No. 23-___

IN THE

Supreme Court of the United States

PRIMESOURCE BUILDING PRODUCTS, INC.,
Petitioner,

v.

UNITED STATES, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Trade Expansion Act of 1968 delegates Congress's constitutional power to set import duties and regulate foreign trade to the President whenever the President declares that imports "threaten to impair the national security." 19 U.S.C. § 1862(c)(1)(A)(ii), (d). The only real constraints on the delegation are procedural: the President can only act in response to a public investigation and report by the Secretary of Commerce, and he must "determine the nature and duration of the action" he will take "[w]ithin 90 days after receiving [that] report." *Id.* § 1862(b), (c)(1)(A), (c)(2), (d). In 2018, President Trump invoked the Act to impose tariffs on imports of "steel mill products" (such as steel plate and pipe). Two years later, he imposed tariffs on certain products made from steel (*e.g.*, nails) without undertaking any of the Act's required procedures. Applying a deferential standard of review, the Federal Circuit found the action lawful. The questions presented are:

1. Whether separation of powers principles require courts to resolve ambiguity in statutory limits on delegations of vast legislative power to the Executive in a way that constrains the delegation or, as the Federal Circuit holds, courts must uphold the President's actions absent "a clear misconstruction of the governing statute."

2. Whether, under the proper standard of review, the Trade Expansion Act of 1968 permitted the President to impose tariffs on steel derivatives without complying with the statute's procedural prerequisites.

PARTIES TO THE PROCEEDING

Petitioner PrimeSource Building Products, Inc., was the plaintiff in the Court of International Trade and appellee in the court of appeals.

Respondents the United States, Joseph R. Biden, Jr., President of the United States, Gina M. Raimondo, Secretary of Commerce, Christopher Magnus, Commissioner of U.S. Customs and Border Protection, and United States Customs and Border Protection, Department of Commerce, were defendants in the Court of International Trade and appellants in the court of appeals.

Respondents Oman Fasteners, LLC, Huttig Building Products, Inc., and Huttig, Inc., were plaintiffs in the Court of International Trade and appellees in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Petitioner is owned by PriSo Acquisition Corporation and no other publicly held company owns 10 percent or more of stock in petitioner.

RELATED PROCEEDINGS

Petitioners' appeal in the Federal Circuit was consolidated with *Oman Fasteners, LLC, et al v. United States, et. al*, No. 21-2252 (Fed. Cir.).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution and Statutes

Regulations

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner PrimeSource Building Products, Inc. respectfully petitions this Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–18a) is reported at 59 F.4th 1255. The Court of International Trade's decisions (Pet. App. 19a–31a, 32a-150a) are reported at 505 F. Supp. 3d 1352 and 520 F. Supp. 3d 1332.

JURISDICTION

The Federal Circuit issued its decision on February 7, 2023. Pet. App. 1a. The court denied a timely petition for rehearing en banc on June 22, 2023. Pet. App. 152a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, Section 1 of the Constitution provides: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Article I, Section 8 of the Constitution provides in relevant part: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises" and to "regulate Commerce with foreign Nations . . . ."

The relevant portions of 19 U.S.C. § 1862 are reproduced in Appendix E to this petition (Pet. App. 154a-161a).

INTRODUCTION

The Constitution assigns Congress the power and responsibility to regulate trade with foreign nations and to set "Duties, Imposes and Excises" on foreign imports. U.S. Const. art. 1, § 8. The Trade Expansion Act of 1962 delegated a substantial portion of that power to the President to exercise largely as he sees fit in the name of protecting national security and economic welfare. *See* Pub. L. No. 87-794, 76 Stat. 872. In particular, the statute authorizes the President to take such "action that, in the judgment of the President, must be taken to adjust the imports" when he determines that those imports "threaten to impair the national security." 19 U.S.C. § 1862(c)(1)(A)(ii). The constraints on the President's delegated authority are procedural—the President can act only after receiving a report from the Secretary of Commerce finding a threat to national security and must "determine the nature and duration of the action" he will take to restrict imports "[w]ithin 90 days after receiving" that report. *Id*. § 1862(c)(1)(A).

In this case, the President followed that process before imposing tariffs on imports of "steel mill products," that is, raw steel as opposed to products *made from* raw steel, *i.e.*, steel derivatives such as nails or car parts. Two years later, without undertaking any of the statutory procedures, the President imposed tariffs on an assortment of steel derivatives as well. The Federal Circuit ultimately sustained the new tariffs, applying circuit precedent that required the court to uphold the President's exercise of his immense delegated authority unless "there has been a clear misconstruction of the statute."

Pet. App. 11a (quoting *Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 89 (Fed. Cir. 1985)).

This case presents the question whether that method of judicial review is consistent with bedrock separation of powers principles. Recognizing the risk to our constitutional order posed by congressional delegations of expansive legislative powers to the Executive, this Court has established interpretative principles, such as the major questions doctrine, designed to ensure that at the very least, extreme delegations of power are clearly intended by Congress. There can be no question that the President's exercise of delegated authority in this case warrants that kind of special separation of powers scrutiny — the statute delegates unprecedented power to the Executive, with virtually no guidance on how to use it. One might think that courts would strictly construe the statutory conditions on such extraordinary delegations lest the judiciary permit an even greater injury to separation of powers than Congress intended. But the Federal Circuit applies the opposite rule, deferring to the Executive's view of the statutory limits on its own authority unless it is clearly wrong.

This petition provides the Court an opportunity to take the next step in its major-questions and related separation of powers jurisprudence. The Court should use it to make unmistakably clear that when confronted by a statute delegating vast legislative power to the Executive, courts must resolve ambiguity in favor constraining the delegation, unless Congress clearly provided otherwise. *Cf. Paul v. United States*, 140 S. Ct. 342 (2019) (Kavanaugh, J., respecting denial of cert.) (noting the need for further consideration of constitutional and "statutory interpretation doctrine" to limit on congressional delegation of "major national policy decisions" to the Executive); *cf. also Biden v. Nebraska*, 143 S. Ct. 2355, 2376 (2023) (Barrett, J., concurring) (noting the "ongoing debate about [the] source and status" of the major questions doctrine); *id.* at 2378 (noting lack of clarity in Court's decisions).

STATEMENT OF THE CASE

I. Legal Background

Section 232 of the Trade Expansion Act provides that if the President determines that "an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security," he shall "determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security." 19 U.S.C. § 1862(c)(1)(A). The phrase "national security" is broadly defined to include not only "national defense requirements" but also the "economic welfare of the Nation." *Id.* § 1862(d). In considering the nation's economic welfare, the President is directed to take into account a variety of factors that tend to expand what counts as an import threatening national security: "the impact of foreign competition on the economic welfare of individual domestic industries; and any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports." *Ibid*. The President's national security determination is not subject to judicial review. *See* Pet. App. 16a-17a.

Section 232 includes little guidance on what the President should do in response to the threat posed by imports. Instead, Congress enacted important procedural constraints on the delegation. Section 232 permits the President to take action only after the Secretary of Commerce conducts an investigation and submits a formal report on the imports' effects on national security. 19 U.S.C. § 1862(c)(1). In conducting the investigation, the Secretary must consult with the Secretary of Defense and "appropriate officers of the United States." *Id*. § 1862(b)(2). If "appropriate," the Secretary must "hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to such investigation." *Ibid*.

The Act contemplates the investigation will be a serious undertaking, giving the Secretary 270 days to complete it. *Id*. § 1862(b)(3)(A). By that deadline, the Secretary must publish a report in the Federal Register describing his findings "with respect to the effect of the importation of such article in such quantities or under such circumstances upon the national security and, based on such findings, the recommendations of the Secretary for action or inaction." *Ibid*.

The President's authority to exercise his delegated powers is contingent on the Secretary conducting this investigation and finding a national security threat. *Id*. § 1862(c)(1)(A). The statute further limits the time in which the President may exercise those powers, providing that "[w]ithin 90 days after receiving [the] report" finding a security threat, "the President shall —"

> (i) determine whether the President concurs with the finding of the Secretary, and
>
> (ii) if the President concurs, determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security.

Ibid. The statute then requires that if the President determines to take action, he "shall implement that action" within 15 days of his determination. *Id*. § 1865(c)(1)(B). And within 30 days of the determination, he "shall submit to the Congress a written statement of the reasons why the President has decided to take action, or refused to take action." *Id*. § 1865(c)(2).

Section 232 then identifies a single circumstance in which the President can take a *different* action than the one he chose within the 90-day deadline without a new investigation from Commerce. Paragraph 3 of subsection (c) provides that if the "action taken by the President . . . is the negotiation of an agreement" to limit imports, and either "no such agreement is entered into" within 180 days or an agreement is reached but "is not being carried out or is ineffective," then the President "shall take such *other* actions as the President deems necessary." *Id*. § 1865(c)(3)(A) (emphasis added). If that happens, then the

"President shall publish in the Federal Register notice of any *additional* actions being taken under this section by reason of this subparagraph." *Ibid*. (emphasis added).

Beyond this provision, nothing in the Act authorizes the President to take any actions other than the ones decided upon within the 90-day period and reported to Congress. However, if other or additional action seems appropriate, nothing in the statute prevents the President from requesting the Secretary to conduct a renewed, expedited investigation that would authorize the President to determine whether the risk to national security still exists and what actions would be appropriate in light of the updated data and advice from the Secretary of Defense.

II. Factual Background

A. President Trump's Initial Steel Tariffs

1. In the Spring of 2017, the Secretary of Commerce opened an investigation into steel imports.[1] In its response to the investigation, the Department of Defense informed the Secretary that "U.S. military requirements for steel and aluminum each only represent about three percent of U.S. production."[2] Therefore, the Department of Defense did not believe that the levels of foreign steel and aluminum imports

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[1] *See* Notice Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Steel, 82 Fed. Reg. 19,205 (Dep't Com. Apr. 26, 2017).

[2] *Am. Inst. for Int'l Steel, Inc. v. United States*, 806 F. App'x. 982, 985-86 (Fed. Cir. 2020) (quoting letter).

documented by the Secretary "impact the ability of DoD programs to acquire steel or aluminum necessary to meet national defense requirements." *Ibid*. The Secretary of Defense further stressed his "concern[] about the negative impact" of the measures being contemplated "on our key allies." *Ibid*.

On January 11, 2018, the Secretary issued a report finding that imports of "steel mill products," such as flat steel, steel pipe, and steel slabs threatened national security. *See* U.S. Dep't Commerce, Bureau of Indus. & Sec., The Effects of Imports of Steel on the National Security, 85 Fed. Reg. 40,202, 40,203-40,204, 40,209, 40,224 (2018). The Report explained that regardless of any impact those imports may have on military readiness, they "have adversely impacted the steel industry" and thereby "are weakening our internal economy." *Id*. at 40,204. The Secretary then recommended that the President impose measures sufficient to "reduce imports to a level that should, in combination with good management, enable U.S. steel mills to operate at 80 percent or more of their rated production capacity." *Ibid*.

Throughout the report the Secretary examined only the effect of imports of "steel mill products," not the effect of imports of derivative products made from steel, such as nails, wire, or auto parts. *See id.* at 40,203. Thus, the initial request for public comments did not mention derivatives or request any information about the quantity of derivative imports or their effect on domestic steel production.[3] Virtually none of the more than 1,500 pages of public comments addressed the question either.[4] The Report itself conducted no analysis, and made no findings, regarding the effects of derivatives on the domestic steel industry. *See* 85 Fed. Reg. at 40,203-40,226. And although the statute expressly authorizes the President to take action to "adjust the imports of the article *and its derivatives*," the Secretary did not propose any actions to reduce imports of steel derivatives. *See* 19 U.S.C. § 1862(c)(1)(A)(ii) (emphasis added); 85 Fed. Reg. at 40,226. Unsurprisingly, then, when the President issued Proclamation 9705 accepting the report's findings on March 8, 2018, he imposed tariffs only on imports of steel mill products and did not exercise his authority to also limit imports of steel derivatives. *See*

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[3] *See* Notice Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Steel, 82 Fed. Reg at 19,205-07.

[4] The public comments are collected online at https://www.bis.doc.gov/index.php/documents/section-232-investigations/1726-merged-public-comments/file. A handful of comments advocated for duties on specific derivative products – flanges, transmission and windmill towers, and circular steel sawblades with diamond tips – without providing any analysis. *See* Public Comments at 300, 397, 1359, 1594 (cites to pagination in pdf file). None of those products was included in the eventual order imposing tariffs on some steel derivatives. *See* Proclamation 9980, Annex II.

Proclamation No. 9705, 83 Fed. Reg. 11,625 (Mar. 15, 2018).

The tariffs the President did impose were substantial—25% on all imported steel mill articles from every country except Canada and Mexico, for which he proposed to continue ongoing trade negotiations. *See id*. at 11,626. As required by the statute, the President's proclamation was published in the Federal Register and delivered to Congress. *See ibid*.

2. Certain steel importers challenged the tariffs in the Court of International Trade (CIT), arguing that the Trade Expansion Act effected an unconstitutional delegation of power to the President. *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) (*AIIS*). The CIT rejected the facial challenge, finding itself bound by this Court's 1976 decision in *Federal Energy Administration. v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976). In that case, this Court concluded that a prior version of the Act provided an adequate "intelligible principle to which the President is directed to conform," pointing to, among other things, the statutory "preconditions to Presidential action." *See* 426 U.S. at 559.

The CIT expressed some discomfort with that result, noting that the statute "seem[s] to invite the President to regulate commerce by way of means reserved for Congress, leaving very few tools beyond his reach." *AIIS*, at 1344. Judge Katzmann wrote separately to voice his "grave doubts" about the constitutionality of the Act in its present form and under this Court's modern precedents. *Id*. at 1347. He noted that although this Court has sometimes upheld statutes conferring significant trade authority on the President, those statutes all "provided ascertainable standards to guide the President." *Id*. at 1351-52. "What we have come to learn is that section 232, however, provides virtually unbridled discretion to the President with respect to the power over trade that is reserved by the Constitution to Congress." *Id*. at 1352. He urged this Court to "revisit [the] assumptions" underpinning *Algonquin*. *Ibid*. "If the delegation permitted by section 232, as now revealed, does not constitute excessive delegation in violation of the Constitution," he asked, "what would?" *Ibid*.

The Federal Circuit affirmed, agreeing that *Algonquin* precluded the plaintiffs' facial challenge. *See AIIS*, 806 F. App'x 982, 989 (Fed. Cir.), *cert. denied* 141 S. Ct. 133 (2020). The court acknowledged, however, that "[f]ive members of the Court have recently expressed interest in at least exploring a reconsideration of" the "intelligible principle" standard. *Id*. at 990.

B. The President's Ad-Hoc Alteration Of Tariff Levels Outside The Statutory Process

Although the statute required the President to identify the "nature and duration of the action" he would take in a written determination issued within 90-days of receiving the Secretary's report, President Trump repeatedly and dramatically changed his response to steel imports long after the statutory 90-day period expired.

1. Throughout 2018 and 2019, the President issued a series of proclamations, altering or eliminating the tariffs for particular countries and products already subject to the actions. *See Transpacific Steel LLC v. United States*, 4 F.4th 1306, 1314-15 (2021), *cert. denied*, 142 S. Ct. 1414 (2022).

For example, on August 10, 2018, the President doubled the tariffs on steel and aluminum imports from Turkey. *See* Proclamation 9772, 83 Fed. Reg. 40,429 (2018). The Proclamation gave no reason for singling out Turkey for increased tariffs, *see ibid.*, but in a tweet, the President implied that it was in retaliation for Turkey allowing its currency to "slide[] rapidly downward against our very strong Dollar! . . . . Our relations with Turkey are not good at this time!"[5]

In none of these cases did the Secretary of Commerce conduct a renewed investigation, solicit public comment, or issue a formal report.[6] Moreover, as far as was publicly disclosed, neither the Secretary nor the President consulted with the Department of Defense or any other agencies or officials. *Cf.* 19 U.S.C. § 1862(b)(2)(A).

2. In 2020, the CIT invalidated the Proclamation singling out Turkey for increased tariffs. *See*

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[5] Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 10, 2018, 5:47 A.M.), http://twitter.com/realdonaldtrump/status/1027899286586109955.

[6] Some Proclamations asserted that "the Secretary has informed" the President of certain facts. *See, e.g.*, Proclamation 9772, 83 Fed. Reg. at 40,429; Proclamation 9980, 85 Fed. Reg. at 5281. But to the extent those representations were made in writing, those documents have never been made public.

Transpacific Steel LLC v. United States, 466 F. Supp. 3d 1246 (CIT 2020). The court majority explained that "the temporal restrictions on the President's power to take action pursuant to a report and recommendation by the Secretary is not a mere discretionary guideline, but a restriction that requires strict adherence." *Id*. at 1252.

A divided panel of the Federal Circuit reversed. *Transpacific*, 4 F.4th at 1310. The majority concluded that all the President must do within the statutory 90-day period is adopt a "plan of action or course of action," with "choices to impose particular burdens in the carrying out of the plan permissibly made later in time." *Id*. at 1321. The court acknowledged that the "timing provisions were meant to prevent the President from acting on stale information." *Id*. at 1332. But it believed that "[c]oncerns about staleness of findings are better treated in individual applications of the statute," suggesting courts would develop their own time limits independent of those Congress enacted. *Ibid*. The court found no staleness problem in the case before it, however, because the increased duties on Turkish steel were imposed "only months after the initial announcement." *Ibid*.

Judge Reyna dissented. In his view, the majority's interpretation "expands Congress's narrow delegation of authority, vitiating Congress's own express limits, and thereby effectively reassigns to the Executive Branch the constitutional power vested in Congress to manage and regulate the Tariff." *Id.* at 1336. (citing U.S. Const. art. I, § 8).

C. The President's Imposition Of Tariffs On Steel Derivatives

On January 24, 2020—more than two years after the Secretary's Steel Report—the President went a significant step further, imposing a 25% tariff on certain steel derivatives. *See* Proclamation 9980, 85 Fed. Reg. 5281 (2020). The Proclamation did not purport to be based on the original Steel Report findings (which, as noted, said nothing about steel derivatives' effect on national security and was based on market data from 2017). *See id*. at 5281-82.[7] To the contrary, the President justified the new tariffs on developments occurring after the tariffs on steel mill products went into effect. *See id*. at 5281.

In particular, the President reported that the "Secretary has informed me that . . . imports of certain derivatives of steel articles have significantly increased since imposition of the tariffs and quotas" and that these imports were "erod[ing] the customer base for U.S. producers" of steel. *Id*. at 5282. In response, the Secretary recommended reducing imports of an eclectic mix of seven steel derivatives: "nails, tacks (other than thumb tacks), drawing pins, corrugated nails, staples (other than of heading 8305) and similar articles," as well as "bumper stampings of steel" used in certain vehicles and "for tractors suitable for agricultural use" (but not bumper

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[7] In the courts below, the Government disavowed any argument that the Secretary's informal findings and recommendations relating to steel derivatives could satisfy the "essential requirements of . . . 19 U.S.C. § 1862(B)(2)(A)." Pet. App. 25a (citation omitted).

stampings for other kinds of tractors or construction equipment). 85 Fed. Reg. at 5285. The proposal omitted the vast majority of steel derivative products, such as home appliances, factory equipment, and most car parts. *See ibid*.

Although the Secretary made representations about the amount and effects of derivative imports, those findings were not the result of the statutory investigative process and were made without the benefit of any public input. There was no notice of the investigation, no request for public comment, and no public hearings. Moreover, for all that can be told, there was no interagency consultation or input from the Department of Defense. In addition, because the Secretary's findings were not memorialized in any public report, its details were not subject to public or congressional scrutiny. Accordingly, it is impossible to tell, for example, whether the Secretary even considered whether imports of this ad-hoc subset of steel derivatives comprised a sufficient portion of the demand for U.S. steel to make any meaningful difference to the domestic steel industry. *See id*. at 5282; *cf.* United States Trade Commission, *Economic Impact of Section 232 and 301 Tariffs on U.S. Industries* 21-22 (March 2023) ("*Economic Impact*") (finding that the "defined derivative products represent a small share of total imports," accounting for 2.3 percent of steel imports by value in 2021).[8]

[8] A*vailable at* https://www.usitc.gov/publications/332/pub5405.pdf.

Nonetheless, the President accepted the Secretary's recommendation and imposed 25% tariffs on the steel derivates the Secretary identified. *Id*. at 5283.

III. Procedural History

1. Petitioner is an importer and reseller of steel derivatives such as steel nails and fasteners for the homebuilding industry. Petitioner and others filed suit challenging the validity of the steel derivative tariffs in cases later consolidated before the CIT. Pet. App. 3a-4a. In 2021, that court held the tariffs unauthorized by statute because they were imposed without compliance with Section 232's process and deadlines. *Id*. 4a.

2. The United States appealed, and the Federal Circuit reversed. *Id*. 5a.

The court explained that under circuit precedent, review of the President's compliance with the Trade Expansion Act is "available, but it is limited." *Id*. 11a. Specifically, "[f]or a court to interpose, there has to be a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority." *Ibid*. (quoting *Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 89 (Fed. Cir. 1985)). The panel emphasized that "[t]his court has repeatedly relied on the *Maple Leaf* formulation to indicate the 'limited' scope of review of non-constitutional challenges to presidential action." *Ibid*. (collecting examples).

The panel then upheld the President's interpretation of the statute, relying in large part on its prior decision in *Transpacific*. The panel again held that the only instance in which the President requires an investigation and report from the Secretary of Commerce is when he first announces his decision to take some kind of action; after that, he can make "adjustments of specific measures. . . in carrying out the plan over time." Pet. App. 12a (quoting *Transpacific*, 4 F.4th at 1319). The court further concluded that the original study and proclamation's failure to "address the effect of imports of derivatives is immaterial." *Id*. 15a. It was sufficient that applying the tariff to these derivatives was "*in line* with the announced plan of action . . . . to achieve the stated implementation objective," something the President "*could have* used in the initial set of measures." *Id*. 14a (emphasis added, citation omitted). Allowing the President to make such alterations outside the statutory process, the panel believed, "serv[es] the 'evident purpose' of § 232." *Ibid*. (quoting *Transpacific*, 4 F.4th at 1323).

The court again recognized that refusing to apply the statutory time limits to new actions could risk the President acting on stale information. *Id*. 14a. And it did not dispute that in this case, the new action in 2020 occurred more than two years after the conclusion of the Secretary's investigation, and nearly two years after the President's initial action against steel mill products, far longer than the several months the court found acceptable in *Transpacific*. *See id*. at 9a-10a. It nonetheless concluded that there was no staleness problem here because the new action was taken "in pursuit of the same goal first articulated in Proclamation 9705" and because it purported to be "in response to the 'current information' provided to the

President by the Secretary." *Id*. at 16a. The court acknowledged that the Government "declin[ed] to put into the record the updated data the Secretary conveyed to the President," which remains undisclosed to the public to this day. *Ibid*. But the panel concluded that nothing in the statute required the President to base his decision on information gathered through the statutory process or to disclose the details of the information he was acting on or how it was gathered. *Id*. at 18a.

3. On June 22, 2023, the Federal Circuit denied the challengers' joint petition for rehearing en banc. Pet. App. 151a.

REASONS FOR GRANTING THE PETITION

The Constitution addresses the power to regulate foreign commerce and set import duties with unusual precision, assigning both responsibilities to Congress, not the President. U.S. Const. art. 1, § 8. Yet, the Trade Expansion Act delegates the entirety of that legislative power to the Executive whenever the President declares that action "must be taken" to ensure that "imports will not threaten to impair national security." 19 U.S.C. § 1862(c)(1)(A)(ii). If there is an intelligible principle for the President to apply in making those determinations, it could hardly be less constraining. The statute defines "national security" with surpassing breadth and malleability. *See id*. § 1862(d). And Congress provided essentially no guidance at all regarding what actions the President should take in response to a threat. The constraints on the delegation are procedural requirements designed to ensure that the President acts on the basis of a public investigation and informed advice from relevant government officials.

In *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976), this Court pointed to those procedural prerequisites as essential to the statute's constitutionality. *See id*. at 559. Yet, the Federal Circuit has now held that once the Executive goes through the statutory process once, for years thereafter the President may take any "action that, in the judgment of the President, must be taken to adjust imports" without any statutory constraint. 19 U.S.C. § 1862(c)(1)(A). This now includes the power to dramatically change the amount of duties imposed,[9] to abandon import duties altogether in favor of a completely different response,[10] to change the countries subject to the action,[11] and to extend the restrictions to products that were not the subject of the initial investigation and Presidential action.[12]

In reaching these conclusions, the Federal Circuit has resolved every potential ambiguity in the statute in favor of broadening the delegation and minimizing the statutory limits on the Executive's exercise of legislative powers. This case provides the Court an opportunity to make clear that separation of powers principles require the opposite approach, one that resolves ambiguity in favor of restraint. And because the Federal Circuit's interpretation of the Act cannot

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[9] *See Transpacific*, 4 F.4th at 1310.

[10] *See id*. at 1314-15.

[11] *See id*. at 1315

[12] Pet. App. 14a-15a.

be upheld under that standard, the Court should reverse and hold that the steel derivatives tariff is unlawful.[13]

I. The Court Should Grant Certiorari To Make Clear That Courts Must Resolve Ambiguity In Statutes Delegating Vast Legislative Power To The Executive In Favor Of Restraining The Delegation.

The Federal Circuit applies an interpretive standard that resolves ambiguity in favor of expanding delegation of legislative trade powers to the President. As the panel explained below, the Federal Circuit only grudgingly permits *any* review of the President's compliance with the statutory limits on his delegated trade powers. Pet. App. 11a (explaining such review is "available, but it is limited"). What review is provided defers to the President's interpretation of his own authority: "For a court to interpose, there has to be a *clear misconstruction of the governing statute*, a *significant* procedural violation, or action outside delegated authority." *Ibid*. (quoting *Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 89 (Fed. Cir. 1985)) (emphasis added).

That standard cannot be reconciled with the family of doctrines this Court has adopted to protect the Constitution's division of authority between the branches. *See generally*, Cass R. Sunstein,

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[13] Because the Federal Circuit has exclusive jurisdiction over appeals under the Trade Expansion Act, a circuit split on the proper construction of that Act could not arise. *See* 28 U.S.C. §§ 1295(a)(5), 1581(i).

Nondelegation Canons, 67 U. Chi. L. Rev. 315 (2000). In the most extreme cases, a transfer of legislative power to the Executive may be so expansive and unguided that the courts are compelled to directly declare it an unconstitutional delegation. *See, e.g.*, *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935). Courts also must construe statutory delegations "narrowly in order to avoid a serious question of unconstitutional delegation of legislative power." *Algonquin*, 426 U.S. at 558-59 (internal quotation marks and citation omitted).

More recently, the Court has applied the "major questions" doctrine to cases "in which the history and the breadth of the authority that [the Executive] has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority." *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022) (cleaned up). In those "extraordinary cases," the Executive's claim of power can prevail only if it can "point to clear congressional authorization." *Id*. at 2608-09.

Thus far, the Court has applied the major questions doctrine principally to decide whether Congress has delegated to the Executive power to regulate a particular subject matter at all—*e.g.*, student loan forgiveness, cigarettes, greenhouse gases, assisted suicide, etc. Here, there is no doubt that Congress intended to delegate the President power to regulate international trade. The interpretative question, instead, concerns the *scope* of that power and, in particular, the meaning of the statutory restrictions placed on the Executive's exercise of that authority.

While the precise question may be different, the underlying constitutional considerations are the same. The President's attempts to legislate the terms of international trade in a product deemed essential to national security is a question of "vast economic and political significance." *Util. Air Regul. Grp v. EPA*, 573 U.S. 302, 324 (2014). The scope of the delegation is enormous, allowing the President to respond to the perceived threat with whatever "action that, in the judgment of the President, must be taken to adjust imports." 19 U.S.C. § 1862(c)(1)(A)(ii); *see Biden v. Nebraska*, 143 S. Ct. at 2373 (invoking major questions doctrine where agency claimed "virtually unlimited power to rewrite the Education Act"); *Ala. Assoc. of Realtors v. DHS*, 141 S. Ct. 2485, 2489 (2021) (calling Government's claim of authority "breathtaking" where only limit was that an agency "deem a measure 'necessary'"). There can be no claim that Congress made the principal policy decisions itself, leaving it to the President to "fill up the details." *Wayman v. Southard*, 23 U.S. 1, 31 (1825). The only choice Congress made was to direct the President to make the relevant policy decisions.

Under the Act, then, significant matters of national trade law are "nothing more than the will of the current President." *Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting); *see also Gonzalez v. Oregon*, 546 U.S. 243, 262 (2006) (applying major-questions doctrine where Attorney General claimed power to prohibit drug uses "he deems illegitimate"). That is the opposite of the liberty-preserve process Congress ordained for the creation of law. *See Gundy*, 139 S. Ct. at 2134 (Gorsuch, J., dissenting).

To be sure, in the 1970s, this Court found no delegation problem with a prior version of the Trade Act. *See Algonquin*, 426 U.S. at 559. But the Court's premise — that the statute "establishes clear preconditions to the Presidential action," such as the prerequisite report from the Secretary's investigation, *ibid.* — has been undermined by the Federal Circuit's repeated untethering of the President's action from those procedural prerequisites. *See AIIS*, 376 F. Supp. 3d at 1351-52 (Katzmann, J., concurring). As now construed, the President may legislate tariffs against goods that were not the subject of any investigation or recommendation by the Secretary, years after the initial investigation, through whatever deliberative process he chooses.

Moreover, in more recent times, members of this Court have drawn precedents like *Algonquin* into question, expressing a willingness to "reconsider the approach we have taken for the past 84 years" in an appropriate case. *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Alito, J., concurring in the judgment); *see also ibid*. (Gorsuch, J., joined by Robert, C.J., and Thomas, J., dissenting) (calling Court's modern non-delegation approach "an understanding of the Constitution at war with its text and history"); *Paul v. United States*, 140 S. Ct. 342 (2019) (Kavanaugh, J., respecting denial of certiorari) ("Justice Gorsuch's thoughtful *Gundy* opinion raised important points that may warrant further consideration in future cases.").

The Court should use this case to begin reconsidering its approach to nondelegation. It need not overrule *Algonoquin* in order to recognize that the Act raises separation of powers concerns sufficient to require that courts find clear congressional authorization before construing the statute in ways that expand the scope of the President's delegated authority. Both "separation of powers principles and a practical understanding of legislative intent" suggest that when Congress delegates broad, unguided legislative power to the Executive, it intends for the conditions on that authority to be strictly construed and enforced. *West Virginia*, 142 S. Ct. at 2609. Only that approach is consistent with constitutional avoidance principles and the judiciary's obligation to view the Executive's claims of "extravagant statutory power over the national economy" with "skepticism." *West Virginia v. EPA*, 142 S. Ctr. 2587, 2609 (2022) (cleaned up).

