ARTICLE

ECONOMIC SECURITY AND THE SEPARATION OF POWERS

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The U.S. Constitution grants Congress the power "[t]o regulate Commerce with foreign Nations," but today the exercise of the foreign commerce power resides primarily with the executive branch. That transfer of control is partly the result of significant delegations of responsibility for managing foreign commerce from Congress to the executive. It is also, however, the result of the securitization of foreign commerce. The executive branch asserts that foreign commerce issues fall under its constitutional powers over foreign affairs, and thus that the it enjoys authority over foreign commerce that exceeds the scope of congressional delegations.

This Article makes three contributions. First, we analyze the development of a trade administrative state charged with managing two sets of broad delegations: to liberalize trade, on the one hand, and to restrict it in the name of "economic security" when the executive deems necessary. Second, we document the way in which the executive branch in recent presidential administrations of both parties have defended their trade policies in court by arguing that the president's independent constitutional powers over (non-commercial) foreign affairs give him license to exercise power over commerce beyond that delegated by Congress, or that Congressional delegations should be construed in his favor. The courts, for their part, have often accepted these claims either directly or indirectly.

Third, we propose three statutory reforms that Congress could pass to restore balance to the branches' regulation of foreign commerce:1)

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Congress should sunset the president's imposition of tariffs or other trade restrictions pursuant to economic security statutes after 90 or 180 days without the possibility of renewal unless Congress acts; 2) Congress should prohibit the executive branch from relying on any international agreement as the legal basis under which any good or service is imported into the United States, exported from the United States, or regulated while in the United States, unless Congress has either explicitly authorized the agreement in advance or approved it after its conclusion; and, 3) Congress should eliminate the Federal Circuit's exclusive jurisdiction over appeals in most trade cases.

INTRODUCTION

The U.S. Constitution grants Congress the power "[t]o regulate Commerce with foreign Nations,"[1] but today the exercise of the foreign commerce power resides primarily with the executive branch. That transfer of control is partly the result of significant delegations of responsibility for managing foreign commerce from Congress to the executive. It is also, however, the result of the executive's assertion that foreign commerce issues fall under the executive branch's constitutional powers over foreign affairs, and thus that the executive branch enjoys authority over foreign commerce that exceeds the scope of congressional delegations.

1 U.S. CONST. art. I, § 8, cl. 3.

To make this sweeping assertion, the executive has sought to develop an account of foreign commerce policy as "economic security" policy.[2] The executive branch has relied on this narrative to implement major foreign commerce policies with little to no congressional oversight or authorization. By invoking economic security in the courtroom as well as in the halls of public opinion, the executive has sought to associate its many foreign commerce delegations with its constitutional foreign affairs power, thus expanding the scope of the former. In short, the executive branch's authority over foreign commerce began as a statutory authority but has increasingly assumed constitutional dimensions.

Drawing on original research into contemporary executive branch practices and recent judicial decisions, this Article argues that this trend is problematic. Invoking security rationales for far-reaching commercial action is not new, but two features have made developments in recent years especially noteworthy. First, officials from both the Trump and Biden administrations have invoked *economic* security as a justification for action across a wide range of policy issues. They have used tools traditionally viewed as commerce tools to address national security threats and they have deployed national security instruments for threats to commerce.[3] Both administrations have relied on statutory security exceptions to impose tariffs on products imported to the United States.[4] They have negotiated trade agreements without congressional approval, arguing that those agreements were critical for the United States'

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2 *See* Andrew Preston, *President Trump Claims National Security Requires Tariffs. That's Not as Strange as It Sounds.*, WASH. POST (Aug. 17, 2018, 6:00 AM), https://www.washingtonpost.com/news/made-by-history/wp/2018/08/17/president-trump-claims-national-security-requires-tariffs-thats-not-as-strange-as-it-sounds [http://perma.cc/PRP4-H2SM] (citing President Trump as saying "[w]e will defend our people, our nations, and our civilization from all who dare to threaten our way of life" while noting that "his rhetoric is little different from his predecessors'"); Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 10, 2017, 2:43 AM), https://twitter.com/realdonaldtrump/status/928936220360503296 [http://perma.cc/X6WPYUK2] ("The United States has been reminded time and again in recent years that economic security is not merely RELATED to national security - economic security IS national security. It is vital to our national strength.").

3 *See, e.g.*, *U.S.-China Trade: Hearing Before the H. Comm. on Ways and Means*, 116th Cong. 6 (2019) (statement of Robert E. Lighthizer, U.S. Trade Rep.) (noting that President Trump directed the Office of the USTR to conduct a study under section 301 as part of a program to "defend our workers, farmers, and ranchers, and our economic system").

