

# ESSAY

## Delegating and Regulating the President's Section 232 and IEEPA Trade Powers

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### ABSTRACT

*Congress has provided the President extraordinary authority to enact emergency trade remedies. Throughout the Trump Administration, American consumers and manufacturers paid the costs of this delegation. This Essay considers procedural reforms that Congress should pass to ensure that future Presidents do not have unchecked authority to order sanctions under the International Emergency Economic Powers Act ("IEEPA") and duties under section 232 of the Trade Expansion Act of 1962. Although the Biden Administration is unlikely to be dependent on unpredictable unilateral emergency action, President Trump exposed the power that any President has to create economic upheaval. Several recent bipartisan bills reforming the President's emergency trade power signal that the time is ripe to reconsider trade policy powers. Yet, those bills do not go far enough. Three administrative reforms are necessary to ensure economic stability: (1) Congress should require a publicly available, broad economic impact study within three months of an emergency order; (2) Congress should narrow the delegation of national security remedies by only extending temporary approval for trade measures over \$1 billion imposed on unenumerated nations; and (3) Congress should redefine national security in the statutes. Congress can adjust the delegation of emer-*

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*agency trade powers to ensure that the President can respond swiftly to adversaries without having unbridled ability to disrupt commerce with trading partners.*

TABLE OF CONTENTS

INTRODUCTION ..... 1281

I. BACKGROUND ..... 1284

    A. *The Statutory and Regulatory Framework of Section 232 and IEEPA*..... 1286

    B. *Recent History of National Emergency Trade Policy* ..... 1289

    C. *Section 232 and IEEPA Orders Have Hurt U.S. Industry* ..... 1290

    D. *Grappling with “National Security” and the Supreme Court* ..... 1292

    E. *Congress’s Recent Bipartisan Interest in Trade Law Reform* ..... 1294

II. CONGRESS SHOULD LIMIT ITS DELEGATION OF TRADE BARRIER AUTHORITY AND ENACT SUBSTANTIVE ADMINISTRATIVE PROCEDURE ..... 1298

    A. *Congress Should Require a Public, Broad Economic Impact Study Within Three Months of an IEEPA or Section 232 Order* ..... 1299

    B. *Congress Should Eliminate the President’s Unilateral Trade Authority for Most IEEPA Sanctions and Section 232 Duties that Have an Economic Impact Above \$1 Billion* ..... 1301

    C. *Redefining National Security* ..... 1304

CONCLUSION ..... 1305

INTRODUCTION

President Trump reminded the country that the President possesses extraordinary ability to enact trade barriers. Over the course of the twentieth century, Congress turned over trade policy to the White House, marking an almost unbridled delegation of power. Yet, the Constitution gives Congress, not the President, the power to control trade. Article I, Section 8 commands, “Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the

United States.”<sup>1</sup> This includes the “regulat[ion of] Commerce with foreign Nations.”<sup>2</sup> Congress chose to delegate this power without meaningful administrative procedure, and the costs are becoming clear.<sup>3</sup> President Biden may not make trade policy decisions in the middle of the night,<sup>4</sup> but the uncertainty created by unlimited executive trade authority does not end with the new Administration. President Trump exposed a broken system of delegated trade power.

The Trump Administration’s theory that economic security, including domestic manufacturing, is national security allowed for combative trade measures against allies and foes.<sup>5</sup> The Administration’s trade policy created measurable short-term economic costs and long-term foreign policy problems.<sup>6</sup> The Administration thought those costs were worth it, but data reveals that tariffs themselves can create national security concerns.<sup>7</sup> Looking to the steel tariffs, the President ordered tariffs ranging from twenty-five to fifty percent on the pretense of protecting U.S. steel jobs.<sup>8</sup> The goal of creating more steel jobs—setting the means aside—might have attracted broader support had the data been on the President’s side. The data revealed, however, that modest improvements in the domestic steel industry were outweighed by job losses in U.S. manufacturing as a whole.<sup>9</sup> If U.S. man-

1 U.S. CONST. art. I, § 8.

2 *Id.*

3 “Congress has sole authority over the regulation of foreign commerce and the imposition of tariffs. Thus, because the President does not possess express constitutional authority to modify tariffs, he must find authority for tariff-related action in statute.” CAITLAIN DEVEREAUX LEWIS, CONG. RSCH. SERV., R44707, PRESIDENTIAL AUTHORITY OVER TRADE: IMPOSING TARIFFS AND DUTIES 2 (2016).

4 *Cf.* Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 23, 2019, 11:58 PM), <https://twitter.com/realDonaldTrump/status/116511122510237696> [<https://perma.cc/W3HH-QHZD>] (last visited Jan. 6, 2021) (“For all of the Fake News Reporters that don’t have a clue as to what the law is relative to Presidential powers, China, etc., try looking at the Emergency Economic Powers Act of 1977. Case closed!”).

5 *See* Peter Navarro, Assistant to the President & Dir. of the White House Off. of Trade & Mfg. Pol’y, Economic Security as National Security: A Discussion with Dr. Peter Navarro at the Center for Strategic and International Studies 3 (Nov. 9, 2018) (transcript available at [https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/181109\\_Economic\\_Security\\_National\\_Security.pdf](https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/181109_Economic_Security_National_Security.pdf) [<https://perma.cc/88WF-E5R6>]) (“Economic security is national security.”).

6 *See infra* Section I.C.

7 *See* Lydia Cox & Kadee Russ, *Steel Tariffs and U.S. Jobs Revisited*, ECONOFACT (Feb. 6, 2020), <https://econofact.org/steel-tariffs-and-u-s-jobs-revisited> [<https://perma.cc/YZ75-9GKC>].

8 *See, e.g.*, Proclamation No. 9740, 3 C.F.R. 104 (2019).

9 Cox & Russ, *supra* note 7 (“While the 2018 tariffs did reduce steel imports, a stated goal, they also caused steel prices for U.S. firms to rise, putting downstream U.S. manufacturing industries at a disadvantage relative to foreign competition.”). This data does not include losses in service fields, including construction.

ufacturing is national security, the United States’s own tariffs can threaten industry just the same as a foreign action.

Existing U.S. emergency trade measures require little analysis in the way of downstream<sup>10</sup> costs of emergency measures. The President and government agencies, including the U.S. International Trade Commission (“USITC”) and the U.S. Department of Commerce (“Commerce”), are not required to consider secondary and tertiary effects of emergency trade measures even if data is generated for internal consideration.<sup>11</sup> The United States’s existing trade regime allows the President to pass national security duties for almost any reason and at almost any cost.<sup>12</sup> This Essay proposes administrative and legislative procedures for ensuring that policy makers and the public understand the cost of unfettered presidential action in national security.

Section 232 of the Trade Expansion Act of 1962 (“section 232”)<sup>13</sup> and the International Emergency Economic Powers Act (“IEEPA”)<sup>14</sup> provide the President the power to identify and address national security issues by use of duties or sanctions to protect and promote U.S. interests against foreign economic threats.<sup>15</sup> President Trump demonstrated the power of combining the two authorities.<sup>16</sup> Section 232 allows emergency duties<sup>17</sup> on imports, and IEEPA gives the President

<sup>10</sup> This Essay uses the word “downstream” to describe the effects of emergency trade measures on industries that are not the target industry.

<sup>11</sup> See *infra* Section II.A.

<sup>12</sup> See *infra* Section I.A.

<sup>13</sup> Trade Expansion Act of 1962, Pub. L. No. 87-794, § 232, 76 Stat. 872, 877 (codified as amended at 19 U.S.C. § 1862).

<sup>14</sup> International Emergency Economic Powers Act, Pub. L. No. 95-223, 91 Stat. 1625, 1626 (1977) (codified at 50 U.S.C. §§ 1701–1706).

<sup>15</sup> See 19 U.S.C. § 1862 (stating that the President may “adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security”); 50 U.S.C. § 1701 (authorizing the President to “deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat”); see also Stephanie Zable, *What Comes After Tariffs: An IEEPA Primer*, LAWFARE (July 19, 2018, 3:12 PM), <https://www.lawfareblog.com/what-comes-after-tariffs-ieepa-primer> [<https://perma.cc/NP5L-HBVS>] (explaining that “[s]everal [P]residents, including Trump, have used the authority granted by IEEPA to impose sanctions on countries such as Russia and Iran”).

<sup>16</sup> See Scott R. Anderson & Kathleen Claussen, *The Legal Authority Behind Trump’s New Tariffs on Mexico*, LAWFARE (June 3, 2019, 4:19 PM), <https://www.lawfareblog.com/legal-authority-behind-trumps-new-tariffs-mexico> [<https://perma.cc/D4L3-RM5E>] (explaining that President Trump used both section 232 and IEEPA to target Mexico).

