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Protectionism or National Security?

The Use and Abuse of Section 232

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EXECUTIVE SUMMARY

President Biden took office at the height of modern American protectionism. The trade policy legacy he inherited from the Trump administration puts the United States at a crossroads. Will Biden go down the problematic path of executive overreach like his predecessor, or will he forge a new path? We may not need to wait long to find out. In his first trade action, President Biden reinstated tariffs on aluminum from the United Arab Emirates under Section 232 of the Trade Expansion Act of 1962, which authorizes the president to impose tariffs when a certain product is "being imported into the United States in such quantities or under such circumstances as to threaten to impair national security." Though infrequently used in the past, Section 232 was a favored trade tool of the Trump administration, which was responsible for nearly a quarter of all Section 232 investigations initiated since 1962. While Congress has constitutional authority over trade policy, Section 232 gives the president broad discretion to enact protectionist measures in the name of national security.

Why is this law a problem? First, the statute's lack of an objective definition of "national security" permits essentially anything to be considered a threat, regardless of the merits. Second, the law's lack of detailed procedural requirements encouraged the Trump administration to cut corners in applying the law, thus breeding cronyism and confusion. Third, President Trump took advantage of the law's ambiguity to shield key Section 232 findings from Congress and the public, undermining both transparency and accountability.

The Trump administration's abuse of the rarely used Section 232 has allowed the statute to become an excuse for blatant commercial protectionism, harming American companies and consumers and our security interests. It's unclear whether the Biden administration will continue this troubling trend or seek reform. The best course of action would be the latter: Biden should avoid using Section 232 and support congressional efforts to rein in presidential power, thus ensuring an end to the calamitous episodes that were common during the Trump era.

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INTRODUCTION

Washington today appears engulfed in peak partisanship, but the last four years of Trump administration trade policy unintentionally united Democrats and Republicans in a common cause: curtailing the president's power to impose "national security" tariffs.

In 2017, the Trump administration dusted off a scarcely used statute, Section 232 of the Trade Expansion Act of 1962, to fight its numerous trade wars. Those misguided efforts not only cost us allies but also hurt our economy. In ramping up Section 232, which allows the president to "adjust" imports that "threaten to impair the national security," President Donald Trump tested the limits of both executive authority and the powers delegated to the president by a Congress left out of the process.[1] Both parties expressed opposition to Trump's Section 232 adventurism but struggled to rein him in.

This paper explains the three ways that the Trump administration used and abused Section 232: offering an overly broad interpretation of "national security" so that essentially anything could be considered a threat; cutting procedural corners to achieve pre-determined outcomes, thus generating confusion abroad and cronyism at home; and defying Congress through a lack of transparency and accountability. As a result, the administration used "national security" to cover for rote protectionism, harming U.S. producers and consumers in the process.

With several Section 232 tariffs still in place, and the status of other investigations unclear, the law presents an early test for the Biden administration and a signal about its future trade policy plans. So far, Biden has not revealed his strategy for Section 232 but did rescind Trump's last-minute plan to turn tariffs on imports from the United Arab Emirates (UAE) into quotas. Observers are left with the following questions:

- Will President Biden rescind some or all current Section 232 tariffs on steel and aluminum or keep them (and related "exclusion" systems) in place?
- Will Biden follow President Trump's lead and use Section 232 to further progressive trade policy objectives under similarly dubious "national security" grounds, or will he support congressional efforts to rein in this power?

While the UAE decision raises some eyebrows, it might not indicate the Biden administration's trade strategy or views on Section 232. President Biden's proclamation effectively mirrored the Trump administration's novel approach to imports and "national security," treating the former as a serious and obvious threat to the latter. However, when asked about the action, White House press secretary Jen Psaki said that the Biden team was still evaluating all of the Trump administration's trade actions and that the decision to reimpose tariffs on the UAE was made "on the basis of foreign policy issues unrelated to trade."[2]

There may be some truth to that, given that the Trump administration concluded a deal with the UAE to sell F-35 fighter jets and armed drones in its last days in office, a move that seems to have coincided with the decision to replace the Section 232 tariffs with quotas.[3] Thus, whether President Biden's UAE proclamation was boilerplate or a sign of future U.S. tariff policy remains to be seen.

Regardless, we argue that Biden should distance himself from this failed and regressive trade policy and that Congress should take immediate steps to rectify the damage done by the Trump administration's harmful actions with respect to Section 232 and restrain those of the current president and future presidents to ensure such episodes are not repeated.