Accordingly, the President's claimed authority to legislate tariffs on steel derivatives in this case should not have been accepted absent "clear congressional authorization." *Ibid*. That includes clear authorization to excuse the President from complying with the statutory procedures for taking actions to reduce imports. Strict enforcement of the Trade Act's procedural requirements is particularly important to maintaining the constitutional order. *See Touby v. United States*, 500 U.S. 160, 166 (1991) (holding that "procedural requirements," including a time requirement, created a lawful delegation because they "meaningfully constrain[ed] the Attorney General's discretion"). The Constitution assigns legislative power to Congress in part because "Article I's detailed process of new laws were . . . designed to promote deliberation." *Gundy*, 139 S. Ct. at 2134 (Gorsuch, J., dissenting). The procedural requirements of the Trade Act are designed to replicate at least some portion of that deliberation when trade policy is made by the Executive rather than Congress. Courts should be especially hesitant before adopting an interpretation of the statute that eliminates those safeguards.

II. The Federal Circuit Could Not Have Upheld The President's Actions Applying Appropriate Separation Of Powers Principles.

The Federal Circuit could not have reached its expansive interpretation of the President's powers if it had applied the proper interpretative standard.

1. The plain text of the statute is clear and straightforward: the President is empowered to take a trade "action" only if, "[w]ithin 90 days after receiving a report" from the Secretary of Commerce, he "determines the nature and duration of the action" he proposes to take." 19 U.S.C. § 1862(c)(1)(A), (B)(2). He is then required to implement that "action" within 15 days of his determination and to report to Congress within 30 days why he decided to take that "action." *Id*. 19 U.S.C. § 1862(c)(1)(B), (2).

The Federal Circuit countenanced the President's claimed authority to impose measures other than those determined through this statutory process by giving the word "action" an extraordinarily expansive reading. An "action," it held, can consist of nothing more than "a plan of action that allows adjustments to specific measures . . . in carrying out the plan over time." Pet. App. 12a (citation omitted). The court thus defined an "action" as the equivalent of a general "plan" and used words like "measures" and "implementing steps" to describe specific actions like imposing tariffs, erecting import quotas, or negotiating a trade agreement. *Id*. at 1261. Even that gloss uses the word "plan" loosely. There was no argument, for example, that the President's initial plan included contingencies to extend tariffs to derivatives on certain conditions. *Cf. id.* at 1321 (stating that an "action" might include "options for contingency-dependent choices"). Indeed, neither the investigation, the Secretary's report, nor the President's Proclamation even mentioned derivatives. *See supra at* 14-15. The only way to claim that the original "plan of action" included steel derivatives would be if the plan were simply to "fix the problem somehow" or "impose these initial measures and see how it goes."

That definition of "action" cannot be squared with the rest of the text. For one thing, the statute requires the President to "implement that action" within 15 days of the determination, making clear that an "action" is concrete and specific, something that can actually be implemented, not just a general "plan of action" whose "implementing steps" will be decided later. Pet. App. 12a.

Likewise, requiring the President to determine, and report to Congress, "the *nature* and *duration* of the action," confirms that an "action" is something more concrete than a simple resolution to suppress imports in some unspecified way over some indeterminate period of time. *Id.* § 1862(c)(1)(A)(ii) (emphasis added). After all, the statute separately requires the President to "determine" whether he "concurs with the finding of the Secretary" that imports are threatening to impair national security. *Id.* § 1862(c)(1)(A)(i). There would be no point in requiring him, in the next subparagraph, to also "determine the nature and duration of the action" if all that required was reiterating his view that imports posed a threat that needed to be dealt with through "specific measures" that would be determined later and changed at will for years on end.

Nor would there be any point in requiring the President to determine that his "action" will "adjust the imports . . . so that such imports will not threaten to impair national security," if by "action," Congress simply meant a general "plan of action" that contained no specific measures whose efficacy could be predicted.

If that were not enough, paragraph 3 of subsection (c) specifically contemplates the possibility that the President might decide later that some "*other* actions" or "*additional* actions" are needed to achieve his objectives, *id.* § 1862(c)(3)(A), yet authorizes him to do so without undertaking the statutory process in only one limited circumstance: if the "action taken by the President under paragraph (1)" – that is, the action determined within 90 days of the Secretary's report – "is the negotiation of an agreement which limits or restricts" imports or exports, and either no agreement is achieved within 180 days or the agreement "is not being carried out or is ineffective." *Id.* § 1862(c)(3)(A). In those circumstances, the statute requires the President to "take such other actions as the President deems necessary" and to "publish in the Federal Register notice of any additional actions being taken." *Ibid*.

By expressly providing for one circumstance in which the President is not required to repeat the investigation before imposing an alternative action, Congress made clear it contemplated no other exception. *See, e.g.*, *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent."). Moreover, paragraph 3 would have been unnecessary if, as the Federal Circuit insists, the President's initial "action" included any "additional impositions on imports" he later determined necessary "to achieve the stated implementation objective." *Transpacific*, 4 F.4th at 1319. Nor would this provision's use of the phrases "other actions" and "additional actions" make any sense if "action" meant a general "plan of action" sufficiently broad to encompass any other or additional action the President might take in response to a failed negotiation.

The Federal Circuit's interpretation of "action" also makes inexplicable Congress's requirement that the President publish a notice of his decision to take other action when negotiations failed, but not when he changes course for any other reason (*e.g.*, because initial import quotas proved ineffective). The Federal Circuit could not explain why Congress would have expressly authorized and regulated alternative actions when the initial action was a negotiation, but not when the initial action was something else.

Unable to convincingly account for the text, the Federal Circuit has resorted to general statutory purposes and an incomplete reading of the legislative history. For example, the panel believed that freeing the President from the procedural conditions "furthers [the Act's] evident purpose," which is to "enable and obligate the President . . . to effectively alleviate the threat to national security." 4 F.4th at 1323. In *Transpacific*, the court also found support in prior instances of Presidents modifying their responses under the Trade Expansion Act without a new investigation or report from the Secretary of Commerce. *Transpacific*, 4 F.4th at 1326-1329.[14] The panel majority recognized that its historical examples largely predated Congress' material revision of the statute in 1988 which, among other things, added the 90-day time limit for the President to determine the "nature and duration" of his proposed action and convey that decision to Congress. *Id*. at 1329. But the court brushed the amendments aside, refusing to

[14] Although this Court noted that practice in *Algonquin*, it did not pass on its consistency with the statute, perhaps because the specific modification before it was the product of a renewed formal investigation by the Secretary of Commerce. 426 U.S. at 553-54. Nor did the Court consider the circumstances under which the President can extend tariffs to a new category of products, such as derivatives. *Cf. id*. at 552 (noting that presidential orders regarding oil imports had always addressed both "crude oil and the principal crude oil derivatives"). Instead, the only question before the Court was whether the Act allowed the President to control oil imports "by imposing on them a system of monetary exactions in the form of licensing fees" as opposed, for example, to "imposing quotas on such imports." *Id*. at 551-52.

construe them as enacting significant constraints on presidential authority absent a "clear indication from Congress of a change in policy," which it found lacking based principally on its reading of the legislative history. *Transpacific*, *id*. at 1329-31.

As Judge Reyna explained in his *Transpacific* dissent, this reasoning fails on its own terms. *See id*. at 1341-42. But more importantly, every aspect of that analysis — the reliance on generalized legislative purpose, the debatable inferences drawn from executive practice and congressional silence, the refusal to construe the 1988 amendments as effecting "a withdrawal of previously existing presidential power" absent "a clear indication from Congress," *id*. at 1329 — is incompatible with the proper standard for interpreting a statute delegating vast legislative powers to the Executive. None of it constitutes the "clear congressional authorization" that separation of powers principles require. *West Virginia*, 142 S. Ct. at 2609.

III. This Case Presents An Ideal Vehicle For Resolving Questions Of Great Doctrinal And Practical Significance.

Accordingly, this case presents the Court an ideal vehicle for deciding the proper rules for resolving ambiguities in statutes delegating expansive legislative power to the Executive Branch — the question is squarely posed by the case and its answer is outcome determinative.[15]

The question is also undeniably important. For the reasons already discussed, the proper standard of review is of vital doctrinal significance. The major question doctrine can protect against agencies making unwarranted claims of extravagant delegated powers, but it does not directly address what should happen when Congress clearly intends to give away broad swaths of its constitutional responsibilities to the Executive branch, often with limited substantive or procedural conditions attached. As this case shows, how courts interpret those limitations is of great significance to maintaining the constitutional plan.

The scope of the President's authority under the Trade Expansion Act is also of immense practical consequence. Almost by definition, the statute governs imports of products that are vital to our economy, steel and steel derivatives being a prime example. Any tariff on such a product necessarily has radiating effects throughout the economy. Here, the steel tariffs have dramatically increased the price of imported steel and steel derivatives by approximately

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[15] Petitioner also adequately preserved the argument below. *See, e.g.*, Pet'r. C.A. Br. 27 (Heading III.B: "Outer Boundaries on the President's Authority to Act Outside the Time Constraints in Section 232 Are Necessary to Avoid Separation-of-Powers Concerns"). To be sure, petitioner did not directly ask the panel to overrule the Circuit's deferential standard of review under *Maple Leaf Fish*. But the panel had no authority to grant such a request, so petitioner's failure to make it is no impediment to review. *See, e.g.*, *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 101 n.7 (2013).

$3 billion per year.[16] They also allow domestic manufacturers to raise their prices, with domestic consumers bearing the brunt of the price increases.[17] As a consequence, steel prices in the United States are up to "40 percent higher even than in high-cost Western Europe."[18] Unsurprisingly, then, downstream industries that rely on steel inputs— which "employ 46 times more people and add 35 times more to GDP than do steel producers"[19] —saw an "average annual decrease in production values" of "$3.4 billion during 2018-21"[20] and the loss of approximately 75,000 jobs (compared to the estimated 1,000 jobs created or saved in the steel industry) in the first few years of the tariffs.[21]

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[16] Https://taxfoundation.org/tariffs-trump-trade-war/#:~:text=Tariffs%20on%20steel%20and%20aluminum%20and%20derivative%20goods%20currently%20remain,based%20on%202018%20import%20values.

[17] *See Economic Impact*, *supra*, at 21-22.

[18] *See* Dan Pearson*, Ending tariffs would curb inflation — but why ignore the main benefits?*, The Hill (July 18, 2022), *available at* https://thehill.com/opinion/international/3563911-ending-tariffs-would-curb-inflation-but-why-ignore-the-main-benefits/.

[19] *Ibid*.

[20] *Id*. at 22.

[21] Kadee Russ & Lydia Cox, *Steel Tariffs and U.S. Jobs Revisited*, https://econofact.org/steel-tariffs-and-u-s-jobs-revisited (Feb. 6, 2020) (citing study by researchers at the Federal Reserve Board of Governors).

The resulting higher prices have propagated through the economy, contributing to inflation.[22] The result has been an increase in costs of materials essential to a variety of domestic industries, including homebuilding. By one estimate, the additional cost to the economy has been approximately $11.5 billion a year, working out to over $900,000 for every job saved or created in the steel industry.[23]

Ordinarily, those bearing the brunt of the tariffs could turn to their local members of Congress to seek relief. But because the tariffs were imposed by presidential proclamation rather than through the constitutional process for imposing taxes and regulating international commerce, Congress has excused itself from the debate and escaped political accountability for the pain the tariffs have inflicted. *See Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting).

This Court should intervene to restore the constitutional balance. The Federal Circuit has steadfastly refused to provide a significant check on the President's exercise of his delegated powers. No other circuit has jurisdiction to do so. *See supra* n.13.

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[22] *See, e.g.*, Megan Hogan & Yilin Wang, To fight inflation, cutting tariffs on China is only the start, Peterson Institute for International Economics (June 3, 2022), https://www.piie.com/blogs/realtime-economic-issues-watch/fight-inflation-cutting-tariffs-china-only-start.

[23] Https://www.washingtonpost.com/business/2019/05/07/trumps-steel-tariffs-cost-us-consumers-every-job-created-experts-say/.

And there is no indication that the tariffs will be lifted anytime soon.

IV. At The Very Least, This Petition Should Be Held For *Loper*.

At the very least, the Court should hold this case pending its decision in *Loper Bright Enterprises v. Raimondo*, No. 22-451. There, the Court will consider the appropriate standard for deferring to an executive agency's interpretation of its own statutory powers, in the process deciding whether to modify or overrule *Chevron v. NRDC*, 467 U.S. 837 (1984). Here, the Federal Circuit invoked its particularly robust form of *Chevron*-style deference for reviewing the Executive's claimed power under the Trade Expansion Act. Pet. App. 11a. The Court's decision in *Loper* could shed important light on whether that standard is consistent with the Constitution's division of powers among the branches. *See, e.g.*, U.S. BIO 7, *Yang v. United States*, No. 02-136 (Solicitor General explaining that a hold is appropriate when the Court's decision in a pending case "could affect the analysis of [the] question" presented by the petition or if "it is possible that the Court's resolution of the question presented in [the pending case] could have a bearing on the analysis of petitioner's argument," even if the cases do "not involve precisely the same question").

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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July 21, 2023

APPENDIX

TABLE OF CONTENTS

APPENDIX A

[PUBLISH]

In the
United States Court of Appeals
for the Federal Circuit

PRIMESOURCE BUILDING PRODUCTS, INC.,
Plaintiff-Appellee

v.

UNITED STATES, JOSEPH R. BIDEN, JR., PRESIDENT OF THE UNITED STATES, UNITED STATES CUSTOMS AND BORDER PROTECTION, CHRISTOPHER MAGNUS, COMMISSIONER OF U.S. CUSTOMS AND BORDER PROTECTION, DEPARTMENT OF COMMERCE, GINA M. RAIMONDO, SECRETARY OF COMMERCE,
Defendants-Appellants

2021-2066

Appeal from the United States Court of International Trade in No. 1:20-cv-00032-TCS-JCG-MMB, Senior Judge Timothy C. Stanceu, Judge Jennifer Choe-Groves, Judge M. Miller Baker

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OMAN FASTENERS, LLC, HUTTIG BUILDING PRODUCTS, INC., HUTTIG, INC., *Plaintiffs-Appellees*

v.

United States, Joseph R. Biden, Jr., President of the United States, United States Customs and Border Protection, Christopher Magnus, Commissioner of U.S. Customs and Border Protection, Department of Commerce, Gina M. Raimondo, Secretary of Commerce,
Defendants-Appellants

Appeal from the United States Court of International Trade in Nos 1:20-cv-00037-TCS-JCG-MMB, 1:20-cv-00045-TCS-JCG-MMB, Senior Judge Timothy C. Stanceu, Judge Jennifer Choe-Groves, Judge M. Miller Baker

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Decided: February 7, 2023

JEFFREY S. GRIMSON, Mowry & Grimson, PLLC, Washington, DC, argued for plaintiff-appellee PrimeSource Building Products, Inc. Also represented by BRYAN PATRICK CENKO, JILL CRAMER, KRISTIN HEIM MOWRY, SARAH WYSS.

ANDREW CARIDAS, Perkins Coie, LLP, Washington, DC, argued for plaintiffs-appellees Oman Fasteners, LLC, Huttig Building Products, Inc., Huttig, Inc. Also represented by MICHAEL PAUL HOUSE; KARL J. WORSHAM, Phoenix, AZ.

MEEN GEU OH, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendants-appellants. Also represented by KYLE SHANE BECKRICH, BRIAN M. BOYNTON, TARA K. HOGAN, PATRICIA M. MCCARTHY.

ADAM H. GORDON, The Bristol Group PLLC, Washington, DC, for amicus curiae The American Steel Nail Coalition. Also represented by LAUREN FRAID, JENNIFER MICHELE SMITH.

Before TARANTO, CHEN, and STOLL, *Circuit Judges*.

TARANTO, *Circuit Judge*.

In 2018, pursuant to § 232 of the Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 872, 877, codified as amended at 19 U.S.C. § 1862, the Secretary of Commerce reported to the President that steel imports threatened national security by contributing to unsustainably low levels of use of domestic steel-producing capacity, and the President, agreeing with the Secretary's finding, issued Proclamation 9705 to adopt a plan of action to address that threat, starting with imposition of higher tariffs on steel imports from certain countries but providing for monitoring and future adjustments if needed. In 2020, the President issued Proclamation 9980, which, based on the required monitoring, raised tariffs on imports of steel derivatives such as nails and fasteners. That proclamation was challenged in two cases (before us here) filed in the Court of International Trade (Trade Court)—one by PrimeSource Building Products, Inc.; the other by Oman Fasteners, LLC, Huttig Building Products, Inc., and Huttig, Inc. (collectively, Oman

Fasteners)—against the United States, the President, and two federal agencies and their heads (collectively, the government). The Trade Court held Proclamation 9980 to be unauthorized by § 232 because the new derivatives tariffs were imposed after the passing of certain deadlines for presidential action set forth in § 232. *See PrimeSource Building Products, Inc. v. United States*, 497 F. Supp. 3d 1333 (Ct. Int'l Trade 2021); *PrimeSource Building Products, Inc. v. United States*, 505 F. Supp. 3d 1352 (Ct. Int'l Trade 2021); *Oman Fasteners, LLC v. United States*, 520 F. Supp. 3d 1332 (Ct. Int'l Trade 2021).

The government appeals. After the Trade Court issued its decisions on the merits, we decided *Transpacific Steel LLC v. United States*, 4 F.4th 1306 (Fed. Cir. 2021), *cert. denied*, 142 S. Ct. 1414 (2022), which led the Trade Court to issue stays of its judgments in the two cases. In *Transpacific*, we upheld a presidential proclamation that increased tariffs on steel beyond Proclamation 9705's rate, concluding that when the President, within the § 232 time limits at issue, adopts a plan of action that contemplates future contingency-dependent modifications, those time limits do not preclude the President from later adding to the initial import impositions in order to carry out the plan to help achieve the originally stated national-security objective where the underlying findings and objective have not grown stale. We now uphold Proclamation 9980. That proclamation's new imposition reaches imports of steel derivatives, which are within § 232's authorization of presidential action based on the Secretary's finding about imports of steel, and there is no staleness or other persuasive reason for overriding the President's judgment that including derivatives helps achieve the specific, original national-security objective. We therefore reverse the judgments of the Trade Court.

I

A

Section 232 "empowers and directs the President to act to alleviate threats to national security from imports." *Id.* at 1311. For the President to act, the Secretary of Commerce must, under § 232(b), first investigate the effects on national security of imports of an article and submit to the President within 270 days a report detailing the Secretary's findings about such effects. 19 U.S.C. § 1862(b)(1)(A)–(3)(A). The report must contain the Secretary's recommendations for action or inaction with respect to imports of that article. *Id.* § 1862(b)(3)(A). If the Secretary finds that imports of the article "threaten to impair the national security, the Secretary shall so advise the President in [the] report." *Id.* Under § 232(c), within 90 days of receiving the Secretary's report, the President must determine whether to concur in that finding. *Id.* § 1862(c)(1)(A)(i). If the President concurs in that finding, then within the same 90 days "the President shall" also "determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article *and its derivatives* so that such imports will not threaten to impair the national security." *Id.* § 1862(c)(1)(A) (emphasis added). If the President determines to take action with respect to the import of the article and its derivatives, “the President shall implement that action” within 15 days of the foregoing determinations, *id.* § 1862(c)(1)(B), that is, within 105 days of the Secretary’s report.

B

In 2017, the Secretary began investigating steel imports and concluded that they posed a threat to national security. J.A. 232–35. On January 11, 2018, the Secretary reported to the President that the imports were “weakening our internal economy” and harming “the [domestic] steel industry,” the continued vitality of which “is essential for national security applications.” *Id.* The Secretary recommended that the President “take immediate action by adjusting the level of these imports through quotas or tariffs” with the goal of “reducing import penetration rates to approximately 21 percent,” so that “U.S. industry would be able to operate at 80 percent of their capacity utilization.” J.A. 236, 288. The 80 percent rate, the Secretary found, was the minimum “necessary to sustain adequate profitability and continued capital investment, research and development, and workforce enhancement in the steel sector” and to thereby “enable U.S. steel mills to increase operations significantly in the short-term and improve the financial viability of the industry over the long-term.” J.A. 234, 289.

On March 8, 2018, the President announced his concurrence and remedial plan. Proclamation 9705: Adjusting Imports of Steel into the United States, 83 Fed. Reg. 11,625 (Mar. 8, 2018). He concurred that “steel articles are being imported into the United

States in such quantities and under such circumstances as to threaten to impair the national security." *Id.* ¶ 5, 83 Fed. Reg. at 11,626. He imposed a 25 percent tariff on imports of various steel articles (*e.g.*, flat-rolled products, bars and rods, tubes, pipes, and ingots) from many countries. *Id.* ¶ 8, clause 2, Annex, 83 Fed. Reg. at 11,626–29; *see PrimeSource*, 497 F. Supp. 3d at 1337–38 n.2. The President deemed this an "important first step in ensuring the economic viability of our domestic steel industry." Proclamation 9705 ¶ 11, 83 Fed. Reg. at 11,626; *id.* clause 2, 83 Fed. Reg. at 11,627. He retained the option to "remove or modify" the impositions if the United States and other countries were to come up with suitable alternatives for remedying the security threat. *Id.* ¶ 9, 83 Fed. Reg. at 11,626. More generally, the President directed the Secretary to "continue to monitor imports of steel articles," "review the status of such imports with respect to the national security," and "inform the President of any circumstances that in the Secretary's opinion might indicate the need for further action by the President under section 232." *Id.* clause 5(b), 83 Fed. Reg. at 11,628.

In light of, *e.g.*, negotiations between the United States government and some foreign governments, the President issued a variety of follow-up proclamations to make changes in the impositions of Proclamation 9705, including the August 2018 Proclamation 9772 that was challenged (and upheld by this court) in *Transpacific.* 4 F.4th at 1314–16. The Secretary monitored relevant imports, as required, and in January 2020, the President issued a new proclamation—now covering *derivatives* of the earlier-covered steel articles—based on information supplied by the Secretary. Proclamation 9980: Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles into the United States, 85 Fed. Reg. 5281 (Jan. 24, 2020).[1]

The President recited that the Secretary had informed him that "domestic steel producers' capacity utilization ha[d] not stabilized for an extended period of time at or above the 80 percent capacity utilization level" that was the objective of Proclamation 9705. *Id.* ¶ 5, 85 Fed. Reg. at 5281. The Secretary stated that "imports of certain derivatives of steel articles have significantly increased since the imposition of the tariffs," and "[t]he net effect of the increase of imports of these derivatives has been to erode the customer base for U.S. producers of . . . steel and undermine the purpose of the proclamations adjusting imports of . . . steel articles to remove the threatened impairment of the national security." *Id.* ¶ 5, 85 Fed. Reg. at 5282. The Secretary characterized this increase in imports of steel derivatives as "circumvent[ing] the duties on . . . steel articles imposed in . . . Proclamation 9705" and "threaten[ing] to undermine the actions taken to address the risk to the national security of the United States found in . . . Proclamation 9705." *Id.* ¶ 8, 85 Fed. Reg. at 5282. The Secretary "assessed that reducing imports of the derivative articles" at issue "would reduce circumvention and facilitate the adjustment of imports that . . . Proclamation 9705, as

[1] The new proclamation covered derivatives of aluminum as well as steel articles, but only the steel aspects of the proclamation are at issue before us.

amended, made to increase domestic capacity utilization to address the threatened impairment of the national security of the United States." *Id.* Accepting the foregoing determinations by the Secretary, the President in Proclamation 9980 extended the 25 percent tariff to certain steel derivatives, including nails, staples, and tacks. *Id.* clause 1, Annex II, 85 Fed. Reg. at 5283, 5290–92; *see PrimeSource*, 497 F. Supp. 3d at 1338–39 n.3. He "concluded that it [was] necessary and appropriate" to extend the tariffs to the specified steel derivatives "to address circumvention . . . and to remove the threatened impairment of the national security." Proclamation 9980 ¶ 9, 85 Fed. Reg. at 5283.

C

PrimeSource and Oman Fasteners, which import steel nails and fasteners covered by Proclamation 9980, brought suit in the Trade Court to challenge the proclamation. As relevant now, they contended that the proclamation's extension of the increased tariff to derivatives was contrary to § 232 because it occurred in January 2020, more than 105 days after the President received the Secretary's report. The Trade Court agreed.

The Trade Court in the PrimeSource case concluded that the 90-day and 15-day limits found in § 232(c) apply to the President's imposition of increased burdens on imports under the provision, including modifications of an earlier plan of action that had been timely adopted. 497 F. Supp. 3d at 1343–59. The court held that, insofar as the January 2020 Proclamation 9980 relied on the Secretary's

January 2018 report on steel articles to satisfy the § 232(b) prerequisite to presidential action, it was untimely under § 232(c). *Id.* When the government stipulated that it was relying solely on that report to satisfy the § 232(b) prerequisite, the Trade Court held Proclamation 9980 invalid and entered final judgment against the government. *PrimeSource*, 505 F. Supp. 3d at 1353–58. The Trade Court reached the same result in the Oman Fasteners case. 520 F. Supp. 3d at 1335–39.

In both cases, the government timely appealed and also moved for at least a partial stay of the judgment pending appeal. The Trade Court granted stays, reflecting the government's newly enhanced chance of success on the merits in light of the intervening decision of this court in *Transpacific*. *See PrimeSource Building Products, Inc. v. United States*, 535 F. Supp. 3d 1327, 1329–36 (Ct. Int'l Trade 2021); *Oman Fasteners, LLC v. United States*, 542 F. Supp. 3d 1399, 1403–09 (Ct. Int'l Trade 2021). The Trade Court did, however, note two distinctions of these cases from *Transpacific*—these cases involve an extension to derivatives of a tariff initially imposed on the articles whose importation was found to threaten national security, not (as in *Transpacific*) an increase in rate of the initial tariff on the same articles; and the time from Secretary report to challenged proclamation is much larger than in *Transpacific* (two years versus seven months). *See PrimeSource*, 535 F. Supp. 3d at 1332–33; *Oman Fasteners*, 542 F. Supp. 3d at 1403–

05. We have jurisdiction over the Trade Court's final judgments under 28 U.S.C. § 1295(a)(5).[2]

II

On appeal, the government maintains that the Trade Court's decisions are incorrect in light of *Transpacific.* Appellees defend the Trade Court's decisions, asserting that factual differences render *Transpacific* inapplicable and that the government's reading of § 232 would run afoul of the delegation doctrine.

We review the Trade Court's interpretation of the statute de novo. *GPX International Tire Corp. v. United States*, 780 F.3d 1136, 1140 (Fed. Cir. 2015). To the extent relevant here, we may review an allegation that the President acted in violation of the Constitution. *USP Holdings*, 36 F.4th at 1365. For an asserted statutory violation, review is also available, but it is limited: "For a court to interpose, there has to be a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority." *Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 89 (Fed. Cir. 1985). This court has

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[2] In *Transpacific*, we flagged the question of whether the claims against the President, as a defendant, must be dismissed. 4 F.4th at 1318 n.5; *accord PrimeSource*, 497 F. Supp. 3d at 1361–62, 1365–70 (Baker, J., concurring in part and dissenting in part). That question arises here as well. Based on our recent precedent, we hold that the claims against the President must be dismissed, but given the presence of the other defendants, we have jurisdiction to review the Trade Court's decisions on the merits. *See USP Holdings, Inc. v. United States*, 36 F.4th 1359, 1366 (Fed. Cir. 2022).

repeatedly relied on the *Maple Leaf* formulation to indicate the "limited" scope of review of non-constitutional challenges to presidential action. *USP Holdings*, 36 F.4th at 1365–66 & n.3 (discussing "limited" scope, quoting *Maple Leaf*, and also quoting formulations approving review of whether "the President clearly misconstrued his statutory authority" and "whether the President has violated an explicit statutory mandate" (cleaned up)); *Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1346 (Fed. Cir. 2018).

A

In *Transpacific*, we addressed whether § 232(c)(1) "permits the President to announce a continuing course of action within the statutory time period and then modify the initial implementing steps in line with the announced plan of action by adding impositions on imports to achieve the stated implementation objective." 4 F.4th at 1318–19. We concluded that the President may do so, explaining:

> [T]he best reading of the statutory text of § 1862, understood in context and in light of the evident purpose of the statute and the history of predecessor enactments and their implementation, is that the authority of the President includes authority to adopt and carry out a plan of action that allows adjustments of specific measures, including by increasing import restrictions, in carrying out the plan over time.

Id. at 1319. And we upheld application of that authority to an increase in impositions that could have been adopted initially under § 232(c) where the President had initially announced a plan of action and later found that an increase would help solve the specific capacity-utilization problem that was the basis for the finding that imports threatened national security. *Id.* at 1310, 1332–33.

Proclamation 9980 comes within the interpretation of § 232 we adopted in *Transpacific.* The initial proclamation (Proclamation 9705) is the same here as in *Transpacific.* As described above, that proclamation rested on the Secretary's finding that imports of steel articles were threatening national security by impairing achievement of an 80 percent capacity utilization level found important for domestic steel makers to sustain their operations to meet national-security needs. J.A. 232–36, 288–89; *see* Proclamation 9705 ¶¶ 2, 4–5, 83 Fed. Reg. at 11,625–26. Proclamation 9705 announced a continuing plan of action aimed at achieving that goal, with monitoring and notice of possible changes in the future. *Id.* ¶¶ 9, 11, clauses 2, 5(b), 83 Fed. Reg. at 11,626–28 (stating that the President "may remove or modify the restriction on steel articles imports," characterizing "the tariff imposed by this proclamation [a]s an important first step in ensuring the economic viability of our domestic steel industry," and directing the Secretary to "continue to monitor imports of steel articles" and to "inform the President of any circumstances that in the Secretary's opinion might indicate the need for further action by the President under section 232"). Later, the Secretary informed the President that a significant increase had occurred in imports of steel derivatives, which in simple economic terms constituted a circumvention of the protections initially adopted to enhance and stabilize domestic steel-making capacity utilization, undermining the effectiveness of the President's previous tariffs. Proclamation 9980 ¶¶ 5, 8, 85 Fed. Reg. at 5281–82. In response, the President extended Proclamation 9705's tariffs to various steel derivative products to address the circumvention threatening the capacity-utilization objective. *Id.* ¶ 9, clause 1, Annex II, 85 Fed. Reg. at 5283, 5290–92.