<sup>17</sup> This paper will use “duty” and “tariff” interchangeably.

sanction authority to pick targets and eliminate transactions.<sup>18</sup> The problem is that the current system does not evaluate downstream economic costs, and it does not consider downstream security concerns.<sup>19</sup>

Applying Justice Jackson's famous *Youngstown Sheet & Tube Co. v. Sawyer*<sup>20</sup> concurrence, the President is now at his maximum power concerning trade measures because Congress has expressly authorized presidential authority to use emergency measures.<sup>21</sup> The President's unilateral emergency trade power, however, stems not from the Constitution, but from statute.<sup>22</sup> This Essay explains the President's section 232 and IEEPA power, reviews recent history, and argues that Congress should rein in the President's trade authority to be concurrent with Congress's trade authority.

Three main reforms are necessary: (1) Congress should require a publicly available, broad economic impact study within three months of an emergency order; (2) Congress should narrow the delegation of national security remedies by only extending temporary approval for trade measures over \$1 billion imposed on unenumerated nations; and (3) Congress should redefine national security in the statutes.

## I. BACKGROUND

During the Trump Administration, scholars and politicians were reminded that the President has vast power to enact trade policies unilaterally.<sup>23</sup> Much of that power is the authority to put up trade bar-

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<sup>18</sup> See Zable, *supra* note 15 (describing a President's broad power under IEEPA to impose sanctions on select companies).

<sup>19</sup> See *infra* Section II.A.

<sup>20</sup> 343 U.S. 579, 634–55 (1952) (Jackson, J., concurring in the judgment and opinion of the Court).

<sup>21</sup> See *id.* at 635–36; see also Amy L. Stein, *A Statutory National Security President*, 70 FLA. L. REV. 1183, 1194 (2018) (noting “a number of national security provisions” that provide the President with vast unilateral trade power “based solely on a unilateral finding of a national security threat devoid of accountability requirements”).

<sup>22</sup> See U.S. CONST. art. I, § 8; LEWIS, *supra* note 3, at 2. Section 232 has faced several recent constitutional challenges. The Court of Appeals for the Federal Circuit affirmed a Court of International Trade (“CIT”) opinion finding that section 232 is constitutional and does not violate nondelegation principles. *Am. Inst. for Int'l Steel, Inc. v. United States*, 376 F. Supp. 3d 1335, 1344–45 (Ct. Int'l Trade 2019), *aff'd*, 806 F. App'x 982 (Fed. Cir. 2020), *cert. denied*, 141 S. Ct. 133 (2020) (mem.). The CIT, however, also held that one of President Trump's section 232 proclamations, altering duties against Turkish steel, “lacked a nexus” to national security. *Transpacific Steel LLC v. United States*, 466 F. Supp. 3d 1246, 1254–55 (Ct. Int'l Trade 2020), *appeal docketed*, No. 20-2157 (Fed. Cir. Aug. 17, 2020).

<sup>23</sup> See, e.g., Kathleen Claussen, *Trade's Security Exceptionalism*, 72 STAN. L. REV. 1097 (2020) (offering a comprehensive review of the relationship between trade law and national security).

riers.<sup>24</sup> Section 232 and IEEPA are only isolated examples of this broad power but are explored here because they are illustrative of the wide delegation of authority and because they have been subject to such extensive debate over the past presidential term.<sup>25</sup> Though the breadth of the delegation of power by the legislative to the executive branch continues to receive attention, this Essay will focus on section 232 and IEEPA. These two laws have been used extensively during the Trump Administration and have received bipartisan support for reform. Section 232 and IEEPA provide some of the broadest and least procedurally restrained power compared with other trade remedies and sanctions.<sup>26</sup>

Section 232 and IEEPA are not interchangeable, but the authorities can overlap in an offensive trade action.<sup>27</sup> IEEPA is primarily used to target geographic-specific organizations and people by sanctioning any entity that does business with the named entity.<sup>28</sup> Then, Commerce can conduct an investigation, and section 232 can be used to ratchet up import tariffs on a foreign industry in the specific country.<sup>29</sup> IEEPA can also technically be used to apply tariffs; it has not been used in that way, however, because Presidents have turned to section 232.<sup>30</sup>

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<sup>24</sup> See *id.* at 1100.

<sup>25</sup> See, e.g., Geoffrey Gertz, *Did Trump's Tariffs Benefit American Workers and National Security?*, BROOKINGS (Sept. 10, 2020), <https://www.brookings.edu/policy2020/votervital/did-trumps-tariffs-benefit-american-workers-and-national-security/> [<https://perma.cc/KS2R-PX3P>]. Other examples of the President's broad power to enact trade policies include section 301 of the Trade Act of 1974 and sections 337 and 338 of the Tariff Act of 1930. See Trade Act of 1974, Pub. L. No. 93-618, § 301, 88 Stat. 1978, 2041 (codified as amended at 19 U.S.C. § 2411); Tariff Act of 1930, Pub. L. No. 71-631, §§ 337338, 46 Stat. 590, 703-06 (codified as amended 19 U.S.C. §§ 1337-1338); see also Timothy Meyer & Ganesh Sitaraman, *The Power to Declare Trade War*, LAWFARE (Mar. 23, 2018, 1:58 PM), <https://www.lawfareblog.com/power-declare-trade-war> [<https://perma.cc/ZSH2-PJT5>]; John Veroneau & Catherine Gibson, *The President's Long-Forgotten Power To Raise Tariffs*, LAW360 (Dec. 14, 2016, 1:53 PM), [https://www.cov.com/-/media/files/corporate/publications/2016/12/law360\\_the\\_presidents\\_long\\_forgotten\\_power\\_to\\_raise\\_tariffs.pdf](https://www.cov.com/-/media/files/corporate/publications/2016/12/law360_the_presidents_long_forgotten_power_to_raise_tariffs.pdf) [<https://perma.cc/4UXW-Z49U>]. See generally BROCK R. WILLIAMS, CONG. RSCH. SERV., R45529, TRUMP ADMINISTRATION TARIFF ACTIONS: FREQUENTLY ASKED QUESTIONS 2 (2020).

<sup>26</sup> Section 301 is a powerful unilateral trade remedy that could have been included in this Essay. Section 338 has been little used. See Veroneau & Gibson, *supra* note 25. Section 337 pertains to intellectual property and is beyond the scope of this Essay.

<sup>27</sup> See CHRISTOPHER A. CASEY, IAN F. FERGUSSON, DIANNE E. RENNACK & JENNIFER K. ELSEA, CONG. RSCH. SERV., R45618, THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT: ORIGINS, EVOLUTION, AND USE 27 (2020).

<sup>28</sup> See *id.* at 17-20.

<sup>29</sup> See *id.* at 27; 19 U.S.C. § 1862.

<sup>30</sup> See CASEY ET AL., *supra* note 27, at 27.

A. *The Statutory and Regulatory Framework of Section 232 and IEEPA*

Section 232 gets its name from its passage as part of the Trade Expansion Act of 1962.<sup>31</sup> The law gives the President broad authority to impose duties on products entering the country that the Secretary of Commerce declares threatening to national security.<sup>32</sup> The investigation begins with a request to the Secretary of Commerce by “any department or agency, upon application of an interested party” or by the Secretary herself.<sup>33</sup> Requiring Commerce to investigate was designed to act as a procedural constraint on the President.<sup>34</sup> After the investigation is initiated, the Secretary has up to 270 days to notify the Department of Defense of the investigation and to produce findings and recommendations to be delivered to the President.<sup>35</sup>

The Secretary’s investigative findings will include “the effect of the importation of such article in such quantities or under such circumstances upon the national security” and will produce either an affirmative or negative determination about where imports should be adjusted.<sup>36</sup> The investigation at Commerce is conducted by the Bureau of Industry and Security (“BIS”).<sup>37</sup> During the investigation, BIS reviews the following:

In terms of national security, Commerce considers (1) existing domestic production of the product; (2) future capacity needs; (3) manpower, raw materials, production equipment, facilities, and other supplies needed to meet projected national defense requirements; (4) growth requirements, including the investment, exploration, and development to meet them; and (5) any other relevant factors.

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<sup>31</sup> See *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 562 (1976) (summarizing the legislative history of section 232); *Section 232 Investigations: The Effect of Imports on the National Security*, BUREAU INDUS. & SEC. [hereinafter *Section 232 Investigations*], <https://www.bis.doc.gov/index.php/other-areas/office-of-technology-evaluation-ote/section-232-investigations> [<https://perma.cc/P9UH-GZXR>] (explaining that a “[s]ection 232 investigation is conducted under the authority of the Trade Expansion Act of 1962”).

<sup>32</sup> 19 U.S.C. § 1862 (stating that the President may “adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security”).

<sup>33</sup> *Id.* § 1862(b)(1)(A).

<sup>34</sup> Congress intended to provide the President factors to consider but provided few other details or commands. See H.R. REP. NO. 87-1818, at 41 (1962).

<sup>35</sup> 19 U.S.C. § 1862(b)(3)(A).