4 *See generally* BRANDON J. MURRILL, CONG. RSCH. SERV., LSB10628, FEDERAL CIRCUIT EXAMINES THE SCOPE OF PRESIDENTIAL TARIFF AUTHORITY (2021) (describing both administrations' use of statutory authority to impose or maintain tariffs).

security.[5] They have imposed extensive new export controls on U.S.-made technologies.[6] They have prohibited transactions with companies such as TikTok and WeChat that they identified as dangers.[7] And they have designed new tools to address threats posed by foreign investment into and out of the United States.[8]

Second, private actors have challenged these actions as contrary to both administrative and statutory rules and doctrines. These lawsuits have led the courts to probe the origins and scope of the delegations, as well as the liberties taken by the executive branch in its exercise of authorities.[9] Although courts have not embraced the executive branch's most expansive arguments, they have also usually upheld the challenged action. In this way too, foreign commerce is coming to resemble national security, where the President (almost) always wins.[10]

Having recognized this problem, members of Congress now debate how to recover control without upending U.S. trade and investment.[11] This undertaking is especially challenging given that much of the

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5 *See* Press Release, The White House, On-the-Record Press Call on the Launch of the Indo-Pacific Economic Framework (May 23, 2022), https://www.whitehouse.gov/briefing-room/press-briefings/2022/05/23/on-the-record-press-call-on-the-launch-of-the-indo-pacific-economic-framework [http://perma.cc/VA3F-YTXU] (describing the purpose of the IPEF as making the Indo-Pacific "secure" for the United States).

6 *See, e.g.*, Gregory C. Allen, *Choking off China's Access to the Future of AI*, CTR. FOR STRATEGIC & INT'L STUD. (Oct. 11, 2022), https://www.csis.org/analysis/choking-chinas-access-future-ai [http://perma.cc/H93V-9G39] ("[T]he Biden administration announced a new export controls policy on artificial intelligence (AI) and semiconductor technologies to China.").

7 Ana Swanson, David McCabe & Jack Nicas, *Trump Administration to Ban TikTok and WeChat from U.S. App Stores*, N.Y. TIMES (Sept. 18, 2020), https://www.nytimes.com/2020/09/18/business/trump-tik-tok-wechat-ban.html [http://perma.cc/FMK6-3CHJ].

8 *See, e.g.*, *Outbound Investment Security Program*, U.S. DEP'T OF TREASURY, https://home.treasury.gov/policy-issues/international/outbound-investment-program [https://perma.cc/28V5-2TPU] (describing one such tool) (last visited Apr. 19, 2024).

9 *See infra* Part II.

10 *See* Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs*, 97 YALE L.J. 1255, 1291-1317 (1988) (discussing the combination of executive assertion of power, congressional acquiescence, and court tolerance that has led to the President almost always winning in foreign affairs). *See generally* HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION IN THE TWENTY-FIRST CENTURY (forthcoming 2024) (arguing that the system of checks and balances built to deal with national security issues have eroded in recent decades).

11 *See, e.g.*, Oliver Ward, *Republican Senators: USTR's Digital Trade Pivot Defies Congress*, INSIDE U.S. TRADE (Apr. 2, 2024, 10:58 AM), https://insidetrade.com/daily-news/republican-senators-ustr-s-digital-trade-pivot-defies-congress [https://perma.cc/X2VS-7ETV] (detailing that while House Democrats are supportive of the USTR's approach, Republican senators believe data localization requirements will hurt small businesses); *Centrist Democrats Push for New Trade Deals, Better Tariff-Exclusion Process*, INSIDE U.S. TRADE (July 19, 2023, 2:10 PM), https://insidetrade.com/trade/centrist-democrats-push-new-trade-deals-better-tariff-exclusion-process [http://perma.cc/3JQK-45RX] (noting that some Democrats are urging the Biden Administration to pursue free trade agreements and establish a more transparent exclusion process for tariffs on foreign goods).

groundwork leading to the current tipping point was laid many decades ago. The balance of authority in our separation of trade law powers has tipped gradually toward the executive since the early part of the twentieth century, with the economic security narrative pushing it to its present limits.

Understanding how the executive gained control is a prerequisite to any reclamation of authority. Accordingly, Part I of this Article unpacks how Congress lost its grip on its delegations to the executive in foreign commerce matters. It describes both the statutory delegations as well as the evolution of a trade administrative state not subject to the legislative and judicial controls that come with ordinary administrative practice. This Part also chronicles the establishment of economic securitization as a self-standing policy area at the nexus between foreign commerce and national security concerns. The branches no doubt agree that the globalized economy requires a strong U.S. presence, and that in turn requires a strong U.S. executive. Somewhere along the way, however, the guiding principles governing the partnership between the executive and the legislature were misplaced and the executive began to abuse its role as an agent of Congress's will.