BACKGROUND

With the flurry of Trump administration executive actions that imposed tariffs, it may be easy to forget that the Constitution gives Congress "exclusive and plenary" authority over regulating commerce with foreign nations.[4] In fact, for much of this country's history, Congress regulated trade directly via

its Article I, Section 8 authority and specific tariff acts. Only in the early 20th century did lawmakers start delegating their tariff authority to the executive branch, whether to promote or restrict international trade.[5]

As an example of the latter, Section 232 of the Trade Expansion Act of 1962 permits the president to take action to restrict imports for national security reasons and establishes the general process for doing so. The Commerce Department initially investigates—at the request of a U.S. department or agency, interested party, or the president—whether an article (defined as any commodity, whether grown, produced, fabricated, manipulated, or manufactured) is "being imported into the United States in such quantities or under such circumstances as to threaten to impair national security." Then, within 270 days, the secretary of commerce reports negative or affirmative findings on the issue and, if affirmative, makes a recommendation to the president on what actions can be taken to "adjust" imports of the article and thereby remedy the national security threat. If the president concurs that these imports threaten national security, he must determine "the nature and duration" of the "import adjustment" remedy within 90 days of receiving the report and act within 15 days after he decides to impose a remedy.[6]

Before imposing a remedy, however, the president may instead enter negotiations to limit or restrict "the importation into, or the exportation to, the United States of the article that threatens to impair national security" within 180 days of deciding to act after receiving findings from the commerce secretary.[7] There is no language to suggest that these talks can continue past the 180-day period, but the statute is ambiguous in this regard. If negotiations are not successful, the president may take other actions, including import restrictions.

As legal scholar Kathleen Claussen explains, "security exceptionalism in U.S. trade law is the product of misunderstood statutes that have been unmoored from their original purposes."[8] Congress passed Section 232 at the height of the Cold War, when national security issues were paramount in national politics.[9] Relative to today, lawmakers at the time also harbored greater faith in presidential self-restraint. In line with these expectations, previous presidents rarely exercised their Section 232 powers to impose import restrictions and, with one exception, never for a product other than petroleum.[10] Table 1 provides a summary of investigation outcomes.

President Trump, on the other hand, exercised little of his predecessors' restraint during his administration. In all six completed Section 232 investigations, Trump's Commerce Department found a national security threat (though it only released official reports in two of them):

- The president concurred and imposed import restrictions in the steel and

"Previous presidents rarely exercised their Section 232 powers to impose import restrictions."

Table 1

Section 232 investigations, 1962–2020

Status	Number
Negative	16
Affirmative, action taken*	8
Affirmative, no action taken	4
Affirmative, negotiations**	3
Terminated	2
Ongoing	1
Total	**34**

Source: Bureau of Industry and Security, Department of Commerce, https://www.bis.doc.gov/; and author's calculation.

*A formal decision on Section 232 was deferred in metal-cutting and metal-forming machine tools (1983), and voluntary restraint agreements (VRAs) were negotiated instead; VRAs came into force in 1986.

**For transformers and certain grain-oriented electrical steel parts, no *Federal Register* notice on the findings of the investigation was issued.

> "Prior to the Trump era, the last Section 232 action was in 1986."

aluminum cases (two of the eight import adjustment actions ever taken under Section 232).

- On automotive goods, the Office of the United States Trade Representative (USTR) was directed to negotiate with Japan and the European Union (EU), and on titanium sponge (an important input in military aircraft), a working group was established in early 2020 to reach an agreement on securing access to the product in times of emergency, given that 94.4 percent of U.S. imports come from Japan.[11] In both cases, President Trump left open the possibility for future, unnamed actions.
- In another investigation, on transformers and transformer materials (components used in the electrical grid), USTR consulted with Mexico to establish a monitoring regime for exports of electrical transformer laminations and cores made of non-North American grain-oriented electrical steel, though an affirmative finding was never officially announced.[12] Also, in this case, USTR noted that consultations with Mexico were conducted "pursuant to their Joint Statement of May 17, 2019," which refers to the agreement reached in the U.S.-Mexico-Canada agreement to lift Section 232 tariffs on steel and aluminum, a different investigation altogether.
- In the uranium case, Trump did not concur with the commerce secretary's national security finding but established a working group that recommended bolstering the domestic industry through primarily non-import measures (outside of Section 232).[13]

One Section 232 investigation was terminated in December 2020 following a request from the petitioner.[14] One other case remains ongoing (with the deadline for the Commerce Department to deliver a report on February 27, 2021), and the Biden administration has yet to comment on it. Table 2 provides a summary of these investigations.

Prior to the Trump era, the last Section 232 action was in 1986.[15] In less than four years of Section 232's 58-year existence, however, the Trump administration was responsible for 24 percent of all investigations, 40 percent of all affirmative national security findings, and 25 percent of all actions.

Beyond the frequency of Trump's resort to Section 232 is the scope of investigations and actions taken. Past actions took the form of quotas, license fees, and embargoes on a narrow range of products (e.g., crude oil from Libya). President Trump, however, was the first to use tariffs as a remedy—and did so broadly, covering essentially all primary steel and aluminum products from almost all countries in his first Section 232 action. Other investigations were similarly broad.