Thus, the President, having "announce[d] a continuing course of action within the statutory time period" (Proclamation 9705), "modif[ied] the initial implementing steps . . . by adding impositions on imports" (extending the tariffs to derivatives in Proclamation 9980) "in line with the announced plan of action" (Proclamation 9705's directive to the Secretary to monitor imports and inform the President of any relevant changes) "to achieve the stated implementation objective" (long-term stabilization of the capacity utilization rate at or above 80 percent). *Transpacific*, 4 F.4th at 1318–19. An imposition on imports of derivatives of the articles that were the subject of the Secretary's threat finding is expressly authorized as an available remedy by § 232(c). In acting to close a loophole exploited by steel-derivatives importers, the President was making a "contingency-dependent choice[] that [is] a commonplace feature of plans of action," *id.* at 1321, adding use of a tool that he could have used in the initial set of measures and later found important to address a specific form of circumvention Congress recognized when it authorized coverage of derivatives of the articles whose imports the Secretary found to threaten national security. *See* Oral Arg. at 25:03–26:20 (agreeing that the mechanism linking Proclamation 9980 to Proclamation 9705—foreign steel producers, facing raised tariffs on direct imports, sold steel to foreign derivatives makers not (yet) subject to raised tariffs, impairing market opportunities of domestic steel makers—"is not complicated").

B

The attempts by PrimeSource and Oman Fasteners to distinguish *Transpacific* to reach a different result here are unpersuasive. First, the fact that the Secretary's 2018 report and Proclamation 9705 did not address the effect of imports of derivatives is immaterial. The President may take action against derivative products regardless of whether the Secretary has investigated and reported on such derivatives. *See* 19 U.S.C. § 1862(b) (stating that the Secretary's investigation and report focus on an "article"); *id.* § 1862(c)(1)(A)(ii) (empowering the President to then adjust imports of both "the article and its derivatives"). There is no textual basis for reading § 232 as empowering the President to do so only at the initial plan-adoption stage, not at later, modification stages. And what we recognized in *Transpacific* as serving the "evident purpose" of § 232—permitting the President to act under an announced plan to adjust initial measures over time to reach the initially adopted objective, 4 F.4th at 1323—applies not only to an increase in tariff rates on the same entries but equally to an extension to derivatives of measures initially imposed only on the underlying articles.

Second, the greater gap in time between the Secretary's finding and the challenged proclamation (here, nearly two years; in *Transpacific*, seven months) does not render *Transpacific* inapplicable. There is no textual basis for a specific time limit on adjustments under a timely adopted plan. Indeed, impositions under § 232 have on numerous occasions been modified many years after they were first adopted. *Id.* at 1326–29.

As we noted in *Transpacific*, a different question might be presented where the underlying finding or objective has become substantively stale; here, as in *Transpacific*, we have no occasion to address that issue, because "there is no genuine concern about staleness." *Id.* at 1332. Proclamation 9980 was issued in pursuit of the same goal first articulated in Proclamation 9705 (extended stabilization at 80 percent of domestic capacity utilization) and in response to the "current information" provided to the President by the Secretary under the "requirements for monitoring the import reductions" that were "put in place" by Proclamation 9705. *Id.* at 1332 n.10. And insofar as appellees fault the President for imposing tariffs on some derivatives but not others, and the government for declining to put into the record the updated data the Secretary conveyed to the President, *see* PrimeSource Br. 31–32; Oman Fasteners Br. 38 & n.15, the criticism is meritless. The information at issue is not part of a legally required and legally consequential decision of the Secretary, *cf. USP Holdings*, 36 F.4th at 1366–67, and so we may not second-guess the facts found and measures taken by the President to support his adjustment, *see Florsheim*

Shoe Co. v. United States, 744 F.2d 787, 795 (Fed. Cir. 1984) (citing *United States v. George S. Bush & Co.*, 310 U.S. 371, 379–80, (1940)); *Chang v. United States*, 859 F.2d 893, 896 n.3 (Fed. Cir. 1988); Oral Arg. at 13:45–16:00 (acknowledging that there is no review of the President's pertinent factual and remedial-appropriateness determinations).

C

Reading § 232 to permit the President to modify an initial plan of action to include derivatives, as he did here, does not render it an unconstitutional delegation. The Supreme Court has already rejected a delegation-doctrine challenge to § 232 (in an earlier form), holding that the "clear preconditions to Presidential action" established by § 232, *e.g.*, a finding by the Secretary regarding the existence of a national-security threat, and consideration by the President of "a series of specific factors," make that authority "far from unbounded." *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 558–60, (1976) (citations omitted). The same is true today, as those "clear preconditions" remain in effect, *id.*, and the President must still consider the statutory factors and act only upon receipt of a report from the Secretary, even if the President possesses the modification authority at issue here, *see* 19 U.S.C. § 1862(b)–(d). Moreover, if § 232 "easily fulfill[ed] th[e] [intelligible principle] test" in 1976, *Algonquin*, 426 U.S. at 559, it also does so now, given that the 1988 amendments, in adding the present deadlines, further defined the congressional delegation of authority to the President. We have rejected the contention that *Algonquin* does not require rejection of a delegation-doctrine challenge to § 232 in its current form. *Transpacific*, 4 F.4th at 1332–33 (citing *American Institute for International Steel, Inc. v. United States*, 806 F. App'x 982, 983–91 (Fed. Cir. 2020), *cert. denied*, 141 S. Ct. 133 (2020)); *see also USP Holdings*, 36 F.4th at 1365. We see no basis for concluding otherwise here.

III

In sum, § 232's deadlines did not prevent the President from modifying his initial timely adopted plan of action by issuing Proclamation 9980, and that conclusion does not render § 232 unconstitutional under the delegation doctrine. Because there are no more facts for the Trade Court to find on remand if *Transpacific* controls, as appellees agreed, Oral Arg. at 23:20–25, we reverse the judgments of the Trade Court and remand the cases for entry of judgment against PrimeSource and Oman Fasteners, including dismissal of the claims against the President.

The parties shall bear their own costs.

REVERSED AND REMANDED

APPENDIX B

Slip Op No. 21-36

In the United States Court of International Trade

PRIMESOURCE BUILDING PRODUCTS, INC.,
Plaintiff

v.

UNITED STATES, et. al.,
Defendants,

Court No. 20-00032

OPINION

[Granting summary judgment in favor of plaintiff. Judge Baker dissents.]

Dated: April 5, 2021

Jeffrey S. Grimson, Mowry & Grimson, PLLC, of Washington, D.C., for plaintiff. With him on the brief were *Kristin H. Mowry*, *Jill A. Cramer*, *Sarah M. Wyss*, *Bryan P. Cenko*, and *Wenhui Ji*.

Jeanne E. Davidson, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendants. With her on the brief were *Tara K. Hogan*, Assistant Director, and *Stephen C. Tosini*, Senior Trial Counsel.

Stanceu, Chief Judge: Plaintiff PrimeSource Building Products, Inc. ("PrimeSource"), a U.S. importer of steel nails, contested a proclamation issued by the President of the United States ("Proclamation 9980") in January 2020. *Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles Into the United States*, 85 Fed. Reg. 5,281 (Exec. Office of the President Jan. 29, 2020) ("*Proclamation 9980*"). Before the court is a "Joint Status Report" the parties submitted in response to our order in *PrimeSource Bldg. Prods., Inc. v. United States*, 45 CIT __, Slip. Op. 21-8 (January 27, 2021) ("*PrimeSource I*"). Joint Status Report (Mar. 5, 2021), ECF No. 108. In response to statements of the parties in the Joint Status Report, the court enters summary judgment in favor of plaintiff.[1]

I. Background

The background of this action is set forth in our prior opinion and summarized briefly herein. *See PrimeSource Bldg. Prods., Inc. v. United States*, 45 CIT __, Slip. Op. 21-8 (Jan. 27, 2021) ("*PrimeSource I*").

A. Proclamation 9980

[1] Judge Baker dissents from the entry of summary judgment in favor of plaintiff for the reasons stated in his dissent from the court's prior opinion and order. *PrimeSource Bldg. Prods., Inc. v. United States*, 45 CIT __, Slip. Op. 21-8 (Jan. 27, 2021) (Baker, J., dissenting)

On January 24, 2020, President Donald Trump issued Proclamation 9980, which imposed a 25% duty on certain imported articles made of steel, including steel nails, and a 10% duty on certain imported articles made of aluminum. As authority for its imposition of duties on the articles, identified as "derivative aluminum articles" and "derivative steel articles," Proclamation 9980 cited Section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862 ("Section 232").[2] Proclamation 9980 also cited previous Presidential proclamations that invoked Section 232, including Proclamation 9704, *Adjusting Imports of Aluminum Into the United States*, 83 Fed. Reg. 11,619 (Exec. Office of the President Mar. 15, 2018) ("*Proclamation 9704*"), and Proclamation 9705, *Adjusting Imports of Steel Into the United States*, 83 Fed. Reg. 11,625 (Exec. Office of the President Mar. 15, 2018) ("*Proclamation 9705*"). *Proclamation 9980* ¶¶ 9–10, 85 Fed. Reg. at 5,283.

B. Procedural History of this Litigation

On February 4, 2020, PrimeSource commenced this action, naming the United States, et al., as defendants and asserting five claims in contesting Proclamation 9980. Summons, ECF No. 1; Compl., ECF Nos. 8 (conf.), 9 (public). Defendants filed a Rule 12(b)(6) motion to dismiss an amended complaint on March 20, 2020 for failure to state a claim on which relief can be granted. Defs.' Mot. to Dismiss for Failure to State a Claim, ECF No. 60 ("Defs.' Mot.").

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[2] All citations to the United States Code are to the 2012 edition.

Plaintiffs opposed defendants' motion to dismiss and moved for summary judgment on April 14, 2020. Rule 56 Mot. for Summ. J., Pl. PrimeSource Bldg. Prods. Inc.'s Mem. of Points and Authorities in Supp. of Mot. for Summ. J. and Resp. to Defs.' Mot. to Dismiss for Failure to State a Claim, ECF No. 73-1. Defendants responded to plaintiff's summary judgment motion on May 12, 2020. Defs.' Reply in Supp. of their Mot. to Dismiss and Resp. to Pl.'s Mot. for Summ. J., ECF No. 78. On June 9, 2020, plaintiff replied in support of its summary judgment motion. Pl. PrimeSource Bldg. Prods. Inc.'s Reply Br. in Supp. of its Mot. for Summ. J., ECF No. 91.

C. Our Decision in *PrimeSource I*

In *PrimeSource I*, we granted defendants' motion to dismiss as to all of plaintiff's claims in the amended complaint except one, stated as "Count 2," in which plaintiff claimed that Proclamation 9980 was issued beyond the statutory time limits set forth in Section 232. *PrimeSource I*, 45 CIT at __, Slip Op. at 55. In Count 2, plaintiff argued that Proclamation 9980 was issued after the expiration of the 105-day time period set forth in Section 232(c)(1), which PrimeSource described as commencing upon the President's receipt, on January 11, 2018, of a report the Secretary of Commerce issued under Section 232(b)(3)(A) on the effect of certain steel articles on the national security of the United States (the "2018 Steel Report"). That report culminated in the President's issuance of Proclamation 9705 in March 2018, which imposed 25% duties on various steel articles, *see Proclamation 9705*, ¶¶ 1–2, 83 Fed. Reg. at 11,625, but not on the derivative steel articles affected by Proclamation 9980 in January 2020.

We stated in *PrimeSource I* that "[d]efendants do not dispute that the 2018 Steel Report is, for purposes of Section 232(c), 19 U.S.C. § 1862(c), the report issued according to Section 232(b)(3)(A), 19 U.S.C. § 1862(b)(3)(A), upon which the President based his adjustment to imports of steel derivatives, including steel nails." *PrimeSource I*, 45 CIT at __, Slip Op. at 20 (citing Defs.' Mot. 24–29). In denying defendants' motion to dismiss Count 2, we concluded that Proclamation 9980 does not comply with the limitation on the President's authority imposed by the 105-day time limitation of Section 232(c)(1) if that time period is considered to have commenced upon the President's receipt of the 2018 Steel Report. *Id.* at __, Slip Op. at 44–45. We held that in this circumstance Count 2 stated a plausible claim for relief. *Id.* at __, Slip Op. at 50.

After denying defendants' motion to dismiss as to the claim in Count 2, we denied plaintiff's motion for summary judgment on that remaining claim upon determining that there existed one or more genuine issues of material fact. Although concluding that Proclamation 9980 was untimely under Section 232(c)(1) when viewed solely as an action taken in response to the Steel Report, we also concluded that there were genuine issues of material fact that bore on the extent to which the subsequent "assessment" or "assessments" of the Commerce Secretary, as identified in Proclamation 9980, validly could be held to have served a function analogous to that of a Section 232(b)(3)(A) report. *Id.* at __, Slip Op. at 54. We also noted that we did not know what form of inquiry or investigation the Commerce Secretary conducted prior to his submission of these communications to the President and whether, or to what extent, that inquiry or investigation satisfied the essential requirements of Section 232(b)(2)(A), 19 U.S.C. § 1862(b)(2)(A). *Id.*

In summary, we concluded in *PrimeSource I* that factual information pertaining to the Secretary's inquiry on, and his reporting to the President on, the derivative articles would be required in order for us to examine whether and to what extent there was compliance by the President with the procedural requirements of Section 232 and whether any noncompliance that occurred was a "significant procedural violation." *Id.* at __, Slip Op. at 54–55 (quoting *Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 89 (Fed. Cir. 1985) (requiring that a procedural violation be "significant" in order to serve as a ground for judicial invalidation of a Presidential action)). We added that "at this early stage of the litigation, we lack a basis to presume that these unresolved factual issues are unrelated to the issue of whether the President clearly misconstrued the statute or the issue of whether the President took action outside of his delegated authority." *Id.* at __, Slip Op. at 55. We noted that the "filing of a complete administrative record could be a means of resolving, or helping to resolve, these factual issues" and directed the parties to consult on this matter and file a scheduling order to govern the subsequent litigation. *Id.*

D. The Joint Status Report

On March 5, 2021, the parties submitted the Joint Status Report in lieu of a scheduling order. In it, defendants expressly waived "the opportunity to provide additional factual information that might show that the 'essential requirements of Section 232(b)(2)(A), 19 U.S.C. § 1862(B)(2)(A)' were met," adding that "[d]efendants do not intend to pursue that argument." Joint Status Report 2 (quoting *PrimeSource I*, 45 CIT at __, Slip Op. at 54.) Defendants informed the court that their "position continues to be that procedural preconditions for the issuance of Proclamation 9980 were met by the Secretary's 2018 Steel Report and the timely issuance of Proclamation 9705, a position that the majority has already rejected." *Id.* at __, Slip Op. at 2–3. The Joint Status Report concludes by stating that "the parties agree and respectfully submit that there is no reason for this Court to delay entry of final judgment. In so representing, the parties fully reserve all rights to appeal any adverse judgment." *Id.* at __, Slip Op. at 3.

II. DISCUSSION

A. *Sua Sponte* Entry of Summary Judgment according to USCIT Rule 56(f)

Because we denied plaintiffs' motion for summary judgment in *PrimeSource I*, no motion for summary judgment is now before us. Nevertheless, we may enter summary judgment for a party *sua sponte* under USCIT Rule 56(f), which provides that "[a]fter giving notice and a reasonable time to respond, the court may . . . consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute."

The United States Supreme Court in *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986) ("*Celotex*") opined that "district courts are widely acknowledged to possess the power to enter summary judgments *sua sponte.*" In interpreting *Celotex*, the Court of Appeals for the Federal Circuit instructed that "[t]he *Celotex* Court also made clear that all that is required is notice [to the party with the burden of proof] that she had to come forward with all of her evidence." *Exigent Tech., Inc. v. Atrana Sols., Inc.*, 442 F.3d 1301, 1308 (Fed. Cir. 2006) (brackets in original). In determining whether to enter summary judgment *sua sponte*, a court must ensure that prejudice will not accrue to the would-be losing party stemming from that party's inability to present evidence of a genuine dispute of material fact. *See Celotex*, 477 U.S. at 326.

B. Defendants' Waiver of the Opportunity to Present Evidence and of Any Defense Related to Procedures Subsequent to the 2018 Steel Report

In this litigation, the parties, and defendants in particular, expressly have declined to pursue the opportunity to present additional evidence to demonstrate the existence of a genuine dispute of a material fact. Specifically, defendants waive any defense they might base on a showing that the "'essential requirements of Section 232(b)(2)(A), 19 U.S.C. § 1862(b)(2)(A)' were met." Joint Status Report 2 (quoting *PrimeSource I*, 45 CIT at __, Slip Op. at 54. Further, we note the significance of defendants' statement in the Joint Status Report that their "position continues to be that procedural preconditions for the issuance of Proclamation 9980 were met by the

Secretary's 2018 Steel Report and the timely issuance of Proclamation 9705." *Id.* at 2–3. This statement constitutes a waiver of any defense that the assessments of the Commerce Secretary, as described in Proclamation 9980, were the functional equivalent of a Section 232(b)(3)(A) report.

By joining in the statement that "the parties agree and respectfully submit that there is no reason for this Court to delay entry of final judgment," *id.* at 3, defendants have waived any claim of prejudice that could result from the entry of summary judgment in favor of plaintiff, subject to their right to appeal. The parties have been given the full opportunity to "come forward" with any evidence of a dispute of material fact. A *sua sponte* order of summary judgment is, therefore, appropriate. *See Celotex*, 477 U.S. at 326.

The court further notes that defendants did not file an answer to plaintiff's complaint or amended complaint. The court's opinion in *PrimeSource I* directed the parties to file a joint scheduling order to govern the remainder of the litigation, which normally would have included a date for the government to answer the complaint with respect to the remaining claim. Here, defendants having waived any argument that Proclamation 9980 was issued within the 105-day time period beginning on the President's receipt of a report qualifying under Section 232(b)(3)(A), there are no contested issues of fact. Therefore, the absence of an answer to the amended complaint is not a procedural bar to the entry of summary judgment.

C. In the Absence of a Genuine Dispute as to any Material Fact, Plaintiff Is Entitled to Judgment as a Matter of Law

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." USCIT R. 56(a). As discussed above, there is no longer a genuine issue of material fact as a result of the representations of the parties in the Joint Status Report. In particular, defendants have waived any defense grounded in a factual circumstance other than one in which the 2018 Steel Report is the only submission made by the Commerce Secretary that could satisfy the requirements of Section 232(b)(3)(A) and upon which Proclamation 9980 could have been based.

Plaintiff PrimeSource is now entitled to judgment as a matter of law. As we concluded in *PrimeSource I*, "the action taken by Proclamation 9980 to adjust imports of derivatives was not implemented during the 105-day time period set forth in § 1862(c)(1), if that time period is considered to have commenced upon the President's receipt of the Steel Report." 45 CIT at __, Slip Op. at 44. Because defendants no longer may raise as a defense that the procedural requirements of Section 232 were met based on any procedure other than one reliant upon the 2018 Steel Report, summary judgment in favor of plaintiff is warranted on the ground that Proclamation 9980 was issued after the President's delegated authority to impose duties on derivatives of steel products had expired. As we held in *PrimeSource I*, any determination the President could have made to adjust the duties on imports of derivatives of the articles named in Proclamation 9705 was required by the statute to have been made during the 90-day period commencing with the President's receipt of a report of the Commerce Secretary satisfying the requirements of Section 232(b)(3)(A), and any action to implement that determination was required to have been taken, if at all, during the 15-day period following that determination. *See* 45 CIT at __, Slip Op. at 32 (holding that "the 90- and 15-day time limitations in Section 232(c)(1) expressly confine the exercise of the President's discretion *regardless* of whether the President determines to adjust imports only of the 'article' named in the Secretary's report or, instead, to adjust imports of the 'article and its derivatives.'") (emphasis in original).

To declare Proclamation 9980 invalid, we must find "a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority." *Maple Leaf Fish Co.*, 762 F.2d at 89. Because the President issued Proclamation 9980 after the congressionally-delegated authority to adjust imports of the products addressed in that proclamation had expired, Proclamation 9980 was action outside of delegated authority. For the reasons we stated in *PrimeSource I*, 45 CIT at __, we reject defendants' position that Congress intended for the time limitations in Section 232(c)(1) to be merely directory, and we find in the untimeliness of Proclamation 9980 a significant procedural violation. As a remedy, PrimeSource is entitled to a declaratory judgment that Proclamation 9980 is invalid as contrary to law and to certain other relief, as described below.

III. Conclusion

We award summary judgment to PrimeSource on the remaining claim in this litigation, which was stated in Count 2 of the amended complaint. As relief on this claim, we will declare Proclamation 9980 invalid as contrary to law and, on that basis, direct that the entries affected by this litigation be liquidated without the assessment of duties pursuant to Proclamation 9980, with refund of any deposits for such duty liability that may have been collected pursuant to Proclamation 9980.[3] Also, should any entries of PrimeSource's merchandise at issue in this litigation have liquidated with the assessment of 25% duties pursuant to Proclamation 9980, PrimeSource is entitled to reliquidation of those entries and a refund of any duties deposited or paid, with interest as provided by law.

Judgment will enter accordingly.

/s/ Timothy C. Stanceu
Timothy C. Stanceu, Chief Judge
/s/ Jennifer Choe-Groves
Jennifer Choe-Groves, Judge

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[3] Earlier in this litigation, upon the consent of both parties, this Court entered a preliminary injunction against the collection of 25% cash deposits on PrimeSource's entries of merchandise within the scope of Proclamation 9980 and against the liquidation of the affected entries. Order (Feb. 13, 2020), ECF Nos. 39 (Conf.), 40 (Public). This preliminary injunction will dissolve upon the entry of judgment. *Id*. If, despite the preliminary injunction, any cash deposits were made or collected, PrimeSource is entitled to a refund of these cash deposits, with interest as provided by law

Dated: April 5, 2021
New York, New York

APPENDIX C

Slip Op. No. 21-8

In the United States Court of International Trade

PRIMESOURCE BUILDING PRODUCTS, INC.,
Plaintiff

v.

UNITED STATES, et. al.,
Defendants,

Before: Timothy C. Stanceu, Chief Judge
Jennifer Choe-Groves, Judge
M. Miller Baker, Judge

Court No. 20-00032

OPINION AND ORDER

[Granting defendants' motion to dismiss plaintiff's amended complaint as it pertains to all claims therein except the claim stated as Count 2; denying the motion to dismiss as to the claim in Count 2 but also denying plaintiff's motion for summary judgment as to that remaining claim. In a separate opinion, Judge Baker concurs in the dismissal of Counts 1, 3, 4, and 5 and dissents from the denial of defendants' motion to dismiss Count 2.]

Dated: January 27, 2021

Jeffrey S. Grimson, Mowry & Grimson, PLLC, of Washington, D.C., for plaintiff. With him on the brief were *Kristin H. Mowry*, *Jill A. Cramer*, *Sarah M. Wyss*, *Bryan P. Cenko*, and *Wenhui Ji*.

Jeanne E. Davidson, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendants. With her on the brief were *Tara K. Hogan*, Assistant Director, and *Stephen C. Tosini*, Senior Trial Counsel.

Stanceu, Chief Judge: Plaintiff PrimeSource Building Products, Inc. ("PrimeSource"), a U.S. importer of steel nails, challenges on various grounds a proclamation issued by the President of the United States ("Proclamation 9980") that imposed 25% tariffs on, *inter alia*, various imported products made of steel (identified in the proclamation as "derivatives" of steel products), including steel nails. Arguing that plaintiff's complaint does not state a claim on which relief can be granted, defendants move to dismiss this action according to USCIT Rule 12(b)(6). Plaintiff opposes defendants' motion to dismiss and moves for summary judgment, urging us to declare Proclamation 9980 invalid and order the refund of any duties that previously may have been collected on its affected entries. In moving to dismiss and in their response to

PrimeSource's summary judgment motion, defendants argue that the President's action was within the authority delegated by Congress and must be upheld.

We grant defendants' motion to dismiss as to four of plaintiff's claims, which are set forth as Counts 1, 3, 4, and 5 of the Amended Complaint, and deny it as to Count 2, in which plaintiff claims that Proclamation 9980 is invalid because it was issued after the authority delegated to the President by the governing statute had expired. Because plaintiff has not shown "that there is no genuine dispute as to any material fact," USCIT R. 56(a), we deny plaintiff's summary judgment motion as to the remaining claim.

I. BACKGROUND

A. The Challenged Presidential Proclamation

On January 24, 2020, President Trump issued Proclamation 9980, *Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles Into the United States*, 85 Fed. Reg. 5,281 (Exec. Office of the President Jan. 29, 2020) ("*Proclamation 9980*"). Proclamation 9980 imposed a duty of 25% *ad valorem* on various imported products made of aluminum and of steel, including steel nails and other steel fasteners as well as "bumper stampings of steel" for motor vehicles and "body stampings of steel" for agricultural tractors. *Id.* at 5,291, 5,293.

The 25% duties imposed by Proclamation 9980 went into effect on February 8, 2020. *Id.* at 5,290. As authority for the President's action, Proclamation 9980 cited Section 232 of the Trade Expansion Act of

1962, 19 U.S.C. § 1862 ("Section 232"),[1] and certain previous proclamations of the President that also invoked Section 232, including Proclamations 9704, *Adjusting Imports of Aluminum Into the United States*, 83 Fed. Reg. 11,619 (Exec. Office of the President Mar. 15, 2018) ("*Proclamation 9704*"), and 9705, *Adjusting Imports of Steel Into the United States*, 83 Fed. Reg. 11,625 (Exec. Office of the President Mar. 15, 2018) ("*Proclamation 9705*"). *Proclamation 9980* ¶¶ 9–10, 85 Fed. Reg. at 5,283.

Proclamation 9705 imposed 25% duties on various steel products in basic and semi-finished form but did not impose duties on the products that were the subject of Proclamation 9980,[2] which Proclamation

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[1] All citations to the United States Code are to the 2012 edition.

[2] The products affected by Proclamation 9705 are certain iron and steel products classified within chapters 72 and 73 of the Harmonized Tariff Schedule of the United States ("HTSUS"), as follows:

(1) *Flat-rolled products* provided for in HTSUS headings 7208 (of iron or nonalloy steel, 600 mm or more in width, hot-rolled, not clad, plated or coated), 7209 (of iron or nonalloy steel, 600 mm or more in width, cold-rolled, not clad, plated or coated), 7210 (of iron or nonalloy steel, 600 mm or more in width, clad, plated or coated), 7211 (of iron or non-alloy steel, less than 600 mm in width, not clad, plated or coated), 7212 (of iron or non-alloy steel, less than 600 mm in width, clad, plated or coated), 7225 (of alloy steel other than stainless, 600 mm or more in width) or 7226 (of alloy steel other than stainless, less than 600 mm in width);

(2) *Bars and rods* provided for in HTSUS headings 7213 (hot-rolled, in irregularly wound coils, of iron or nonalloy

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steel), 7214 (other, of iron or nonalloy steel, not further worked than forged, hot-rolled, hot-drawn or hot-extruded, but including those twisted after rolling), 7215 (other, of iron or nonalloy steel), 7227 (hot-rolled, in irregularly wound coils, of alloy steel other than stainless), or 7228 (other bars and rods of alloy steel other than stainless; angles, shapes and sections, of alloy steel other than stainless; hollow drill bars and rods, of alloy or nonalloy steel); angles, shapes and sections of HTSUS heading 7216 (angles, shapes and sections of iron or nonalloy steel) except products not further worked than cold-formed or cold-finished, of subheadings 7216.61.00, 7216.69.00, or 7216.91.00; wire provided for in HTSUS headings 7217 (wire of iron or nonalloy steel) or 7229 (wire of alloy steel other than stainless); sheet piling provided for in HTSUS subheading 7301.10.00; rails provided for in HTSUS subheading 7302.10 (rail and tramway track construction material of iron or steel: rails); fish-plates and sole plates provided for in HTSUS subheading 7302.40.00 (rail and tramway track construction material of iron or steel: fish plates and sole plates); and other products of iron or steel provided for in HTSUS subheading 7302.90.00 (other railway or tramway track construction material of iron or steel, other than switch blades, crossing frogs, point rods and other crossing pieces, fish plates and sole plates);

(3) *Tubes, pipes, and hollow profiles* provided for in HTSUS headings 7304 (seamless, of iron (other than cast iron) or steel), or 7306 (other (for example, open seamed or welded, riveted or similarly closed), of iron or steel); *tubes and pipes* provided for in HTSUS heading 7305 (other tubes and pipes (for example, welded, riveted or similarly closed), having circular cross sections, the external diameter of which exceeds 406.4 mm, of iron or steel);

(4) *Ingots, other primary forms and semi-finished products* provided for in HTSUS heading 7206 (iron and nonalloy

9980 described as "Derivatives of Steel Products."[3]

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steel in ingots or other primary forms (excluding certain iron in lumps, pellets or similar forms, of heading 7203)), 7207 (semi-finished products of iron or nonalloy steel) or 7224 (alloy steel other than stainless in ingots or other primary forms; semi-finished products of alloy steel other than stainless); and

(5) *Products of stainless steel* provided for in HTSUS heading 7218 (stainless steel in ingots or other primary forms; semi-finished products of stainless steel), 7219 (flat-rolled products of stainless steel, 600 mm or more in width), 7220 (flat-rolled products of stainless steel, less than 600 mm in width), 7221 (bars and rods, hot-rolled, in irregularly wound coils, of stainless steel), 7222 (other bars and rods of stainless steel; angles, shapes and sections of stainless steel), or 7223 (wire of stainless steel).

Proclamation 9705, Adjusting Imports of Steel Into the United States, Annex ("To Modify Chapter 99 of the Harmonized Tariff Schedule of the United States"), 83 Fed. Reg. 11,625, 11,629 (Exec. Office of the President Mar. 15, 2018).