Part of the exercise of understanding how the executive gained control over trade policy, to which we turn in Part II, is identifying where and how constitutional claims over the President's non-commercial foreign affairs authority began to engulf understandings of Congress's plenary authority over the regulation of commerce with foreign nations—from the perspective of both the executive as well as the courts. Officials from both the Biden and Trump Administrations have advanced novel arguments before the courts asserting this point: foreign commerce is part of security, and therefore the President has his own constitutional foundations for action in the domain of commerce. And, in several instances, the courts have endorsed this view either directly or indirectly.[12]

Given that the courts usually have not been willing to course-correct, it falls on Congress to restore the balance in its favor. In Part III, we set out three paths to this end. Each path offers a statutory solution to a different aspect of the problem: the authority to set tariffs, the authority to negotiate and conclude trade agreements, and the jurisdiction of the courts to review the executive's exercise of the foreign commerce power. We acknowledge the difficulties Congress would face in passing these proposals, especially in imposing new statutory limits on the executive

12 *See infra* Part II.

branch's agreement and tariff authorities. But we argue that these obstacles can be overcome, and that it is in the nation's interest to do so.

I. THE DELEGATIONS AND THEIR ELABORATIONS

The history of U.S. trade lawmaking, including the story of and relationships among the actors who have led that process, has taken several turns since the Founding. The cornerstone has always been Article I, section 8 of the Constitution, which provides that Congress "shall have Power To lay and collect Taxes, Duties, Imposts and Excises, . . . [and] To regulate Commerce with foreign Nations."[13] Today, Congress has delegated considerable responsibility for choosing the nation's trade policies in the first instance, as well as for the day-to-day implementation of those policies, to the President, to the U.S. Trade Representative (USTR), and occasionally also to other executive branch agencies and actors. Supplementing that expansive policy-setting landscape are the executive's claims to broad control over trade policy, relying on capacious statutes permitting the President to act where economic security interests so require. This Part explains how the route from the balance of power during the Founding era to the present executive dominance involved waves of increasingly porous delegated authority.

A. *Early Statutes and Institutional Foundations*

Although the Constitution assigns control over the regulation of foreign commerce to Congress, in the earliest days, much of the actual application and development of the government's regulation of foreign commerce was a collaboration between the legislature and executive, with executive agencies and the President engaged in supportive roles.[14] Setting tariff rates was a central preoccupation of Congress,[15] and the President managed the collection of those tariffs.[16] The President negotiated Friendship, Commerce, and Navigation treaties, and the

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13 U.S. CONST. art I, § 8, cl. 1, 3.

14 *See* The Economic Effect of Significant U.S. Import Restraints, Inv. No. 332-325, USITC Pub. 4094, at 65 (Aug. 2009) ("Prior to the 1930 act, tariff changes were viewed as entirely the domain of Congress."); Hal Shapiro & Lael Brainard, *Trade Promotion Authority Formerly Known as Fast Track: Building Common Ground on Trade Demands More than a Name Change*, 35 GEO. WASH. INT'L L. REV. 1, 6 (2003) ("Prior to the twentieth century U.S. regulation of foreign commerce was almost exclusively a congressional prerogative . . . .").

15 For instance, the tariff acts from the eighteenth and nineteenth centuries are summarized in U.S. TARIFF COMM'N, THE TARIFF AND ITS HISTORY: A COLLECTION OF GENERAL INFORMATION ON THE SUBJECT 70-84 (1934).

16 Kathleen Claussen, *Trade Administration*, 107 VA. L. REV. 845, 856 (2021) [hereinafter Claussen, Trade Administration].

Senate ratified those treaties.[17] There was engagement between the branches in policymaking and partnership in implementation.

Over the course of the following century, Congress passed more than a dozen laws that gave the President limited permission to set tariff rates and other aspects of trade policy directly. In legislation passed between 1794 and 1890, Congress granted the President the power to change, specially apply, or even reverse a limited and defined set of rules contained in statutes when the President found it to be in the "interest of the United States"[18] or "if in his judgment the public interest [or safety] should require it."[19] Congress entrusted the President with the ability to make modest adjustments to certain trade practices and tariff rates where he found it to be in the national interest. The contours of the national interest were largely left to the President's discretion. Nevertheless, apart from these circumscribed departures, tariffs—the primary instrument of foreign commerce regulation at the time—remained subject to direct and active congressional control.[20] The idea that the President could act, in essence, as Congress's trustee for particular modifications to congressional trade policy is reflected still today in statutory authorities that remain on the books and to which we will return.

In addition to those national-interest-styled delegations, Congress delegated additional authorities around the turn of the twentieth century that began to expand the President's role into one in which the President acted more like a fiduciary, managing trade policy on behalf of Congress and according to its instructions. Beginning in 1890, Congress delegated authority to the President to adjust tariffs on products imported into the United States through negotiated agreements with foreign countries. The McKinley Tariff Act of 1890 allowed the President to suspend, by proclamation, duty-free treatment of certain products where the President found that a foreign government imposed "unequal and unreasonable" tariffs on American products.[21] The Supreme Court endorsed the constitutionality of the statute, finding that such authority to adjust tariffs on a reciprocal basis pursuant to a congressional

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17 *See* John F. Coyle, *The Treaty of Friendship, Commerce, and Navigation in the Modern Era*, 51 COLUM. J. TRANS. L. 302, 307-11 (2013) (discussing the history of the use of treaties of friendship, commerce, and navigation).