<sup>36</sup> *Id.*

<sup>37</sup> RACHEL F. FEFER & VIVIAN C. JONES, CONG. RSCH. SERV., IF10667, SECTION 232 OF THE TRADE EXPANSION ACT OF 1962, at 1 (2020).

On imports, Commerce must consider (1) the impact of foreign competition on the domestic industry deemed essential for national security; (2) the effects that the “displacement of domestic products” cause, including substantial unemployment, decreases in public revenue, loss of investment, special skills, or production capacity; and (3) any other relevant factors that are causing, or will cause, a weakening in the national economy.<sup>38</sup>

Commerce is not required to consider how adjusted imports would affect other industries or how those effects to other industries would impact national security; it only considers the effect the targeted import has on other industries.<sup>39</sup> After Commerce delivers its findings to the President, the President has ninety days to decide whether she agrees.<sup>40</sup> She then has fifteen days from that point to take action.<sup>41</sup>

IEEPA, like section 232, is a sweeping statutory grant of power from Congress to the President.<sup>42</sup> The Act was enacted in 1977, but arose out of the Trading with the Enemy Act (“TWEA”),<sup>43</sup> passed in 1917 to govern business with enemy powers during World War I.<sup>44</sup> In the 1930s, Congress expanded this Act to give the President broad authority to “declare states of emergency in peacetime and assume expansive domestic economic powers.”<sup>45</sup> By the 1970s, however, Congress was interested in adjusting procedure to rein in executive authority in response to Watergate, the Vietnam War, and other events.<sup>46</sup> Congress amended the TWEA to achieve this objective by including a notice provision for Congress, a biannual congressional review, and the ability to terminate an order.<sup>47</sup> Congress also created IEEPA to confer a new authority that it thought would properly balance the need to provide the President the ability to respond to emergencies but ensure procedural limitations and limited scope.<sup>48</sup>

<sup>38</sup> *Id.* (summarizing 15 C.F.R. § 705.4 (2001)).

<sup>39</sup> *See id.*

<sup>40</sup> 19 U.S.C. § 1862(c).

<sup>41</sup> *Id.*

<sup>42</sup> *See* CASEY ET AL., *supra* note 27, at 2.

<sup>43</sup> Trading with the Enemy Act, Pub. L. No. 65-91, 40 Stat. 411 (1917) (codified as amended at 50 U.S.C. § 4301).

<sup>44</sup> CASEY ET AL., *supra* note 27, at 2–3.

<sup>45</sup> *Id.* at 4.

<sup>46</sup> *Id.* at 6.

<sup>47</sup> National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified as amended at 50 U.S.C. §§ 1601–1651); *see* CASEY ET AL., *supra* note 27, at 8.

<sup>48</sup> *See* H.R. REP. NO. 95-459, at 10 (1977) (explaining that the House Committee on International Relations believed Congress was creating “substantive restrictions” with IEEPA and



Congress also tried to create more procedural limitations on the President by passage of the National Emergencies Act (“NEA”).<sup>49</sup> This law created a procedure for declaring an emergency that once announced, would pair with the President’s IEEPA authority to remedy emergencies.<sup>50</sup> This procedural restraint, however, lacks restraining power, as illuminated by President Trump’s numerous emergency declarations.<sup>51</sup>

IEEPA gives the President power to “investigate, regulate, or prohibit” foreign transactions, transfers and payments between banks, and the import and export of currency or securities.<sup>52</sup> The law also allows the President to hold or liquidate any property that the President orders seized from foreign persons or organizations hostile to the United States.<sup>53</sup> Despite Congress’s intention that IEEPA restrict the President, Congress created few real restraints. The law requires that, when possible, the President consult Congress before exercising emergency power.<sup>54</sup> It requires that the President report the following details to Congress after action has been taken: (1) the circumstances that necessitated action; (2) why the President believes the threat is “unusual and extraordinary”; (3) the actions that are being taken; (4) why the actions are necessary; and (5) the countries that will be affected.<sup>55</sup> The law also requires the President to periodically follow up with Congress with regard to the aforementioned list.<sup>56</sup> It specifies that the emergency may be terminated by the President or by a joint resolution of Congress.<sup>57</sup> When the NEA was passed, an emergency

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hoped that “[a] state of national emergency should not be a normal state of affairs”); CASEY ET AL., *supra* note 27, at 9–10.

<sup>49</sup> Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified as amended at 50 U.S.C. §§ 1601–1651); *see also* Patrick A. Thronson, Note, *Toward Comprehensive Reform of America’s Emergency Law Regime*, 46 U. MICH. J.L. REFORM 737, 738 (2013) (explaining that the NEA was enacted to prevent the “proliferation of national emergencies”).

<sup>50</sup> 50 U.S.C. §§ 1601–1651; *Id.* at §§ 1701–1702; *see also* Barry E. Carter, *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime*, 75 CALIF. L. REV. 1159, 1229 (1987) (stating that IEEPA authorizes the President “to employ a wide range of economic sanctions” after declaring a national emergency under the NEA).

<sup>51</sup> *See* Andrew Boyle, *An Emergency or Business as Usual? Huawei and Trump’s Emergency Powers*, BRENNAN CTR. FOR JUST. (May 24, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/emergency-or-business-usual-huawei-and-trumps-emergency-powers> [<https://perma.cc/R5GM-NVDP>]; *see also* Carter, *supra* note 50, at 1230 (explaining that “[w]hile IEEPA’s procedural requirements are an improvement over TWEA, . . . IEEPA is also flawed”).

<sup>52</sup> 50 U.S.C. § 1702.

<sup>53</sup> *Id.* § 1702(a)(1)(C).

<sup>54</sup> *Id.* § 1703.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* § 1622.

declaration could be vetoed by a simple majority of one house through a legislative veto.<sup>58</sup> Subsequently, however, the Supreme Court found legislative vetoes unconstitutional,<sup>59</sup> and a now rare supermajority in both chambers is required.<sup>60</sup>

### B. *Recent History of National Emergency Trade Policy*

Since the NEA was passed, the vast majority of national emergencies under the Act have involved use of IEEPA.<sup>61</sup> This has not all occurred under the Trump Administration. Rather, IEEPA has become a routine national security power of the President.<sup>62</sup> Prior to the Trump presidency, many Presidents used the statute to impose sanctions for national security reasons.<sup>63</sup> Of the sixty-nine NEA declarations since 1973, however, thirteen were declared by President Trump during only four years in office.<sup>64</sup> Similarly, although section 232 has been used at least nineteen times—most often for energy related imports—there was a seventeen year gap in its usage between 2001 and 2018.<sup>65</sup> Since 2018, President Trump has used section 232 four times.<sup>66</sup> Consequently, section 232 litigation exploded under the Trump Administration.<sup>67</sup>

President Obama used IEEPA repeatedly, but his list of targeted countries was a less surprising array of existing adversaries, including, but not limited to, South Sudan, Yemen, Russia, Libya, and North Korea.<sup>68</sup> Though both IEEPA and section 232 have been used since their inception, the Trump Administration demonstrated the sheer

<sup>58</sup> Elizabeth Goitein, *How Congress Is Pushing Back Against Trump's Unprecedented Use of Emergency Powers*, WASH. POST (Sept. 25, 2020, 6:00 AM), <https://www.washingtonpost.com/politics/2020/09/25/how-congress-is-pushing-back-against-trumps-unprecedented-use-emergency-powers/> [https://perma.cc/WFD4-MBVQ].

<sup>59</sup> *INS v. Chadha*, 462 U.S. 919, 959 (1983).

<sup>60</sup> Goitein, *supra* note 58.

<sup>61</sup> Andrew Boyle, *An Emergency or Business as Usual? Huawei and Trump's Emergency Powers*, BRENNAN CTR. FOR JUST. (May 24, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/emergency-or-business-usual-huawei-and-trumps-emergency-powers> [https://perma.cc/R5GM-NVDP].

<sup>62</sup> *See id.*

<sup>63</sup> *See Zable, supra* note 15.

<sup>64</sup> *Declared National Emergencies Under the National Emergencies Act*, BRENNAN CTR. FOR JUST., (May 10, 2020), <https://www.brennancenter.org/our-work/research-reports/declared-national-emergencies-under-national-emergencies-act> [https://perma.cc/27HK-QDV4]. In contrast, President Obama made twelve NEA declarations over two terms in office. *Id.*

<sup>65</sup> *Section 232 Investigations, supra* note 31.

<sup>66</sup> *See id.*

<sup>67</sup> *See, e.g., Am. Inst. for Int'l Steel, Inc. v. United States*, 376 F. Supp. 3d 1335 (Ct. Int'l Trade 2019), *aff'd*, 806 F. App'x 982 (Fed. Cir. 2020), *cert. denied*, 141 S. Ct. 133 (2020) (mem.).

