

National Foundation for American Policy

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New Research: Section 232 An Unconstitutional Delegation of Power to President; Tariffs on National Security Grounds Cost Workers and Consumers

Congress May Need to Act to Reform U.S. Trade Law

Arlington, Va. – “Section 232 of the Trade Expansion Act of 1962 authorizes the president to adjust imports on the basis of national security in a way that runs counter to the principles of limited government and the role of Congress in international trade,” according to a National Foundation for American Policy (NFAP) [study](#). “The law places no limits on the president in determining what may constitute a threat to national security, the metrics examined to demonstrate such a threat and the action that could be taken after such a threat to national security is determined to exist. Given the most recent unsuccessful constitutional challenge to section 232 based on the law’s overly broad delegation of legislative power to the executive branch, Congressional action is needed to establish limits on the president to prevent the type of unbridled actions that have taken place during the Trump administration,” concluded the study’s authors Donald B. Cameron, Jr., a partner in the international trade practice at Morris, Manning & Martin, and Emma K. Peterson, the director of international trade analytics in the international trade practice at Morris, Manning & Martin.

“A judge asked if under the current interpretation of section 232 the president could claim that importing peanut butter is a national security threat and levy tariffs,” said NFAP Executive Director Stuart Anderson. “If a president can declare anything he wants to be a national security threat, then the real threat appears to be the law that makes this possible.”

The study, “Section 232 and Reform of U.S. Trade Law,” can be found at <https://nfap.com/>.

Among the findings of the analysis:

- The broad definition of national security as contemplated by the statute affords the president unlimited autonomy in determining whether or not the target product of a section 232 investigation threatens to impair national security. Further, section 232 allows the president to take virtually any action he chooses to adjust imports of the target product if imports of that product are found to be a threat to national security.
- The national security provision has rarely been used in the nearly 75 years since the General Agreement on Tariffs and Trade (GATT) was signed. Further, this provision was not intended to give member states unlimited power. The language of Article XXI was purposefully written so that this exception would be used only in extraordinary, limited circumstances.
- Following the U.S. claim of national security in imposing tariffs on steel and aluminum it is not surprising that numerous countries, including China, Russia, Canada, Mexico, and the European Union, retaliated against the United States, imposing their own tariffs on a variety of traded goods, focusing heavily on agricultural products. After decades of only rare invocation of the national security exception, the president of the United States appears to

have invoked it for precisely the purpose the drafters of the exception hoped it would not be used.