18 Act of Feb. 9, 1799, ch. 2, § 4, 1 Stat. 613.

19 Act of Dec. 19, 1806, ch. 1, § 3, 2 Stat. 411.

20 *See supra* note 14.

21 Tariff of 1890, ch. 1244, § 3, 26 Stat. 567. *See also* F.W. Taussig, *The New United States Tariff*, 4 ECON. J. 573, 573-74 (1894) (discussing the context of the passage of the act).

delegation was permissible because Congress may "delegate a power to determine some fact or state of things upon which the law makes, or intends to make, [Congress's] action depend."[22]

Legislation every five to ten years in the early part of the twentieth century maintained this practice of giving the President the ability to evaluate the tariff and trade policy landscape with respect to U.S. foreign trading partners and then to issue proclamations that would adjust U.S. trade policies to accommodate those relationships.[23] Presidents themselves, however, acknowledged that this was not a plenary power.[24] As one of us has written, "the general understanding at the time among commentators was that Congress still retained not just ultimate authority but rather complete authority on trade matters. Trade power started and stopped with Congress."[25]

Thus far our recitation of critical junctures in the separation of trade law powers has concentrated on adjusting tariffs and quotas. Apart from the Founding Era, during which the survival of the young nation turned on its economic success,[26] "national security" was not squarely part of the discourse surrounding foreign commerce. World War I changed that. The war prompted Congress to grant the President an extraordinary degree of control over international trade and investment in the Trading With the Enemy Act (TWEA).[27] Enacted in 1917 as part of a group of statutes designed to allow the President to take control of private property for public use during the war, the TWEA did not just give the President the power to modify tariffs, but it also went beyond the adjustment modality of the nineteenth-century legislation.[28] Initially, the TWEA allowed the President to regulate or prohibit cross-border business

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22 Field v. Clark, 143 U.S. 649, 694 (1892).

23 *See, e.g.*, Dingley Act, ch. 11, § 3, 30 Stat. 151, 151 (1897); Fordney-McCumber Act of 1922, ch. 356, § 315, 42 Stat. 858, 941–46; Payne-Aldrich Tariff Act of 1909, ch. 6, § 2, 36 Stat. 11, 82–83.

24 *See, e.g.*, President William Howard Taft, Inaugural Address (Mar. 4, 1909), *in* PRESIDENTIAL ADDRESSES & STATE PAPERS OF WILLIAM HOWARD TAFT FROM MARCH 4, 1909 TO MATCH 3, 1910 (1910) ("It is imperatively necessary, therefore, that a tariff bill be drawn . . . and as promptly passed as due consideration will permit . . . . I venture this as a suggestion only, for the course to be taken by Congress, upon the call of the Executive, is wholly within its discretion."); President Warren G. Harding, Inaugural Address (Mar. 4, 1921); President Franklin Delano Roosevelt, Press Conference (June 2, 1933) ("Congress would never give me complete authority to write tariff schedules.").

25 Claussen, Trade Administration *supra* note 16, at 865.

26 *Id.* at 855 n.23 ("The United States fought wars over trade and fought wars through trade. Trade was inextricably linked to the existence of the nation.").

27 Trading with the Enemy Act, ch. 106, 40 Stat. 411 (1917) (codified as amended at 50 U.S.C. §§ 4301–36, 4338–41).

28 *Id.*

transactions in times of war.[29] Later, however, the TWEA was amended and extended beyond wartime to "any other period of national emergency declared by the President."[30] This extension was enabled by President Roosevelt's use of security rhetoric during the Depression that was not unlike some of the rhetoric that modern policymakers have used to describe the work they are doing, especially with respect to U.S. jobs and competition with China.[31] The TWEA remained on the books, alongside the presidential tariff modification authorities, for possible invocation by the President during any type of national emergency.

During this period, Congress also created an institutional architecture within the executive branch for managing the regulation of foreign commerce. Through myriad statutes setting up new agencies and distributing tasks, Congress created a system that could not only execute Congress's policies, but also could formulate its own policy and ultimately usurp Congress's policy- and law-making functions. These delegations included those that allowed the President to select trade advisors, established an independent Tariff Commission to advise on tariff policy, and granted executive branch officials the ability to select and implement trade policies of their choosing.[32] This last set of delegations grew exponentially over the decades.[33] The Departments of Agriculture, Commerce, State, and the Treasury all received numerous taskings from Congress to implement trade policy, administer tariffs, and engage with foreign partners on trade-related matters.[34] Executive agencies acted in fact-finding roles and investigatory capacities and served quasi-judicial functions.[35] Most of these administrative functions offered relatively little discretion, but the executive would capitalize on those grants in the years

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29 *Id.* at § 5(b).