Table 2

Status of Trump administration Section 232 investigations

Investigation	Initiated	Department of Commerce finding	Status
Steel	2017	Affirmative	Action taken
Aluminum	2017	Affirmative	Action taken
Automobiles and auto parts	2018	Affirmative	Negotiations
Uranium ore and products	2018	Affirmative	No action taken
Titanium sponge	2019	Affirmative	Negotiations
Transformers and certain grain-oriented electrical steel parts	2020	Affirmative	Negotiations
Mobile cranes	2020	-	Terminated
Vanadium	2020	-	Ongoing

Sources: Congressional Research Service, "Section 232 Investigations: Overview and Issues for Congress," August 24, 2020; and press reports.

From the start, Section 232 was a key weapon in the president's trade war and, by his own admission, a way to gain leverage in trade negotiations—purposes far removed from congressional intent. Such use is presidential power run amok. The Trump administration abused Section 232 by broadening what can be considered a "threat to national security."

TRUMPED UP SECURITY THREAT

President Trump in 2017 ordered the Department of Commerce to investigate the putative "national security" threats posed by imports of steel and aluminum articles.[16] After receiving the department's affirmative findings and report, the president imposed tariffs of 25 percent on steel and 10 percent on aluminum imports on March 23, 2018.[17] As his first actions under Section 232, the steel and aluminum tariffs provided a troubling glimpse into how the administration viewed the scope of the statute.

Because Section 232 provides no definition for "national security," the statute allows for an interpretation of the term that is broadly disconnected from reality and prior U.S. government practice—precisely what the Trump administration did with respect to steel and aluminum. First, the U.S. military requires only 3 percent of total domestic steel and aluminum production—the primary basis for Trump's defense secretary at the time, James Mattis, to suggest that broad-based import restrictions (as opposed to "targeted tariffs") were unnecessary.[18] Second, imports originate predominantly from reliable military allies, while countries like China and Russia are small players in the U.S. market. Yet the administration ignored the allied status of our trading partners—unlike all prior Section 232 determinations—and applied tariffs globally. Is steel from our top import partner, Canada, a threat to our security? The administration seemed to suggest as much, despite the fact that Canada's industrial base is incorporated into U.S. defense planning by law.[19]

Worse still, the administration's own words and actions belied the supposed "national security" basis for these tariffs. For example, Canada and Mexico's exemptions from the tariffs were made contingent on the conclusion of the renegotiation of the North American Free Trade Agreement (NAFTA). In a television interview, then Commerce Secretary Wilbur Ross explained that the Section 232 tariffs were "motivation" for Canada and Mexico to make a "fair" deal on NAFTA.[20] Obviously, the "fairness" of NAFTA has nothing to do with protecting domestic steel and aluminum producers from imports (and thus, per the administration, national security).

Similarly, the administration used the tariffs to secure modest concessions from the Korean government during the Korea-U.S. trade agreement renegotiation talks that had begun months earlier.[21] Trump subsequently doubled Section 232 tariffs on Turkish steel imports in response to the Erdoğan government's moves in Syria and continued imprisonment of American pastor Andrew Brunson, only to lower them again a few months later.[22]

These and other actions revealed that the Trump administration used Section 232 not to protect national security but to gain leverage in a seemingly unending series of bilateral negotiations—a conclusion reinforced by similar talks arising from subsequent Section 232 actions on automotive goods and titanium sponge.

Eventually, several trading partners were exempted from the steel and aluminum tariffs, with some agreeing to quotas instead of tariffs, as shown in Table 3.

Despite these agreements, President Trump continued to use the threat of Section 232 tariffs against several of these countries. For example, on December 2, 2019, he announced that he would restore tariffs on imports from Argentina and Brazil due to alleged currency devaluations.[23] In mid-2020, he threatened to reimpose tariffs on aluminum from Canada (only to relent a few months later)—defended under a bilateral agreement that requires trade monitoring so that if "imports of aluminum or steel products surge meaningfully beyond historic volumes of trade over a period of time" duties can be reinstated following consultations.[24]

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Table 3

Country exemptions for Section 232 steel and aluminum tariffs

Country	Steel	Aluminum	Date
Argentina	Quota	Quota	May 31, 2018
Australia	Permanent exemption	Permanent exemption	May 31, 2018
Brazil	Quota	-	May 31, 2018
Canada	Exemption with monitoring	Exemption with monitoring	May 19, 2019
Mexico	Exemption with monitoring	Exemption with monitoring	May 19, 2019
South Korea	Quota	-	April 30, 2018

Source: Congressional Research Service, "Section 232 Investigations: Overview and Issues for Congress," August 24, 2020.

> "Broad interpretation of national security gives too much power to presidents to decide what threatens national security, making such actions subject to political expediency."