[3] Proclamation 9980 imposed 25% tariffs on four categories of products that it described as "Derivatives of Steel Articles." The four categories of products are as follows:

(1) *Threaded steel fasteners suitable for use in powder-actuated handtools*, classified in subheading 7317.00.30, HTSUS (nails, tacks (other than thumb tacks), drawing pins, corrugated nails, staples (other than staples in strips of HTSUS heading 8305) and similar articles, of iron or steel, whether or not with heads of other material, but excluding such articles with heads of copper;

(2) *Certain other steel fasteners: nails, tacks* (other than thumb tacks)*, drawing pins, corrugated nails, staples* (other than staples in strips of HTSUS heading 8305) *and similar articles*, of iron or steel, of one piece construction,

B. Proceedings Before the Court of International Trade

Plaintiff commenced this action on February 4, 2020, naming as defendants the United States, the U.S. Department of Commerce, U.S. Customs and Border Protection, and various officers of the United States in their official capacities (the President of the United States, the Secretary of Commerce, and the Acting Commissioner of Customs and Border

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made of round wire (other than certain collated roofing nails), classified in HTSUS statistical subheadings 7317.00.5503 (collated, assembled in a wire coil, not galvanized), -5505 (collated, assembled in a plastic strip, galvanized), -5507 (collated, assembled in a plastic strip, not galvanized), -5560 (not collated, coated, plated, or painted), -5580 (vinyl, resin or cement coated), and other steel fasteners of one-piece construction (other than thumb tacks), not made of round wire, and other than cut, classified in HTSUS statistical subheading 7317.00.6560;

(3) *Bumper stampings of steel for motor vehicles* (classified in HTSUS subheading 8708.10.30 (parts and accessories of the motor vehicles of HTSUS headings 8701 to 8705: bumpers); and

(4) *Body stampings of steel for tractors suitable for agricultural use*, classified in HTSUS subheading 8708.29.21 (parts and accessories of the motor vehicles of headings 8701 to 8705: other parts and accessories of bodies (including cabs): other: body stampings: for tractors suitable for agricultural use).

Proclamation 9980, *Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles into the United States*, Annex II ("Derivatives of Steel Articles"), 85 Fed. Reg. 5,281, 5,290 (Exec. Office of the President Jan. 29, 2020)

Protection). Summons, ECF No. 1; Compl., ECF Nos. 8 (conf.), 9 (public).

Plaintiff amended its complaint on February 11, 2020. First Am. Compl., ECF Nos. 21 (conf.), 22 (public) ("Am. Compl."). Defendants filed their Rule 12(b)(6) motion to dismiss the amended complaint on March 20, 2020. Defs.' Mot. to Dismiss for Failure to State a Claim, ECF No. 60 ("Defs.' Mot."). On April 14, 2020, plaintiff opposed defendants' motion to dismiss and moved for summary judgment. Rule 56 Mot. for Summ. J., Pl. PrimeSource Bldg. Prods. Inc.'s Mem. of Points and Authorities in Supp. of Mot. for Summ. J. and Resp. to Defs.' Mot. to Dismiss for Failure to State a Claim, ECF No. 73-1 ("Pl.'s Br."). Defendants replied in support of their motion to dismiss and responded to plaintiff's summary judgment motion on May 12, 2020. Defs.' Reply in Supp. of their Mot. to Dismiss and Resp. to Pl.'s Mot. for Summ. J., ECF No. 78 ("Defs.' Reply"). Plaintiff replied in support of its summary judgment motion on June 9, 2020. Pl. PrimeSource Bldg. Prods. Inc.'s Reply Br. in Supp. of its Mot. for Summ. J., ECF No. 91 ("Pl.'s Reply").

II. DISCUSSION

A. Subject Matter Jurisdiction

We exercise subject matter jurisdiction according to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(i)(2), (i)(4). Paragraph (i)(2) of § 1581 grants this Court jurisdiction of a civil action "that arises out of any law of the United States providing for . . . tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue." *Id.* § 1581(i)(2). Paragraph (i)(4) grants this Court jurisdiction of a civil action arising "out of any law of the United States providing for . . . administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection." *Id.* § 1581(i)(4).

B. Standards of Review

A court reviewing a challenge to Presidential action taken pursuant to authority delegated by statute does so according to a standard of review that is highly deferential to the President. "For a court to interpose, there has to be a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority." *Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 89 (Fed. Cir. 1985). Review of Proclamation 9980 according to the Administrative Procedure Act, 5 U.S.C. § 706 ("APA"), is not available because the President is not an agency for purposes of the APA. *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992). In an action such as this one, where a statute commits a determination to the President's discretion, a reviewing court lacks authority to review the President's factual determinations. *United States v. George S. Bush & Co.*, 310 U.S. 371, 379–80 (1940); *Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1349 (Fed. Cir. 2018) ("In particular, courts have repeatedly confirmed that, where the statute authorizes a Presidential 'determination,' the courts have no authority to look behind that determination to see if it is supported by the record." (citing *George S. Bush & Co.*, 310 U.S. at 379)); *Maple Leaf Fish Co.*, 762 F.2d at 89 ("The President's findings of fact and the motivations for his action are not subject to review." (citing *Florsheim Shoe Co. v. United States*, 744 F.2d 787, 795 (Fed. Cir. 1984))).

To avoid dismissal for failure to state a claim on which relief can be granted, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." USCIT R. 8(a)(2). A court will grant a motion to dismiss if the complaint fails to allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, (2009).

The court will grant a motion for summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." USCIT R. 56(a).

C. Defendants' Motion to Dismiss

Plaintiff raises five claims in its complaint. Am. Compl. In its first claim ("Count 1"), *id.* ¶¶ 62–69, PrimeSource alleges that the Secretary of Commerce violated the Commerce Department's regulations, 15 C.F.R. § 705, and the Administrative Procedure Act in various ways when providing the "assessments" on which the President based Proclamation 9980. PrimeSource alleges, *inter alia*, that the Secretary failed to initiate an investigation, failed to notify the Secretary of Defense of an initiation of an investigation, failed to publish an Executive Summary in the Federal Register, and failed to provide for public hearings, as required by its regulation, *id.* ¶¶ 66–67, and violated the APA when he "failed to provide interested parties with sufficient notice and an opportunity to comment" on the imposition of the duties on derivatives, *id.* ¶ 68, and when he failed to provide a reasoned explanation for its assessments, *id.* ¶ 69.

PrimeSource's second claim ("Count 2") is that Proclamation 9980 was issued in violation of the time limits specified in Section 232. *Id.* ¶¶ 70–73. Specifically, plaintiff alleges: (1) noncompliance with Section 232(c)(1)(A), 19 U.S.C. § 1862(c)(1)(A), which directs the President to make a determination on a report submitted by the Commerce Secretary under 19 U.S.C. § 1862(b)(3)(A) within 90 days of receiving such report, and (2) noncompliance with 19 U.S.C. § 1862(c)(1)(B), which directs the President to implement any determination the President makes to adjust tariffs on an article and its derivatives within 15 days after the President makes such a determination. *Id.* Maintaining that the relevant report issued under § 1862(b)(3)(A) was the report the President received on January 11, 2018, which resulted in Proclamation 9705, a Presidential action that imposed 25% duties on steel products other than the derivatives affected by Proclamation 9980, PrimeSource alleges that "[i]n issuing Proclamation 9980 a full 653 days since the 90-day window closed for the President to determine what action must be taken and 638 days after the 15-day window to implement such action, the President failed to follow the mandated procedures set forth in Section 232." *Id.* ¶ 73.

In Count 3, *id.* ¶¶ 74–78, plaintiff asserts that it has a property interest in its imports of steel derivative products, *id.* ¶ 76, and that "[b]y failing to provide parties with notice and an opportunity to comment before issuing Proclamation 9980 imposing Section 232 tariffs on steel and aluminum derivative products, the President violated PrimeSource's due process rights protected under the Fifth Amendment," *id.* ¶ 78.

Count 4, *id.* ¶¶ 79–80, alleges that "Section 232 is unconstitutional and not in accordance with the law because it represents an over-delegation by Congress to the President of its legislative powers by failing to set forth an intelligible principle for the President to follow when implementing Section 232," *id.* ¶ 80.

Finally, Count 5, *id.* ¶¶ 81–82, asserts that "[t]he Secretary of Commerce violated Section 232 by making 'assessments', 'determinations' and providing other 'information' to the President without following any of the statutory procedures for new action and by doing so outside the statutory time periods applicable to the 2017-18 investigation conducted by the Secretary of Commerce that resulted in Proclamation 9705," *id.* ¶ 82.

1. Plaintiff's First, Third, Fourth, and Fifth Claims Must Be Dismissed

Plaintiff's first claim (Count 1), in challenging the "assessments" of the Secretary of Commerce addressing steel and aluminum derivatives, alleges various violations of the Commerce Department's regulations, 15 C.F.R. § 705, and the APA. The assessments by the Commerce Secretary merely provided facts and recommendations for potential action by the President rather than impose duties under the authority of Section 232. These actions had no direct or independent effect on PrimeSource. They were, therefore, not final actions PrimeSource could challenge in a cause of action brought under the APA. *See* 5 U.S.C. § 704 ("final agency action for which there is no other adequate remedy in a court are subject to judicial review"); *Motions Sys. Corp. v. Bush*, 437 F.3d 1356, 1362 (Fed. Cir. 2006) (*en banc*) (citing *Franklin*, 505 U.S. at 798); *DRG Funding Corp. v. Sec'y of HUD*, 76 F.3d 1212, 1214 (D.C. Cir. 1996) (citing 5 U.S.C. § 704).

PrimeSource argues that the Commerce Secretary's actions should be deemed "final," and therefore judicially reviewable, because the Secretary's actions "represent the consummation of the Secretary's decision-making process that have direct legal consequences on importers of derivative steel products like PrimeSource, and, therefore, are reviewable under the APA." Pl.'s Br. 26 (citing *Bennett v. Spear*, 520 U.S. 154 (1997) (agency action held final where it marks consummation of agency's decision-making process and is one that either determines rights or obligations or is one from which legal consequences flow)). Here, however, the legal consequence, which is the imposition of tariffs on imported steel "derivatives," resulted from an exercise of the President's broad discretion, not from the actions of the Commerce Secretary.

For its "finality" argument, PrimeSource relies, erroneously, on *Corus Group PLC v. U.S. Int'l Trade Comm'n*, 352 F.3d 1351 (Fed. Cir. 2003). Pl.'s Br. 28–

32. *Corus Group* considered whether a "serious injury" determination of the U.S. International Trade Commission ("ITC") in an "escape clause" investigation involving the U.S. steel industry under Section 201 of the Trade Act of 1974 could be challenged in this Court as a final agency action. 352 F.3d at 1358. Under the statutory scheme, an affirmative determination of serious injury to a U.S. domestic industry is a statutory prerequisite to the exercise of the President's discretion to impose temporary tariff protection. *Id.* at 1359. If the ITC commissioners were equally divided on the question of serious injury (as occurred in that case, in which the vote on injury was a three-to-three tie), the President could consider the decision agreed upon by either group of commissioners as the determination of the ITC. The President considered the decision of the three commissioners voting affirmatively to be the ITC determination and, on that basis, imposed safeguard duties on certain steel imports. In the situation presented, and under the unique statutory scheme, the ITC vote, which itself was challenged in the litigation, had legal consequence and therefore could be contested in the Court of International Trade. *Id.* The Court of Appeals for the Federal Circuit (the "Court of Appeals") distinguished *Corus Group* in *Michael Simon Design, Inc. v. United States*, 609 F.3d 1335 (Fed. Cir. 2010), a case more closely analogous to this case. In *Michael Simon*, the Court of Appeals held that ITC recommendations to the President for modifications to the Harmonized Tariff Schedule of the United States could not be subjected to judicial challenge because, lacking any binding legal effect,

they did not constitute "final agency action" within the meaning of 5 U.S.C. § 704. 609 F.3d at 1339–40.

In further support of the claim in Count 1, PrimeSource argues that the Commerce Secretary's assessments regarding steel and aluminum derivatives are the product of "rulemaking" that, under the APA, 5 U.S.C. § 553(b)–(c), required the Secretary to provide the public notice and an opportunity for comment. Pl.'s Br. 34–38. This argument lacks merit. The Secretary's assessments did not themselves impose the tariffs on derivatives or implement any other measure. They did not "implement, interpret, or prescribe law or policy" within the meaning of the APA, 5 U.S.C. § 551(4).

Because the claim stated as Count 1 does not assert a valid cause of action, it must be dismissed.

Plaintiff's third claim, alleging a due process violation stemming from the President's failure to provide parties with notice and the opportunity to comment before issuing Proclamation 9980, also must be dismissed. The Due Process Clause of the Fifth Amendment did not require the President, in order to avoid a deprivation of due process, to provide notice or the opportunity to comment before imposing duties on imported merchandise under delegated legislative authority, and neither Section 232 nor any other statute required such a procedure. Moreover, PrimeSource fails to identify any authority for its theory that, on the facts it has pled, it had a protected property interest in maintaining the tariff treatment applicable to its imported merchandise that existed prior to Proclamation 9980. Plaintiff relies on *NEC*

Corp. v. United States, 151 F.3d 1361 (Fed. Cir. 1998) in support of that theory, Pl.'s Br. 41, but *NEC Corp.* is not on point, having arisen from an action brought (unsuccessfully) to enjoin the conducting of an antidumping duty investigation based on alleged "prejudgment" on the part of the Commerce Department. PrimeSource also relies upon *Schaeffler Grp. USA, Inc. v. United States*, 786 F.3d 1354 (Fed. Cir. 2015), Pl.'s Br. 41, but that case also is inapposite. Rejecting a claim that the petition support requirement of the Continued Dumping and Subsidy Offset Act of 2000 (the "CDSOA") was impermissibly retroactive according to the Due Process Clause, the Court of Appeals "assume[d] without deciding, for purposes of our analysis, that Schaeffler had a protected property interest implicating the Due Process Clause." 786 F.3d at 1361. The property interest claimed by plaintiff Schaeffler Group USA, Inc. was not pre-existing tariff treatment but a claimed right that arose "because, when it checked the box to oppose a petition, it believed that it would not be subjecting itself to competitive harm through the aggrandizement of its competitors." *Id.* Reasoning that the CDSOA was not impermissibly retroactive, the appellate court chose not to reach the question of whether there was a vested property right "because we find that Congress had a rational basis for the retroactive effect of the petition support requirement." *Id.*

PrimeSource's fourth claim, that Section 232 is impermissible under the U.S. Constitution as an impermissibly broad delegation of legislative authority from Congress to the Executive Branch, is foreclosed by the decision of the U.S. Supreme Court in *Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976). Therefore, it too must be dismissed.

The fifth count in PrimeSource's complaint contains only one substantive paragraph, as follows:

> The Secretary of Commerce violated Section 232 by making "assessments", "determinations" and providing other "information" to the President without following any of the statutory procedures for new action and by doing so outside the statutory time periods applicable to the 2017-18 investigation conducted by the Secretary of Commerce that resulted in Proclamation 9705.

Am. Compl. ¶ 82. This claim, which is similar to the claim in Count 1 but grounded in alleged violations of Section 232 instead of alleged violations of the Commerce Department regulations or the APA, also must be dismissed. Section 232 does not provide for judicial review of any action taken thereunder. Accordingly, for PrimeSource's fifth count to be cognizable, judicial review must exist under the APA. But as with Count 1, this claim cannot be brought under the APA, which "limits nonstatutory judicial review to 'final' agency actions." *DRG Funding Corp.*, 76 F.3d at 1214 (citing 5 U.S.C. § 704); *see Motion Sys. Corp.*, 437 F.3d at 1362.

We address below plaintiff's remaining claim, which is set forth as Count 2.

2. Defendants' Motion to Dismiss the Claim in Count 2 Must Be Denied

Section 232, 19 U.S.C. § 1862, grants the President broad authority to "adjust the imports of the article and its derivatives" that threaten to impair the national security, *id.* § 1862(c)(1)(A). Congress conditioned the delegation of this authority upon the President's receipt of a report by the Secretary of Commerce on the findings of an investigation "to determine the effects on the national security of imports" of an article that is the subject of a request for such an investigation by "the head of any department or agency" or that is the subject of an investigation initiated upon the Commerce Secretary's "own motion." *Id.* § 1862(b)(1)(A). In conducting the investigation, the Commerce Secretary must consult with the Secretary of Defense "regarding the methodological and policy questions raised" in the investigation and seek "information and advice from, and consult with, appropriate officers of the United States." *Id.* § 1862(b)(2)(A)(i), (ii). The statute further provides that "if it is appropriate and after reasonable notice," the Commerce Secretary shall "hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to such investigation." *Id.* § 1862(b)(2)(A)(iii). The Secretary of Commerce is directed to submit the report of the investigation to the President within 270 days after the investigation is initiated. *Id.* § 1862(b)(3)(A). The statute lists numerous non-exclusive factors the Commerce Secretary and the President are to consider in making their determinations. *Id.* § 1862(d).

Plaintiff's claim in Count 2 is that Proclamation 9980 is invalid as untimely because the President's authority to adjust imports of a new set of products made of steel (i.e., the "derivatives") had expired.[4] PrimeSource argues that Section 232 expressly limited, according to the time periods set forth in 19 U.S.C. § 1862(c)(1), any action the President could take to adjust imports of such products, including steel nails. Under PrimeSource's interpretation of Section 232, the action effected by Proclamation 9980 could have been valid only had it been implemented within 105 days (i.e., the 90 days allowed by § 1862(c)(1)(A)[5]

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[4] Although plaintiff has named the President (among other officers of the United States) in his official capacity as a defendant in this action, we do not construe the claim in Count 2 as a claim against the President. The claim is directed against Proclamation 9980 itself, not the President, against whom no remedy is sought

[5] The provision setting forth the 90-day time period reads as follows:

> Within 90 days after receiving a report submitted under subsection (b)(3)(A) of this section [19 U.S.C. § 1862(b)(3)(A)] in which the Secretary [of Commerce] finds that an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, the President shall—(i) determine whether the President concurs with the finding of the Secretary, and (ii) if the President concurs, determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security.

19 U.S.C. § 1862(c)(1)(A)

plus the 15 days allowed by § 1862(c)(1)(B)[6]) of the receipt of a report of the Commerce Secretary submitted under § 1862(b)(3)(A). *See* Am. Compl. ¶¶ 70–73. According to PrimeSource, Proclamation 9980 was issued 638 days after the transmittal of that report to the President and is, therefore, null and void. *Id.* ¶ 73.

Plaintiff's Count 2 claim rests upon a "plain meaning" interpretation of Section 232(c)(1), 19 U.S.C. § 1862(c)(1). This provision, in subparagraph (A), requires the President to make certain determinations within 90 days of receiving the Commerce Secretary's report under Section 232(b)(3)(A). In subparagraph (B), it directs the President, if determining to take action "to adjust imports of an article and its derivatives," to implement that action within 15 days of making that determination.

The Secretary of Commerce, following an investigation initiated under Section 232, submitted a report to the President under 19 U.S.C. § 1862(b)(3)(A)

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[6] The provision setting forth the 15-day time period reads as follows:

> If the President determines under subparagraph (A) [19 U.S.C. § 1862(c)(1)(A)] to take action to adjust imports of an article and its derivatives, the President shall implement that action by no later than the date that is 15 days after the day on which the President determines to take action under subparagraph (A).

19 U.S.C. § 1862(c)(1)(B)

(the "Steel Report")[7] on January 11, 2018. Defs.' Mot. 5–6; Pl.'s Br. 3–4; *see Proclamation 9980* ¶ 1, 85 Fed. Reg. at 5,281. That report was the basis for Proclamation 9705. *Proclamation 9980* states that the President, based on certain "assessments" of the Secretary of Commerce, concluded that it was "necessary and appropriate in light of our national security interests to adjust the tariffs imposed by previous proclamations to apply to the derivatives of aluminum articles and steel articles described in Annex I and Annex II to this proclamation." *Proclamation 9980* ¶ 9, 85 Fed. Reg. at 5,283. While mentioning these "assessments" of the Commerce Secretary, Proclamation 9980 does not state that the President was taking action pursuant to any report the Commerce Secretary issued under Section 232(b)(3)(A), 19 U.S.C. § 1862(b)(3)(A), subsequent to the January 2018 Steel Report.

Defendants do not dispute that the 2018 Steel Report is, for purposes of Section 232(c), 19 U.S.C. § 1862(c), the report issued according to Section 232(b)(3)(A), 19 U.S.C. § 1862(b)(3)(A), upon which the President based his adjustment to imports of steel derivatives, including steel nails. *See* Defs.' Mot. 24–29. Instead, they offer a different interpretation of Section 232(c)(1) (19 U.S.C. § 1862(c)(1)) than does

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[7] The Secretary's Report was published in the Federal Register earlier this year. *Publication of a Report on the Effect of Imports of Steel on the National Security: An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, as Amended*, 85 Fed. Reg. 40,202 (Dep't of Commerce July 6, 2020). We take judicial notice of this published document.

plaintiff, arguing that in issuing Proclamation 9980, the President remained free to adjust imports of articles not addressed in Proclamation 9705 that the President designates as "derivatives" of those articles, despite the time limitation of Section 232(c)(1), including, specifically, the 15-day window of § 1862(c)(1)(B). *See id.*

Defendants advance two arguments in support of their statutory interpretation. Their first argument holds that the President complied with the time limits in Section 232(c)(1) when, in 2018, he issued Proclamation 9705 within 105 days of the President's receipt of the Steel Report. Their theory is that Proclamation 9980, rather than being an "action," or an implementation, separate from Proclamation 9705, was permissible under Section 232(c)(1) as a "modification" of that earlier action. Def.'s Mot. 25–34. Their second argument is in the alternative. The gist of this second argument is that even if the issuance of Proclamation 9980 was not in compliance with the time limitations of Section 232(c)(1), the court still should sustain Proclamation 9980 because the time limitations are merely "directory" and therefore did not preclude the President from adjusting imports of the products named therein. *Id.* at 34–36.

Defendants' first argument is, essentially, that Proclamation 9980 was timely according to Section 232(c)(1) because Proclamation 9705, of which Proclamation 9980 was a permissible modification, was timely. Further to this argument, defendants maintain that "section 232 delegates broad authority to the President to make adjustments to actions taken pursuant to the statute." *Id.* at 25. They direct our attention, specifically, to the words "nature and duration" in Section 232(c)(1)(A)(ii), 19 U.S.C. § 1862(c)(1)(A)(ii), arguing that "[i]f the Secretary's report recommends that action be taken to protect the national security, and if the President concurs, the President 'must determine the *nature and duration of the action* that, *in the judgment of the President*, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security.'" *Id.* at 25 (quoting 19 U.S.C. § 1862(c)(1)(A)(ii)) (emphasis in original). Defendants characterize the terms "nature and duration" as "necessarily flexible and broad." *Id.* They also argue that the word "implement" appearing in Section 232(c)(1)(B), 19 U.S.C § 1862(c)(1)(B), "should not be read with the finality that PrimeSource appears to ascribe to it." *Id.* at 26. They urge that we interpret Section 232(c)(1) to mean that "[t]he statute contemplates continued monitoring and adjustments to section 232(c) actions, as circumstances change." *Id.* While acknowledging that amendments made to Section 232 by the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, Title I, 102 Stat. 1107, Title I, §§ 1501(a), (b)(1) (the "1988 amendments") imposed the time limits in current Section 232(c)(1), they argue that the President's authority to modify actions previously taken predated those amendments, which they view as having preserved, rather than having curtailed, that modification authority. *Id.* at 29–32.

Although defendants would define the issue before us in broad and general terms, we conclude that the precise question is not whether, or to what extent, Section 232 provides general authority for "monitoring and adjustments" of an action previously taken. We conclude, instead, that the question before us is a narrower one: whether the President's having characterized the articles affected by Proclamation 9980 as "derivatives" of the steel products affected by Proclamation 9705 is, by itself, sufficient for us to conclude that Proclamation 9980 was timely according to Section 232(c)(1).[8] In considering this question, we conclude that Section 232(c)(1) would have empowered the President, upon a timely issuance of Proclamation 9705 in 2018, to include an adjustment to imports of, in addition to the specific articles identified by the Commerce Secretary in the Steel Report, "derivatives" of those articles. Section 232(c) allows the President the discretion to do so regardless of whether derivative products were identified and recommended to him in a report the Secretary submits under Section 232(b)(3)(A). Further, we presume that had the President done so, he would have acted within his discretion in characterizing the products affected by Proclamation 9980 as derivatives of the articles affected by Proclamation 9705. We note that Section 232 does not confine the President's discretion by defining the term "derivatives," and, in any event, we

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[8] Because Proclamation 9980 imposed tariffs on a new set of articles ("derivatives" of previously affected articles) rather than raise the tariff on an article already the subject of a Presidential action taken under Section 232, this case presents a different factual circumstance than the one this Court addressed in *Transpacific LLC v. United States, et al.*, 43 CIT __, 415 F. Supp. 3d 1267 (2019) and *Transpacific Steel LLC v. United States, et al.*, 44 CIT __, 466 F. Supp. 3d 1246 (2020).

do not construe plaintiff's claim as contesting this characterization.

Two provisions in Section 232—the only provisions in the statute that mention "derivatives"—bear on the question before us. Section 232(c)(1)(A) directs the President to make two determinations "[w]ithin 90 days after receiving a report submitted under subsection (b)(3)(A) of this section [19 U.S.C. § 1862(b)(3)(A)] in which the Secretary [of Commerce] finds that *an article* is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security." 19 U.S.C. § 1862(c)(1)(A) (emphasis added). Subparagraph (i) of Section 232(c)(1)(A) provides that the President must determine whether he concurs with the affirmative finding of the Commerce Secretary in the report submitted under Section 232(b)(3)(A). Subparagraph (ii), the first of the two statutory provisions addressing derivatives, provides that the President, if concurring, "shall . . . determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article *and its derivatives* so that such imports will not threaten to impair the national security." *Id.* § 1862(c)(1)(A)(ii) (emphasis added). Section 232(c)(1)(B), the second of the two statutory provisions mentioning derivatives, directs that, if determining "under subparagraph (A) [19 U.S.C. § 1862(c)(1)(A)] to take action to adjust imports of an article *and its derivatives*, the President shall implement that action by no later than the date that is 15 days after the day on which the President determines to take action under subparagraph (A)." *Id.* § 1862(c)(1)(B) (emphasis added).

A predecessor to the current Section 232, Section 7 of the Trade Agreements Extension Act of 1955,[9] did not contain the current reference to "derivatives." In pertinent part, Section 7 provided as follows:

> In order to further the policy and purpose of this section, whenever the Director of the Office of Defense Mobilization has reason to believe that any article is being imported into the United States in such quantities as to threaten to impair the national security, he shall so advise the President, and if the President agrees that there is reason for such belief, the President shall cause an immediate investigation to be made to determine the facts. If, on the basis of such investigation, and the report to him of the findings and recommendations made in connection therewith, the President finds that the article is being imported into the United States in such quantities as to threaten to impair the national security, he shall take such action as he deems necessary to adjust the imports of

[9] The immediate predecessor of this provision, enacted as Section 2 of the Trade Agreements Extension Act of 1954, contained a very brief national security provision: "No action shall be taken pursuant to such section 350 [negotiating authority] to decrease the duty on any article if the President finds that such reduction would threaten domestic production needed for projected national defense requirements." Pub. L. No. 83–464, 68 Stat. 360 (1954). This provision remains in current law as Section 232(a), 19 U.S.C. § 1862(a).

> such article to a level that will not threaten to impair the national security.

Trade Agreements Extension Act of 1955, Pub. L. No. 86–169, § 7, 69 Stat. 162, 166. As defendants point out, Defs.' Mot. 27, the conference report on this legislation stated that "[i]t is the understanding of all the conferees that the authority granted to the President under this provision is a continuing authority." H.R. Rep. No. 84–745 at 7 (1955).

In renewing trade agreement authority in the Trade Agreements Extension Act of 1958, Congress made numerous changes to the national security provisions. Among the changes was a lengthy new subsection describing the factors to be considered when determining the effects of imports on national security; this provision is continued in current law as current Section 232(d), 19 U.S.C. § 1862(d). The Trade Agreements Extension Act of 1958, in § 8(a), streamlined the existing national security investigative procedure by eliminating the requirement that the President initiate an investigation and placing that responsibility instead upon the Director of the Office of Defense and Civilian Mobilization. Most pertinent to this case is that Congress also granted the President, if advised by the Director that imports of an "article" threaten to impair the national security, the authority to adjust the imports of "such article and its derivatives":

> Upon request of the head of any Department or Agency, upon application of an interested party, or upon his own motion, the Director of the Office of Defense and Civilian

> Mobilization (hereinafter in this section referred to as the "Director") shall immediately make an appropriate investigation, in the course of which he shall seek information and advice from other appropriate Departments and Agencies, to determine the effects on the national security of imports of the article which is the subject of such request, application, or motion. If, as a result of such investigation, the Director is of the opinion that the *said article* is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, he shall promptly so advise the President, and, unless the President determines that the article is not being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security as set forth in this section, he shall take such action, and for such time, as he deems necessary to adjust the imports of such article *and its derivatives* so that such imports will not so threaten to impair the national security.

Pub. L. No. 85–686, § 8(a), 72 Stat. 673, 678 (1958) (emphasis added). This provision authorized the President, on his own authority, to adjust the imports of derivatives of the article that was investigated and reported to him.

The language on derivatives was added to the legislation (H.R. 12591, the "Trade Agreements Extension Bill of 1958") by an amendment

(Amendment No. 20) in the Senate, to which the House receded. Trade Agreements Extension Bill of 1958, Conference Report [to accompany H.R. 12591], Rep. No. 2502, 85th Cong., 2d Sess., at 7 (1958). The debate in the House on the Conference Report on H.R. 12591 indicates that the purpose of Amendment No. 20 in the Senate was to ensure that the President could address the possibility that derivatives of the investigated article would circumvent the measures taken to adjust imports of the article itself. 104 Cong. Rec. 16,537, 16,542 (1958). There was a specific concern involving derivatives of imports of crude oil and other natural resources, but Amendment 20 effected a change that was without limitation as to the type of product involved.[10] *See id.* Significantly, Proclamation 9980

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[10] The floor statement of House Ways and Means Chairman Mills, 104 Cong. Rec. 16,537, 16,542 (1958), included the following:

> The Senate further authorized the President that if he should take such action as he deems necessary to adjust the imports of the particular article, he may also adjust the imports of its derivatives. The effect of the addition of the language with respect to derivatives in the statute serves the same purpose as the expression of intent on the part of the Committee on Ways and Means which was elaborated in a colloquy between the gentleman from Texas [Mr. IKARD] and myself on the floor of the House when the legislation was under consideration by the House. At that time, in response to an inquiry from the gentleman from Texas, I observed that prudent administration of this provision of the law would require that, if action in the interest of national security is indicated with respect to the

identified "circumvention" of the tariffs on the steel products affected by Proclamation 9705 as a justification for the President's decision. *Proclamation 9980*, ¶ 8, 85 Fed. Reg. at 5,282.