<sup>68</sup> *Declared National Emergencies Under the National Emergencies Act, supra* note 64.

power of these nearly unchecked authorities by initiating them frequently and unpredictably. For example, one of President Trump's final NEA declarations was targeted at International Criminal Court personnel who investigated U.S. citizens.<sup>69</sup>

### C. *Section 232 and IEEPA Orders Have Hurt U.S. Industry*

Both Republicans and Democrats are concerned that the President's emergency trade authority can threaten U.S. industry.<sup>70</sup> There are two main types of threats, threats centering around job losses in domestic industries other than the industry targeted for protection, and threats centering on foreign affairs—caused either by retaliatory tariffs from U.S. targeted countries or damaged relations with allies.<sup>71</sup>

Beginning with the first category, a President's broad emergency trade authority can threaten U.S. industry by causing job losses in industries other than those targeted for protection. Then—U.S. Trade Representative Robert Lighthizer explained that the goal of President Trump's protectionist trade policy was to protect middle-class jobs that do not require a college education.<sup>72</sup> Using the government's own data, however, independent studies have concluded that job retention in fields targeted for protection—like steel manufacturing—are temporary, while job losses in fields other than those targeted for protection—like fields that purchased steel products—would result in a net loss of manufacturing jobs.<sup>73</sup> Another study found that job losses in construction alone—related to high taxes on steel imports—out-

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<sup>69</sup> See Exec. Order No. 13,928, 85 Fed. Reg. 36,139 (June 11, 2020).

<sup>70</sup> See, e.g., Jordain Carney, *Senate Republicans Float Legislation to Reverse Trump Tariffs*, THE HILL (Mar. 6, 2018, 6:36 PM), <https://thehill.com/blogs/floor-action/senate/377072-senate-gop-weighs-legislation-over-trump-tariffs> [<https://perma.cc/6SVN-MWUX>] (reporting that even then—Senate Majority Leader Mitch McConnell has publicly pushed back against White House tariff expansion and noting many Republican senators' comments that tariffs are damaging); Press Release, Nancy Pelosi, Speaker, House of Representatives, Transcript of Pelosi Weekly Press Conference Today (June 5, 2019), <https://pelosi.house.gov/news/press-releases/transcript-of-pelosi-weekly-press-conference-today-37> [<https://perma.cc/Z3JB-2ZUL>] (expressing concern that IEEPA could be used against U.S. allies).

<sup>71</sup> Retaliatory tariffs can cause domestic jobs losses, too.

<sup>72</sup> Robert E. Lighthizer, *How to Make Trade Work for Workers*, FOREIGN AFFS., July/Aug. 2020, at 78, 78.

<sup>73</sup> LAURA M. BAUGHMAN, TRADE P'SHIP WORLDWIDE, TRUMP TRADE POLICY: FOUNDED ON ROCK OR SAND? 6 (2020), <https://tradepartnership.com/wp-content/uploads/2020/07/Trade-PolicyAndJobs.pdf> [<https://perma.cc/RMJ3-Y849>] (finding also that well-paying jobs are widely available in service fields, including construction, plumbing, trucking, general maintenance, and sales, among others); see also Aaron Flaaen & Justin Pierce, *Disentangling the Effects of the 2018–2019 Tariffs on a Globally Connected U.S. Manufacturing Sector* 3 (Bd. of Governors of the Fed. Reserve Sys., Fin. & Econ. Discussion Series, Working Paper No. 2019-086, 2019), <https://doi.org/10.17016/FEDS.2019.086> [<https://perma.cc/EX5R-6NYS>] (finding that “tariff in-

weighed steel job gains 2.5 to one.<sup>74</sup> Even if partisans want to debate exactly what the job losses were, the consequences of the Trump Administration's taxes (tariffs)<sup>75</sup> on steel are not surprising when eighty Americans work in a steel-using industry for every one that is employed to manufacture steel.<sup>76</sup> For example, Americana proprietor, Harley Davidson has outsourced some U.S. motorcycle manufacturing because U.S. expenses were too high.<sup>77</sup> U.S. manufacturing businesses have filed tens of thousands of exemption petitions because they continue to suffer the adverse consequences of large tariffs on steel.<sup>78</sup>

Moving to the second category, a President's broad emergency trade authority also threatens U.S. foreign relations. Retaliatory tariffs are another hit to the domestic economy. In response to section 232 tariffs on Chinese steel and section 301 tariffs on Chinese agriculture, U.S. soybean farmers saw China—their largest market—dry up, with a seventy-five percent decline in Chinese purchasing in 2018.<sup>79</sup> The United States also had an IEEPA order against China related to

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creases enacted in 2018 are associated with relative reductions in manufacturing employment and relative increases in producer prices").

<sup>74</sup> *Id.*

<sup>75</sup> Public radio host Kai Ryssdal—along with a chorus of economists—spent the Trump Administration reiterating that tariffs are taxes on Americans. See Kai Ryssdal (@kairyssdal), TWITTER (Sept. 17, 2018, 3:19 PM), <https://twitter.com/kairyssdal/status/1041768685663223809> [<https://perma.cc/44F2-35Q3>] (“A semi-regular reminder: *tariffs are taxes* on imported goods that’re [sic] *paid by consumers*.” (emphasis added)); see also *Why Tariffs Are Bad Taxes*, ECONOMIST (July 31, 2018), <https://www.economist.com/the-economist-explains/2018/07/31/why-tariffs-are-bad-taxes> [<https://perma.cc/R77K-PF65>] (“Tariffs are taxes, which create a wedge between the price paid by buyers of imported goods and the one foreign sellers get.”).

<sup>76</sup> Chad P. Brown, *There Is Little Dignity in Trump's Trade Policy*, FOREIGN AFFS. (July 9, 2020), <https://www.foreignaffairs.com/articles/united-states/2020-07-09/there-little-dignity-trumps-trade-policy> [<https://perma.cc/S8Q6-XMCD>]. Because steel-using industries employ vastly more employees, “[steel] tariffs have shifted injury from one industry to a much broader segment of the economy.” Eric Martin, *Senators Plan Bipartisan Revamp of National-Security Tariffs*, BLOOMBERG (Mar. 15, 2021, 6:02 PM), <https://www.bloomberg.com/news/articles/2021-03-15/senators-propose-bipartisan-revamp-of-national-security-tariffs> [<https://perma.cc/4RD7-TPG2>] (quoting comments of the Coalition of American Metals Manufacturers and Users); see also Brown, *supra* (explaining that steel-using American manufacturing has “bore the brunt” of rising steel costs).

<sup>77</sup> Brown, *supra* note 76.

<sup>78</sup> *Id.* (“A growing number of economic studies conclude that Trump’s trade policy has been costly for American businesses, workers, and farmers.”).

<sup>79</sup> JUSTIN CHOE, ALEXANDER HAMMER & CHRISTOPHER MONTGOMERY, U.S. SOYBEAN EXPORTS TO CHINA CRUSHED AMID RISING TRADE TENSIONS 1 (2019), [https://www.usitc.gov/publications/332/executive\\_briefings/chinasoyebot.pdf](https://www.usitc.gov/publications/332/executive_briefings/chinasoyebot.pdf) [<https://perma.cc/8HM9-CNCJ>]; see also *Trump's New Farm Tariffs No Match for China's Retaliatory Duties*, BLOOMBERG (Aug. 14, 2019, 9:21 PM), <https://www.bloomberg.com/news/articles/2019-08-14/trump-tariffs-to-hurt-u-s-farmers-more-than-china-counterparts> [<https://perma.cc/JQT2-DELC>].

technology, which inevitably contributed to increased trade tensions between the two powers.<sup>80</sup>

Losses in U.S. international standing related to unilateral tariff and sanction authorization against allies are another worrisome result of unchecked presidential power. For example, President Trump threatened to use IEEPA against Mexico during United States-Mexico-Canada Agreement (“USMCA”) negotiations.<sup>81</sup> That move not only threatened the negotiations but also contributed to weak U.S. standing in other trade negotiations.<sup>82</sup> Additionally, other allies, including Canada, the European Union, Turkey, Japan, and India have all threatened or carried out tariffs against U.S. exports in response to section 232 orders against them.<sup>83</sup>

#### D. *Grappling with “National Security” and the Supreme Court*

Thinking about national security duties and sanctions requires risk assessment and line drawing. From this, at least two competing schools of thought can be discerned that attempt to balance economic concerns against national security concerns.

One school of thought is that national security is paramount and should never be second guessed or balanced with economic or political concerns.<sup>84</sup> Deploying that approach at full throttle sometimes means accepting collateral economic costs, those cost themselves being potential downstream national security risks.<sup>85</sup> An example is the Trump Administration’s conclusion that the United States must con-

<sup>80</sup> See Elena Chachko, *Could the TikTok and WeChat Executive Orders Undermine IEEPA?*, LAWFARE (Aug. 8, 2020, 2:49 PM), <https://www.lawfareblog.com/could-tiktok-and-wechat-executive-orders-undermine-ieepa> [<https://perma.cc/562Q-4MC5>].