It is hard to see how such actions were taken to address legitimate national security concerns and not simply to protect U.S. industry from competition or to achieve other objectives of the Trump administration.

The administration's interpretation of what constituted a threat to "national security" was dubious at best and dangerous at worst. Economic threats are obviously much broader than national security threats and can be justified by far more—and far more questionable—metrics (e.g., jobs). The conflation of economic security and national security also makes Section 232 ripe for abuse, and by equating a single U.S. industry's financial prospects with the overall national security, imports of almost anything can be said to threaten national security (and thus be restricted). Judge Claire R. Kelly of the U.S. Court of International Trade (USCIT) asked Department of Justice lawyers if "the President wants to worry about jobs in the peanut butter industry and that somehow, he can make a national security connection and have some sort of embargo on peanut butter . . . he could do that"?[25] The government lawyers essentially admitted that courts could not question an executive branch determination that peanut butter imports were a national security threat.[26]

Finally, by suggesting that undefined "economic security" equals national security, a president's interpretation of the law allows for a wide array of future claims—even those unrelated to a specific industry. For example, presidents could claim that trading with countries without a minimum wage or certain environmental regulations harms our national security, and then they could take trade actions, such as an embargo or tariffs, to remedy this "threat." Such a broad interpretation of national security gives too much power to presidents to decide what threatens national security, making such actions subject to political expediency.

Unfortunately, Congress has opened the door to precisely this type of abuse by failing to define, via objective and verifiable metrics, what constitutes a "national security threat"; directing the president to "give consideration" to the "economic welfare" (including that of individual domestic industries) in the statute, Section 232(d); and failing to require the prompt publication of the Commerce Department's findings in this regard.

CUTTING PROCEDURAL CORNERS

The Trump administration also flouted the law through procedural actions—particularly on modifications of or exemptions from tariffs and publication of the reports supporting them—that take advantage of the statute's ambiguity. For example, Trump claimed that the law allowed him essentially unfettered discretion to modify an import adjustment action if the secretary of commerce thinks conditions have changed—an interpretation that conveniently allowed him to avoid the law's procedural requirements for imposing new tariffs. In particular, Section 232 requires

an investigation by the commerce secretary and affirmative findings of a national security threat. It then gives the president 90 days to concur with the secretary's findings and "determine the nature and duration of" an action to remedy the threat to national security. On making this determination, the president has 15 days to act to adjust subject imports.[27]

Trump's interpretation of the law, however, sidestepped these procedural safeguards and justified his abrupt "modification" of tariffs on Turkish steel imports in August 2018, increasing them from 25 percent to 50 percent without an investigation and well beyond the deadlines for action.[28] For authority, Trump pointed to the language in his prior proclamation, which stated:

> The Secretary shall continue to monitor [steel and aluminum imports] . . . with respect to the national security. . . . The Secretary shall inform me of any circumstances that in the Secretary's opinion might indicate the need for further action under section 232.[29]

After the tariffs went into effect, an importer of Turkish steel sued the Trump administration in the USCIT, arguing (among other claims) that the president cut corners in the procedures required by law. In November 2019, a unanimous three-judge panel agreed that "the President's expansive view of his power under Section 232 is mistaken, and at odds with the language of the statute, its legislative history, and its purpose."[30]

Despite the court's order that the Trump administration's "expansive view" of presidential power is "mistaken," however, President Trump soon advanced an *even more expansive* view of his power. On January 24, 2020, Trump announced that he was broadening the original "national security" tariffs to include "derivative" steel and aluminum products such as nails, pins, and staples.[31] Again, he pointed to the original proclamations as his source of legal authority[32]—the same justification that the USCIT had denied weeks earlier. Furthermore, the tariffs were scheduled to go into effect on February 8, 2020, just 16 days after the announcement, leaving little room for public consultation and thorough consideration of the impact of such actions. Several companies filed lawsuits against these tariffs at the USCIT, challenging the actions being taken outside Section 232's prescribed 90-day window, the lack of public consultations, and disrespect to their due process. Since February 13, 2020, the USCIT has granted injunctions to these companies, preventing U.S. Customs and Border Protection from collecting tariffs on their "derivative" steel and aluminum imports, until it hears their cases.[33]

Simply put, not only did President Trump ignore the court as he rushed these tariffs out the door without procedures required by Congress, but he also injected the entire Section 232 process with uncertainty as businesses and trading partners clamored to respond. Just the announcement of tariff actions has been shown to rattle stock markets.[34] The "reinstatement" of aluminum tariffs against Canada in August 2020 is also illustrative of the Trump administration's disregard for procedural requirements. The administration argued that such action was allowed under the agreement to lift the initial tariffs in May 2019. The agreement said that the parties could enter into consultations and then take action if "imports of aluminum or steel products surge meaningfully beyond historic volumes of trade over a period of time."[35] The Canadian government, however, countered that no such negotiations occurred, and Canadian Deputy Prime Minister Chrystia Freeland called the decision "unnecessary, unwarranted and entirely unacceptable."[36] After Canadian threats to retaliate, the tariffs were quickly lifted, but any goodwill achieved by the implementation of the United States–Mexico–Canada Agreement months earlier quickly dissipated.