In enacting Section 232 of the Trade Expansion Act of 1962, Congress essentially carried over the language of § 8(a) of the 1958 statute, reassigning the investigative responsibility from the Director of the Office of Defense and Civilian Mobilization to the Director of the Office of Emergency Planning. [11]

> imports of a particular article, it would follow that appropriate action with respect to the derivatives of such article would also be in order if it has been found that the imports of such derivatives would have the effect of threatening to impair the national security.

The colloquy to which Chairman Mills referred included the following:

> Mr. IKARD. Is it intended that when the imports of a natural resource are controlled under the provisions of the national security section of the committee bill, and with particular reference to petroleum, that such control should take into consideration the importation of products, derivatives, or residues of petroleum so that these products and derivatives could not be imported in a way that would circumvent the control of the imports of the basic natural resource?
>
> Mr. MILLS. Yes. Clearly, when a decision is taken to restrict imports in the interest of national security, it is our intention that the decision be effective and not rendered ineffective by circumvention.

House debate on H.R. 12591, 104 Cong. Rec. 10,672, 10,750 (1958).

[11] The new provision read as follows:

Neither the 1958 version nor the 1962 version of the statute placed any time limits on the President's authority to adjust imports of the investigated article or derivatives of that article, and in that respect the authority delegated to the President by the 1962 statute could be described as "continuing."

Congress again amended Section 232 in 1975. The investigative responsibility was transferred from the Director of the Office of Emergency Planning to the

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> Upon request of the head of any department or agency, upon application of an interested party, or upon his own motion, the Director of the Office of Emergency Planning (hereinafter in this section referred to as the "Director") shall immediately make an appropriate investigation, in the course of which he shall seek information and advice from other appropriate departments and agencies, to determine the effects on the national security of imports of the article which is the subject of such request, application, or motion. If, as a result of such investigation, the Director is of the opinion that the said article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, he shall promptly so advise the President, and, unless the President determines that the article is not being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security as set forth in this section, he shall take such action, and for such time, as he deems necessary to adjust the imports of such article and its derivatives so that such imports will not so threaten to impair the national security.

Trade Expansion Act of 1962, Pub. L. No. 87–794, § 232(b), 76 Stat. 872, 877.

Secretary of the Treasury,[12] the current language on public participation was added, and, for the first time, Congress placed a time limit on the investigation:

> The Secretary [of the Treasury] shall, if it is appropriate and after reasonable notice, hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to such investigation. The Secretary shall report the findings of his investigation under this subsection with respect to the effect of the importation of such article in such quantities or under such circumstances upon the national security and, based on such findings, his recommendation for action or inaction under this section to the President within one year after receiving an application from an interested party or otherwise beginning an investigation under this subsection.

Pub. L. No. 93–618, 88 Stat. 1978, 1993–94 (1975). Congress placed no time limit on the exercise of discretion by the President.

Congress next made major changes to Section 232 in the 1988 amendments, which resulted in the

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[12] Along with certain other responsibilities pertaining to international trade, this responsibility was transferred to the Secretary of Commerce by *Reorganization Plan No. 3 of 1979*, § 5(a)(1)(B), eff. Jan. 2, 1980, 44 Fed. Reg. 69,273, 69,274, 93 Stat. 1381, 1383.

current Section 232.[13] Among a number of new procedural requirements, including requirements for reporting to the Congress on actions taken or declined to be taken, the 1988 amendments imposed, for the first time, time limits on the exercise of discretion by the President. These were the aforementioned 90-day time period in which the President is to "determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives . . . ," 19 U.S.C. § 1862(c)(1)(A)(ii), and the 15-day time period in which the President, if determining "to take action to adjust imports of an article and its derivatives," is directed to "implement that action," *id.* § 1862(c)(1)(B).

Defendants maintain that "[n]othing in the 1988 amendments' text or legislative history . . . suggests that Congress intended to alter, let alone withdraw, its long-standing delegation of authority to take continuing action" and that "[t]he circumstances leading to passage of the 1988 amendments make clear Congress' desire to prevent *inaction*, not to curtail further action." Defs.' Mot. 29–30. Turning first to the text of the 1988 amendments, we are unconvinced by defendants' argument that these amendments maintained, unchanged, the "continuing" authority of the President.

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[13] An intervening amendment in 1980 added current Section 232(f), which provided that Congress could invalidate Presidential action to adjust imports of petroleum or petroleum products upon a "disapproval resolution." Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96–223, Title IV, § 402, 94 Stat. 229.

As amended, the statute expressly requires the President, "[w]ithin *90 days* after receiving a report submitted under subsection (b)(3)(A)," (i.e., the report the Commerce Secretary is to issue within 270 days of the initiation of an investigation under 19 U.S.C. § 1862(b)) to "determine the nature and duration of *the action* that, in the judgment of the President, must be taken to adjust the imports of the article *and its derivatives* . . . ." *Id.* § 1862(c)(1)(A)(ii) (emphasis added). Section 232(c)(1)(B) provides that "[i]f the President determines . . . to take *action* to adjust imports of an article *and its derivatives*, the President *shall implement that action* by *no later* than the date that is *15 days* after the day on which the President determines to take action . . . ." *Id.* § 1862(c)(1)(B) (emphasis added). Contrary to defendants' urging that we read Section 232(c)(1) broadly and flexibly, we find no ambiguity in the time limitations it imposes. Nor do we find the provision ambiguous in its application of those time limits to an action taken to adjust imports of "derivatives." In short, there is no "flexible" reading of this provision under which the express time limitations on a Presidential "action," and implementation thereof, do not apply. And we find no indication anywhere in the text of the statute as amended by the Omnibus Trade and Competitiveness Act that the President retained authority to adjust imports of articles identified in the Secretary's report and then, after an extended period of time, adjust imports of derivatives of those articles without complying with the detailed procedures of Section 232(b) and (c). To the contrary, the 90- and 15-day time limitations in Section 232(c)(1) expressly confine the exercise of the President's discretion *regardless* of whether the President determines to adjust imports only of the "article" named in the Secretary's report or, instead, to adjust imports of the "article and its derivatives." *See* 19 U.S.C. § 1862(c)(1). No other provision in Section 232 provides to the contrary or, for that matter, addresses in any way the authority to adjust imports of derivatives. Had Congress intended, in the 1988 amendments, to preserve Presidential authority to adjust imports of derivatives after the close of the 105-day period, presumably it would have created an exception to the general time limitation it imposed in Section 232(c)(1). But we see no indication of such an intent in the plain meaning of the statute and find indications to the contrary.

Defendants' "flexible" reading of Section 232(c)(1) would require us to interpret the "action" taken by Proclamation 9980 and that taken by Proclamation 9705 as parts of the same "action." This presents several interpretive problems. For one, it is contrary to the plain and ordinary meaning of the words "action" and "implement" as used in Section 232(c)(1). There can be no question, as a factual matter, that the two, separately-published proclamations stemmed from two separate Presidential determinations and were directed at two different sets of products. Each necessarily required its own implementation. *See* 19 U.S.C. § 1862(c)(1)(B) ("[T]he President *shall implement that action* by no later than the date that is 15 days after the day on which the President determines to take *action* under subparagraph A"). The President "implemented" the "action" he determined to take following his receipt of the Steel

Report when he issued Proclamation 9705 in 2018. In enacting Section 232(c)(1) as part of the 1988 amendments, Congress placed time limits on the exercise of the President's discretion for the first time in the history of the statute. The straightforward language by which Congress did so did not leave room for an interpretation that the President retained, indefinitely, discretion to adjust imports of derivatives of an article affected by an earlier action and implementation. Despite the express time limitation Congress imposed, defendants insist that the President may resume his "implementation" indefinitely—presumably even repeatedly through subsequent measures, and even many years later—and thereby sidestep the express time limitations Congress imposed.

Additionally, defendants' interpretation of Section 232 would require us to ascribe a different meaning to the word "action" as used in Section 232(c)(1) than that indicated by the use of that term in another provision added to the statute by the 1988 amendments, Section 232(c)(3) (19 U.S.C. § 1862(c)(3)). In Section 232(c)(3), Congress created an exception to the time limitations in Section 232(c)(1), and an alternate procedure, to apply when the "action" the President chooses to take under Section 232(c)(1) is to pursue a trade agreement "which limits or restricts the importation into, or the exportation to, the United States of the article that threatens to impair national security." 19 U.S.C. § 1862(c)(3)(A)(i). Under this alternate procedure, if, after 180 days, no agreement is reached or if an agreement "is ineffective in eliminating the threat to the national security posed by imports of such article," the President may "take such other *actions* as the President deems necessary to adjust the imports of such article so that such imports will not threaten to impair the national security." *Id.* § 1862(c)(3)(A)(ii) (emphasis added). Section 232(c)(1) uses the singular term "action"—which Section 232(c)(3) also uses to refer to the determination taken under Section 232(c)(1)—and then distinguishes that term by using the term "*other* actions" (also identified as "*additional* actions"), 19 U.S.C. § 1862(c)(3)(B)(ii) (emphasis added), that the President is authorized to take under Section 232(c)(3) in the event the Section 232(c)(1) "action," i.e., any trade agreement, or attempt to obtain one, is deemed by the President to be insufficient to eliminate the threat from imports of the article. Thus, defendants' reading of the word "action" as used in Section 232(c)(1) to encompass, broadly, a series of continuing measures to adjust imports, as opposed to a discrete action that may be implemented, cannot be reconciled with the use of that term in Section 232(c)(3). We disfavor an interpretation that ascribes different meanings to the same term as used in different provisions of the same statute. *See Brown v. Gardner*, 513 U.S. 115 (1995) ("[T]here is a presumption that a given term is used to mean the same thing throughout a statute.").

Although placing no express time limits on the "other actions" in Section 232(c)(3), as it did in Section 232(c)(1), Congress limited these "additional actions" to those that adjust imports of the article that was, or would have been, affected by the trade agreement. *Id.* § 1862(c)(3)(A) (confining the additional actions to actions "to adjust the imports of *such article*" (emphasis added)). In substance, Proclamation 9980 concludes that the previously-imposed tariffs on steel articles were (in the words of 19 U.S.C. § 1862(c)(3)) "ineffective in eliminating the threat to the national security." But Proclamation 9980 differs from an "additional action" taken under Section 232(c)(3) in two critical respects: it did not follow a determination to enter into a trade agreement (a determination of which the President must give timely notification to Congress under Section 232(c)(2)), and even if it had, it would not have conformed to the procedure thereunder because the "additional action" was not directed to the same article as was the original action.

Where a statute creates an exception to a general rule (as Section 232(c)(3) does in creating an exception to the time limitations of Section 232(c)(1)), such exception is to be read narrowly and not interpreted to apply where Congress did not expressly provide for it. *Comm'r v. Clark*, 489 U.S. 726, 739 (1989) ("In construing provisions ... in which a general statement of policy is qualified by an exception, we usually read the exception narrowly in order to preserve the primary operation of the provision.") (citing *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) ("To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people.")). When we read the statute as a whole, we see the detailed, specialized procedure Congress set forth as Section 232(c)(3) as another indication that Proclamation 9980 must be viewed as untimely under Section 232(c)(1) if considered to be an action that was taken based solely on the Steel Report.

Defendants' argument referring to the words "nature and duration" in Section 232(c)(1)(A)(ii) also fails to convince us that the President retains authority, indefinitely, to take additional steps to adjust imports of articles not addressed in his original action. Because different products were affected, the "nature" of the action the President took in 2020 differed from the nature of the action he took in 2018.

Defendants argue that specific factors set forth in Section 232(d), 19 U.S.C. § 1862(d), that the President is to consider in exercising his authority under Section 232 signify that "[t]he statute contemplates continued monitoring and adjustments to section 232(c) actions, as circumstances change." Defs.' Mot. 26. According to defendants, "[m]any of these factors, including the 'domestic production needed for projected national defense requirements,' the 'capacity of domestic industries to meet such requirements,' and 'the impact of foreign competition on the economic welfare of individual domestic industries,' are dynamic by nature and invite ongoing evaluation and, as necessary, course correction." *Id.* (quoting 19 U.S.C. § 1862(d)). This argument, too, is unpersuasive, confusing the non-exclusive list of factors the President is to consider in his determination of what action is needed with the time periods in which he must make and implement that determination. As we discussed above, the list of non-exclusive factors set forth in current Section 232(d) were added by Trade Agreements Extension Act of 1958. We find nothing in the text of Section 232(d) that creates an exception to the time limits

Congress imposed, as Section 232(c)(1), thirty years later.

In support of their motion to dismiss, defendants argue, additionally, that "[i]t is no defect that the Secretary's investigation covered steel articles and not derivatives of steel articles, such as nails." Defs.' Mot. 37 (citing Compl. ¶¶ 41–42); Defs.' Reply 2 (arguing that "Commerce plays no statutory role with respect to derivative articles."). According to defendants, "the President is authorized to adjust imports of derivatives of articles, even when the Secretary's investigation and report addressed only the article itself." Defs.' Mot. 37 (quoting 19 U.S.C. § 1862(c)(1)(A)(ii) ("if the President concurs, determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article *and its derivatives* . . . .")). As we discussed above, the President is empowered to adjust imports of derivatives of the investigated article regardless of whether the investigation, and the Commerce Secretary's Section 232(b)(3)(A) report, included them. Defendants' argument does not confront the question of timeliness: PrimeSource challenges the timeliness of the President's action on the ground that the time limitations of Section 232(c)(1) apply regardless of whether or not the President's action is directed to derivatives of an article affected by an earlier action.

In support of their argument that nothing in the legislative history of the 1988 amendments evinces congressional intent to limit the Presidents' discretion as to modifications of earlier actions, defendants cite congressional testimony showing, they argue, that the

1988 amendments were motivated by frustration on the part of certain members of Congress with President Reagan's delay in taking actions under Section 232, in particular with respect to machine tools. *Id.* at 30–31 (citing Hearings Before the Comm. on Ways & Means on H.R. 3 Trade and International Economic Policy Other Proposals Reform Act, 100th Cong. (1987); Hearings Before the Subcomm. on Trade of H. Comm. On Ways & Means, 99th Cong., 2d Sess. 1282 (1986)).

A Senate report on the legislation, while noting that then-current law imposed a one-year requirement for the investigation (shortened to 270 days by the 1988 amendments), also noted that under current law "[t]here is no time limit for the President's decision." Report of the Committee on Finance on S. 490, S. Rep. 100-71, at 135 (1987). "The basic need for the amendment arises from the lengthy period provided by present law—one year for investigations and no time limit for decisions by the President—before actions to remove a threat posed by imports of particular products to the national security are taken. For example, in the machine tools case, the President waited over 2½ years before taking any action to assist the domestic industry." *Id.* "The Committee [on Finance] believes that if the national security is being affected or threatened, this should be determined and acted upon as quickly as possible." *Id.*

At least arguably, the legislative history defendants cite, and the quoted Senate report, are consistent with a view that Congress could have intended that the President retain "modification" authority such as defendants posit, so long as he imposes an initial measure within the time limits. But Section 232(c)(1) as effected by the 1988 amendments unambiguously placed time limits on the President's authority to adjust imports of derivatives as well as the imports of the investigated article. Were there intent to retain the authority to impose subsequent measures to adjust imports of derivatives after the expiration of the 105-day period, we would expect to see at least some indication of that intent in the legislative history. However, we find nothing in the legislative history to indicate that Congress intended to do so. Such indications as we are able to find are to the contrary. The conference agreement on the Omnibus Trade and Competitiveness Act of 1988 summarizes the amendment to Section 232 as follows:

A. Amends section 232 of the Trade Expansion Act of 1962 to require the Secretary of Commerce to report to the President within 270 days of initiating an investigation.

B. Requires the Secretary of Commerce to consult with the Secretary of Defense regarding the methodological and policy questions raised by the investigation; and requires the Secretary of Defense, upon request of the Commerce Secretary, to provide defense requirements with respect to the article under investigation.

C. Requires the President to decide, within 90 days of receiving the Commerce Secretary's report, on whether to take action and if so to proclaim such action within 15 days.

D. Requires the President to report to Congress within 30 days on the action taken and reasons for such action.

E. Authorizes the enforcement of the quantitative restrictions negotiated with respect to machine tool imports.

Summary of the Conference Agreement on H.R. 3, The Omnibus Trade and Competitiveness Act of 1988 at 15–16 (Comm. Print 1988). The use of the words "proclaim such action" in paragraph C, above, casts further doubt on defendants' expansive and flexible interpretation of the word "implement" as used in 19 U.S.C. § 1862(c)(1)(B). "Proclaim" is the verb form of the noun "proclamation," and "proclaim *such action*" is inconsistent with an interpretation under which Congress intended the President to have authority to proclaim additional "actions" indefinitely (through subsequent proclamations), after the time period had passed.

In summary, we view defendants' argument on legislative history as confusing an apparent motivation with the specific statutory means Congress chose to achieve its objective, which is reflected in the plain meaning of the language of the amendments. The solution Congress adopted was to require, generally, that the President implement an import adjustment (whether on the investigated article or on that article and its derivatives) within the 105-day time period following receipt of the report the Secretary submits under Section 232(b)(3)(A) (with the limited "trade agreement" exception discussed previously). The statute did not provide general authority for the President to take, or implement, another "action" (or actions) on derivatives after that time period elapsed.

According to defendants, "[t]hat the statute also involves foreign affairs and national security cautions against an inflexible reading" of the provisions governing the exercise of the President's Section 232 authority. Defs.' Mot. 33. In support of this argument, they cite *B-West Imports, Inc. v. United States*, 75 F.3d 633, 636 (Fed. Cir. 1996), *Florsheim*, 744 F.2d at 793, and *American Ass'n of Exporters & Importers-Textile & Apparel Grp. v. United States*, 751 F.2d 1239, 1248 (Fed. Cir. 1985). While the statutory interpretation principle defendants identify is a valid one, it does not serve the arguments they make in favor of their particular interpretation of Section 232. As we have explained, there is no "flexible" reading of Section 232(c)(1) that suffices to allow the President to adjust, through new tariffs, imports of derivatives of previously-affected articles outside of the time limits Congress imposed, and the appellate decisions on which defendants rely do not lend support to any such reading.

In *B-West Imports* and in *Florsheim Shoe Co.*, the Court of Appeals addressed interpretations of statutes conferring Presidential authority in matters involving import regulation. Each of these cases rejected an appellant's statutory interpretation that was plainly unreasonable. *B-West Imports* held that a provision in the Arms Export Control Act, 22 U.S.C. § 2778, which granted the President authority to "control" arms imports, encompassed the authority to revoke previously-issued permits for importations of munitions from the People's Republic of China. The Court of Appeals rejected the interpretation of § 2778 advanced by appellants, who conceded that the term "'control' is broad enough to allow the President to ban imports by denying licenses or permits for future imports." 75 F.3d at 635. The opinion states that "if the term 'control' includes the power to prohibit, as appellants concede that it does, we are unable to discern any basis for construing the statute to convey the power to deny permits and licenses in advance, but to withhold the power to revoke them once they have been issued." *Id.* at 636. The case did not involve an attempt to invoke *delegated* authority to adjust imports that was claimed to have expired. *Florsheim Shoe Co.* rejected an importer's challenge to an action by the President that withdrew duty-free treatment provided under the Generalized System of Preferences ("GSP") program for certain leather articles from India. The Court of Appeals, upon interpreting statutory language providing that "[t]he President may withdraw, suspend, or limit the application of the duty-free treatment accorded under section 2461 of this title with respect to any article or with respect to any country . . . ," 19 U.S.C. § 2464 (1982) (amended to 19 U.S.C. § 2463(c)(1) (1996)), rejected appellant's argument that "the President may only limit duty-free treatment for a particular article from all countries or for all articles from a particular country" and therefore lacked authority to withdraw duty-free treatment from a specific article from a particular beneficiary country. 744 F.2d at 794. The Court of Appeals viewed appellant's argument as based on an "over-emphasis on the word 'or'" in § 2464 that was at odds with the overall provision. In the instant case, plaintiff advocates a "plain meaning" construction of Section 232(c)(1), rather than one such as that advocated in *Florsheim Shoe Co.*, which was a strained interpretation of a provision delegating tariff authority to the President that failed to recognize that the greater power the provision granted must be read to include the lesser.

The third decision defendants cite, *American Ass'n of Exporters & Importers-Textile & Apparel Grp.*, adjudicated, and rejected, claims that an administrative agency, the Committee on the Implementation of Textile Agreements, "failed to abide by its statutory authority," "acted arbitrarily," and violated "the statutory and constitutional rights" of members of plaintiff's organization "to have notice of the proposed actions and an opportunity to be heard." 751 F.2d at 1246. In disposing of appellant's "statutory authority" claim, the Court of Appeals disagreed with a narrow construction of section 204 of the Agricultural Act of 1956, under which the President negotiated agreements on importations of textiles and textile products. The Court of Appeals rejected the argument that Congress, in authorizing the President "to issue regulations governing the entry or withdrawal from warehouse of any such commodity, product, textiles, or textile products to carry out such agreements," 7 U.S.C. § 1854 (1982), "intended to incorporate the terms of any agreements concluded pursuant to section 204 into that statute itself." 751 F.2d at 1241, 1247 (footnote omitted). The Court reasoned that the statutory phrase "to carry out" as used in § 1854 "does not imply that Congress restricted the President's discretion in this regard by requiring him to implement the agreements in the particular manner seen by appellant" but rather "is a broad grant of authority to the President in the international field in which congressional delegations are normally given a broad construction." *Id.* This case, in contrast, does not involve delegated authority to promulgate implementing regulations, and there is no "broad construction" of the express time limitations in Section 232(c)(1) that plausibly supports defendants' argument.

In summary, the action taken by Proclamation 9980 to adjust imports of derivatives was not implemented during the 105-day time period set forth in § 1862(c)(1), if that time period is considered to have commenced upon the President's receipt of the Steel Report. The President's having characterized the articles affected by Proclamation 9980 as "derivatives" of the steel products affected by Proclamation 9705 is, therefore, insufficient by itself to support a conclusion that Proclamation 9980 was timely according to Section 232(c)(1).

We turn next to defendants' second argument, which is that the statutory deadlines in Section 232(c)(1) are directory, not mandatory, an argument apparently in the alternative to their argument that the President complied with all procedural requirements. Defs.' Mot. 35. They maintain that where Congress did not expressly state the consequences of failures to meet deadlines, the deadlines ordinarily should not be construed as mandatory, and the court should so construe them here. But as we pointed out above, accepting this logic would require us to conclude that Congress established the time limitations, which were central to the 1988 amendments and related to other procedural requirements imposed by those amendments, while at the same time intending that these limitations would have no binding effect on the exercise of the President's discretion. It also would require us to conclude that the President could take virtually any action he chose, even one adjusting imports of products that are not derivatives of those affected by an earlier action, despite the express time limitations in Section 232(c)(1). Such an interpretation essentially renders Section 232(c)(1), as added by the 1988 amendments, a nullity. As the court has explained, the plain meaning and structure of Section 232 are to the contrary.

The aforementioned Section 232(c)(3), another provision added by the 1988 amendments, also is inconsistent with an interpretation that the Section 232(c)(1) time limitations are merely directory. As the court has discussed, this alternate procedure applies when the President determines that the appropriate "action" is to seek a trade agreement limiting or restricting the importation into, or exportation to, the United States of "the article that threatens to impair national security." 19 U.S.C. § 1862(c)(3)(A)(i). But it is axiomatic that when interpreting a statute, a court is to give effect to every word and every provision. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.'") (citing *United States v. Menasche*, 348

U.S. 528, 538–39, (1955)); *see also Williams v. Taylor*, 529 U.S. 362, 404, (2000) (describing the above rule as the "cardinal principle of statutory construction"). The procedure Congress spelled out in detail in Section 232(c)(3) would appear to be rendered superfluous if the time limitations in Section 232(c)(1) were interpreted to have no binding effect. In summary, defendants' conception of a "flexible" statutory scheme under which the Section 232(c)(1) time limits are merely directory is inconsistent with the elaborate procedural mechanisms Congress included to ensure oversight generally, and to provide, specifically, for the special situation arising from the President's negotiation of a trade agreement.

In support of their argument that the time limitations in Section 232(c)(1) are merely directory, defendants cite *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 159 (2003) (citing *United States v. James Daniel Good Real Property*, 510 U.S. 43, 63 (1993)), *Hitachi Home Elecs., Inc. v. United States*, 661 F.3d 1343, 1345–46 (Fed. Cir. 2011), *Gilda Industries, Inc. v. United States*, 622 F.3d 1358, 1365 (Fed. Cir. 2010), and *Canadian Fur Trappers Corp. v. United States*, 884 F.2d 563, 566 (Fed. Cir. 1989). Defs.' Mot. 35. These cases are inapposite. They did not involve an express limitation Congress imposed on the delegation to the Executive Branch of a legislative power the Constitution vested in the Congress. See U.S. CONST. art. I, § 8, cl. 1 (conferring the power to lay and collect Duties) & cl. 3 (conferring the power to regulate commerce with foreign nations). In each, the Supreme Court or the Court of Appeals, using established methods of statutory interpretation, concluded that

Congress intended for the time limitation at issue to be merely directory. We approach the issue in this case not by applying a blanket presumption as to whether a deadline is directory or mandatory, as defendants would have us do, but by examining the statute as a whole, giving effect to "every clause and word," *Duncan*, 533 U.S. at 174, to discern congressional intent as to the statutory time limits in question. Here, the nature of the delegation (a delegation of a legislative power reserved by the Constitution to the Congress), the plain meaning of Section 232(c)(1), and the indicia of congressional intent appearing elsewhere in Section 232 preclude us from concluding that the time limits are merely directory.

Barnhart v. Peabody Coal Co. arose from a statutory requirement in the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. § 9706(a) ("Coal Act"), that the Secretary of Labor assign, before October 1, 1993, retired coal miners whose former employers were no longer in business to extant "signatory operators," who would assume the annual premium obligations for those retirees' benefits. After the Department of Labor was unable to complete the lengthy assignment process by the statutory due date, it proceeded to assign some 10,000 previously-unassigned beneficiaries to signatory operators. 537 U.S. at 155–56. The issue in the case was whether those assignments were valid regardless of the untimeliness of the Department's actions. From a comprehensive examination of the Coal Act, including the legislative purpose of requiring the assignments and the consequence of holding assignments made after the deadline to be invalid, which the Court considered to be contrary to the overall intent of the statute, the Court held that the statutory date for the assignments did not invalidate the subsequent assignments. *Id.* at 172 ("The way to reach the congressional objective, however, is to read the statutory date as a spur to prompt action, not as a bar to tardy completion of the business of ensuring that benefits are funded, as much as possible, by those identified by Congress as principally responsible."). The case at bar does not present an analogous situation. Rather than spur agency action to complete a complex administrative task such as that required by the Coal Act, Congress endeavored in the 1988 amendments to Section 232 to impose new controls, through time limitations and reporting requirements, on the exercise of Presidential discretion.

Hitachi Home Elecs., Inc. involved the requirement in Section 515(a) of the Tariff Act that Customs and Border Protection act on a protest within two years. Rejecting the plaintiff's argument that a protest not acted upon within the two-year period is "deemed allowed," the Court of Appeals noted that a protestant desiring to obtain expeditious allowance or denial, or alternatively judicial review, may seek accelerated disposition under Section 515(b). 661 F.3d at 1348–49. Nothing in the Tariff Act even suggested congressional intent that a protest not acted upon during the two-year period should be deemed to have been allowed, and the provision for accelerated disposition is contrary to such an intent.

Gilda Industries, Inc. held that a failure of the U.S. Trade Representative to make a notification required by 19 U.S.C. § 2417(c)(2) to be made to domestic parties of the impending termination of a retaliatory trade action occurring by operation of § 2417(c)(1) four years after its imposition, in the absence of a written request from a domestic party for continuation, did not nullify the statutorily-required termination. Under the reasoning of the Court of Appeals, the termination of the retaliatory trade action on the four-year anniversary date, absent a continuation request by a party already on notice of the termination, was unaffected by the absence of the notification required by § 2417(c)(2). 622 F.3d at 1365.

Canadian Fur Trappers Corp. involved a previous version of Section 504(d) of the Tariff Act, which directed the Customs Service to liquidate an entry within 90 days of removal of a suspension of liquidation but did not provide a consequence for a failure by the Customs Service to do so. The Court of Appeals rejected the importers' argument that such failure resulted in a deemed liquidation at the entered duty rate, a highly consequential result for which the statute did not then provide. 884 F.2d at 566.

In summary, we are not convinced by either of the two arguments defendants put forth to support their motion to dismiss plaintiff's Count 2 claim. The President's characterization of the articles affected by Proclamation 9980 as derivatives of the articles affected by Proclamation 9705 is insufficient, by itself, to support a conclusion that the challenged decision satisfied the time limitations in Section 232(c)(1), and Congress did not intend for those time limits to be merely directory. Count 2 of plaintiff's complaint states "a claim to relief that is plausible on its face," *Twombly*, 550 U.S. at 570, and we decline to dismiss it at this stage of the proceedings.

D. Plaintiff's Motion for Summary Judgment

PrimeSource characterizes its motion as a USCIT Rule 56 motion for summary judgment, Pl.'s Br. 1 (moving pursuant to USCIT Rule 56 "because there is no genuine dispute as to any material fact and PrimeSource is entitled to judgment as a matter of law"). Nevertheless, it appears that plaintiff also is moving for relief under USCIT Rule 56.1 ("Judgment on an Agency Record for an Action Other Than That Described in 28 U.S.C. § 1581(c)(1)"). Plaintiff refers to its motion as a "Motion for Judgment on the Agency Record," Pl.'s Br. 50, and in this way identifies its motion as one brought under USCIT Rule 56.1. To date, neither plaintiff nor defendants have raised the question of whether an administrative agency record will be relevant to this litigation.

Rule 56.1 applies when "a party believes that the determination of the court is to be made solely on the basis of the record made before an agency." USCIT R. 56.1(a). Certain of the claims we have dismissed in this litigation were APA claims, which we dismissed for the reason discussed above, which is that there is no final agency action that may be contested under the APA. The remaining claim, that of Count 2, is not an APA claim as it contests an action of the President, not an agency action. Therefore, we consider plaintiff's motion as a Rule 56 motion for summary judgment, not a motion under Rule 56.1. But it does not necessarily follow that an agency record will be irrelevant to this proceeding or that individualized procedures similar to those specified under Rule 56.1 will not be useful as this litigation proceeds.

