Bibles but Not Textbooks: Trump's Tariff Exemptions Pick Winners and Losers,” ProPublica, August 22, 2019.

23. Schwarzenberg, *Section 301: Tariff Exclusions*.

24. Minority Staff Report, U.S. Senate Committee on Agriculture, Nutrition, and Forestry, *President Trump's “Aid Not Trade” Policy: Skewed Payments Choose Winners and Losers, Fail to Help Farmers Hit the Hardest* (Washington: U.S. Senate Committee on Agriculture, Nutrition, and Forestry, November 2019).

25. Letter from Carol Rice (Assistant Inspector General for Audit and Evaluation) to Nazak Nikakhtar (Assistant Secretary for Industry and Analysis), October 28, 2019, <https://www.oig.doc.gov/OIGPublications/OIG-20-003-M.pdf>.

recommendations to improve transparency, the Commerce Department ignored the IG's advice.<sup>26</sup>

Elsewhere, the administration has impeded oversight. Trump has effectively disavowed the various oversight mechanisms embedded into the CARES Act, which implicates the Agriculture Department's Coronavirus Food Assistance Program.<sup>27</sup>

## CONGRESSIONAL ACQUIESCENCE

At root, these problematic programs emanate from unbounded grants of power by Congress. For the two direct-payment programs discussed above, the Agriculture Department's only statutory guidance was to support agricultural producers. Even less concrete is the dispensing power claimed by the Commerce Department and the U.S. Trade Representative—the agencies understood their authority to be implied. The upshot is that none of these programs was designed by Congress. Rather, they're all a function of agency discretion.

It's bad enough that Congress has ceded so much of its authority to the executive branch. Worse still is the fact that a critical mass of lawmakers seemingly condones the administration's attempts to further push the envelope of presidential power.

In the 2019 Consolidated Appropriations Act, for example, Congress provided more than \$4 million specifically for the Commerce Department's national security tariff exclusion process.<sup>28</sup> The same spending bill *required* the U.S. Trade Representative to continue with its Section 301 exclusion process.<sup>29</sup>

Congress has lent similarly tacit approval to the Department of Agriculture's impromptu initiatives. For the Market Facilitation Program, Congress retroactively

expanded eligibility in the 2019 Additional Supplemental Appropriations for Disaster Relief Act by eliminating an income threshold for benefits.<sup>30</sup> Many lawmakers also availed themselves of the program. For example, Senate Finance Committee Chair Chuck Grassley (R-IA) told reporters he would apply for trade aid to help his Iowa farm.<sup>31</sup>

## TROUBLING TEMPLATE FOR PRESIDENTIAL POWER

The ad hoc administrative state is an unfortunate innovation in executive power. While such action is not unprecedented, the current administration has broken new ground with the number, size, and scope of these programs.

If Congress remains passive, we can expect subsequent presidents to build on Trump's model. The template is straightforward: find a capacious or implied delegation; whip together an administrative program that maximizes discretion; and recite "good cause" to escape any procedural rigor.

Even if lawmakers engaged in robust oversight after the fact—and they haven't—Congress would remain effectively sidelined. These programs are so large and entail such significant sums that they incur tremendous reliance interests the moment they go into effect (which, in these cases, is upon their announcement in the *Federal Register*). As a result, it's a prohibitively huge political lift to manage these programs legislatively after they've started operating.

Ideally, Congress would narrow its capacious delegations and thereby control the ad hoc administrative state. The second-best option would be for lawmakers to pass statute-specific mechanisms whereby agencies could not institute these sorts of programs without first obtaining permission from both chambers of Congress.

26. Rachel F. Fefer et al., *Section 232 Investigations: Overview and Issues for Congress* (Washington: Congressional Research Service, April 7, 2020).

27. Kyle Cheney and Connor O'Brien, "Trump Removes Independent Watchdog for Coronavirus Funds, Upending Oversight Panel," Politico, April 7, 2020.

28. Consolidated Appropriations Act of 2019, Pub. L. No. 116-6.

29. Consolidated Appropriations Act of 2019.

30. Additional Supplemental Appropriations for Disaster Relief Act of 2019, Pub. L. No. 116-20.

31. Eric Kleefeld, "GOP Senator Applies for Farm Aid, but Maintains Support for Trump's Trade War with China," Vox, May 25, 2019.