<sup>81</sup> William Alan Reinsch, Jack Caporal, Beverly Lobo & Catherine Tassin de Montaignu, *The U.S.-Mexico Tariff Threat Has Passed, for Now*, CTR. FOR STRATEGIC & INT’L STUD. (June 11, 2019), <https://www.csis.org/analysis/us-mexico-tariff-threat-has-passed-now> [<https://perma.cc/RYG5-TH6L>].

<sup>82</sup> See *id.* (explaining that the Trump Administration’s trade approach risked causing world “leaders to second-guess the value of an agreement with the United States and be less politically inclined to cooperate with the United States”).

<sup>83</sup> WILLIAMS, *supra* note 25, at 16.

<sup>84</sup> See Kevin J. Wolf, Former Assistant Sec’y of Com. for Export Admin., Prepared Remarks on Export Controls Before the House Committee on Foreign Affairs (Mar. 14, 2018) (transcript available at <https://docs.house.gov/meetings/FA/FA00/20180314/107997/HHRG-115-FA00-Wstate-WolfK-20180314.pdf>) [<https://perma.cc/5XRU-E2CR>] (“National security concerns are, of course, paramount and should be the basis for any final decisions.”); cf. LUCIA RETTER, ERIK J. FRINKING, STIJN HOORENS, ALICE LYNCH, FOOK NEDERVEEN & WILLIAM PHILLIPS, RAND EUR., RELATIONSHIPS BETWEEN THE ECONOMY AND NATIONAL SECURITY 23–24 (2020), [https://www.rand.org/content/dam/rand/pubs/research\\_reports/RR4200/RR4287/RAND\\_RR4287.pdf](https://www.rand.org/content/dam/rand/pubs/research_reports/RR4200/RR4287/RAND_RR4287.pdf) [<https://perma.cc/HM55-LQS6>].

<sup>85</sup> See RETTER ET AL., *supra* note 84; Wolf, *supra* note 84.

tinue large-scale steel production for national security, even if other U.S. manufacturing is damaged.<sup>86</sup>

The other school of thought is to balance security gains in one area against losses in another.<sup>87</sup> An example of this would be an administration's decision to protect steel jobs, only after carefully balancing the benefit of protected steel jobs against the consequences to alliances and lost production in domestic manufacturing that steel protectionism would cause.<sup>88</sup> This second approach has its limitations because of real security threats to the United States, and the anticompetitive nature of some global trading partners, including China.<sup>89</sup> Even if the first approach is correct, however, and “national

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<sup>86</sup> The Trump Administration justified this damage, in part, by arguing that the damage was short-term, as supply chains recalibrated and manufacturing came back to America. See James Politi, Sue-Lin Wong & Andrew Edgecliffe-Johnson, *US Companies Reshape Supply Chains After China Ultimatum*, FIN. TIMES (May 23, 2019), <https://www.ft.com/content/bb3a3546-7c31-11e9-81d2-f785092ab560> [<https://perma.cc/8S9B-SSMX>]; see also Humeyra Pamuk & Andrea Shalal, *Trump Administration Pushing to Rip Global Supply Chains from China: Officials*, REUTERS (May 4, 2020, 1:09 AM), <https://www.reuters.com/article/us-health-coronavirus-usa-china/trump-administration-pushing-to-rip-global-supply-chains-from-china-officials-idUSKBN22G0BZ> [<https://perma.cc/NP7W-UUCG>] (discussing the difficulty in moving manufacturing and business from China back to the U.S. or its allies).

<sup>87</sup> Oddly, the Trump Administration demonstrated this view itself. Although the Administration determined domestic steel production was essential to national security, the Administration ultimately expanded tariff exceptions for a substantial number of countries—presumably under the assumption that damaging relations with allies would be a bigger threat to national security than propping up U.S. steel at all costs. See Gary Clyde Hufbauer, *Trump's Stumble Disrupts His Love Affair with US-Made Steel*, PETERSON INST. FOR INT'L ECON. (Aug. 11, 2020, 11:45 AM), <https://www.piie.com/blogs/trade-and-investment-policy-watch/trumps-stumble-disrupts-his-love-affair-us-made-steel> [<https://perma.cc/2XV2-GEKS>]. The Biden Administration has hedged between the two camps. On the one hand, U.S. Trade Representative Katherine Tai has said that our trade laws need to be modernized and more nuanced. David Lawder, *U.S. Trade Chief: 1962 Law Used for Metals Tariffs Needs Modernization*, REUTERS (May 12, 2021, 5:06 PM), <https://www.reuters.com/world/americas/us-trade-chief-tai-vows-use-new-usmca-trade-pact-address-mexican-labor-issues-2021-05-12/> [<https://perma.cc/Q6GB-XP98>]. On the other hand, however, the Administration has kept Trump's China tariffs in place. See Brian Flood, *Biden White House Defends Trump China Tariffs in Legal Showdown*, BLOOMBERG L. (Mar. 15, 2021, 11:02 AM), <https://news.bloombergtax.com/international-trade/biden-white-house-defends-trump-china-tariffs-in-legal-showdown> [<https://perma.cc/949U-ELAF>].

<sup>88</sup> The Congressional Budget Office found that President Trump's trade policy would lower gross domestic product (“GDP”) by 0.5%, while also reducing real household income by four figures. WILLIAMS, *supra* note 25, at 28; see also Erica York, *Tracking the Economic Impact of U.S. Tariffs and Retaliatory Actions*, TAX FOUND. (Sept. 18, 2020), <https://taxfoundation.org/tariffs-trump-trade-war/> [<https://perma.cc/5992-HBGN>] (detailing the economic impact of U.S. tariffs and retaliatory actions). Steel is an important product for military production, but other products and goods are important for national security, too.

<sup>89</sup> Agreement on the need for the World Trade Organization's rules against unfair trade enforcement is one example. See Press Release, Off. of the U.S. Trade Representative, WTO Report on U.S. Action Against China Shows Necessity for Reform (Sept. 15, 2020), <https://>

security” includes certain domestic manufacturing, not accounting for second order effects to U.S. manufacturing stemming from high tariffs can be costly.<sup>90</sup> Because of this difficulty in defining national security and balancing trade policy, the judiciary has tried to stay out of national security line drawing.<sup>91</sup>

Two Supreme Court decisions have been most responsible for expanding the authority of the President’s national security authority. In *Dames & Moore v. Regan*,<sup>92</sup> the Supreme Court upheld the President’s authority to settle claims with Iran without congressional approval because IEEPA and other legislation indicated Congress’s acquiescence in this area of the law.<sup>93</sup> Shortly thereafter, in *INS v. Chadha*,<sup>94</sup> the Supreme Court held the legislative veto by one house of Congress unconstitutional because it violated separation of powers principles.<sup>95</sup> Since these decisions expanding the President’s national security authority, Congress has continued to stand back while the White House has claimed increasing amounts of power over trade and security.<sup>96</sup>

Congress has suffered judicial setbacks in its capabilities to restrain the President. The level of which these setbacks are self-inflicted, however, should not be discounted.<sup>97</sup> Indeed, Professor Kathleen Claussen argues that Congress has increased its authority over trade negotiations, while decreasing its authority to challenge increasingly unchecked emergency duties that are ostensibly used as national security policy.<sup>98</sup>

### *E. Congress’s Recent Bipartisan Interest in Trade Law Reform*

Although *Chadha* closed the door to a popular legislative device, Congress has not fully ceded its constitutional role. For one, Congress

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ustr.gov/about-us/policy-offices/press-office/press-releases/2020/september/wto-report-us-action-against-china-shows-necessity-reform [https://perma.cc/3Q2M-SHJF].

<sup>90</sup> See *supra* Section I.C.

<sup>91</sup> See Amy L. Stein, *A Statutory National Security President*, 70 FLA. L. REV. 1183, 1197–98 (2018).

<sup>92</sup> 453 U.S. 654 (1981).

<sup>93</sup> *Id.* at 669–70, 678–79; see also Timothy Meyer & Ganesh Sitaraman, *Trade and the Separation of Powers*, 107 CALIF. L. REV. 583, 607–08 (2019).

<sup>94</sup> 462 U.S. 919 (1983).

<sup>95</sup> *Id.* at 957–58. Giving the President unilateral trade power was easier to justify if Congress could quickly roll back measures.

<sup>96</sup> See Meyer & Sitaraman, *supra* note 93, at 608.

<sup>97</sup> See Claussen, *supra* note 23, at 1126–28 (explaining that although the *Chadha* decision limited Congress’s ability to restrain the President through the legislative veto, Congress also chooses to use trade delegations that lack stringency and constraint).