Under USCIT Rule 56(a), the burden is on the moving party to show "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." At this pleading stage of the litigation, we cannot conclude that plaintiff has met this burden. To declare Proclamation 9980 invalid, and on that basis enter summary judgment in plaintiff's favor, we must find "a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority." *Maple Leaf Fish Co.*, 762 F.2d at 89. As we discussed previously, defendants conceded that Proclamation 9980 was not based on a report, other than the Steel Report, that was designated as a report issued pursuant to Section 232(b)(3)(A). This concession was relevant to our conclusion that Proclamation 9980 was not issued within the time period imposed by Section 232(c)(1), if that time period is deemed to have begun with the President's receipt of the Steel Report. But at this stage of the litigation, we cannot conclude that the time period imposed by Section 232(c)(1) necessarily began on January 11, 2018, the date the Steel Report was received by the President. Therefore, we are not now able to determine whether or not the claim in Count 2 is validly based on a "significant procedural violation," *Maple Leaf Fish Co.*, 762 F.2d at 89.

Although Proclamation 9980 was issued long after the 105-day period beginning with the receipt of the Steel Report, it also was issued pursuant to what Proclamation 9980 describes as an "assessment" (or "assessments") of the Commerce Secretary. Proclamation 9980 states that "[i]t is the Secretary's *assessment* that foreign producers of these derivative articles have increased shipments of such articles to the United States to circumvent the duties on aluminum articles and steel articles imposed in Proclamation 9704 and Proclamation 9705, and that imports of these derivative articles threaten to undermine the actions taken to address the risk to the national security . . . ." *Proclamation 9980* ¶ 8, 85 Fed. Reg. at 5,282 (emphasis added). It further states that "[t]he Secretary has *assessed* that reducing imports of the derivative articles . . . would reduce circumvention" and identifies the reduction of those imports as a measure to address the threatened impairment of the national security. *Id.* (emphasis added). The Proclamation states that the adjustment of the tariffs on the derivative articles is being taken "[b]ased on the Secretary's assessments." *Id.* ¶ 9, 85 Fed. Reg. at 5,283 ("Based on the Secretary's *assessments*, I have concluded that it is necessary and appropriate in light of our national security interests to adjust the tariffs imposed by previous proclamations to apply to the derivatives of aluminum articles and steel articles described in Annex I and Annex II to this proclamation.") (emphasis added).

The Secretary of Commerce is the official Section 232 identifies as having the responsibility of conducting a Section 232(b) investigation and preparing a Section 232(b)(3)(A) report. Proclamation 9980 did not characterize as a "report" submitted under Section 232(b)(3)(A) the communication or communications by which the Secretary of Commerce transmitted his recommendation to the President to adjust tariffs on the aluminum and steel products Proclamation 9980 identified. Nevertheless, it is clear from the text of Proclamation 9980 that the Secretary of Commerce undertook certain preparations prior to the President's action and also that the Secretary made a recommendation relating to the subject matter of Section 232(b)(3)(A) ("If the Secretary finds that such article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, the Secretary shall so advise the President in such report.").

Even though the Secretary's communications to the President on derivative articles were not designated in Proclamation 9980 as having been made pursuant to Section 232(b)(3)(A), we are not in a position to ascertain the extent to which these communications nevertheless met the fundamental requirements of Section 232(b)(3)(A), for the straightforward reason that those communications, and any related records, are not before us. Although concluding that Proclamation 9980 was untimely under Section 232(c)(1) when viewed solely as an action taken in response to the Steel Report, we also conclude that there are genuine issues of material fact that bear on the extent to which the subsequent "assessment" or "assessments" of the Commerce Secretary identified in Proclamation 9980 validly could be held to have served a function analogous to that of a Section 232(b)(3)(A) report. Nor do we know what form of inquiry or investigation, if any, the Commerce Secretary conducted prior to his submission of these communications to the President and whether, or to what extent, any such inquiry or investigation satisfied the essential requirements of Section 232(b)(2)(A), 19 U.S.C. § 1862(b)(2)(A).

We do not imply that the Secretary's actions are judicially reviewable in this case. We conclude instead that factual information pertaining to the Secretary's communicating to the President on the derivative articles would be required in order for us to examine whether, and to what extent, there was or was not compliance by the President with the procedural requirements of Section 232 and whether any noncompliance that occurred was a "significant procedural violation," *Maple Leaf Fish Co.*, 762 F.2d at 89. Moreover, at this early stage of the litigation, we lack a basis to presume that these unresolved factual issues are unrelated to the issue of whether the President clearly misconstrued the statute or the issue of whether the President took action outside of his delegated authority.

In summary, there remain genuine issues of material fact precluding us from granting plaintiff's motion for summary judgment, and as a result plaintiff has not met the burden required to obtain a judgment in its favor on its Count 2 claim. It would appear that the filing of a complete administrative record could be a means of resolving, or helping to resolve, these factual issues, but rather than directing a specific procedure, we believe it advisable that the parties first consult on these matters and report to the court on a scheduling order that will govern the remainder of this litigation.

III. CONCLUSION AND ORDER

We grant the government's motion to dismiss as to Counts 1, 3, 4, and 5 of the amended complaint and deny it as to Count 2. We deny plaintiff's motion for summary judgment as to Count 2 because plaintiff has not met the burden of showing "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." USCIT R. 56(a). Therefore, upon consideration of all papers and proceedings herein, and upon due deliberation, it is hereby

ORDERED that the claims stated as Counts 1, 3, 4, and 5 of the amended complaint be, and hereby are, dismissed for failure to state a claim on which relief can be granted; it is further

ORDERED that plaintiff's motion for summary judgment be, and hereby is, denied with respect to the claim stated in Count 2 of the amended complaint; it is further

ORDERED that the parties shall consult and submit to the court, by February 26, 2021, a joint schedule to govern the remainder of this litigation; and it is further

ORDERED that if the parties are unable to agree upon a schedule, each shall submit a proposed schedule by February 26, 2021 that includes a justification for its position.

/s/ TIMOTHY C. STANCEU

Timothy C. Stanceu, Chief Judge

/s/ JENNIFER CHOE-GROVES

Jennifer Choe-Groves, Judge

Dated: January 27, 2021
New York, New York

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

I respectfully dissent from my colleagues' parrying the question of whether we have subject-matter jurisdiction over claims against the President. In my view, both Federal Circuit precedent and the separation of powers compel that we *sua sponte* raise the question and then dismiss him from the case.

On the merits, I concur in my colleagues' decision to grant the government's motion to dismiss (and deny PrimeSource's cross-motion for summary judgment as to) Counts 1, 3, and 4 of the amended complaint and therefore join the majority opinion's discussion of those claims. I also concur in dismissing (and denying PrimeSource's cross-motion as to) Count 5 but write separately to explain my views on why that claim fails.

Finally, although I concur in my colleagues' denial of PrimeSource's cross-motion for summary judgment as to Count 2 of the amended complaint, my reasons differ, and I respectfully dissent from their denial of the government's motion to dismiss that claim, which alleges that the President violated Section 232 by imposing tariffs on steel derivative products after the statutory implementation deadline.

In my view, if the President timely implements Section 232 action to restrict imports—and there is no dispute that the President did so in the original Proclamation 9705 restricting steel *articles*—the statute also permits him to later modify such restrictions, and that modification power is coextensive with the original power to act in the first instance. Because the President could have also acted as to steel *derivatives* when he initially restricted steel article imports in Proclamation 9705, Section 232 permitted him to later extend those restrictions to derivatives. I would therefore grant the government's motion to dismiss Count 2 for failure to state a claim.

Statutory and Factual Background

A. Section 232

As its title indicates, Section 232 of the Trade Expansion Act of 1962, as amended, authorizes the President to impose import restrictions to "[s]afeguard[ ] national security." 19 U.S.C. § 1862. In short, the statute directs that in various circumstances, the Secretary of Commerce is to investigate the national security effects of specified imports. *Id.* § 1862(b)(1)(A).

Once the Secretary initiates an investigation, the statute prescribes the following steps:

- The Secretary is to give the Secretary of Defense immediate notice of the investigation, *id.* § 1862(b)(1)(B), and is then to consult with him about "the methodological and policy questions raised in any investigation," *id.* § 1862(b)(2)(A)(i).
- The Secretary is to "seek information and advice from, and consult with, appropriate officers of the United States." *Id.* § 1862(b)(2)(A)(ii).

- "[I]f it is appropriate and after reasonable notice," the Secretary is to "hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to such investigation." *Id.* § 1862(b)(2)(A)(iii). In other words, hearings or other opportunity for comment are not mandatory.
- The Secretary may also ask the Secretary of Defense to assess "the defense requirements of any article that is the subject of an investigation." *Id.* § 1862(b)(2)(B).

Section 232 requires the Secretary to submit a report to the President by no later than the date that is 270 days after the date on which the investigation commenced. *Id.* § 1862(b)(3)(A).[1] The report is ***1363** to discuss "the effect of the importation of such article in such quantities or under such circumstances upon the national security" and to set forth the Secretary's recommendations for action or inaction; in addition, if the Secretary believes the importation threatens "to impair the national security," the report must so state. *Id.*

If the Secretary finds a threat to national security, the President then has 90 days to determine whether

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[1] The statute directs that in executing their duties, the Secretary and the President are to keep in mind, among other things, various enumerated considerations bearing on national security. *See* 19 U.S.C. § 1862(d).

he "concurs" with the Secretary's finding. *Id.* § 1862(c)(1)(A)(i). If he so concurs, the President must

> determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security.

Id. § 1862(c)(1)(A)(ii).[2]

The statute further directs that if the President determines to take action to restrict imports to protect national security, he must "implement" that action within 15 days of determining to do so. *Id.* § 1862(c)(1)(B). Taken together, the two deadlines (to "determine" and then to "implement") give the President 105 days to act after receiving the Secretary's report.

If the President's action is to attempt to negotiate an agreement restricting the imports in question, the statute provides that if such an agreement is not reached within 180 days of his decision, *id.* § 1862(c)(3)(A)(ii)(I), *or* if such an agreement, having been reached, is "not being carried out or is ineffective," § 1862(c)(3)(A)(ii)(II), the President may "take such other actions as [he] deems necessary to

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[2] The statute also requires the President to submit a written statement to Congress within 30 days of his determination explaining his reasons for acting or declining to act on the Secretary's report. 19 U.S.C. § 1862(c)(2).

adjust imports of such article so that they do not threaten national security. *Id.* § 1862(c)(3)(A)(ii).[3]

B. Proclamation 9705's steel tariffs

Following a Section 232 investigation, the Secretary here issued a report finding that steel imports threatened national security.[4] Based on this report, in 2018 the President issued Proclamation 9705, which imposed 25 percent duties on imported raw steel. *See* Proclamation No. 9705 of March 8, 2018, *Adjusting Imports of Steel into the United States*, 83 Fed. Reg. 11,625 (Mar. 15, 2018). The proclamation further directed the Secretary to monitor steel imports and their effect on national security and, after appropriate consultations with other Executive Branch officials, inform the President of "any circumstances that . . . might indicate" the need for further Section 232 duties or that "the increase in duty rate provided for in this proclamation is no longer necessary." *Id.* at 11,628.

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[3] The statute further requires that when there has been such a failure to conclude an agreement restricting imports or that such an agreement, if reached, was ineffective, the President must publish in the Federal Register notice of either (1) any such "additional actions" taken, *see* 19 U.S.C. § 1862(c)(3)(A)(ii), or (2) his determination not to take any such additional actions. *See id.* § 1862(c)(3)(A)(B).

[4] *See generally* U.S. Dep't of Commerce, Bureau of Industry & Security, The Effect of Imports of Steel on the National Security (Jan. 11, 2018), https://www.bis.doc.gov/index.php/documents/steel/2224-the-effect-of-imports-of-steel-on-the-national-security-with-redactions-20180111/file, 85 Fed. Reg. 40,202 (Dep't Commerce July 6, 2020).

C. Proclamation 9980's extension of tariffs to steel derivative products

On January 24, 2020, the President issued Proclamation 9980, which stated that the Secretary had informed him as follows:

> [I]mports of certain derivatives of steel articles have significantly increased since the imposition of the tariffs and quotas [in Proclamation 9705]. The net effect of the increase of imports of these derivatives has been to erode the customer base for U.S. producers of . . . steel and undermine the purpose of the proclamations adjusting imports of . . . steel articles to remove the threatened impairment of the national security.

Proclamation No. 9980 of January 24, 2020, *Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles into the United States*, 85 Fed. Reg. 5281, 5282 (Jan. 29, 2020). The President further explained that the Secretary had advised him that foreign producers of steel derivative products had "increased shipments of such articles to the United States to circumvent . . . Proclamation 9705." *Id.*

Based on that information and recommendation from the Secretary, the President extended Proclamation 9705's 25-percent duties to certain steel *derivative* products (e.g., steel nails) not previously addressed by the Secretary's report on steel article imports or by Proclamation 9705. *Id.* at 5283.[5] The government implicitly concedes that unlike Proclamation 9705, Proclamation 9980 was not preceded by a Section 232 investigation and report by the Secretary. *See* ECF 60, at 49 ("The Secretary was not required to conduct another investigation or to follow the procedures for an investigation . . . ."); ECF 78, at 37 (referring to PrimeSource's "incorrect belief that the President had to request an entirely separate investigation . . .").

D. This suit and the pending motions

Plaintiff PrimeSource Building Products, Inc., brought this suit challenging Proclamation 9980. ECF 1.[6] PrimeSource's amended complaint alleges that it is an importer of steel nails injured by duties imposed by Proclamation 9980. ECF 22, at 7–10.[7] An affidavit of a PrimeSource executive attached to its amended complaint provides evidentiary substantiation of these allegations. ECF 22-1, at 16–17.

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[5] Proclamation 9980 also extended tariffs to certain aluminum article derivatives not at issue in this case

[6] Chief Judge Stanceu thereafter assigned this case to this three-judge panel. *See* 28 U.S.C. § 255(a) (authorizing the chief judge to designate a three-judge panel to hear and determine any civil action which "(1) raises an issue of the constitutionality of . . . a proclamation of the President . . .; or (2) has broad or significant implications in the administration or interpretation of the customs laws."). Chief Judge Stanceu concurrently assigned several other related cases challenging Proclamation 9980 to the same panel

[7] In this opinion, pagination references in citations to the Court record are to the pagination found in the ECF header at the top of each page.

PrimeSource's amended complaint names the United States, the President, the U.S. Department of Commerce, the Secretary of Commerce, U.S. Customs and Border Protection, and the Acting Commissioner of Customs as defendants. ECF 22, at 7.

PrimeSource asserts the following claims: Count 1—an Administrative Procedure Act claim based on the Secretary's alleged violations of Section 232's procedural requirements, *id.* at 19–21; Count 2—a nonstatutory review claim based on the President's alleged violation of Section 232's procedural requirements, *id.* at 22; Count 3—a due process claim based on the President's alleged actions, *id.* at 22–23; Count 4—a constitutional claim based on Congress's alleged overdelegation of authority to the President in Section 232, *id.* at 23–24; and Count 5—a nonstatutory review claim based on the Secretary's alleged violations of Section 232's procedural requirements, *id.* at 24.

PrimeSource requests that the Court "[e]njoin Defendants from implementing or further enforcing Proclamation 9980," "declare Proclamation 9980 unlawful," and order a "[r]efund to PrimeSource [of] any duties that may be collected on its imported articles pursuant to Proclamation 9980." *Id.* at 25.

The government moves to dismiss for failure to state a claim, *see* USCIT R. 12(b)(6). ECF 60.

PrimeSource opposes and cross-moves for summary judgment, *see* USCIT 56. ECF 73.[8]

Analysis

I. We have no jurisdiction to enter relief directly against the President and should dismiss him from the case.

In my view, we should dismiss the President as a party for two separate and independent reasons.[9]

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[8] The affidavit attached to the amended complaint establishes PrimeSource's constitutional standing for purposes of its cross-motion for summary judgment.

[9] My colleagues avoid the jurisdictional issue, stating "we do not construe the claim in Count 2 [the lone claim surviving today's decision] as a claim against the President. The claim is directed against Proclamation 9980 itself, not the President, against whom no remedy is sought." *Ante* at 1344 n.4. Unfortunately, we cannot so easily wish this jurisdictional problem away. The *President*, not Proclamation 9980, is a defendant in this litigation. Count 2, which alleges that Proclamation 9980 is invalid, is merely a legal claim asserted against the President and the other defendants. *See* ECF 22, at 22. As relief for this claim, PrimeSource requests that the Court issue a declaratory judgment and injunction against all defendants, including the President. *Id.* at 25. There is no plausible basis upon which to state that Count 2 is directed against every defendant except the President, or that—even if we withhold injunctive relief against the President—any declaratory relief that we might ultimately grant would merely apply against Proclamation 9980, as opposed to the defendants, including the President. Declaratory relief under 28 U.S.C. § 2201 binds parties, not things. *See Restatement (Second) of Judgments* § 33 (1982) ("A valid and final judgment in an action brought to declare rights or other legal relations of the parties is conclusive in a subsequent action between them as to the matters declared,

First, the statute giving us jurisdiction to hear this case does not confer jurisdiction over such claims. Second, even if our jurisdictional statute permitted us to award relief against the President, the separation of powers does not.

Although the government has not questioned our jurisdiction to enter relief against the President, our subject-matter jurisdiction, like standing, "is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). Jurisdiction must exist as to "each claim" a plaintiff "seeks to press and for each form of relief that is sought." *Town of Chester, N.Y. v. Laroe Estates*, 137 S. Ct. 1645, 1650 (2017) (quoting *Davis v. FEC*, 554 U.S. 724, 734 (2008)).

Thus, we have an independent obligation to determine whether we have subject-matter jurisdiction to enter relief directly against the President, *see Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) (federal courts have an independent duty to examine their jurisdiction), even though the practical consequences of our decision may be the same because we can enjoin the President's subordinates from executing his unlawful orders in limited situations through nonstatutory review. [10] *Cf. McGirt v.*

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and, in accordance with the rules of issue preclusion, as to any issues actually litigated by them and determined in the action.").

[10] "Nonstatutory review" is "the type of review of administrative action which is available, not by virtue of those explicit review provisions contained in most modern statutes which create administrative agencies, but rather through the use of traditional common-law remedies—most notably, the writ of

mandamus and the injunction—against the officer who is allegedly misapplying his statutory authority or exceeding his constitutional power." 33 Wright & Miller, *Federal Practice and Procedure* § 8304 (2d ed. 2020) (quoting Antonin Scalia, *Sovereign Immunity Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases*, 68 Mich. L. Rev. 867, 870 (1969–70)).

Federal courts entertain claims for nonstatutory review against the President's subordinates to enjoin them from enforcing allegedly unlawful Presidential orders. *See Franklin v. Massachusetts*, 505 U.S. 788, 828 (1992) (Scalia, J., concurring) ("Review of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive . . . ."). The Supreme Court has assumed, but never directly recognized, the availability of such nonstatutory review for claims against Presidential subordinates based on the President's alleged violation of a statutory mandate. *See Dalton v. Specter*, 511 U.S. 462, 474 (1994) ("We may assume for the sake of argument that some claims that the President has violated a statutory mandate are judicially reviewable outside the framework of the APA.").

In the Federal Circuit, nonstatutory review claims against Presidential subordinates for the President's alleged violation of a statute are "only rarely available," *Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1346 (Fed. Cir. 2018), and are limited to whether the President has violated "an explicit statutory mandate." *Id.* (quoting *Motions Sys. Corp. v. Bush*, 437 F.3d 1356, 1361 (Fed. Cir. 2006) (en banc)); *see also Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 89 (Fed. Cir. 1985) (federal court review of Presidential action under a statute is limited to situations involving "a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority"). Thus, dismissal of the President from this suit would not preclude us from granting declaratory and injunctive relief against the President's subordinates based on his alleged violation of Section 232's procedural requirements in issuing Proclamation 9980.

Oklahoma, 140 S. Ct. 2452, 2504 (2020) (Thomas, J., dissenting) ("The Court might think that, in the grand scheme of things, this jurisdictional defect is fairly insignificant. After all, we were bound to resolve this . . . question sooner or later. But our desire . . . for . . . convenience and efficiency must yield to the overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere.") (cleaned up).

> Our obligation to consider our jurisdiction is even more pronounced in this case because the Judiciary has the "responsibility to police the separation of powers in litigation involving the executive," *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 402 (2004) (Ginsburg, J., dissenting) (cleaned up), even if, as here, the Executive Branch declines to defend its own constitutional prerogatives. The "separation of powers does not depend on the views of individual Presidents, *see Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 879–80 (1991), nor on whether 'the encroached-upon branch approves the encroachment.'" *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 497 (2010) (quoting *New York v. United States*, 505 U.S. 144, 182 (1992)). The President "cannot . . . choose to bind his successors by diminishing their powers." *Id.* The government's failure to seek dismissal of the President does not relieve us of our obligations under the separation of powers.

A. Jurisdiction under 28 U.S.C. § 1581(i) does not encompass claims against the President.

PrimeSource invokes 28 U.S.C. § 1581(i) as the jurisdictional basis for this suit. ECF 22, at 4.[11] In 2003, the Federal Circuit held that § 1581(i) jurisdiction does not encompass claims against the President, noting that while "the President's *actions* are subject to judicial review, it does not necessarily follow that a claim for relief may be asserted against the President directly." *Corus Grp. PLC v. ITC*, 352 F.3d 1351, 1359 (Fed. Cir. 2003) (emphasis added). The court recognized the principle that the APA does not authorize an action directly against the President[12] and then explained as follows:

> This reasoning seems equally applicable to actions under 28 U.S.C. § 1581(i), which refers only to actions "against the United States, its agencies, or its officers" and does not specifically include the President. We conclude that section 1581(i) does not authorize proceedings directly against the President.
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> Since the complaint in this action relied solely on section 1581 as the basis of jurisdiction,

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[11] The statute provides in relevant part that our Court "shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for," *inter alia*, "(2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue." 28 U.S.C. § 1581(i).

[12] See, e.g., *Franklin*, 505 U.S. at 801 ("As the APA does not expressly allow review of the President's actions, we must presume that his actions are not subject to its requirements.").

> the President should have been dismissed as a party.

Corus Grp., 352 F.3d at 1359 (cleaned up).

Six months later, a decision of this court held that *Corus Group* was wrongly decided because it misread an earlier Federal Circuit decision holding that § 1581(i) waived the sovereign immunity of the President and other officials. *See Motion Sys. Corp. v. Bush*, 342 F. Supp. 2d 1247, 1254–56 (CIT 2004) (discussing *Corus Group* and *Humane Society of the United States v. Clinton*, 236 F.3d 1320 (Fed. Cir. 2001)).

On appeal in *Motion Systems*, the Federal Circuit granted rehearing en banc to consider whether *Corus Group* should "be overruled *en banc* insofar as it holds that § 1581(i) does not authorize relief against the President." *Motion Sys. Corp. v. Bush*, 140 F. App'x 257, 258 (Fed. Cir. 2005) (en banc) (per curiam). Significantly, the later merits opinion never addressed this question, apparently because the en banc court found the President's actions not subject to judicial review. *See Motions Sys. Corp. v. Bush*, 437 F.3d 1356, 1359 (Fed. Cir. 2006) (en banc).[13]

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[13] Because it did not directly address the question, *Motions Systems* cannot be read as implicitly endorsing the conclusion that the President can be sued under § 1581(i). The Supreme Court has "described such unrefined dispositions as 'drive-by jurisdictional rulings' that should be accorded 'no precedential effect' on the question whether the federal court had authority to adjudicate the claim in suit." *Arbaugh*, 546 U.S. at 511, (quoting *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 91 (1998)); *cf.*

In my view, *Corus Group* is binding on us, notwithstanding the earlier Federal Circuit decision in *Humane Society* allowing the President and other officers to be sued under § 1581(i).[14] First, the *Corus Group* court explained that *Humane Society* "dealt only with the general issue of the government's sovereign immunity and not with the applicability of § 1581(i) to the President individually." *Corus Grp.*, 352 F.3d at 1359 n.5. Thus, in the eyes of the Federal Circuit, the two cases do not conflict. If judicial hierarchy means anything, it must mean that the Federal Circuit's reading of its own cases binds this Court.

Because the *Corus Group* court distinguished *Humane Society*, we are bound to follow *Corus Group* and to dismiss the President as a party. *See Preminger v. Sec'y of Veterans Affairs*, 517 F.3d 1299, 1309 (Fed. Cir. 2008) ("A prior precedential decision on a point of law by a panel of this court is binding precedent and cannot be overruled *or avoided* unless or until the court sits *en banc.*") (emphasis added).

Second, even if *Corus Group*'s reading of *Humane Society* is not binding on us, my own reading of

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Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2100 (2019) (Gorsuch, J., concurring) (explaining that "drive-by jurisdiction" means that a court's failure to directly address issues such as standing or jurisdiction "cannot be mistaken as an endorsement of it").

[14] Where two Federal Circuit panel decisions *directly* conflict, the earlier opinion controls unless and until the en banc court rules otherwise. *Newell Cos. v. Kenney Mfg. Co.*, 864 F.2d 757, 765 (Fed. Cir. 1988).

Humane Society is the same as *Corus Group*'s. As the *Humane Society* panel merely assumed that § 1581(i)'s jurisdictional grant includes claims against the President, that drive-by jurisdictional assumption is not entitled to any weight, *see supra* note 13, and *Corus Group* controls that question.

B. The separation of powers prevents us from issuing injunctive or declaratory relief directly against the President in the performance of his official duties.

For separation of powers purposes, "[t]he President's unique status under the Constitution distinguishes him from other executive officials." *Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982); *see also Harlow v. Fitzgerald*, 457 U.S. 800, 811 n.17 (1982) ("Suits against other officials—including Presidential aides—generally do not invoke separation-of-powers considerations to the same extent as suits against the President himself.").

Because of these separation of powers considerations, any request for relief directly against the President "should . . . raise[] judicial eyebrows." *Franklin*, 505 U.S. at 802 (plurality opinion of O'Connor, J.). The *Franklin* plurality of four justices[15] observed that "in general, 'this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties.'" *Id.* at 802–03 (plurality opinion of O'Connor, J.) (quoting *Mississippi*

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[15] Chief Justice Rehnquist and Justices White and Thomas joined the relevant portion of Justice O'Connor's opinion in *Franklin*.

v. Johnson, 4 Wall. 475, 501 (1867)). On this point, Justice Scalia agreed with the plurality and explained that "[t]he apparently unbroken historical tradition supports the view that . . . the President and the Congress (as opposed to their agents)—may not be ordered to perform particular executive or legislative acts at the behest of the Judiciary." *See id.* at 827 (Scalia, J., concurring).[16]

If the Supreme Court cannot grant injunctive relief against the President in the performance of his official duties, as five justices of the Court agreed that it cannot do, then lower federal courts may not do so either.[17]

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[16] Although the Supreme Court has recognized that the President is not totally immune to judicial process, *see, e.g.*, *Trump v. Vance*, 140 S. Ct. 2412, 2421–24 (2020) (tracing over 200 years of case law involving subpoenas directed to presidents), the critical distinction is that in those cases the President was to "provide information relevant to an ongoing criminal prosecution [or, in *Trump v. Vance*, a grand jury investigation], which is what any citizen might do; [the court orders] did not require him to exercise the 'executive Power' in a judicially prescribed fashion." *Franklin*, 505 U.S. at 826 (Scalia, J., concurring). In *Franklin*, the plurality also noted that "[w]e have left open the question whether the President might be subject to a judicial injunction requiring the performance of a purely 'ministerial' duty." *Id.* at 802 (plurality opinion of O'Connor, J.); *see also id.* at 827 n.2 (Scalia, J. concurring) (making the same observation). The President's issuance of Proclamation 9980 plainly does not involve "ministerial" duties.

[17] *See, e.g.*, *In re Trump*, 958 F.3d 274, 297 (4th Cir. 2020) (en banc) (Wilkinson, J., dissenting) ("Over the course of this nation's entire existence, there has been an unbroken historical tradition

Nor may we issue even declaratory relief against the President. In at least two different contexts, the Supreme Court has recognized that because declaratory relief is functionally equivalent to injunctive relief, any bar on the latter also applies to the former. *See, e.g.*, *California v. Grace Brethren*

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implicit in the separation of powers that a President may not be ordered by the Judiciary to perform particular Executive acts.") (cleaned up), *vacated as moot*, No. 20-331 (U.S. Jan 25, 2021); *Hawaii v. Trump*, 859 F.3d 741, 788 (9th Cir.) ("Finally, the Government argues that the district court erred by issuing an injunction that runs against the President himself. This position of the government is well taken. Generally, we lack jurisdiction of a bill to enjoin the President in the performance of his official duties. . . . [T]he extraordinary remedy of enjoining the President is not appropriate here.") (cleaned up), *vacated on other grounds*, 138 S. Ct. 377 (2017) (mem.); *Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010) ("The only apparent avenue of redress for plaintiffs' claimed injuries would be injunctive or declaratory relief against all possible President-elects and the President himself. But such relief is unavailable. . . . With regard to the President, courts do not have jurisdiction to enjoin him and have never submitted the President to declaratory relief.") (cleaned up); *Anderson v. Obama*, 2010 WL 3000765, at *2 (D. Md. July 28, 2010) (denying motion for preliminary injunction seeking to prevent President Obama from signing or enforcing the Affordable Care Act "because the Court lacks power to grant the requested relief. The Court has no jurisdiction to issue an injunction against the President in his official capacity and in the performance of non-ministerial actions."); *Willis v. U.S. Dep't of Health & Human Servs.*, 38 F. Supp. 3d 1274, 1277 (W.D. Okla. 2014) (finding that suit attempting to enjoin President Obama from enforcing any part of the ACA "contravenes an extensive amount of well-settled law" and "raises serious separation of powers concerns" because "[l]ongstanding legal authority establishes that the judiciary does not possess the power to issue an injunction against the President or Congress").

Church, 457 U.S. 393, 407–08 (1982) (holding that "because there is little practical difference between injunctive and declaratory relief," the Tax Injunction Act bars federal court jurisdiction over suits seeking declaratory as well as injunctive relief to "enjoin, suspend or restrain the . . . collection of any tax under State law") (quoting 28 U.S.C. § 1341); *Samuels v. Mackell*, 401 U.S. 66, 73 (1971) (holding that because "the practical effect of the two forms of relief will be virtually identical," *Younger* abstention principles apply to declaratory relief as much as injunctive relief). Lower courts have applied this principle in additional contexts. *See, e.g.*, *Tex. Emps.' Ins. Ass'n v. Jackson*, 862 F.2d 491, 506 (5th Cir. 1988) ("If an injunction would be barred by [the Anti-Injunction Act, 28 U.S.C.] § 2283, this should also bar the issuance of a declaratory judgment that would have the same effect as an injunction.") (cleaned up and quoting Charles Alan Wright, *Federal Courts* § 47, at 285 (4th ed. 1983)).