30 Emergency Banking Relief Act, ch. 1, § 2, 48 Stat. 1, 1 (1933).

31 President Franklin Delano Roosevelt, Inaugural Address (Mar, 4, 1933), *in* 2 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 11, 15 (1938) (calling for the government to "wage a war against the emergency" of unemployment).

32 *See* Claussen, Trade Administration, *supra* note 16, at 869-91 (discussing the rise of "managerial trade administration" as a product of congressional delegation).

33 *See* Daniel K. Tarullo, *Law and Politics in Twentieth Century Tariff History*, 34 UCLA L. REV. 285, 350-51 (1986) (describing this growth).

34 *See, e.g.*, Anti-Dumping Act of 1921, Pub. L. No. 67-10, § 201, 42 Stat. 9, 11 (authorizing the Treasury Secretary to conduct investigations into dumping and publish information about violators); Act of June 5, 1930, Pub. L. No. 71-304, § 1, 46 Stat. 497 (authorizing the Secretary of Agriculture to investigate agricultural practices abroad); Exec. Order No. 6,651 (Mar. 23, 1934) (establishing the Office of Special Adviser to the President on Foreign Trade); Exec. Order No. 9,832, 12 Fed. Reg. 1363 (Feb. 25, 1947) (creating the Interdepartmental Committee on Trade Agreements).

35 *See* Claussen, Trade Administration, *supra* note 16, at 869-91.

that followed to justify further exercises of authority, especially as the global direction of trade law shifted its attention to the dismantling of not just tariffs, but also regulatory barriers to free trade.

The first step toward a consistent congressionally supported trade liberalization policy was the Reciprocal Trade Agreements Act (RTAA) in 1934.[36] The RTAA was significant because it gave the President new authority to enter into trade agreements with other countries that would reduce tariffs and to implement those agreements by presidential proclamation alone.[37] In fact, years before the RTAA, some presidents had initiated these types of negotiations,[38] but at that time, Congress still regulated most tariff rates through legislation, keeping them very high in some instances.[39] The RTAA invited the President to make deals for the United States that would lead to the reciprocal diminution of tariff rates.[40] Although it was time-limited and had to be renewed, the RTAA set the policy tone for decades of liberalization thereafter.[41]

These statutory and institutional measures laid the foundation for a dichotomy that would shortly emerge in U.S. trade law: one between statutes that empowered the executive branch to negotiate liberalizing trade agreements and statutes that empowered the executive branch to raise tariffs in the interest of national security.

B. *The Statutory Free-Trade and Security Dichotomy*

Beginning in the middle part of the twentieth century, the core of U.S. foreign commerce policymaking shifted from tariffs to reciprocal trade agreements. Congress renewed the RTAA multiple times following World War II.[42] The RTAA and its successors, in turn, provided the legal authority for the United States to enter into the foundational General Agreement on Tariffs and Trade (GATT), significantly lowering tariff rates on products

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36 *See* Reciprocal Trade Agreements Act of 1934, Pub. L. No. 73-316, ch. 474, 48 Stat. 943 (codified as amended in scattered sections of 19 U.S.C.).

37 *See id.*

38 In 1923, the President authorized the Secretary of State to negotiate commercial treaties with other countries to accord each other unconditional most-favored-nation treatment. 1 OFF. OF THE HISTORIAN, U.S. DEP'T OF STATE, PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, 1923 131 (1938).

39 *See Protectionism in the Interwar Period*, OFF. OF THE HISTORIAN, U.S. DEP'T OF STATE, https://history.state.gov/milestones/1921-1936/protectionism [http://perma.cc/254L-ZJ6T] (last visited 2016) (describing congressional increases of tariffs in the early twentieth century).

40 Reciprocal Trade Agreements Act, 48 Stat. 943.

41 *See generally* Michael J. Hiscox, *The Magic Bullet? The RTAA, Institutional Reform, and Trade Liberalization*, 53 INT'L ORG. 669 (1999).

42 Timothy Meyer & Ganesh Sitaraman, *Trade and the Separation of Powers*, 107 CALIF. L. REV. 583, 602-04 (2019).

from other signatory countries.[43] The negotiation of these types of deals with foreign partners required significant collaboration between the branches, and considerable leadership from the executive branch. That arrangement tested the delicate balance of the interbranch relationship in new ways.

By the 1970s, Congress had put into place what is today called "trade promotion authority" (TPA) (or "fast track" authority as it was known then) to promote its liberalization agenda.[44] The original concept behind TPA was that Congress would empower the President to negotiate significant reciprocal reductions in tariff rates, under the condition that the negotiated outcome would not be implemented unless Congress approved the final package.[45] Congress would then conduct its approval process through streamlined legislative procedures, provided that the President had fulfilled Congress's statutory mandates and objectives.[46] In some limited circumstances, TPA also enabled the President to enter into limited agreements that lowered tariffs without further congressional approval,[47] but for most major negotiations, the President was supposed to act as Congress's agent under this arrangement.