<sup>98</sup> *Id.* at 1131.

periodically passes Miscellaneous Tariff Bills (“MTBs”) that suspend or reduce certain tariffs.<sup>99</sup> These MTBs are governed by the American Manufacturing Competitiveness Act of 2016,<sup>100</sup> which requires that imports proposed for duty exemption be noncontroversial in that they have no domestic producer and no member objects.<sup>101</sup> After a list of proposed imports is created, the USITC produces a report with basic information on each product; it notes losses in U.S. revenue from decreased tax revenue and details beneficiaries of the duty suspension, among other analysis.<sup>102</sup> Congress is still capable of working with the executive branch to coordinate trade policy.

In addition to periodically suspending or reducing certain tariffs, Congress has also signaled it has its eyes set on more ambitious reform, and the time could not be better for legislation on national security trade power reform. Both sides of the aisle in Congress have expressed interest in passing law adjusting the President’s authority to authorize national security trade laws.<sup>103</sup> Over the course of 2019 and 2020, both the Democratic controlled House and the Republican controlled Senate advanced bills with different proposals for reducing the President’s unilateral trade remedy authority.<sup>104</sup>

With President Trump out of office, the risk of partisanship derailing support for adjusting the delegation has lessened,<sup>105</sup> and Con-

<sup>99</sup> VIVIAN C. JONES & LIANA WONG, CONG. RSCH. SERV., IF10478, MISCELLANEOUS TARIFF BILLS (MTBs) (2021).

<sup>100</sup> Pub. L. No. 114-159, 130 Stat. 395 (codified at 19 U.S.C. § 1332 note).

<sup>101</sup> 19 U.S.C. § 1332 note (American Manufacturing Competitiveness). There is a list of other criteria that also applies. *See id.*

<sup>102</sup> *Id.*

<sup>103</sup> Republican Senator Chuck Grassley, then the Senate Finance Committee Chairman, announced that reining in the President’s section 232 power was a goal of his. *See Niv Elis, Grassley Says He Wants to Rein in Trump Tariff Powers*, THE HILL (Jan. 8, 2020, 4:29 PM), <https://thehill.com/policy/finance/477416-grassley-says-he-wants-to-rein-in-trump-tariff-powers> [<https://perma.cc/5T6C-HWNH>]. Senator Ron Wyden, the Senate Finance Committee’s top Democrat, and now current Chairman, said he was open to “putting some guardrails [on] unpredictable and chaotic trade policy” and “find[ing] a legislative solution that will garner wide bipartisan support.” *Id.*

<sup>104</sup> *See infra* notes 110–29 and accompanying text.

<sup>105</sup> President Biden has expressed interest in reducing trade barriers at the same time as promoting American manufacturing. *See OFF. OF THE U.S. TRADE REPRESENTATIVE, 2021 TRADE POLICY AGENDA AND 2020 ANNUAL REPORT 1* (2021), <https://ustr.gov/sites/default/files/files/reports/2021/2021%20Trade%20Agenda/Online%20PDF%202021%20Trade%20Policy%20Agenda%20and%202020%20Annual%20Report.pdf> [<https://perma.cc/GH84-8LMM>]. This direction away from a heavy dependence on section 232 and IEEPA, and an interest in restoring norms, may allow for agreement among Congress members on trade law reform. *Cf. Editorial, Joe Biden and the Restoration of the American Republic*, FIN. TIMES (Jan. 20, 2021), <https://www.ft.com/content/7b7da65d-7452-461a-8dfb-480cd30f3f4b> (last visited May 22, 2021). Although President Biden may want to retain trade power, especially in light of Congress’s disfunc-



gress has renewed its push to adjust its delegation of trade power. By March 2021, approximately two months into the new Biden Administration, a bipartisan group of senators renewed a legislative push to amend section 232 authority.<sup>106</sup> The Trade Security Act of 2021<sup>107</sup> would include the Department of Defense in the investigation phase to try to ensure a legitimate national security assessment, mandate congressional consultation, and create a congressional disapproval procedure.<sup>108</sup> The Department of Defense would be required to submit to the President a report of its findings within 200 days and a public version of these findings would be made available in the Federal Register.<sup>109</sup>

Although some Republican bills recommended narrow procedural changes, Republicans have consistently joined Democrats for aggressive reform. The Bicameral Congressional Trade Authority Act of 2019 (“BCTAA”),<sup>110</sup> a bipartisan bill originating in the Senate Finance Committee, offered the most comprehensive reform. The bill would amend section 232 in the following key ways: (1) it would redefine “national security” to explicitly exclude “the general welfare of the United States,” and instead define it as aggression from other countries; (2) it would include the Secretary of Defense in section 232 investigations; (3) it would terminate presidential trade adjustments within sixty days unless an order received approval by joint resolution of Congress; (4) it would formalize an exclusion process at the USITC; and (5) it would require the USITC to submit a report to Congress within eighteen months detailing that effect of the action on the subject industry and on “the overall economy of the United States.”<sup>111</sup>

Other proposed Senate Finance Committee reform bills include the Reclaiming Congressional Trade Authority Act<sup>112</sup> and the Promot-

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tion, the damage of unrestricted trade power is now laid bare by President Trump’s use of executive trade authority delegated from Congress.

<sup>106</sup> See Eric Martin, *Senators Plan Bipartisan Revamp of National-Security Tariffs*, BLOOMBERG (Mar. 15, 2021, 6:02 PM), <https://www.bloomberg.com/news/articles/2021-03-15/senators-propose-bipartisan-revamp-of-national-security-tariffs> [<https://perma.cc/ZE9E-SY9L>].

<sup>107</sup> S. 746, 117th Cong. (2021).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> S. 287, 116th Cong. (2019); H.R. 940, 116th Cong. (2019). This bill was also endorsed by the U.S. Chamber of Commerce. See Letter from the U.S. Chamber of Com. to the Members of the U.S. Cong. (Jan. 30, 2019), <https://www.uschamber.com/letters-congress/us-chamber-letter-the-bicameral-congressional-trade-authority-act-of-2019> [<https://perma.cc/L2D2-26ZG>].

<sup>111</sup> S. 287; H.R. 940. The bill’s proposal that the USITC report on the effect of new section 232 duties on the overall economy comes close to this paper’s proposal but falls short for the reasons below. See *infra* Part II.

<sup>112</sup> S. 899, 116th Cong. (2019); H.R. 3477, 116th Cong. (2019).

ing Responsible and Free Trade Act of 2019.<sup>113</sup> The bipartisan Reclaiming Congressional Trade Authority Act would require Congress to approve a President's request to modify all duty rates, except those for urgent actions which would be allowed to stand for 120 days under unilateral authority.<sup>114</sup> This Act would also require that the USITC assess the impact on the whole economy in addition to the target industry.<sup>115</sup> The Promoting Responsible and Free Trade Act of 2019, proposed by a Democratic member, would include the Department of Defense in the decision-making process and grant Congress power to approve or disapprove of trade remedies.<sup>116</sup>

Several proposed bills target IEEPA directly. House Democrats proposed a bill that would amend IEEPA to clarify that the President has no authority to enact duties under the statute.<sup>117</sup> Although a President has never used IEEPA to enact duties on imports, President Trump threatened to impose tariffs under IEEPA against Mexico and China.<sup>118</sup> The Trade Certainty Act of 2019,<sup>119</sup> in the Senate, proposed the same restriction.<sup>120</sup> Representative Ilhan Omar proposed the Congressional Oversight of Sanctions Act.<sup>121</sup> This Act would require congressional approval to extend emergency declarations and would ramp up reporting requirements, including requiring the Office of the Comptroller General to report on the effect of a trade action on the United States, other countries, and on humanitarian missions.<sup>122</sup>

Weaker bills have also been debated, including the Global Trade Accountability Act of 2019,<sup>123</sup> the Trade Security Act of 2019,<sup>124</sup> and the American Business Tariff Relief Act of 2019.<sup>125</sup> The Global Trade Accountability Act of 2019 proposed amending the law to improve congressional review of duty and trade measure implementation.<sup>126</sup>

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<sup>113</sup> H.R. 3673, 116th Cong. (2019).

<sup>114</sup> S. 899; H.R. 3477.

<sup>115</sup> S. 899; H.R. 3477.

<sup>116</sup> H.R. 3673.

<sup>117</sup> To Prohibit the Imposition of Duties on the Importation of Goods Under the International Emergency Economic Powers Act, H.R. 3557, 116th Cong. (2019).

<sup>118</sup> See Elizabeth Goitein & Andrew Boyle, *Limiting This Governmental Emergency Power Could Curb Presidential Overreach*, FORTUNE (Mar. 4, 2020, 2:30 PM), <https://fortune.com/2020/03/04/national-emergency-foreign-sanctions-ieepa> [<https://perma.cc/8QVL-8C53>].

<sup>119</sup> S. 2413, 116th Cong. (2019).

<sup>120</sup> *Id.*

<sup>121</sup> H.R. 5879, 116th Cong. (2020).