Because declaratory relief is functionally equivalent to injunctive relief, the same structural separation of powers principles that counsel against enjoining the President necessarily also apply to issuing "a declaratory judgment against the President. It is incompatible with his constitutional position that he be compelled personally to defend his executive actions before a court." *Franklin*, 505 U.S. at 827 (Scalia, J., concurring); *see also Newdow*, 603 F.3d at 1013 (D.C. Cir. 2010) (declaratory relief against the President is unavailable); *In re Trump*, 958 F.3d at 302 ("We have no more power to issue a declaratory judgment against the President regarding the performance of an official duty than we do an injunction.") (Wilkinson, J., dissenting).

In short, even if § 1581(i) permitted the assertion of claims against the President in our Court, in my view the statute would violate the separation of powers. We should dismiss all claims against the President for lack of jurisdiction. Our failure to do so only invites "more and more disgruntled plaintiffs [to] add his name to their complaints" in our Court and thereby produce "needless head-on confrontations between [us] and the Chief Executive." *Franklin*, 505 U.S. at 827 (Scalia, J., concurring).

II. Count 5 fails because PrimeSource has abandoned any claim for nonstatutory review against the Secretary outside of the APA.

In Count 5, PrimeSource appears to assert a claim against the Secretary outside of the APA for alleged procedural violations of Section 232:

> The Secretary of Commerce violated Section 232 by making "assessments", "determinations" and providing other "information" to the President without following any of the statutory procedures for new action and by doing so outside the statutory time periods applicable to the 2017–18 investigation conducted by the Secretary of Commerce that resulted in Proclamation 9705.

ECF 22, at 24. According to my colleagues, "for PrimeSource's fifth count to be cognizable, judicial review must exist under the APA" because "Section

232 does not provide for judicial review of any action taken thereunder." *Ante* at [48a]. My colleagues therefore conclude that because PrimeSource's APA claim against the Secretary in Count 1 fails for lack of final agency action, then Count 5 necessarily fails as well.

My colleagues imply that absent a statutory cause of action in the statute under which official action is taken, which Wright and Miller refer to as "special statutory review," *see* 33 *Federal Practice & Procedure* § 8301 (2d ed. 2020), the only recourse that a person or entity injured by official action has is an action under the APA, which Wright and Miller denominate as "general statutory review." *Id.* My colleagues overlook a third possible avenue for judicial relief against official agency action, nonstatutory review.

Courts have recognized that a person threatened with injury by actions of Executive Branch officials may sometimes seek declaratory and injunctive relief against such officials even though the underlying statute provides no cause of action and no relief is available under the APA. Such actions are known as "nonstatutory review." *Id.*; *see also supra* note 10 (explaining nonstatutory review in the context of challenges to agency enforcement of *Presidential* actions); 33 *Federal Practice & Procedure* § 8304 (2d ed. 2020). "It does not matter . . . whether traditional APA review is foreclosed" because nonstatutory review is available "when an agency is charged with acting beyond its authority." *Aid Ass'n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1172 (D.C. Cir. 2003) (quoting *Dart v. United States*, 848 F.2d 217, 221 (D.C. Cir. 1988)).

Nevertheless, nonstatutory review is available in only very limited circumstances. "Non-statutory review is a doctrine of last resort, 'intended to be of extremely limited scope' and applicable only to preserve judicial review when an agency acts 'in excess of its delegated powers.'" *Schroer v. Billington*, 525 F. Supp. 2d 58, 65 (D.D.C. 2007) (quoting *Griffith v. Fed. Lab. Rel. Auth.*, 842 F.2d 487, 493 (D.C. Cir. 1988)); *see also* Kathryn E. Kovacs, *Revealing Redundancy: The Tension Between Federal Sovereign Immunity and Nonstatutory Review*, 54 Drake L. Rev. 77, 107 (2005) (to state a claim for nonstatutory review challenging agency action, "[a] plaintiff must allege more than that an agency acted illegally or even interfered with his rights; he must allege that the agency did so in a manner that exceeded its statutory or constitutional authority"). In short, nonstatutory review relief against an agency official is roughly analogous to mandamus relief against a district court or our Court—strong medicine that is only rarely available. *Cf. Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380 (2004) (mandamus "is a 'drastic and extraordinary' remedy 'reserved for really extraordinary causes'" such as when the district court has departed from "the lawful exercise of its prescribed jurisdiction") (quoting *Ex parte Fahey*, 332 U.S. 258, 259–60 (1947)).

Given these principles, I read Count 5 of PrimeSource's complaint as asserting a nonstatutory review claim based on the *Secretary's* alleged violations of Section 232's procedural requirements, just as Count 2 is a nonstatutory review claim based on the *President's* alleged violations of Section 232's procedural requirements.

Nevertheless, PrimeSource has effectively abandoned Count 5 by tethering it to its APA claim in Count 1. *See* ECF 73-1, at 7 n.1 (characterizing "both Counts 1 and 5 from PrimeSource's amended complaint" as involving whether the Secretary, "in failing to follow the procedures set forth in Section 232 ... violated the *Administrative Procedure[] Act*") (emphasis added). Because I agree with my colleagues that PrimeSource's APA claim under Count 1 fails for lack of final agency action, *see ante* at [43a-48a], PrimeSource's linkage of Count 5 to Count 1 dooms the former.

III. Proclamation 9980 did not violate Section 232.

PrimeSource contends that Proclamation 9980 violated Section 232 by imposing tariffs on steel derivative products outside of the statutory deadlines for implementing such action. Although not expressly framed as such, PrimeSource appears to assert two alternative theories (even as it repeatedly blurs the two theories together).

First, citing the Court's decision in *Transpacific Steel LLC v. United States*, 415 F. Supp. 3d 1267 (CIT 2019) (*Transpacific I*),[18] PrimeSource argues that after

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[18] In *Transpacific I*, a different three-judge panel of the Court held—in the context of denying the government's Rule 12(b)(6) motion to dismiss—that the President's modification of Proclamation 9705 to increase duties on Turkish steel imports

the President timely implements Section 232 import restrictions, he cannot later *modify* such restrictions outside of the 105-day period for taking action upon receiving a report from the Secretary.[19] *See* ECF 73-1, at 20 (invoking *Transpacific I* against the government's argument that Section 232 "provide[s] the President with flexibility to modify his actions" outside of the statutory deadline for acting).

Although my colleagues distinguish the *Transpacific* litigation on its facts, *see ante* at [98a] n.8 (noting that case involved a modification to the *means* of Section 232 import restrictions rather than—as here—the *products* covered by such restrictions), in denying the government's motion to dismiss Count 2 my colleagues nonetheless appear to tacitly embrace the *Transpacific* opinions' rationale, which reads the 1988 amendments as barring modifications to Section 232 action after the statutory implementation

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violated Section 232 because the statute does not permit such modifications after the statutory implementation deadline has passed absent another formal investigation and report by the Secretary. *See* 415 F. Supp. 3d at 1273–76; *see also Transpacific Steel LLC v. United States*, 466 F. Supp. 3d 1246, 1253 (CIT 2020) (*Transpacific II*) (holding, in the context of summary judgment, that "nothing in the statute . . . support[s] . . . continuing authority to modify Proclamations outside of the stated timelines."), *appeal docketed*, No. 20-2157 (Fed. Cir. Aug. 17, 2020).

[19] The "105-day period" reflects the initial 90-day period for the President to determine whether he concurs in the Secretary of Commerce's finding and, if so, to determine the nature and duration of the action he deems necessary, plus the subsequent 15-day period for him to "implement that action." *See* 19 U.S.C. § 1862(c)(1)(A)–(B).

deadline has passed. *See ante* at [64a] ("[W]e are unconvinced by defendants' argument that the[ ] [1988] amendments maintained, unchanged, the 'continuing authority' of the President."); *ante* at [65a] ("[T]here is no 'flexible' reading of [Section 232] under which the express time limitations on a Presidential 'action,' and implementation thereof, do not apply."); *ante* at [73a] ("Section 232(c)(1) . . . unambiguously placed time limits on the President's authority to adjust imports of derivatives as well as the imports of the investigated article."). Thus, notwithstanding my colleagues' distinguishing of the *Transpacific* case on its facts, their rationale would—like *Transpacific*'s—bar modifications of Section 232 import restrictions after the statutory deadline for implementation even as to the means of such restrictions.

PrimeSource also appears to argue in the alternative that even if Section 232 permits such modifications of import restrictions outside of the statutory deadlines for taking new action, Proclamation 9980's tariffs on steel derivative products nevertheless constituted entirely new Section 232 action subject to the statute's procedural requirements, rather than a permissible modification, because Proclamation 9705 was limited to steel *articles* and did not include steel derivatives. *See* ECF 73-1, at 30 (contending that Proclamation 9980 "was not "a *permissible* modification of Proclamation 9705") (emphasis added); *id.* at 31 ("The instant case goes one step beyond *TransPacific* because here the untimely additional duties are being extended to types of products *that were never even previously investigated.*") (emphasis added); *id.* at 53 ("Given that the Secretary determined a hearing was appropriate in the initial investigation, he cannot now issue additional recommendations to the President on *new* products that were not subject to initial investigation.") (emphasis added).

My colleagues also appear to embrace this alternative theory as a basis for denying the government's motion to Count 2. *See ante* at [66a] (stating that Proclamation 9705 and 9980 "and were directed at two different sets of products. Each necessarily required its own implementation.").

I disagree with both of PrimeSource's alternative theories, and for that reason would grant the government's motion to dismiss Count 2. I begin with the *Transpacific* theory—namely, that the 1988 amendments to the statute bar the President from modifying Section 232 import restrictions after the statutory deadline for implementing those restrictions has passed.

A. Section 232 permits the President to modify import restrictions after the statutory implementation deadline has passed.

In my view, Section 232 permits the President to modify import restrictions without repeating the formal procedures necessary for initial action. As explained below, (1) the original statute that Congress enacted in 1955 and later reenacted as Section 232 permitted the President to modify import restrictions; (2) the 1988 amendments to Section 232 did not withdraw the President's preexisting authority to modify such restrictions; and (3) given that Section

232 import restrictions can last for decades, it would be both incongruous and unworkable to read the statute as precluding later modifications of such restrictions.

1. The pre-1988 statutory language permitted the President to modify import restrictions.

a. The word "action" in the original 1955 statute gave the President continuing authority to modify import restrictions.

Section 232 originated in the Trade Agreements Extension Act of 1955, Pub. L. No. 86–169, § 7, 69 Stat. 162, 166. That statute required the Director of the Office of Defense Mobilization to notify the President whenever the Director had "reason to believe that any article is being imported into the United States in such quantities as to threaten to impair the national security." *Id.* If the President agreed, the statute required him to order the Director to investigate the matter and report back. If, in turn, the investigation and the subsequent report led the President to conclude that imports of the article threatened national security, the statute required that he "take *such action* as he deems necessary to adjust the imports of such article to a level that will not threaten to impair the national security." *Id.* (emphasis added).[20]

[20] The original 1955 statute did not include the words "and its derivatives" following the words "imports of such article."

In 1975, Attorney General William Saxbe examined this statutory language and opined[21] that the words "such action" implied a continuing course of conduct that could include modifications:

> The normal meaning of the phrase "such action," in a context such as this, is not a single act but rather a continuing course of action, with respect to which the initial investigation and finding would satisfy the statutory requirement. This interpretation is amply supported by the legislative history of the provision, which clearly contemplates a continuing process of monitoring and modifying the import restrictions, as their limitations become apparent and their effects change.

Restriction of Oil Imports, 43 Op. Att'y Gen. No. 20, at 3–4 (Jan. 14, 1975).[22]

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[21] Although issued in the name of Attorney General Saxbe, the Justice Department official responsible for this memorandum presumably was then–Assistant Attorney General Antonin Scalia, who headed the Office of Legal Counsel from 1974 until 1977.

[22] Attorney General Saxbe noted a statement by Congressman Cooper, floor manager for the legislation, that "having taken an action, [the President] would retain flexibility with respect to the continuation, modification, or suspension of any decision that had been made." 43 Op. Att'y Gen. No. 20, at 3 (quoting 101 Cong. Rec. 8160–61 (1955)). The Attorney General further referenced the Conference Report for the bill, which stated that "it is . . . the understanding of all the conferees that the authority granted to the President under this provision is a continuing authority." *Id.* (quoting H.R. Rep. 84-745, at 7 (1955)).

Attorney General Saxbe opined that for both modification or continuation of restrictions, the statute presumed that the appropriate agency would monitor the factual situation and the effectiveness of any restrictions and advise the President to act accordingly. 43 Op. Att'y Gen. No. 20, at 3–4. This continued monitoring did "not have to comply with the formal investigation and finding requirements applicable to the original imposition of the restriction." *Id.* at 4.

b. The 1958 amendments enhanced the President's power.

In the Trade Agreements Extension Act of 1958, Congress amended the statute while retaining the key language—"such action"—authorizing modifications of import restrictions. As amended, the statute provided:

> (b) Upon request of the head of any Department or Agency, upon application of an interested party, or upon his own motion, the Director of the Office of Defense Mobilization (hereinafter in this section referred to as the "Director") shall immediately make an appropriate investigation, in the course of which he shall seek information and advice from other appropriate Departments and Agencies, to determine the effects on the national security of imports of the article which is the subject of such request, application, or motion. If, as a result of such investigation, the Director is of the opinion that the said article is being imported into the

> United States in such quantities or under such circumstances as to threaten to impair the national security, he shall promptly so advise the President, and unless the President determines that the article is not being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security as set forth in this section, *he shall take such action*, and for such time, as he deems necessary to adjust the imports of such article and its derivatives so that such imports will not so threaten to impair the national security.

Pub. L. No. 85–686, § 8(a), 72 Stat. 673, 678 (emphasis added).

These amendments enhanced the President's power under the statute in at least three ways. First, Congress eliminated the wasteful requirement that the relevant agency first seek the President's approval to undertake the investigation, thereby allowing a more streamlined process for initiating action in the first instance. Second, Congress made clear that the President's discretion regarding "action" also included the "time" that action would last. Third, Congress gave the President the power to act with respect to *derivatives* of products identified in the agency's report, even if the report itself did not address such derivatives.

As my colleagues observe, the legislative history of these 1958 amendments reflects that Congress authorized the President to act as to derivatives of an investigated article out of concern that such imports might allow circumvention of restrictions on that article. *See ante* at 26–27.

c. Congress made technical changes between 1962 and 1988.

In 1962, Congress reenacted the provision as Section 232 of the Trade Expansion Act of 1962, Pub. L. No. 87–794, 76 Stat. 872, 877. This reenactment and codification did not materially change the statute. *See* S. Rep. 87-2059, 1962 USCCAN 3118.

In the ensuing quarter century after the 1962 reenactment, Congress made various technical changes to the statute, but none of them materially changed the President's powers under the statute conferred by the original 1955 legislation and enhanced by the 1958 amendments.[23] Thus, on the eve of Congress's 1988 amendments, Section 232 provided in relevant part:

Upon request of the head of any department or agency, upon application of an interested party, or upon his own motion, the Secretary of the Treasury (hereinafter referred to as the "Secretary") shall

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[23] In 1975, Congress amended the statute for the primary purpose of reassigning duties to different subordinate officials. *See* Trade Act of 1974, § 127(d)(3), Pub. L. No. 93–618, 88 Stat. 1978, 1993 (1975). In 1980, Congress amended Section 232 to establish a procedure whereby Congress could invalidate Presidential action to adjust imports of petroleum or petroleum products upon the enactment of a disapproval resolution. *See* Crude Oil Windfall Profit Tax Act of 1980, § 402, Pub. L. No. 96–223, 94 Stat. 229, 301

immediately make an appropriate investigation ... to determine the effects on the national security of imports of the article which is the subject of such request, application, or motion.

The Secretary shall, if it is appropriate and after reasonable notice, hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to such investigation. The Secretary shall report the findings of his investigation under this subsection with respect to the effect of the importation of such article in such quantities or under such circumstances upon the national security and, based on such findings, his recommendation for action or inaction under this section to the President within one year after receiving an application from an interested party or otherwise beginning an investigation under this subsection.

If the Secretary finds that such article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, he shall so advise the President and the President *shall take such action*, and for such time, as he deems necessary to adjust the imports of such article and its derivatives so that such imports will not threaten to impair the national security, unless the President determines that the article is not being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security.

19 U.S.C. § 1862(b) (1980) (emphasis added).[24]

d. Presidents repeatedly modified Section 232 import restrictions in the three decades prior to the 1988 amendments.

In 1959, President Eisenhower invoked Section 232 after a formal agency investigation ***1376** and report found that crude oil and derivatives thereof were "being imported in such quantities and under such circumstances as to threaten to impair the national security." Proclamation No. 3729 of March 10, 1959*, Adjusting Imports of Petroleum and Petroleum Products into the United States*, 24 Fed. Reg. 1781 (Mar. 12, 1959). President Eisenhower imposed import quotas on "crude oil, unfinished oils, and finished products." *Id.* He also directed the relevant officials to advise him "of any circumstances which ... might indicate the need for further Presidential action" under the statute. *Id.* at 1784 § 6(a).[25]

President Eisenhower and his successors thereafter modified Proclamation 3279 at least 26 times between 1959 and the end of 1974, and none of those amendments involved a further investigation or report even though some involved significant alterations to the means of restricting petroleum

[24] To enhance readability, the block quotation above separates Section 232(b) into separate paragraphs.

[25] The quoted language is strikingly similar to the instruction in Proclamation 9705 directing the Secretary of Commerce to continue to monitor steel imports. *See* 83 Fed. Reg. at 11,628 ¶ (5)(b).

imports. *See* 43 Op. Att'y Gen. No. 20, at 3. No new investigation was conducted, and no new report was issued, until 1975.[26]

Reviewing this history in 1975, Attorney General Saxbe emphasized that Congress had acquiesced in this interpretation of Section 232: "The interpretation here proposed, whereby import restrictions once imposed can be modified without an additional investigation and finding, has been sanctioned by the Congress' failure to object to the President's proceeding on that basis repeatedly during the past 15 years." 43 Op. Att'y Gen. No. 20, at 5. After Attorney General Saxbe issued his opinion in 1975, this practice continued. By my count, Presidents modified prior Section 232 action without repeating the statute's formal investigation and report procedures over a dozen times between 1975 and the 1988 amendments. *See* Addendum.

This unbroken "statutory history" of administrative practice and interpretation "form[s] part of the context of the statute, and . . . can properly be presumed to have been before all the members of

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[26] Despite General Saxbe's advice that there was no need to do so, the Secretary of the Treasury decided to go through the investigation-and-report process in the leadup to President Ford issuing Proclamation 4341, which amended Proclamation 3279 and provided for a long-term system of license fees. *See* Proclamation No. 4341 of January 23, 1975, *Modifying Proclamation 3279, Relating to Imports of Petroleum and Petroleum Products, and Providing for the Long-Term Control of Imports of Petroleum and Petroleum Products Through a System of License Fees*, 40 Fed. Reg. 3965 (Jan. 27, 1975) (referring to the Secretary of the Treasury's investigation and report).

[Congress] when they voted" on the 1988 amendments to Section 232. Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 256 (2012); *cf. Nike, Inc. v. Wal-Mart Stores, Inc.*, 138 F.3d 1437, 1440–43 (Fed. Cir. 1998) (tracing a statute's evolution over time to ascertain a word's meaning); *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 267–68 (1992) (interpreting a statute by tracing the history of another provision upon which the one at issue was modeled and noting that "we can only assume [Congress] intended them to have the same meaning that courts had already given them").

2. The 1988 amendments did not withdraw the President's preexisting modification power.

a. The 1988 amendments retained the statutory language authorizing modifications.

In 1988, Congress amended Section 232. *See* Omnibus Trade and Competitiveness Act of 1988, § 1501(a), Pub. L. No. 100–418, 102 Stat. 1107, 1258. Some of the amendments were clearly stylistic—the amended version, for example, avoids the masculine pronouns "he" and "his" when referring to the President and cabinet officials in favor of gender-neutral terminology (for example, "as he deems necessary" versus "in the judgment of the President"). Some of the changes were of a structural nature—the old statute contained lengthy paragraphs and the amendments broke those down into shorter, more readable pieces with multiple subparagraphs.

One of those structural changes entailed moving the provisions conferring authority [27] upon the President to subsection (c)(1), which as discussed below also imposed a 105-day deadline for the President to exercise that authority. As so amended, subsection (c)(1) provides:

> (c)(1) (A) Within 90 days after receiving a report submitted under subsection (b)(3)(A) in which the Secretary finds that an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, the President shall—
>
> > (i) determine whether the President concurs with the finding of the Secretary, and
> >
> > (ii) if the President concurs, *determine the nature and duration of the action* that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security.
>
> (B) If the President determines under subparagraph (A) to *take action* to adjust imports of an article and its derivatives, the President *shall implement that action* by no later than the date that is 15 days after the

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[27] The 1988 amendments also imposed a 270-day deadline for the Secretary to issue a report upon initiating an investigation. See 19 U.S.C. § 1862(b)(3)(A).

> day on which the President determines to take action under subparagraph (A).

19 U.S.C. § 1862(c)(1) (emphasis added).

Critically for present purposes, subsection (c)(1) retained the statutory language noted by Attorney General Saxbe granting the President's continuing authority to modify Section 232 action previously taken—the words "the action," "take action," and "that action." *See* 43 Op. Att'y Gen. No. 20, at 3–4. Under the prior-construction canon of statutory construction, Congress's reenactment of the same statutory language implicitly ratified Attorney General Saxbe's interpretation and the prior administrative practice of the preceding three decades. See *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) ("When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well."); *see also* Scalia & Garner, *supra*, at 324 (explaining that "when a term . . . has been authoritatively interpreted by a high court, or has been given uniform interpretation by the lower courts or the responsible agency . . . [t]he term has acquired . . . a technical sense . . . that should be given effect in the construction of later-enacted statutes").

My colleagues contend that reading "action" as investing the President with continuing authority is "contrary to [its] plain and ordinary meaning." *Ante* at [66a]. But they do not proffer any definition of action to support this contention.

Even if their reading of the word "action" were correct, however, my disagreement with my colleagues is that they read the statute as if Congress wrote the 1988 legislation on a blank slate. But 1988 is not Year One for our purposes. The 1988 legislation amended a statute with a preexisting 30-year history of administrative interpretation and practice under which the word "action" invests the President with continuing authority. As Congress is presumed to have been aware of that history when it amended the statute and retained the word "action," this is one of those contexts in which "[t]he past is never dead. It's not even past." William Faulkner, *Requiem for a Nun* 73 (Knopf Doubleday Publishing Group 2011).

In *Transpacific II*, the court acknowledged this history of Presidential modifications to Section 232 import restrictions, but reasoned that the 1988 amendments removed this authority by deleting "language that could be read to give the President the power to continually modify Proclamations." 466 F. Supp. 3d at 1253. The 1988 amendments changed "the President *shall take such action, and for such time*, as he deems necessary," 19 U.S.C. § 1862(b) (1980), to the President shall "*determine the nature and duration of the action* that, in the judgment of the President, must be taken . . . ." 19 U.S.C. § 1862(c)(1)(A)(ii) (emphasis added). The *Transpacific II* court noted that the 1988 amendments "omit[ted] the clause 'and for such time.'" 466 F. Supp. 3d at 1253.

In my view, *Transpacific II* erred in ascribing significance to this change. First, the President's modification authority under the pre-1988 version of the statute stemmed from the words "such action," *not* "for such time." *See* 43 Op. Att'y Gen. No. 20, at 2 ("The normal meaning of the phrase '*such action*,' in a context such as this, is not a single act but rather a continuing course of action.") (emphasis added).

Second, even if "for such time" in the pre-1988 statute were the source of the President's modification authority, that clause means the same thing as "the . . . duration" in the current statute: "[T]he length of time something lasts." Duration, *Black's Law Dictionary* (11th ed. 2019). Thus, the change from "for such time" to "the duration" was purely stylistic.

The legislative history bears out this reading. For example, the House Committee report included the following side-by-side comparison summaries of the then-existing statutory language and the meaning of the proposed changes. The key elements of the then-existing law and proposed amendments are underscored; notably, there is no underscoring of either "for such time" in the then-existing law or "the . . . duration" in the proposed amendments:

MISCELLANEOUS TRADE LAW PROVISIONS

Item	Present Law	Subcommittee Proposal
1. National security relief	Section 232 of the Trade Expansion Act of 1962, requires the Secretary of Commerce to investigate, upon request or own motion, the effects of imports of an article on national security and report his findings and recommendations to the President within one year. If he finds "an article is being imported in such quantities or under such circumstances as to threaten to impair the national security," the President, if he concurs with the finding, must take such action for such time as he deems necessary to "adjust" the imports. There is no time limit for the President's decision.	Reduces the period for investigation by Commerce to 9 months. Imposes a 90-day time limit for the President to determine whether he concurs with the Secretary's advice and, if so, the nature and duration of action. Requires proclamation of any action within 15 days.

Staff of H. Comm. on Ways and Means, 100th Cong., Amendments to H.R. 3, Comprehensive Trade Policy

Reform Legislation, As Reported by the Subcomm. on Trade, Explanation and Comparison with Present Law 92 (Comm. Print 1987).

If I am correct and Congress's retention of the word "action" presumptively carried forward the meaning reflected in the preceding three decades of administrative interpretation and practice, the question then becomes whether other language in the 1988 amendments rebuts that presumption by effectively repealing the President's modification authority in the word "action." I now turn to that question.

b. The 1988 amendments' insertion of a deadline for the President to implement his action did not impliedly repeal the President's continuing authority to modify action once taken.

According to PrimeSource, the statute's 15-day deadline to "implement" Section 232 action bars later modification of such action. ECF 73-1, at 30. The plain meaning of the word "implement," however, does not foreclose future modifications to action—rather, the word "implement," in its relevant sense, merely means to "put (a decision or plan) into effect." 1 *Shorter Oxford English Dictionary* 1330 (5th ed. 2002);[28] *see also The American Heritage Dictionary of the English Language* 660 (1981) (defining "implement" as "[t]o provide a definite plan or procedure to ensure the

[28] The other definitions of "implement" as a transitive verb are of a sort that cannot be relevant in the Section 232 context.

fulfillment of"). Although my colleagues invoke the plain meaning of "implement" to hold that it repealed the President's preexisting modification authority, *see ante* at [66a-67a] they do not proffer any competing definition.

As amended in 1988, all the statute requires is that the President "implement" the action within the 15 days of determining to act, that is, to put the plan of action into effect. It does not contain any language limiting the President's preexisting statutory authority to modify that action later as necessary to protect the national security. Put differently, Section 232 does not prohibit the President from "implementing" a plan of continuing action that says, in essence, "We'll try *x*, but if our ongoing monitoring reveals that *x* doesn't work or that the relevant facts have changed, then we'll adjust it as necessary."

Consistent with the practice of his predecessors, that's what the President did here. In Proclamation 9705, he "implemented" a system of tariffs intended to address steel imports on an ongoing basis. Under that action, he directed the Secretary to monitor the effectiveness of the restrictions taken. *See* 83 Fed. Reg. at 11,628. After the Secretary advised the President that further action was necessary because steel derivative imports circumvented Proclamation 9705, the President issued Proclamation 9980.

To read Section 232 as granting the President ongoing authority to modify his actions, as past presidents did, does not—contrary to *Transpacific I*—read the deadlines out of the statute. *See Transpacific I*, 415 F. Supp. 3d at 1275 n.13 ("If the President has the power to continue to act, to modify his actions, beyond these deadlines, then these deadlines are meaningless."). The new deadlines inserted by the 1988 amendments require prompt *implementation*, i.e., putting a plan of action into effect, without which the President has no authority to act at all assuming those deadlines are mandatory,[29] but those deadlines do not apply to modifications of action that was otherwise timely implemented in the first instance. Thus, as amended in 1988, the statute requires the President to decide on his plan within 90 days of receiving the Secretary's report and put that plan into place within 15 days of so deciding, but so long as he does so, it does not prohibit him from later modifying that plan.

Because the 1988 amendments' insertion of deadlines for the President to "implement action" can peacefully coexist with Congress's retention of the President's modification authority in the word "action" from the pre-1988 statute, those deadlines cannot be read as impliedly repealing the latter. "Repeal by implication is invoked only when an enactment *is irreconcilable* with an earlier statute, or the enactment so comprehensively covers the subject matter of the earlier statute that it must have been intended as a substitute. In either case, Congress' intention to repeal the earlier law must be 'clear and

[29] For present purposes, I assume that the statute's deadlines are mandatory. I do not reach, and therefore express no view on, the government's alternative argument that that the statute's deadlines are directory rather than mandatory. *See* ECF 60, at 45–47.

manifest.'" *Todd v. Merit Sys. Prot. Bd.*, 55 F.3d 1574, 1577 (Fed. Cir. 1995) (cleaned up and emphasis added); *see also* 1A Sutherland Statutes and Statutory Construction § 22:34 (7th ed. 2020 update) ("[P]rovisions introduced by an amendatory act should be read together with provisions of the original section that were reenacted or left unchanged as if they had originally been enacted as one section. Effect is to be given to each part, and they are interpreted so they do not conflict."). Here, because the implementation deadline added by the 1988 amendments *is* reconcilable with the President's continuing authority to act in the word "action," there is no clear and manifest intention on the part of Congress to repeal that preexisting authority.

The presumption against an implied repeal of the President's preexisting authority to modify Section 232 action is even stronger here because of the three decades of administrative practice and interpretation of Section 232 recognizing that authority prior to the 1988 amendments. If Congress removed the authority, we should expect to find a clear indication that Congress affirmatively sought to make such a radical change. "Here, the applicable principle is that Congress does not enact substantive changes *sub silentio.*" *United States v. O'Brien*, 560 U.S. 218, 231, (2010) (citing *Director of Revenue of Mo. v. CoBank ACB*, 531 U.S. 316, 323 (2001)); *see also CoBank ACB,* 531 U.S. at 324 (rejecting interpretation of statutory amendments "that Congress made a radical—but entirely implicit—change" that overruled a "50-year history"); *In re Cuozzo Speed Techs., Inc.*, 793 F.3d 1268, 1277 (Fed. Cir. 2015) (noting that Congress is assumed to recognize longstanding existing law and that it is improper to assume Congress alters that sort of thing *sub silentio*).