Equally concerning in this regard is the process by which domestic industry was granted exemptions from tariffs. In addition to international exemptions for key trading partners, the Trump administration set

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up a tariff exclusion process for domestic industry, which also allows U.S. companies to object to these requests.[37] The process was no less arbitrary, erratic, and lacking in transparency than the reinstatement of tariffs and the opaque manner by which "negotiations" were conducted. In October 2019, the U.S. Department of Commerce's Office of the Inspector General issued a memorandum stating that "the Section 232 exclusion request review process is neither transparent nor objective" and cited concerns of "the appearance of improper influence in decision-making for tariff exclusion requests." For example, "of the more than 100 meetings and telephone conversations between Department officials and interested parties that we examined for the period March 1, 2018, through March 31, 2019, none had an official record of the subjects discussed during the meeting."[38] This lack of transparency should have raised an alarm.

The volume of requests submitted amplify concerns of abuse and crony capitalism. Recent estimates suggest that 169,929 steel and 19,288 aluminum exclusions requests have been made as of September 2020.[39] For steel requests, 56 percent were approved and 15 percent denied, while for aluminum requests, 58 percent were approved and 11 percent denied. Many are still pending. Economist Christine McDaniel has observed that objections from industry play an important role in the denial of requests, since the Commerce Department will deny requests if the product is domestically available.[40] Four major steel-producing companies, Nucor, US Steel, Timken, and AK Steel, have made up more than half of all objections, though as McDaniel notes, "it is not clear whether Commerce confirms that the steel or aluminum were actually produced and delivered to the US manufacturer that filed (and was denied) the exclusion."

That few companies benefit from these tariffs while the rest of the economy shoulders the costs is enough to question the reasonableness of such actions.

Finally, the Trump administration abused statutory ambiguity with respect to the formal publication of Commerce Department findings and recommendations in Section 232 investigations. In particular, the agency's report must be submitted to the president and "published in the *Federal Register*" (minus confidential information), but the statute provides no time frame for doing so. As a result of this loophole, Section 232 reports on automotive goods, uranium, and titanium sponge have been completed but remain confidential, even as the Commerce Department found a national security threat and the president took "action" thereon. It is precisely because of the law's open-endedness that actions related to it become so difficult to track.

In transformers and certain grain-oriented electrical steel parts, the Commerce Department made no official notice of an affirmative finding or the delivery of a report to President Trump, but a news report stated that the report had been issued and that the administration had pursued a "remedy" in the form of negotiations with Mexico.[41] Thus, those accused of undermining national security (by importing subject goods) and potentially facing the closure of their businesses via new U.S. import restrictions have been unable to see the allegations against them. As the president of the American International Automobile Dealers Association put it upon the non-release of the Section 232 report on automotive goods in 2019, "if you're subjecting products that my members sell to tariffs and accusing me of potentially being a national security threat, I think the least you can do is let them know the outcome."[42]

An additional problem with Section 232 is that it is not clear on what happens if the Commerce Department does not submit a report to the president within 270 days. This is the case of the investigation into vanadium, which was initiated on June 2, 2020. The 270-day period for the completion of that investigation ended on February 27, 2021. It could be argued that after 270 days have lapsed, the Commerce Department would have to initiate a new investigation. But there still appears to be substantial leeway for the Biden administration to simply restart the clock.

Congress has raised questions about these actions and even sought to overturn one, but like the court rulings, these calls have been ignored.

DEFYING CONGRESS'S CALL FOR ACCOUNTABILITY

President Trump abused executive privilege to keep Congress in the dark on Section 232—in violation of not one but two laws. The 2018–19 investigation of automotive goods shows how.

On May 23, 2018, the Trump administration initiated a Section 232 investigation on imports of automobiles and automotive parts.[43] The Commerce Department provided its report to the president, and President Trump concurred with the report's findings in May 2019 that auto imports threaten to impair national security.[44] Rather than impose tariffs, however, the president chose to pursue negotiations with exporting countries, thus retaining even more discretion to impose tariffs or take any other actions if negotiations subsequently failed.[45]

This "threat," however, was groundless. Unlike the steel and aluminum cases, for example, the entire U.S. industry opposed Section 232 action on automotive goods. General Motors sells more vehicles in China than in the United States,[46] and the domestic industry—supported by imports and foreign investment—has been thriving by any conceivable metric, including jobs.[47] Indeed, foreign automakers have invested over $75 billion in the U.S. market since 1982.