<sup>122</sup> *Id.*

<sup>123</sup> S. 1284, 116th Cong. (2019); H.R. 723, 116th Cong. (2019).

<sup>124</sup> S. 365, 116th Cong. (2019); H.R. 1008, 116th Cong. (2019).

<sup>125</sup> S. 2362, 116th Cong. (2019).

<sup>126</sup> S. 1284; H.R. 723.

This bill would include mandatory reporting to Congress and a procedure for Congress to review and approve of unilateral presidential trade actions.<sup>127</sup> The bipartisan Trade Security Act of 2019 shifted authority from the Commerce Secretary to the Defense Secretary and created a mechanism for congressional disapproval.<sup>128</sup> Finally, the American Business Tariff Relief Act of 2019 would create a process for businesses to seek exemptions from import duties ordered by the President.<sup>129</sup> Congress has proposed numerous reform bills to limit the President's ability to abuse national security trade remedy authority, and the time is ripe to build on this momentum.

## II. CONGRESS SHOULD LIMIT ITS DELEGATION OF TRADE BARRIER AUTHORITY AND ENACT SUBSTANTIVE ADMINISTRATIVE PROCEDURE

Bipartisan calls for reform are a signal that the time is ripe to ensure future Presidents do not have unchecked power to abuse national security trade remedy authority. Previous calls for reform, however, come up short on specificity. The extent of the abuse demonstrates that specific legislation and procedure is necessary so that future Presidents are not able to damage U.S. industry and tarnish the country's international standing by unpredictably enacting unilateral tariffs on allies and trading partners. Currently, when the President orders an IEEPA sanction or a section 232 duty rate, he has untethered power, and neither he nor his executive branch is required to consider broad economic impact.

The BCTAA, supported by a bipartisan coalition, came close to providing the meaningful reform necessary to restrain the President's untethered power in this area, but it suffered administrability problems and created insufficient procedural constraints.<sup>130</sup> Although the BCTAA did extend unilateral authority for only sixty days unless Congress voted by joint resolution to continue the adjustment,<sup>131</sup> this procedural constraint was insufficient because joint resolutions create

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<sup>127</sup> S. 1284 § 2; H.R. 723 § 2.

<sup>128</sup> S. 365; H.R. 1008.

<sup>129</sup> S. 2362.

<sup>130</sup> See S. 287, 116th Cong. (2019); H.R. 940, 116th Cong. (2019). The Trade Security Act also lacks specificity and does not address section 232's biggest substantive and procedural problems. See S. 365; H.R. 1008; see also Inu Manak & Scott Lincicome, *The Trade Security Act Is a First Step, but No Solution to Section 232 Abuse*, CATO INST. (Mar. 18, 2021, 10:10 AM), <https://www.cato.org/blog/trade-security-act-first-step-no-solution-section-232-abuse> [https://perma.cc/5N64-YD4J].

<sup>131</sup> S. 287 § 2(d); H.R. 940 § 2(d).

too high a barrier for routine adjustments and targeted measures. The BCTAA would also have given the USITC eighteen months to provide a broad economic impact study.<sup>132</sup> This is too long a period for Congress and the public to understand fundamental emergency actions that can amount to far reaching economic policy because after eighteen months, damage to domestic industry and consumer spending power can be long lasting. To meaningfully restrain a President's virtually unlimited authority in this area, Congress needs to create concurrent authority that will allow legitimate national security threats to be addressed swiftly.

To protect U.S. companies and consumers, Congress should pass legislation ensuring accountability for section 232 and IEEPA orders. Three main reforms are necessary: (1) Congress should require a publicly available, broad economic impact study within three months of an emergency order; (2) Congress should narrow the delegation of national security remedies by only extending temporary approval for trade measures over \$1 billion imposed on unenumerated nations; and (3) Congress should redefine national security in the statutes.

*A. Congress Should Require a Public, Broad Economic Impact Study Within Three Months of an IEEPA or Section 232 Order*

Congress, and ultimately the public, need the tools to understand the impact of the President's economic policy; therefore, the USITC should be required to produce a broad economic study within three months of a section 232 or IEEPA order. The USITC is best suited for this because it is somewhat insulated from partisanship by nature of being independent, and review of recent bills shows that Congress trusts the USITC for this sort of analysis.<sup>133</sup>

Current laws lack substantive administrative procedure, which means that Congress and the public are denied the ability to hold the President accountable for national security measures. IEEPA requires the President submit a report to Congress about the actions the President took and the emergency requiring the actions, but those reports are allowed to lack specificity and analysis.<sup>134</sup> Section 232 requires an investigation by Commerce before the President is allowed to implement action, but Commerce's focus is almost exclusively on the sub-

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<sup>132</sup> S. 287 § 2(e); H.R. 940 § 2(e).

<sup>133</sup> See *supra* Section I.E.

<sup>134</sup> See 50 U.S.C. § 1703; see also S. 287 § 2(e); H.R. 940 § 2(e).

ject industry as opposed to downstream industries and the economy as a whole.<sup>135</sup>

Congressional bills have recognized that more accountability is needed, but reform efforts continue to lack specificity about the economic analysis required. For example, the BCTAA would require a broad economic impact study within eighteen months, but this timeline is too long, and the requirements are too ambiguous.<sup>136</sup> The USITC should be compelled to provide specific reporting within three months on a definite list, including: affected downstream industries, job gains or losses expected in downstream industries, the long-term gains expected in subject industries, overall economic cost to GDP, expected change to real household income, explanations for why the subject industry is essential to national security, and global sources for subject products or services, among others. Requiring a report within three months would allow Congress and the public to understand a trade policy's impact before the damage is too difficult to reverse. Congress has the power to require more procedure for emergency actions, but it has yet to do so.

Critically, this requirement could also help open trade measures to Administrative Procedure Act ("APA")<sup>137</sup> and constitutional challenges, and create accountability for presidential action. For example, Congress could simultaneously preempt the President's decision from judicial review, while requiring more procedural due process for domestic companies, workers, and consumers affected negatively by an emergency order.<sup>138</sup> Requiring more procedural due process would allow these domestic companies, workers, and consumers affected by an emergency order to bring APA and constitutional challenges. This would create more accountability for presidential action. Under this approach, the executive branch would still be responsible for complet-

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<sup>135</sup> See 19 U.S.C. § 1862(b).

<sup>136</sup> See S. 287; H.R. 940. There have been bipartisan calls to include the Department of Defense and the USITC in trade remedy investigations, and the BCTAA is only one example. See *supra* notes 107–09, 114–16 and accompanying text. Including more stakeholders may improve analysis, but the Executive, first and foremost, needs specific requirements about *what* analysis is needed. Commerce and the Department of the Treasury ("Treasury") are both capable of producing economic impact studies, and the Treasury especially has national security expertise because of the way it has weaponized monetary policy by, in part, using IEEPA.

<sup>137</sup> 5 U.S.C. § 500.

<sup>138</sup> See *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 758 F.3d 296, 311 (D.C. Cir. 2014) (holding that although the President's national security decision was not reviewable, procedural due process still applied to the decision-making process). This opinion is limited to the Committee on Foreign Investment in the United States, but it shows the power of Congress over the judiciary.

ing the economic impact analysis, but new legislation with enhanced due process requirements would enable courts to remand the USITC's decisions if the agency declined to provide reports with sufficient detail, or more likely, used a disagreeable economic analysis formula.

*B. Congress Should Eliminate the President's Unilateral Trade Authority for Most IEEPA Sanctions and Section 232 Duties that Have an Economic Impact Above \$1 Billion*

The most substantial reform requires amending the President's unilateral legislative authority to impose section 232 duties or IEEPA sanctions when there is an estimated economic impact over \$1 billion on unenumerated nations. Much of the pushback to President Trump's trade policy came from its lack of discipline—the trade war with China and the tariffs on allies created economic waves.<sup>139</sup> Targeted sanctions on countries like Iran and Russia, however, remain uncontroversial.<sup>140</sup> Congress should amend section 232 and IEEPA to allow the President unchanged authority to target enumerated nations while terminating any other action within thirty days unless Congress approves it by joint resolution.

One way to understand this proposal is by imagining how this policy could have reined in the Trump Administration. Target countries can be grouped into three categories. The first category is a country grouping that Congress would likely enumerate for complete presidential discretion. The second category is countries that Congress would be highly unlikely to sanction. The third category is countries that are not close allies, but not enemies in the traditional sense. Dividing countries in three categories illustrates how Congress could implement law consisting of varying oversight for enumerated and unenumerated countries.

The first category is made up of countries that the President would have complete discretion over. Iran and Russia surely would have made the list, meaning the President could scale duties up or down at any time consistent with his existing authority.<sup>141</sup> Even within this category, however, Congress would still be privy to a broad eco-

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<sup>139</sup> See *supra* notes 79–83 and accompanying text.