- Rather than boosting the economy, the actions taken during the Trump administration under section 232 with respect to steel and aluminum products contributed to a recession in the manufacturing sector that preceded the Covid-19 pandemic and contributed significantly to the devastation of U.S. agricultural exports.
- The imposition of tariffs on imports of steel and aluminum products benefitted only a small segment of U.S. manufacturing (i.e., steel producers). The current administration's use of section 232 has been harmful not only in terms of its impact on international relations, but also in its impact on the U.S. economy. U.S. Federal Reserve data released in early 2020 demonstrated that the U.S. manufacturing sector was in a recession during 2019, prior to any potential impact arising from the Covid-19 pandemic. In December 2019, manufacturing jobs declined by 12,000, with the steepest loss occurring in the making of fabricated metal products. A major contributor to this trend is that jobs in U.S. industries that use steel inputs outnumber jobs in U.S. industries that produce steel by approximately 80 to 1.
- The adverse effects of the section 232 tariffs on steel and aluminum do not stop at the manufacturing sector, and in fact they trickle down to consumers of finished steel products. The Peterson Institute for International Economics, a non-partisan, non-profit think tank, calculated that every steel job saved by the Trump administration's tariffs costs U.S. consumers over \$900,000—more than 13 times the typical salary of a steelworker—caused by the 10 percent increase in steel prices that U.S. companies have paid since the tariffs went into effect. The same study estimates the total additional cost to the economy to be \$11.5 billion per year.
- Another group that has been hard-hit by the Trump administration's section 232 tariffs are U.S. farmers. Retaliatory tariffs placed on U.S. agricultural products by China (as well as other countries such as Canada and Mexico) significantly reduced the volume of U.S. agricultural exports. According to the Congressional Research Service, China was the top destination for U.S. agricultural exports for 2010 to 2016, but by mid-2019, the Chinese market for U.S. agricultural goods shrunk to only fourth largest. In terms of actual value, U.S. agricultural exports to China declined by 53 percent between 2017 and 2018, from \$19 billion to \$9 billion. This decline occurred in the wake of China's imposition of retaliatory tariffs ranging from 15 to 25 percent on various imports from the United States, including 94 agricultural products.
- Based on the sheer number of investigations initiated and actions taken, the types of products being targeted, and the widespread retaliation by international trading partners, it is evident that the Trump administration has come to view section 232 as an instrument to be used not necessarily for national security, but rather as a convenient tool for managing trade without the inconvenience or necessity of proving that imports are "unfair" or that they are the cause of material or serious injury, as would be the case with countervailing duties, antidumping duties, or safeguards.
- A court case brought by the American Institute for International Steel ("AIIS") and initially filed before the U.S. Court of International Trade ("CIT"), argued that section 232 was unconstitutional because it constituted an improper delegation of authority, which violated Article 1, Section 1 of the U.S. Constitution and the doctrine of separation of powers. In March 2019, a three-judge panel at the CIT rejected this challenge, citing the U.S. Supreme Court's decision in *Federal Energy Administration v. Algonquin SNG Inc.*, 426 U.S. 548 (1976) ("*Algonquin*"), wherein the Supreme Court rejected a challenge to section 232 also based on the issue of non-delegation. However, although the CIT ultimately decided

against AIIIS, citing the necessity of relying on the *Algonquin* decision, Judge Katzmann (one of the three judges on the CIT panel) expressed “grave doubts” about the constitutionality of section 232 absent *Algonquin*, stating that “it is difficult to escape the conclusion that the statute has permitted the transfer of power to the president in violation of the separation of powers.” (Donald B. Cameron was one of several attorneys representing AIIIS in this constitutional challenge.)

- Several members of Congress have put forth proposed legislation in an attempt to address the actions taken by President Trump under section 232. While some of the proposed legislation involves providing assistance to U.S. companies already harmed by section 232, others of the proposed bills are more forward-looking, seeking to limit the power of the president under section 232 in the future.
- The bills differ in scope but they share a common theme: The need for Congressional approval before action is taken pursuant to section 232. These proposed bills implicitly recognize the issue that AIIIS brought before the CIT, CAFC, and Supreme Court: Section 232 affords the president far too much power with no limitations on its use. While the powers afforded to the president under section 232 have existed for decades, President Trump’s use of section 232 is unprecedented, both in terms of frequency and scope, as well as in the broad definition of what constitutes a threat to national security. Requiring Congressional approval would effectively limit future presidents from abusing section 232 in the same way and would restore a balance, reducing the overly-broad power the president is currently afforded under section 232 to those situations where the issue actually is “national security” rather than a convenient means of managing trade.

About the National Foundation for American Policy

Established in 2003, the National Foundation for American Policy (NFAP) is a 501(c)(3) non-profit, non-partisan public policy research organization based in Arlington, Virginia focusing on trade, immigration and related issues. The Advisory Board members include Columbia University economist Jagdish Bhagwati, Ohio University economist Richard Vedder, Cornell Law School professor Stephen W. Yale-Loehr and former INS Commissioner James W. Ziglar. Over the past 24 months, NFAP’s research has been written about in the *Wall Street Journal*, the *New York Times*, the *Washington Post*, and other major media outlets. The organization’s reports can be found at www.nfap.com. Twitter: [@NFAPResearch](https://twitter.com/NFAPResearch)

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