So, what was the justification for Section 232 action on autos? We don't know because President Trump refused to release the report from the secretary of commerce, despite a law—passed almost six months after the report was completed—requiring the Commerce Department to do so.[48]

The publication deadline was attached to a spending bill, so Trump had little choice but to sign the measure into law. However, just before the congressional deadline expired, the Trump administration claimed that the Commerce Department's report was protected from disclosure while the president pursued open-ended trade talks, permitted under Section 232(c)(3), with major automotive exporters like Japan and the EU.[49]

The administration claimed that as long as those negotiations were ongoing, the report was protected by executive privilege, which empowers the president to withhold information from the other branches of government. In particular, the Office of Legal Counsel argued that the secretary of commerce's report "is a quintessential privileged presidential communication" that includes advice to the president from his cabinet and is "protected by the deliberative process component of executive privilege, because it reflects a recommendation made in connection with deliberations over the President's final decision."[50] Furthermore, the Office of Legal Counsel argued that disclosure "could compromise the United States' position in ongoing international negotiations" (i.e., those with Japan and the EU).

Both points are questionable. On the former, other Section 232 reports—including those that the Trump administration issued for steel and aluminum—contained similar "presidential communications" yet were published in full (with only business proprietary information redacted) in advance of presidential action. On the latter, administration officials' consultations with Congress on other trade negotiations and matters of national security did not cause problems, and there is no clear reason why Section 232 negotiations are special. That the U.S.-Japan "Phase One" negotiations and President Trump's time in office have concluded further undermines this privilege claim, yet the Section 232 report on automobiles remains unpublished.

ASSESSING THE ECONOMIC IMPACT OF PROTECTING "NATIONAL SECURITY"

In exercising presidential authority under Section 232, the Trump administration equated tariff protection for specific industries with the overall economic and national security of

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the United States, without regard for the tariffs' actual impact. President Trump declared repeatedly, for example, that tariffs on steel and aluminum imports protected the whole country and all American workers and generated substantial revenue (paid, of course, by foreigners).[51]

Such claims are unsupportable. A 2018 study by the Trade Partnership estimated that the cost of Section 232 actions on steel and aluminum would reduce U.S. gross domestic product (GDP) by 0.2 percent annually, coupled with a reduction of both U.S. imports and exports for the first one to three years that the tariffs, quotas, and retaliation were in place. And contrary to Trump's claims that the tariffs would boost jobs, the authors estimated that the net job impact of the tariffs would be negative, with 16 jobs lost for every steel/aluminum job gained.[52] Their estimates include retaliation from our trading partners. The total value of retaliation announced by Canada, India, the EU, Russia, China, Japan, Turkey, and Mexico would be imposed on upward of $35.6 billion of U.S. exports. Although there are fewer retaliatory tariffs in effect today as a result of the country exemptions, the legality of the existing retaliatory tariffs remains disputed, but this has not stopped the EU, China, Turkey, India, and Russia from maintaining upward of $9 billion in tariffs on U.S. exports.[53] Even without including the effects of retaliation, economists Lydia Cox and Kadee Russ estimate that the rise in input costs due to the Section 232 tariffs led to 75,000 fewer jobs in U.S. manufacturing by mid-2019.[54]

Furthermore, Americans have paid for most of the tariff costs. Economists Mary Amiti, Stephen J. Redding, and David E. Weinstein found that "the Trump administration's tariff changes have been almost entirely passed through into domestic prices, leaving exporter prices unchanged."[55] Economists Brian Kelly and Gareth Green, looking only at the steel industry, came to a similar conclusion, showing that importers have borne the full incidence of tariffs and that, furthermore, steel prices actually rose *before* tariffs were implemented, as domestic producers prepared to cash in.[56] The economic reality has led to such head-scratching headlines as "I Support Trump's Tariffs but Need an Exemption," when the CEO of specialty-metals producer of Allegheny Technologies stated that "Buying American isn't an option."[57] Or "The Biggest Fan of Trump's Steel Tariffs Is Suing over Them," when JSW Steel USA, whose president and CEO publicly supports the tariffs, sued the administration for failing to exempt his company from paying import duties, contributing to their plants operating at unprofitable levels.[58]

As these headlines indicate, the steel and aluminum tariffs have not brought about economic revival in those industries and in some cases made things worse, leading to layoffs and plant closures.[59] While steel prices and domestic supply rose in the wake of President Trump's tariff announcement, demand was weak and tariff-exempt foreign steel continued to arrive to the United States, leading to oversupply and depressed prices through 2019.[60] The effects of the tariffs have been disastrous for some of the largest domestic steel producers: U.S. Steel, for instance, registered losses of $642 million in 2019 and from November 2019 to February 2020 laid off more than 1,650 workers as it scaled back production and idled facilities in Michigan and northwest Indiana.[61]

Indeed, Trump admitted when expanding the Section 232 tariffs to steel and aluminum "derivates" that the tariffs had not achieved the administration's original capacity utilization goals, in large part because tariff-induced steel and aluminum price increases caused industrial consumers to purchase "derivative" products from abroad, thereby hurting domestic derivative products producers and in turn depressing domestic demand for the tariffed metals.[62] This was an entirely predictable outcome.