In periodic renewals of TPA authority, Congress sought to keep control of the negotiated outcomes in international trade discussions by imposing additional procedural constraints.[48] However, the executive branch moved into the driver's seat as international trade negotiations shifted away from their previous focus on the reduction of tariffs to the elimination of "non-tariff barriers" to trade.[49] Harmonizing rules or otherwise committing to avoid unfair treatment in these new areas such as licensing requirements, health and safety regulations, and other administrative measures that could be considered discriminatory to foreign business—many of which had a direct impact on domestic rulemaking—became the next step toward liberalizing trade at the international level.[50] Although TPA established elaborate organizational mandates and objectives for the executive in these negotiations, this shift set up a conflict between the executive branch, which often sought to

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43 *Id.*; General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

44 Trade Act of 1974, Pub. L. No. 93-618, § 151, 88 Stat. 1978, 2001 (1975).

45 *Id.* § 102(a).

46 *Id.* § 151.

47 *Id.* § 101.

48 *See* Kathleen Claussen, *Trade's Security Exceptionalism*, 72 STAN. L. REV. 1097, 1126-27 (2020).

49 Meyer & Sitaraman, *supra* note 42, at 609-10.

50 *Id.* at 612-26.

negotiate agreements with trading partners to reduce non-tariff barriers, and Congress, which remained ambivalent and sometimes objected to the scope of the executive's ambition.[51]

Outside of trade agreements, security issues re-surfaced in the form of delegations to the President to unilaterally impose trade barriers in response to national security considerations.[52] In both the Trade Expansion Act of 1962 and the Trade Act of 1974, Congress institutionalized these exceptions to the general framework of trade liberalization by delegating to executive branch agencies the authority to determine when circumstances might warrant the imposition of new trade barriers.[53] Following a recommendation from the relevant agency concerning any harm to the United States and its interests, the President would make the final decision on any increase in tariffs or other restriction on trade to correct or mitigate the threat.

These two key statutes—the acts of 1962 and 1974—codified antagonistic paradigms: they empowered the President to enter into liberalizing trade agreements while also allowing him to restrict trade when he determined that security so demanded. Congress has reaffirmed this framework on multiple occasions up to the present day.[54]

Although the dangers of the statutory liberalization-security dichotomy would not fully manifest until the 2010s, this dichotomy is the foundation of today's interbranch tension. That tension was aggravated by three additional developments in the U.S. policymaking terrain: the establishment of the USTR in the Executive Office of the President, the passage of the International Emergency Economic Powers Act (IEEPA), and the limited judicial review of executive trade actions.

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51 *See, e.g.*, Clyde H. Farnsworth, *Tide of Protectionism in Congress*, N.Y. TIMES, July 4, 1985, at D1.

52 Trade Expansion Act of 1962 § 232(c), 19 U.S.C. § 1862 (granting the President the power to adjust the imports of goods such that they "will not threaten to impair the national security").

53 *Id.*; Trade Act of 1974 § 301, 19 U.S.C. § 2411 (delegating such power to the U.S. Trade Representative).

54 *See, e.g.*, Bipartisan Trade Promotion Authority Act of 2002, Pub. L. No. 107-210, 116 Stat. 993 (codified at 19 U.S.C. §§ 3801–13); Bipartisan Congressional Trade Priorities and Accountability Act of 2015, Pub. L. No. 114-26, 129 Stat. 320 (codified at 19 U.S.C. §§ 4201–10); Trade Agreement Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979); Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948 (1984); Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1102, 102 Stat. 1107 (1988) (codified as amended in scattered sections of 19 U.S.C.) (renewing such delegations of power). To be sure, only the trade negotiating authority required renewal, the security exceptions have no expiration date. *See* Kathleen Claussen, Response, *Our Trade Law System*, 73 VAND. L. REV. EN BANC 195, 209 (2020) ("[W]hile trade negotiating authority permitting the president to negotiate mostly lower tariff rates with trading partners requires congressional renewal, our delegated security exceptions and other tariff-raising authorities do not expire.").

First, the demand for attention to a broader range of trade-related matters by the executive branch required coordination and management and prompted Congress to direct the President to appoint a Special Representative for Trade Negotiations in 1962 and to establish an interagency organization on trade.[55] The Trade Act of 1974 subsequently created the Office of the U.S. Trade Representative.[56] President Kennedy put the agency in the Executive Office of the President (EOP)—the administrative body that houses the White House Office, the National Security Council, and the Office of Management and Budget, among other small agencies.[57] Congress tasked USTR with having "primary responsibility for developing, and for coordinating the implementation of, United States international trade policy."[58]

Although USTR's original role was modest, USTR has relied on the terms of its organic statutes and its position in the EOP to assert greater authority over time. In particular, USTR has asserted that its "primary responsibility" for U.S. trade policy provides some authority for the negotiation of trade agreements without congressional approval.[59] Occupying space in the EOP, for its part, keeps USTR close to the President and his closest advisors. It also sometimes serves as the basis for USTR's claim to exceptional administrative law treatment, as described further below.