<sup>140</sup> See, e.g., JARRETT BLANC & ANDREW S. WEISS, U.S. SANCTIONS ON RUSSIA: CONGRESS SHOULD GO BACK TO FUNDAMENTALS (2019), <https://carnegieendowment.org/2019/04/03/u.s.-sanctions-on-russia-congress-should-go-back-to-fundamentals-pub-78755> [<https://perma.cc/GFE3-292T>].

<sup>141</sup> Congress could also pass laws creating additional sanctions if the President declined to act aggressively enough. See, e.g., Richard E. Levy, *Presidential Power in the Obama and Trump*

nomic impact study to understand how an order might ripple through the U.S. economy. Under this proposal, Congress could, at any time, amend the legislation to add additional noncontroversial countries.

The second category is countries that Congress would be highly unlikely to sanction and should be governed by concurrent authority of Congress and the President. These countries would be unenumerated. For a President's sanctions against this group to continue after thirty days, Congress would be required to approve these sanctions by joint resolution. In this group are countries—such as Mexico or Canada—with which the United States has strong long-standing relationships. The proposed law would have likely discouraged President Trump from declaring an IEEPA emergency against Mexico<sup>142</sup> because it would have been close to a guarantee that Congress would not have approved a joint resolution at the expiration of thirty days. The President's current ability to unilaterally order sanctions against Mexico promoted rare bipartisan contempt, enough to spur through both houses of Congress a joint resolution ending President Trump's IEEPA order.<sup>143</sup> President Trump vetoed the joint resolution, however, and the House failed to override the veto.<sup>144</sup> The ultimate failure of that joint resolution demonstrates that concurrent authority must be designed to prevent gridlock.

Although an exceedingly high bar makes sense if a President proposes sanctioning allies, it does not make sense for all emergency orders on all countries, especially countries with a history of hostility toward the United States. Requiring a joint resolution for all emergency declarations could add to gridlock and hurt the United States's threat response time. Risk of gridlock is further lessened by the carveout for any order that produces an effect less than \$1 billion.

The third category includes countries—like China—that are not close allies but not enemies in the traditional sense. Although third category countries are adversarial, they would also be unenumerated. For this third category of countries, a President would retain unilateral trade authority over all IEEPA sanctions and Section 232 duties, but timely and public USITC reports detailing damage to the U.S. economy and job losses to U.S. companies outside of the targeted industry

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*Administrations*, J. KAN. BAR ASS'N., Sept. 2018, at 46, 50 (explaining that Congress passed additional sanctions against Russia when the President declined to act aggressively).

<sup>142</sup> See *supra* note 81 and accompanying text.

<sup>143</sup> S.J. Res. 54, 116th Cong. (2019).

<sup>144</sup> Juliegrace Brufke, *House Fails to Override Trump Veto on Border Wall*, THE HILL (Mar. 26, 2019, 2:15 PM), <https://thehill.com/homenews/house/435880-push-to-override-trump-border-veto-fails-in-house> [<https://perma.cc/B696-A5DZ>].

would encourage the President to be less aggressive. Even in the third category, consisting of unenumerated adversarial nations, Congress's new oversight could still guide the President's trade policy. The recent U.S. trade war with China would likely have been different had the President's power been more restricted.<sup>145</sup> Congress could have added China to the enumerated list, but likely would not have because of close economic ties between the two countries. Assuming China stayed off the list, President Trump would likely have been much less aggressive with the scale of his tariffs; he knew that members of his own party were opposed to progression of the trade war. Further, the President may have been dissuaded by quickly arriving USITC reports detailing damage to the U.S. economy and job losses to U.S. companies outside of the targeted industry.

Shifting power away from the President and back to Congress does not come without concern. Congress has become infamously dysfunctional and some defenders of the national security establishment may be hesitant to reduce the President's ability to respond to national security threats.<sup>146</sup> Because Congress is a partisan body, political abuse is always a risk anytime Congress gets involved—but allowing the President to have unfettered discretion has proved costly, too.

Congress is unlikely to hold out approval for needed emergency measures, and its willingness to renew general level defense bills on a bipartisan basis through both Democratic and Republican administrations shows that when it comes to trade and national security, both parties prefer action.<sup>147</sup> A bipartisan contingent of the Senate has already demonstrated that it is willing to pull back its delegation of national security trade power.<sup>148</sup> Additionally, Congress already uses the

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<sup>145</sup> See *supra* notes 79–80 and accompanying text.

<sup>146</sup> See Derek Willis & Paul Kane, *How Congress Stopped Working*, PROPUBLICA (Nov. 5, 2018, 10:00 AM), <https://www.propublica.org/article/how-congress-stopped-working> [<https://perma.cc/8YAR-VXSZ>]. Party leaders increasingly control Congress and act as “junior partner[s] to the executive.” *Id.* Defenses of the current duty and sanction system were condensed into a recent student work suggesting that broader reform of section 232 contradicts the reason Congress delegated national security trade authority in the first place: to allow the President to respond quickly to threats. See Eric Krieger, Comment, *Rethinking Presidential Authority in Trade: A Modus Vivendi for Congressional Non-Interference and National Security*, 88 UMKC L. REV. 1039, 1040–41 (2020).

<sup>147</sup> The 2020 defense bill passing with a veto-proof majority is one example. See Karoun Demirjian, *Congress Votes to Send Defense Bill to Trump with Veto-Proof Majorities*, WASH. POST (Dec. 11, 2020, 6:31 PM), [https://www.washingtonpost.com/national-security/senate-vote-defense-bill-trump/2020/12/11/c21e4160-3bbe-11eb-9276-ae0ca72729be\\_story.html](https://www.washingtonpost.com/national-security/senate-vote-defense-bill-trump/2020/12/11/c21e4160-3bbe-11eb-9276-ae0ca72729be_story.html) [<https://perma.cc/5HYS-YPTZ>].

<sup>148</sup> See S. 287, 116th Cong. (2019).



MTB process to revoke tariffs it does not like.<sup>149</sup> Although shifting power away from the President and back to Congress creates some concerns, under this proposal the President would still be responsible for creating national security policy. Congress would have regulatory power instead of acting in an observatory role.

### C. *Redefining National Security*

To further limit the President's unilateral emergency trade authority, Congress should narrow the definition of national security. Of the three proposed reforms, this reform is the easiest to achieve because it is a narrow change, and the Senate has already proposed passing it.<sup>150</sup> Currently, section 232 and IEEPA do not narrowly define national security.<sup>151</sup> They leave national security undefined.<sup>152</sup> The President is authorized to take action against any "unusual and extraordinary threat."<sup>153</sup> In response to this ambiguity, the BCTAA proposed defining covered products to relate to energy, critical infrastructure, or military, and define national security to mean foreign aggression and *not* general welfare.<sup>154</sup> The same national security definition could be applied to both statutes, and even if it were the only reform enacted, it would at least require the President to more precisely define the security threat. It may also discourage an emergency order unless threats could be clearly defined, as a more substantive process requirement could open the door to due process litigation for procedural obfuscations.

Changing this definition alone would not be enough. Since *Dames & Moore v. Regan*, the Supreme Court has provided the President nearly limitless authority to decide national security and U.S. foreign policy.<sup>155</sup> The Court—now more conservative than when *Dames* was decided—is unlikely to restrict the executive branch's authority.<sup>156</sup> Multiple reforms are needed to restrict the President's national secur-

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<sup>149</sup> See JONES & WONG, *supra* note 99.

<sup>150</sup> See S. 287 (proposing, among other things, that national security be redefined as "the protection of the United States from foreign aggression" and explicitly exclude "the protection of the general welfare of the United States"); H.R. 940, 116th Cong. (2019) (same).

<sup>151</sup> See 19 U.S.C. § 1862; 50 U.S.C. § 1701.

<sup>152</sup> See 19 U.S.C. § 1862; 50 U.S.C. § 1701.

<sup>153</sup> 50 U.S.C. § 1701(a).

<sup>154</sup> S. 287 § 2(a); H.R. 940 § 2(a).

<sup>155</sup> See *supra* notes 92–96 and accompanying text; see also Peter E. Harrell, *How to Reform IEEPA*, LAWFARE (Aug. 28, 2019, 11:49 AM), <https://www.lawfareblog.com/how-reform-ieepa> [<https://perma.cc/E7KP-PYJC>].

<sup>156</sup> See Harrell, *supra* note 155.

ity power, but giving courts a clear definition of national security would be a start.

#### CONCLUSION

Through a three-part reform to section 232 and IEEPA, Congress should reassume some concurrent authority and withdraw from the President its total delegation of emergency trade power. Requiring substantive administrative procedure and creating outright restraints on the President would help U.S. industry by reducing the risk of destructive measures, and would lead to greater accountability by allowing challenges to administrative procedure. Bipartisan agreement indicates that the executive branch does not need to be a threat to national security and economic stability.