Heightening the cause for concern, economist Chad Bown from the Peterson Institute for International Economics notes that while the economic impact of the recent expansion to derivative products was much smaller than the original action, it opened the door for further

cascading protectionism as downstream industries lobbied for protection.[63] In fact, as early as 2016, economists Aksel Erbahar and Yuan Zi documented that increased protection of inputs increased the probability that downstream users would petition the government for additional protection.[64]

Indeed, the Department of Commerce's initiation of a Section 232 investigation on vanadium imports represents a particularly egregious case of this phenomenon. Vanadium is a special type of metal that is used to produce metal alloys and often used to strengthen steel. Given that it has so many uses, including for national security (e.g., aircraft, ballistic missiles, and jet engines), the Department of the Interior has designated vanadium as a critical mineral.[65] The Commerce Department notes that U.S. demand for vanadium, which has strategic applications in the aerospace, energy, and construction industries, is "supplied entirely through imports."[66] Moreover, the two petitioning firms process but do not mine vanadium and are therefore not representative of a domestic industry that could claim material harm from imports.[67] Altogether, the investigation could result in disguised protection to a nascent U.S. industry, though Trump took no action by the end of his term. It remains to be seen what Biden will do with this ongoing case.

The expansive application of Section 232 authority raises questions about the long-term impact of these tariffs as more industries clamor for protection, and there's little that our trading partners or Congress seem to be able to do about it.

IT'S TIME FOR CONGRESS TO ACT

Congress has taken notice of Section 232, and there have been various reform proposals, but so far, no efforts have succeeded. Sen. Chuck Grassley (R-IA) stated that reforming Section 232 was a key goal in 2020.[68] There also have been numerous bills with broad bipartisan support.[69] Grassley sought to reconcile two bills, the Bicameral Congressional Trade Authority Act of 2019, cosponsored by Sens. Pat Toomey (R-PA) and Mark Warner (D-VA), and the Trade Security Act, cosponsored by Sens. Rob Portman (R-OH), Doug Jones (D-AL), Joni Ernst (R-IA), Lamar Alexander (R-TN), Dianne Feinstein (D-CA), Deb Fischer (R-NE), Kyrsten Sinema (D-AZ), and Todd Young (R-IN). Both bills include several important reform ideas, but the Toomey-Warner bill would give Congress a larger role in the process. Taking these bills and President Trump's actions into consideration, we offer the following recommendations:

- *Repeal Section 232:* This Cold War statute is superfluous given the expansion of presidential trade and other national security powers in laws enacted after 1962. Thus, striking Section 232 from the U.S. Code would eliminate the potential for abuse while leaving national security protected.

If Congress lacks the appetite for full repeal, it should consider the following reforms:

- *Resolution for approval:* Congress could amend the law to retake final say over Section 232 tariffs. Under this framework, the president would propose a tariff, but it would only take effect following a resolution of approval passed by both chambers of Congress. This approach is in the Toomey-Warner bill (three other bills also proposed something similar).[70] Other proposals, such as those that would allow for automatic implementation of presidential import actions unless Congress passed joint "disapproval resolutions," would likely prove to be little better than current law (due to inevitable congressional disagreement) and thus should be avoided. The Trade Security Act includes a disapproval resolution.[71]
- *Provide for judicial review:* Much of the Trump administration's Section 232 mischief resulted from the Supreme Court's refusal to review the president's statutory powers—unless Congress expressly calls for such review. As long as Section 232

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> "As long as Section 232 does not expressly provide for judicial review, courts will adhere to precedent and be highly deferential of presidential invocations of 'national security.'"

does not expressly provide for judicial review, courts will adhere to precedent and be highly deferential of presidential invocations of "national security."