Second, the 1977 IEEPA allowed the President to declare "a national emergency" to deal with an "unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States."[60] Under IEEPA, the President may "investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of . . . any property in which any foreign country or a national thereof has

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55 *See* Trade Expansion Act of 1962, Pub. L. No. 87-794, §§ 241–42, 76 Stat. 872 (1962).

56 *See* Trade Act of 1974, Pub. L. No. 93-618, § 141, 88 Stat. 1978, 1999 (1975) (codified as amended at 19 U.S.C. § 2171).

57 *History of the United States Trade Representative*, OFF. OF THE U.S. TRADE REPRESENTATIVE, https://ustr.gov/about-us/history [http://perma.cc/9MKJ-CMZP] (detailing the agency's history) (last visited Apr. 19, 2024).

58 19 U.S.C. § 2171(c)(1)(A).

59 *See* Kathleen Claussen & Timothy Meyer, *The President's (and USTR's) Trade Agreement Authority: From Fisheries to IPEF*, LAWFARE (July 18, 2022, 9:01 AM), https://www.lawfaremedia.org/article/presidents-and-ustrs-trade-agreement-authority-fisheries-ipef [http://perma.cc/GQP4-NEAR].

60 International Emergency Economic Powers Act, Pub. L. No. 95-223, §202(a), 91 Stat. 1625.

any interest; by any person . . . subject to the jurisdiction of the United States."[61]

As with the TWEA before it, the IEEPA authorizes extensive presidential action in regulating foreign commerce without further congressional approval. The very title of the statute emphasizes the possibility of economic emergencies and offers a possible legal justification for far-reaching executive action on foreign commerce. The IEEPA has an even lower threshold to executive intervention than the 1962 and 1974 Trade Acts, which allowed the executive branch to impose tariffs only following the requisite agency findings. It also permits the President to do more than simply impose or raise tariffs. Presidents have invoked this authority in a wide range of circumstances since its enactment.[62]

Third, the trade lawmaking activities of the President and the trade agencies under him are often not subject to the traditional administration law disciplines. The precise situation varies depending on the agency or the activity, but often there is limited notice and comment, limited judicial review, and limited checks for arbitrary or capricious decision-making.[63]

When advantageous, the foreign commerce bureaucracy has sought shelter in the broad deference that courts have afforded administrative agencies in the twentieth century. It thus successfully beat back non-delegation challenges to some of its core statutes,[64] relied on *Chevron* deference to uphold stressed readings of foreign trade statutes,[65] and generally benefitted from having challenges to most of its actions reviewed by the Court of International Trade, an Article III court that operates primarily as an administrative law court.[66] At the same time,

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61 *Id.* §203(a)(1)(B).

62 CHRISTOPHER A. CASEY, DIANNE E. RENNACK & JENNIFER K. ELSEA, CONG. RSCH. SERV., R45618, THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT: ORIGINS, EVOLUTION, AND USE 15-23 (2024).

63 *See, e.g.*, Trade Expansion Act of 1962, Pub. L. No. 87-794, § 232, 76 Stat. 872, 877 (1962).

64 Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 569 (1976) (rejecting a nondelegation challenge to section 232 of the Trade Expansion Act of 1962); Am. Inst. Int'l Steel, Inc. v. United States, 806 F. App'x 982, 990-91 (Fed. Cir. 2020), *cert. denied*, 141 S. Ct. 133 (2020) (same).

65 *See, e.g.*, Wheatland Tube Co. v. United States, 495 F.3d 1355, 1359-64 (2007) (deferring under *Chevron* to the Commerce Department's determination that the phrase "United States import duties" in the Tariff Act of 1930 does not refer to all duties imposed on imports into the United States); *Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, 63 F.4th 25, 36-37 (Fed. Cir. 2023) (interpreting the statute so as to make it unnecessary to apply *Chevron*). *See generally* Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649 (2000) (discussing this concept more broadly).

66 *See* Customs Courts Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727 (codified as amended in scattered section of 19 U.S.C.) (stipulating provisions in relation to the Court of International Trade).

though, the foreign trade bureaucracy also invoked foreign affairs exceptions to administrative law disciplines that apply to most other agencies engaged in aspects of economic policymaking. Most notably, USTR has argued that most of its decision-making processes, such as decisions regarding what kinds of tariffs to impose on Chinese products during the Trump administration, fall within the foreign affairs exception of the Administrative Procedure Act (APA).[67] The normal limits on statutory delegations to administrative agencies have thus not counterbalanced the policy freedom that accompanies delegation to administrative agencies as may be expected.

The next Part documents how the executive branch has relied on the trends we identified in this Part—the rise of an economic security paradigm within the President's delegated authorities and the emergence of a trade administrative state that claims exception from the ordinary administrative rules governing economic regulation—to try (often successfully) to insulate its foreign commerce policies from judicial review.