To appreciate just how radical a change PrimeSource's reading of the 1988 amendments represents, it's worth considering President Reagan's use of Section 232 authority in the runup to those amendments. In 1982, Muammar Kaddafi's Libya was a serious, lethal menace to U.S. national security interests.[30] That year, without a formal Section 232 investigation and report, President Reagan modified the oil import restrictions of Proclamation 3729—issued by President Eisenhower in 1959—to exclude Libyan oil imports indefinitely. President Reagan explained he did so because the applicable cabinet officials had advised him that continued oil imports from Libya were "inimical to the United States national security." Proclamation No. 4907 of March 10, 1982, *Imports of Petroleum*, 47 Fed. Reg. 10,507 (Mar. 11, 1982).

Under the theory advanced by PrimeSource, Congress in 1988 outlawed President Reagan's restriction of Libyan oil imports because he failed to receive a formal Section 232 report before acting. This is purportedly so even though only two years earlier, in 1986, Libyan agents had executed a terrorist attack

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[30] Among other things, in late 1981 "American intelligence picked up reports from multiple sources (including an intercepted phone call of Kaddafi himself) that Kaddafi was plotting to assassinate Reagan." Steven F. Hayward, *The Age of Reagan—The Conservative Counterrevolution 1980–1989* at 178 (Three Rivers Press 2009).

on American servicemembers in West Berlin, and President Reagan ordered military strikes on Libya in retaliation. Hayward, *supra* note 30, at 489–91. In view of this contemporaneous statutory history, PrimeSource's theory asks us to read the 1988 amendments as implicitly working a revolutionary change in the statute.

In short, because the 1988 amendments requiring the President to exercise Section 232 action within 105 days of receiving the Secretary's report do not clearly indicate that Congress *also* sought to curtail the "systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned," *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring), of the type taken by President Reagan in 1982 as to Libyan oil imports, we should construe the statute as preserving that authority.

c. The President's continuing authority to act under subsection (c)(3) added by the 1988 amendments is consistent with the President's continuing authority to act retained in subsection (c)(1).

One of the substantive changes made by the 1988 amendments was to add a completely new provision broadening the scope of permissible Section 232 "action" to include seeking to negotiate an agreement restricting the imports of articles threatening national security. This provision was inserted as a new paragraph (3) in subsection (c), where it functions in tandem with the preexisting grant of Presidential authority to take "action" in paragraph (1). It provides:

(3) (A) If—

(i) the action taken by the President under paragraph (1) is the negotiation of an agreement which limits or restricts the importation into, or the exportation to, the United States of the article that threatens to impair national security, and

(ii) either—

(I) no such agreement is entered into before the date that is 180 days after the date on which the President makes the determination under paragraph (1)(A) to take such action, or

(II) such an agreement that has been entered into is not being carried out or is ineffective in eliminating the threat to the national security imposed by imports of such article,

the President shall take such other actions as the President deems necessary to adjust the imports of such article so that such imports will not threaten to impair the national security. The President shall publish in the Federal Register notice of any additional actions being taken under this section by reason of this subparagraph.

(B) If—

> (i) clauses (i) and (ii) of subparagraph (A) apply, and
>
> (ii) the President determines not to take any additional actions under this subsection,
>
> the President shall publish in the Federal Register such determination and the reasons on which such determination is based.

19 U.S.C. § 1862(c)(3) (emphasis added).

Subsection (c)(3) thus contains an alternative procedure, with different time periods, applicable when the President decides—as the "action" taken under (c)(1)—to negotiate an agreement restricting the importation of the article that threatens to impair national security. It provides that if either no agreement is reached within 180 days of the President's decision to negotiate *or* an agreement was reached but is not being carried out or is ineffective, "the President shall *take such other actions* as the President deems necessary to adjust the imports of such article so that imports will not threaten to impair the national security." 19 U.S.C. § 1862(c)(3)(A) (emphasis added). Under subsection (c)(3), the President plainly has authority to take further action without first obtaining a new report and investigation from the Secretary.

Invoking *Transpacific I*, PrimeSource contends that subsection (c)(3)'s grant of modification authority implies that no similar authority exists under subsection (c)(1). *See* ECF 73-1, at 19 (citing *Transpacific I*, 415 F. Supp. 3d at 1276 n.15). The *Transpacific I* court reasoned that Section 232 did not permit the President to modify import restrictions by increasing them, in part because "[w]here Congress envisioned ongoing action by the President it provided for it." *Transpacific I*, 415 F. Supp. 3d at 1276 n.15 (citing 19 U.S.C. § 1862(c)(3)). My colleagues make essentially the same point. *See ante* at [65a-66a].

I disagree with this conclusion for several reasons. To begin with, it ignores that the 1988 amendments were only that—amendments to a preexisting statute that already permitted the President to modify import restrictions. As explained above, the 1988 amendments left intact the statutory language in subsection (c)(1) permitting such modifications—"action"—and under the prior-construction canon Congress is presumed to have incorporated that meaning into the amended Section 232.

Subsection (c)(3), on the other hand, represented an entirely *new* substantive grant of authority uncontemplated in the pre-1988 statute. It makes clear that the "action" taken by the President under (c)(1) within the new deadlines now includes—in addition to the unilateral action by the President contemplated by the pre-1988 statute such as tariffs or import quotas—an attempt to negotiate import restrictions with foreign partners, i.e., *bilateral* action. Of course, such negotiations might fail, meaning that the President's bilateral action within the relevant deadline might be stillborn.

In specifying that the President can take "other actions" in such circumstances, Congress simply made the President's authority to take bilateral action under the new subsection (c)(3) symmetrical with the

President's preexisting authority under subsection (c)(1) to make such modifications in the context of unilateral action. Far from implying that no such power exists under subsection (c)(1), Congress's provision of such authority in subsection (c)(3) simply provides further support that Congress did not repeal such preexisting authority in subsection (c)(1).

Finally, neither PrimeSource nor the *Transpacific* decisions have any answer to this question: Why would Congress *repeal* the President's preexisting authority to modify Section 232 action in the context of unilateral action, and yet in the same breath expressly *grant* that same authority solely in the limited context of unsuccessful attempts to restrict imports by agreement? It defies common sense that for no apparent reason Congress would take away preexisting authority in every other context that it was simultaneously *conferring* in the new context of failed bilateral action.

When statutory interpretation yields such irrational results, it suggests that something is wrong with the interpretation. *See, e.g.*, *W. Air Lines, Inc. v. Bd. of Equalization of State of S.D.*, 480 U.S. 123, 133, (1987) (noting that where an interpretation yields illogical results, it "argue[s] strongly against the conclusion that Congress intended these results"); *Greenlaw v. United States*, 554 U.S. 237, 251 (2008) (citing the foregoing language from *Western Air Lines* to support the conclusion that "[w]e resist attributing to Congress an intention to render a statute so internally inconsistent"); *Bayer AG v. Housey Pharms., Inc.*, 340 F.3d 1367, 1377–78 (Fed. Cir. 2003) (refusing to interpret statute in a way that yielded "an illogical result")[31]

3. Interpreting Section 232 to bar modifications of import restrictions compromises the statute's effectiveness.

Section 232 import restrictions might last for years. Proclamation 3729 is a good example—President Eisenhower promulgated it in 1959 and it remained in effect, with a substantial number of modifications, until President Reagan eventually revoked it in 1983. *See* Proclamation No. 5141 of December 22, 1983, *Imports of Petroleum and Petroleum Products*, 48 Fed. Reg. 56,929, 56,929, 98 Stat. 3543, 3544, § 1 (Dec. 27, 1983) ("Proclamation No. 3279, as amended, is revoked."). In effect, Section 232 authorizes the President to establish an ongoing regulatory program as to imports of an article and its derivatives.

It is precisely because Section 232 allows the President to establish a regulatory program that it is essential and appropriate for the President to be able to quickly adjust the program after the cumbersome initial machinery of the formal investigative and

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[31] My colleagues imply that the President's authority under subsection (c)(3)—either as to action in the first instance or continuing authority—does not extend to derivatives because, unlike subsection (c)(1), subsection (c)(3) does not expressly encompass derivatives. *See ante* at [66a-67a]. As this case does not involve action under (c)(3), we do not have to resolve that issue today, but I note that (c)(3) cross-references action taken under (c)(1), and therefore (c)(3)'s grant of authority may extend to derivatives as well.

reporting process has already determined the existence of a national security threat. As General Saxbe noted in 1975, "facts constantly change." 43 Op. Att'y Gen. No. 20, at 6.

To read the statute as restricting the President's authority to make adjustments in real time to respond to evolving threats violates the canon of effectiveness, under which "[a] textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored." Scalia & Garner, *supra*, at 63. "This canon follows inevitably from the facts that (1) interpretation always depends on context, (2) context always includes evident purpose, and (3) evident purpose always includes effectiveness." *Id.*

By precluding the President from using Section 232 to establish an ongoing regulatory program to adjust imports, PrimeSource's theory compromises the effectiveness of the statute as a tool for "[s]afeguarding national security." 19 U.S.C. § 1862; *cf.* 2A *Sutherland Statutory Construction* § 45:12 (7th ed. 2019 update) ("[A] statute should not be read in an atmosphere of sterility, but in the context of what actually happens when humans fulfill its purpose."). Even if PrimeSource's interpretation were textually permissible, it would be disfavored against another textually permissible interpretation that preserves, rather than diminishes, the statute's effectiveness.[32]

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[32] Indeed, the 1988 amendments were motivated by Congress's "frustration" with the President's failure to take timely Section 232 action once the Secretary had identified a national security

Finally, if there is any context where the canon of effectiveness must not be overlooked, it is in this realm of national security. The President's most solemn duty is to protect the nation in a perilous world, and to that end we should choose a textually permissible interpretation of the statute that allows the President to "anticipate distant danger, and meet the gathering storm[.]" A. Hamilton, *The Federalist No. 25*, at 161 (J. Cooke ed. 1961).[33]

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threat. *See Transpacific II*, 466 F. Supp. 3d at 1252. It is incongruous that in moving to expedite action under the statute, Congress would have simultaneously enfeebled longstanding Presidential authority to adjust such action to respond to changing facts in real time.

[33] On this issue, my colleagues may eventually reach the same destination as I do, but they take a more circuitous route. They deny PrimeSource's motion for summary judgment as to Count 2, reasoning that there is a genuine issue of material fact in dispute as to whether the Secretary's "assessments" referenced in Proclamation 9980 might qualify as a Section 232 report, *see ante* at [84a–88a], notwithstanding the government's concession to the contrary. While my colleagues may be correct that we might ultimately be able to characterize Proclamation 9980 as a timely "new" Section 232 action by characterizing the Secretary's assessments as a "report," I would take the government at its word here rather than invite the President to characterize every recommendation by the Secretary as a Section 232 report authorizing new action. In effect, my colleagues' reading of the 1988 amendments as revoking the President's modification authority on the back end compels them to potentially water down the statute's procedural requirements on the front end to avoid compromising the statute's effectiveness as a national security tool. *Cf. Transpacific II*, 466 F. Supp. 3d at 1255 ("The President is not authorized to act under Section 232 based on any offhanded suggestion by the Secretary; the statute requires a formal investigation and report.").

B. Proclamation 9980's extension of import restrictions to steel derivatives was a permissible modification of Proclamation 9705 rather than new action.

PrimeSource appears to argue in the alternative, and my colleagues agree, that even if the President has the power to modify Section 232 action that was otherwise timely implemented, that power is limited to the specific universe of imported articles and derivatives addressed by the original proclamation and that any later action restricting derivatives not included in the original action requires a new Section 232 investigation and report. Specifically, my colleagues conclude that because Proclamation 9705's restrictions were limited to steel *articles*, Proclamation 9980's restrictions of steel *derivatives* "implemented" a new action for purposes of Section 232's procedural requirements. *Ante* at [66a].

I disagree for two reasons. First, the President's power to act in the first instance extends to derivatives of articles that are the subject of an investigation and report by the Secretary, even if such an investigation and report did not address derivatives. Second, if the President has the power to modify Section 232 action, that power is necessarily coextensive with his power to act in the first instance.

1. The President's power to act in the first instance extends to an article and its derivatives.

Section 232 directs the Secretary to investigate, and report to the President about, the national security effects of imports of "the article." 19 U.S.C.

§§ 1862(b)(1)(A), (b)(2)(B), (b)(3)(A), (c)(1)(A).[34] The statute directs the President, provided he concurs with the Secretary's findings, to take action to adjust the imports "of the article *and its derivatives.*" *Id.* § 1862(c)(1)(A)(ii) (emphasis added); *see also id.* § 1862(c)(1)(B) (directing the President to "implement" his decision "to take action to adjust imports of an article *and its derivatives*") (emphasis added).

Thus, it is indisputable that the Secretary is to investigate imports of an article, but the President can then act as to the article *and its derivatives*, even if the Secretary's investigation and report did not address derivatives. PrimeSource complains that the Secretary's investigation and report were focused on "imports of steel" and "did not mention steel nails specifically, nor any derivative articles generally," and further complains that none of the public comments "put PrimeSource on notice that Commerce was considering" applying tariffs to imported steel nails. ECF 73-1, at 9. But had the President included steel nails—derivatives of the steel articles that were the subject of the Secretary's report and investigation—in Proclamation 9705, PrimeSource would have no valid objection because Section 232(c)(1)(A)(ii) and (B) allow the President to act to adjust imports of the "article

[34] 19 U.S.C. § 1862(c)(1)(A) is focused on what actions the President is to take after receiving a report from the Secretary, but it begins by referring to the President's "receiving a report submitted under subsection (b)(3)(A) in which the Secretary finds that an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security."

and its derivatives." 19 U.S.C. § 1862(c)(1)(A)(ii), (c)(1)(B) (emphasis added). That the Secretary's investigation and report did not address derivatives of steel articles did not mean that the President's proclamation could not do so.

2. The President's power to modify import restrictions is coextensive with his power to act in the first instance.

If the President has the power to modify Section 232 action without another formal investigation and report by the Secretary—and as discussed above at length, I believe that he does—I see nothing in the statute suggesting that the President's modification power is narrower than his power to act in the first instance. The statute—not the President's original Section 232 action—sets the boundaries on the scope of the President's power to modify such action, and the statute permits the President to take action—both initial action within the 105 days after the Secretary's report *and* thereafter continuing action under the pre-1988 interpretation ratified by the 1988 amendments—as to an "article *and its derivatives.*" 19 U.S.C. § 1862(c)(1)(A)(ii), (c)(1)(B) (emphasis added). In short, the President's statutory power to modify is necessarily coextensive with the original power to act in the first instance absent any statutory restriction to the contrary.

Thus, that Proclamation 9705's import restrictions on steel articles did not encompass steel derivatives did not mean that the President could not later extend those restrictions to such derivatives absent another formal investigation and report. To read the statute otherwise—that is, as prohibiting the President from extending Section 232 import restrictions to derivatives unless the Secretary has first formally investigated and reported on those derivatives—makes no sense when the statute permits the President to act as to derivatives in the first instance without any such formal investigation and report by the Secretary *as to derivatives.* What is the point of requiring a formal investigation and report as to derivatives at the modification stage when no such investigation and report (as to derivatives) is even necessary at the implementation stage?

As Attorney General Saxbe opined in 1975, the statute presumes that the relevant officials will advise the President in real time of changes in underlying facts that warrant adjusting Section 232 action. 43 Op. Att'y Gen. No. 20, at 3–4. And there is no question here that the Secretary did just that by timely advising the President that steel article derivative imports were undermining Proclamation 9705 and therefore required prompt remedial action. *See* 85 Fed. Reg. at 5282.

To read the statute as nevertheless demanding that the President defer acting on such advice until the Secretary conducts a formal investigation and report as to the continued existence of a national security threat is to exalt supposed form over actual substance and reintroduces into the statute wasteful inefficiency akin to that which Congress eliminated in 1958. *See supra* at [116a-117a] (discussing pre-1958 version of the statute that permitted the Secretary to initiate an investigation only after first receiving direction from the President to do so, even though the Secretary had already advised the President of the need for action). Such a reading also violates the canon of effectiveness previously discussed. *See* Scalia & Garner, *supra*, at 63.

Finally, I note that the historical record confirms my reading of the statute. That record shows that Presidents repeatedly modified Proclamation 3279—President Eisenhower's Section 232 import restrictions on petroleum products that lasted almost a quarter century—to add derivative products not encompassed by the original proclamation. *See, e.g.*, Proclamation No. 3509 of November 30, 1962, *Modifying Proclamation 3279 Adjusting Imports of Petroleum and Petroleum Products*, 27 Fed. Reg. 11,985, 11,985–87, 77 Stat. 963 (Dec. 5, 1962) (adding natural gas); Proclamation No. 3823 of January 29, 1968, *Modifying Proclamation 3279 Adjusting Imports of Petroleum and Petroleum Products*, 33 Fed. Reg. 1171, 1171–73, 82 Stat. 1603 (Jan. 30, 1968) (adding liquids derived from tar sands); Proclamation No. 4178 of January 17, 1973, *Modifying Proclamation No. 3279, Relating to Imports of Petroleum and Petroleum Products*, 38 Fed. Reg. 1719, 1719–21, 87 Stat. 1150 (Jan. 18, 1973) (adding liquid hydrocarbons produced from gilsonite and oil shale).

As discussed above, this history of administrative interpretation and practice forms part of the statutory history that "can properly be presumed to have been before all the members of the legislature when they voted" on the 1988 amendments. Scalia & Garner, *supra*, at 256. If the 1988 amendments retained the President's power to modify Section 232 action without another formal investigation and report—and, as explained above, my view is that they did—those amendments *also* necessarily retained the President's power to modify Section 232 action by extending import restrictions to derivatives of an article encompassed by an original action. *See Bragdon*, 524 U.S. at 645 ("When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well.").[35]

Conclusion

For the reasons set forth above, I respectfully dissent from my colleagues' decision to avoid confronting the question of whether we have subject-matter jurisdiction over claims against the President. I concur in their decision to grant the government's motion to dismiss Counts 1, 3, 4, and 5 of the amended complaint for failure to state a claim, as well as in their decision to deny PrimeSource's cross-motion for summary judgment as to those same counts. I join their opinion as to Counts 1, 3, and 4. Finally, although I concur in their decision to deny PrimeSource's cross-motion for summary judgment as to Count 2, I respectfully dissent from their decision to deny the government's motion to dismiss that count for failure to state a claim.

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[35] This case does not present, and therefore I express no view on, the issue of whether the President's Section 232 modification authority extends to *articles* that were not the subject of any investigation and report by the Secretary.

/s/ *M. MILLER BAKER*
M. Miller Baker, Judge

Addendum to opinion of Baker, J.

Presidential Modifications of Section 232 Actions Without New Formal Investigations and Reports Between 1975 and 1988

1. Proclamation No. 4355 of March 4, 1975, *Modifying Proclamation 3279, as Amended, Relating to Imports of Petroleum and Petroleum Products, and Providing for the Long-Term Control of Imports of Petroleum and Petroleum Products Through a System of License Fees*, 40 Fed. Reg. 10,437, 89 Stat. 1248 (Mar. 6, 1975).
2. Proclamation No. 4377 of May 27, 1975, *Modifying Proclamation No. 3279, as Amended, Relating to Imports of Petroleum and Petroleum Products, and Providing for the Long-Term Control of Imports of Petroleum and Petroleum Products Through a System of License Fees*, 40 Fed. Reg. 23,429, 89 Stat. 1275 (May 30, 1975).
3. Proclamation No. 4412 of January 3, 1976, *Modifying Proclamation No. 3279, as Amended, Relating to Imports of Petroleum and Petroleum Products, and Providing for the Long-Term Control of Imports of Petroleum Products Through a System of License Fees*, 41 Fed. Reg. 1037, 90 Stat. 3073 (Jan. 6, 1976).
4. Proclamation No. 4543 of December 27, 1977, *Modifying Proclamation No. 3279, as Amended,*

Relating to Imports of Petroleum and Petroleum Products, and Providing for the Long-Term Control of Imports of Petroleum and Petroleum Products Through a System of License Fees, 42 Fed. Reg. 64,849, 92 Stat. 3907 (Dec. 29, 1977).

5. Proclamation No. 4629 of December 8, 1978, *Imports of Petroleum and Petroleum Products*, 43 Fed. Reg. 58,077, 93 Stat. 1476 (Dec. 12, 1978).
6. Proclamation No. 4655 of April 6, 1979, *Imports of Petroleum and Petroleum Products*, 44 Fed. Reg. 21,243, 93 Stat. 1508 (Apr. 10, 1979).
7. Proclamation No. 4702 of November 12, 1979, *Imports of Petroleum and Petroleum Products*, 44 Fed. Reg. 65,581, 93 Stat. 1554 (Nov. 14, 1979).
8. Proclamation No. 4748 of April 11, 1980, *Technical Amendments to Proclamation 4744*, 45 Fed. Reg. 25,371, 94 Stat. 3747 (Apr. 15, 1980).
9. Proclamation No. 4751 of April 23, 1980, *Amendment to Proclamation 4744*, 45 Fed. Reg. 27,905, 94 Stat. 3750 (Apr. 25, 1980).
10. Proclamation No. 4762 of June 6, 1980, *Petroleum Import Licensing Requirements*, 45 Fed. Reg. 39,237, 94 Stat. 3760 (June 10, 1980).
11. Proclamation No. 4766 of June 19, 1980, *Imports of Petroleum and Petroleum Products*, 45 Fed. Reg. 41,899, 94 Stat. 3763 (June 23, 1980).

12. Proclamation No. 4907 of March 10, 1982, *Imports of Petroleum*, 47 Fed. Reg. 10,507, 96 Stat. 2709 (Mar. 11, 1982).
13. Proclamation No. 5141 of December 22, 1983, *Imports of Petroleum and Petroleum Products*, 48 Fed. Reg. 56,929, 98 Stat. 3543 (Dec. 27, 1983)

APPENDIX D

In the
United States Court of Appeals
for the Federal Circuit

PRIMESOURCE BUILDING PRODUCTS, INC.,
Plaintiff-Appellee

v.

UNITED STATES, JOSEPH R. BIDEN, JR., PRESIDENT OF THE UNITED STATES, UNITED STATES CUSTOMS AND BORDER PROTECTION, CHRISTOPHER MAGNUS, COMMISSIONER OF U.S. CUSTOMS AND BORDER PROTECTION, DEPARTMENT OF COMMERCE, GINA M. RAIMONDO, SECRETARY OF COMMERCE,
Defendants-Appellants

2021-2066

Appeal from the United States Court of International Trade in No. 1:20-cv-00032-TCS-JCG-MMB, Senior Judge Timothy C. Stanceu, Judge Jennifer Choe-Groves, Judge M. Miller Baker

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OMAN FASTENERS, LLC, HUTTIG BUILDING PRODUCTS, INC., HUTTIG, INC.,
Plaintiffs-Appellees

v.

United States, Joseph R. Biden, Jr., President of the United States, United States Customs and Border Protection, Christopher Magnus, Commissioner of U.S. Customs and Border Protection, Department of Commerce, Gina M. Raimondo, Secretary of Commerce,
Defendants-Appellants

Appeal from the United States Court of International Trade in Nos 1:20-cv-00037-TCS-JCG-MMB, 1:20-cv-00045-TCS-JCG-MMB, Senior Judge Timothy C. Stanceu, Judge Jennifer Choe-Groves, Judge M. Miller Baker

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ON PETITION FOR REHARING EN BANC

June 22, 2023

Before MOORE, *Chief Judge*, NEWMAN LOURIS, DYK. PROST. REYNA, TARANTO, CHEN, HUGHES, STOLL AND STARK, *Circuit Judges*[1]

PER CURIAM.

ORDER

Oman Fasterners, LLC, Huttig Building Products, Inc., Huttig, Inc. and PrimeSource Building Products,

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[1] Circuit Judge Cunningham did not participate.

Inc. filed a petition for rehearing en banc. A response to the petition was invited by the court and filed by Joseph R. Biden, Jr., Commerce, Troy Miller, Gina M. Raimondo, United States Customs and Border Protection and the United States. The petition was first referred as a petition to the panel that heard the appeal, and thereafter the petition was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the Court will issue June 29, 2023.

FOR THE COURT

June 22, 2023 — /s/ Jarrett B. Perlow
Date — Jarrett B. Perlow
Acting Clerk of Court

APPENDIX E

19 U.S.C. §1862

(a) Prohibition on decrease or elimination of duties or other import restrictions if such reduction or elimination would threaten to impair national security

No action shall be taken pursuant to section 1821(a) of this title or pursuant to section 1351 of this title to decrease or eliminate the duty or other import restrictions on any article if the President determines that such reduction or elimination would threaten to impair the national security.

(b) Investigations by Secretary of Commerce to determine effects on national security of imports of articles; consultation with Secretary of Defense and other officials; hearings; assessment of defense requirements; report to President; publication in Federal Register; promulgation of regulations

(1)(A) Upon request of the head of any department or agency, upon application of an interested party, or upon his own motion, the Secretary of Commerce (hereafter in this section referred to as the "Secretary") shall immediately initiate an appropriate investigation to determine the effects on the national security of imports of the article which is the subject of such request, application, or motion.

(B) The Secretary shall immediately provide notice to the Secretary of Defense of any investigation initiated under this section.

(2)(A) In the course of any investigation conducted under this subsection, the Secretary shall--

(i) consult with the Secretary of Defense regarding the methodological and policy questions raised in any investigation initiated under paragraph (1),

(ii) seek information and advice from, and consult with, appropriate officers of the United States, and

(iii) if it is appropriate and after reasonable notice, hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to such investigation.

(B) Upon the request of the Secretary, the Secretary of Defense shall provide the Secretary an assessment of the defense requirements of any article that is the subject of an investigation conducted under this section.

(3)(A) By no later than the date that is 270 days after the date on which an investigation is initiated under paragraph (1) with respect to any article, the Secretary shall submit to the President a report on the findings of such investigation with respect to the effect of the importation of such article in such quantities or under such circumstances upon the national security and, based on such findings, the recommendations of the Secretary for action or inaction under this section. If the Secretary finds that such article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, the Secretary shall so advise the President in such report.

(B) Any portion of the report submitted by the Secretary under subparagraph (A) which does not contain classified information or proprietary information shall be published in the Federal Register.

(4) The Secretary shall prescribe such procedural regulations as may be necessary to carry out the provisions of this subsection.

(c) Adjustment of imports; determination by President; report to Congress; additional actions; publication in Federal Register

(1)(A) Within 90 days after receiving a report submitted under subsection (b)(3)(A) in which the Secretary finds that an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, the President shall--

(i) determine whether the President concurs with the finding of the Secretary, and

(ii) if the President concurs, determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security.

(B) If the President determines under subparagraph (A) to take action to adjust imports of an article and its derivatives, the President shall implement that action by no later than the date that is 15 days after the day on which the President determines to take action under subparagraph (A).

(2) By no later than the date that is 30 days after the date on which the President makes any determinations under paragraph (1), the President shall submit to the Congress a written statement of the reasons why the President has decided to take action, or refused to take action, under paragraph (1). Such statement shall be included in the report published under subsection (e).

(3)(A) If—

(i) the action taken by the President under paragraph (1) is the negotiation of an agreement which limits or restricts the importation into, or the exportation to, the United States of the article that threatens to impair national security, and

(ii) either—

(I) no such agreement is entered into before the date that is 180 days after the date on which the President makes the determination under paragraph (1)(A) to take such action, or

(II) such an agreement that has been entered into is not being carried out or is ineffective in eliminating the threat to the national security posed by imports of such article,

the President shall take such other actions as the President deems necessary to adjust the imports of such article so that such imports will not threaten to impair the national security. The President shall publish in the Federal Register notice of any additional actions being taken under this section by reason of this subparagraph.

(B) If—

(i) clauses (i) and (ii) of subparagraph (A) apply, and

(ii) the President determines not to take any additional actions under this subsection,

the President shall publish in the Federal Register such determination and the reasons on which such determination is based.

(d) Domestic production for national defense; impact of foreign competition on economic welfare of domestic industries

For the purposes of this section, the Secretary and the President shall, in the light of the requirements of national security and without excluding other relevant factors, give consideration to domestic production needed for projected national defense requirements, the capacity of domestic industries to meet such requirements, existing and anticipated availabilities of the human resources, products, raw materials, and other supplies and services essential to the national defense, the requirements of growth of such industries and such supplies and services including the investment, exploration, and development necessary to assure such growth, and the importation of goods in terms of their quantities, availabilities, character, and use as those affect such industries and the capacity of the United States to meet national security requirements. In the administration of this section, the Secretary and the President shall further recognize the close relation of the economic welfare of the Nation to our national security, and shall take into consideration the impact of foreign competition on the economic welfare of individual domestic industries;

and any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports shall be considered, without excluding other factors, in determining whether such weakening of our internal economy may impair the national security.

(d)[2] Report by Secretary of Commerce

(1) Upon the disposition of each request, application, or motion under subsection (b), the Secretary shall submit to the Congress, and publish in the Federal Register, a report on such disposition.

(2) Omitted

(f)[3] Congressional disapproval of Presidential adjustment of imports of petroleum or petroleum products; disapproval resolution

(1) An action taken by the President under subsection (c) to adjust imports of petroleum or petroleum products shall cease to have force and effect upon the enactment of a disapproval resolution, provided for in paragraph (2), relating to that action.

(2)(A) This paragraph is enacted by the Congress—

(i) as an exercise of the rulemaking power of the House of Representatives and the Senate, respectively, and as such is deemed a part of the rules of each House, respectively, but applicable only with respect to the procedures to be followed in that House

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[2] So in original. Two subsecs. (d) have been enacted.

[3] So in original. No subsec. (e) has been enacted.

in the case of disapproval resolutions and such procedures supersede other rules only to the extent that they are inconsistent therewith; and

(ii) with the full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner, and to the same extent as any other rule of that House.

(B) For purposes of this subsection, the term "disapproval resolution" means only a joint resolution of either House of Congress the matter after the resolving clause of which is as follows: "That the Congress disapproves the action taken under section 232 of the Trade Expansion Act of 1962 with respect to petroleum imports under _______ dated _______.", the first blank space being filled with the number of the proclamation, Executive order, or other Executive act issued under the authority of subsection (c) of this section for purposes of adjusting imports of petroleum or petroleum products and the second blank being filled with the appropriate date.

(C)(i) All disapproval resolutions introduced in the House of Representatives shall be referred to the Committee on Ways and Means and all disapproval resolutions introduced in the Senate shall be referred to the Committee on Finance.

(ii) No amendment to a disapproval resolution shall be in order in either the House of Representatives or the Senate, and no motion to suspend the application of this clause shall be in order in either House nor shall it be in order in either House for the Presiding Officer to entertain a request to suspend the application of this clause by unanimous consent.