- *Narrow what constitutes "national security":* A primary problem with Section 232 is that it does not define "national security." Although the Constitution vests the president with independent authority to protect "national security," only Congress is authorized to regulate international trade (and so should dictate the terms by which the president may impose "national security" import restrictions). Thus, lawmakers should repeal Section 232(d) to clarify that "national security" is not coterminous with "economic security" (thus permitting rote protectionism under the guise of national defense) and replace this provision with one that sets objective benchmarks for when imports may constitute a national security threat (e.g., when current Defense Department needs exceed half of domestic production *and* less than half of imports come from U.S. allies). Lawmakers should also incorporate this standard into Section 232(b), which currently requires the secretary of commerce to initiate an "appropriate investigation" upon receiving any request, no matter how baseless, from any "interested party." In this regard, Congress could adopt language that parallels the U.S. antidumping law's standard for initiation and thus permit the initiation of a Section 232 investigation where a petition provides a "reasonable indication" of a "national security" threat (as amended above).
- *Move Section 232 investigations to an independent agency:* The Commerce Department is an executive branch agency whose objective is to support domestic industries, not national security, and whose leadership is subject to direct presidential management—factors that appear to have played a role in the department's Trump-era Section 232 investigations. Congress should insulate Section 232 investigations from presidential management by moving this function to the International Trade Commission, which has extensive experience with determining whether imports injure domestic industries and whose leadership cannot be fired "at-will" by the president.
- *Include a public interest provision:* Just as some countries' antidumping laws contain a "public interest test," which allows duties to be blocked if they are contrary to the broader public interest, so too should Section 232.[72] This provision would preempt cascading protectionism by making it mandatory for the secretary of commerce to consider complex downstream effects of trade actions. Just like in antidumping investigations, Section 232 cases feature conflicting interests between domestic and foreign producers, between domestic producers and downstream users (which can include the U.S. government), and between governments.[73] Since investigations may be requested by any "interested party" seeking protection (regardless of the merits), the default outcome will be suboptimal to the country as a whole if the government does not assess a proposed remedy's effects not only on the industry but also on all other affected groups, particularly other domestic manufacturers and U.S. allies.
- *Eliminate procedural loopholes:* Section 232's ambiguity allows the president to avoid publishing a report and to use "negotiations" to keep it secret (even from Congress) or threaten future import actions indefinitely. Even when negotiations are concluded, the president appears to have unlimited authority to act again if the agreement is not fulfilled or deemed ineffective. Congress should eliminate these problems by providing firm deadlines for both the publication

of a nonconfidential version of the Commerce Department report and the completion of international negotiations.

A WORD OF CAUTION FOR PRESIDENT BIDEN

Any legislative changes would almost certainly require presidential approval, as veto-proof majorities are rare. Thus, President Biden would need to agree to limit his own trade powers for necessary improvements to Section 232 to take effect. Such action may prove politically difficult due to Biden's need to show quick "results" in 2021 and a shift in congressional priorities with a now Democratic-led Senate. For example, Biden has promised to impose carbon tariffs (a "carbon adjustment fee against countries that are failing to meet their climate and environmental obligations") in concert with heightened U.S. climate regulations, and such actions may be higher on the administration's legislative to-do list. Furthermore, given the current ease of imposing Section 232 tariffs without Congress and calls by certain progressives to use the law to advance their climate change goals, President Biden may find such actions (and thus refusal to embrace Section 232 reforms) too difficult to resist.[74]

That course of action would be a grave mistake. First, bipartisan Section 232 reform is just the type of policy that would support Biden's campaign for national unity and against presidential overreach, while controversial unilateral climate tariffs would contradict those statements, as well as those on the damage, dubiousness, and inefficacy of Trump's "national security" tariffs. Second, Section 232 reform would find political support in the vast majority of Democratic voters who now support trade and oppose protectionism—protectionism that carbon tariffs could very well become, given the long history of domestic industries turning well-meaning regulatory policies into anti-competitive blockades. As Biden's climate plan—or any other plan implemented via Section 232—becomes less about legitimate policy and more about insulating political favorites from fair international competition, it would lose credibility not only with American voters but also with our trading partners—precisely the type of Trumpian outcome a Biden administration has promised to avoid.

To distance himself from this failed policy tool, President Biden should quickly lift Section 232 tariffs on steel and aluminum. He should also end the investigation on vanadium, which he could do by declaring that the national security concern is over, thus terminating the power to act without a new investigation or finding by the Commerce Department. He should also request that the Commerce Department publish all reports that have not yet been released and issue a proclamation stating that he will not pursue further negotiations in relation to the investigations on automobiles, titanium sponge, and transformers and certain grain-oriented electrical steel parts. Finally, President Biden should support Section 232 repeal or reform to prevent such calamitous episodes from happening again.

CONCLUSION

During the Trump administration, eight investigations were initiated under Section 232 on steel, aluminum, automobiles, uranium ore, titanium sponge, grain-oriented electrical steel, mobile cranes, and vanadium. One of these investigations remains ongoing, and three resulted in negotiations, two of which did not produce a result by the end of Trump's term. While President Trump was not the first to use Section 232, he will certainly not be the last if no action is taken.

Though the Constitution gives Congress "exclusive and plenary" authority to regulate trade, the Trump administration shut lawmakers out of Section 232 tariffs. Even if courts can check a president's worst excesses, that won't stop future presidents from trying. Relying on presidential restraint is not enough. Congress must reassert itself, and President Biden should accept its decision.

"While President Trump was not the first to use Section 232, he will certainly not be the last if no action is taken."

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