II. CONSTITUTIONALIZING PRESIDENTIAL CONTROL OF FOREIGN ECONOMIC AFFAIRS

The President's constitutional powers over foreign affairs often overlap with Congress's constitutional power over foreign commerce. Most obviously, the President's power to negotiate treaties includes those related to commerce. This concurrent authority raises the possibility of a conflict: the President will claim that his actions are constitutional under his foreign affairs powers, notwithstanding any statute to the contrary, while Congress or its advocates will claim that a statute regulating foreign commerce precludes the executive's conduct. Historically, Congress has won these arguments. For example, in *Little v. Barreme*, a Founding Era decision, the Supreme Court found a U.S. Navy captain liable for seizing a foreign commercial vessel contrary to a congressional statute, despite the fact that the captain acted consistently with military orders.[68]

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67 *See In re* Section 301 Cases, 570 F. Supp. 3d 1306, 1335 (Ct. Int'l Trade 2022) ("The Government contends that the promulgation of List 3 and List 4A falls under the foreign affairs exception to the APA because they 'were part of the negotiation of an international trade agreement' and 'relate[d] to the President's overall political agenda concerning relations with another country.'").

68 Little v. Barreme, 6 U.S. (2 Cranch) 170, 178-79 (1804); *see also* J. Gregory Sindak, *The Quasi-War Cases—And Their Relevance to Whether "Letters of Marque and Reprisal" Constrain Presidential War Powers*, 28 HARV. J.L. & PUB. POL'Y 465, 493 (2005) (arguing that Congress's

In recent years, however, views have begun to change. "Economic security" has become an organizing concept for U.S. foreign commerce policy and recent administrations have invoked security-premised tariff authorities. As a result, the boundary between Congress's authority over foreign commerce and the President's authority over foreign affairs and national security has become blurry. The executive branch has drawn on this blurry policy space to argue that statutory limits on its foreign commercial authority do not bind it.[69] Instead, it has buttressed its delegated authority with claims of independent constitutional authority over commercial matters like tariffs.[70] And unlike Founding Era courts, today's judiciary has often accepted these claims.[71] We divide this Part into two Sections. Section A discusses the government's claims, while Section B discusses how the courts have addressed these claims.

This structure may seem a bit unusual. It is common to address claims raised in litigation alongside the courts' resolution of those claims rather than to treat them separately, or even to ignore the litigants' positions entirely. We believe, however, that it is important to identify the specific claims that the executive makes, even when the courts do not embrace the strongest version of the executive's arguments, for three reasons. First, government lawyers are under an obligation to act in the public interest, which should include respect for the Constitution's allocation of power over foreign commerce. In other words, the executive is not a private litigant. It should not automatically take the maximalist position with regard to its own powers, especially when its claims diminish the role of Congress. Second, while courts may not always accept the strongest version of the executive's argument, they may implicitly embrace the logic that underlies the executive's constitutional claims of preeminence in foreign affairs, even when analyzing commercial statutes. Foreign affairs exceptionalism in the courts, in other words, need not always rest on exceptional constitutional claims. Exceptional modes of statutory interpretation can achieve the same end. Finally, the executive often acts without judicial review in the foreign affairs context. The executive's position in litigation is thus telling as to how we might expect it to act when the threat of judicial review is absent.

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statutory language prevailed over the military's orders in *Little v. Barreme* because the case concerned foreign commerce).

69 *See infra* Part II.A.

70 *Id.*

71 *See infra* Part II.B.

A. *Executive Branch Claims*

On the 2024 campaign trail, former President Donald Trump has promised to impose 10 percent tariffs on all imports into the United States and 60 percent tariffs on imports from China—a significant tax increase for U.S. consumers.[72] Similarly, when he first came into office in 2017, President Trump brought with him a belief that new tariffs on foreign imports, especially those from China, held the key to revitalizing U.S. manufacturing and industry.[73] His administration imposed sweeping tariffs on Chinese imports,[74] levied 25 percent and 10 percent tariffs on steel and aluminum imports no matter their origin,[75] and prohibited transactions with popular apps like TikTok and WeChat.[76] He also threatened a range of other actions, including tariffs on products from Mexico if Mexico did not stem illegal immigration into the United States as well as a U.S. withdrawal from the North American Free Trade Agreement.[77]

These policies drew a number of legal challenges, some of which rested on constitutional arguments and some of which rested on restrictions contained in the statutes allegedly authorizing the actions.

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72 Yuka Hayashi, *Trump Is Primed for a Trade War in a Second Term, Calling for 'Eye-for-Eye' Tariffs*, WALL ST. J. (Dec. 26, 2023, 9:00 AM), https://www.wsj.com/politics/elections/trump-is-primed-for-a-trade-war-in-a-second-term-calling-for-eye-for-eye-tariffs-aff5bec5 [http://perma.cc/SHR9-GH7Q]; Rebecca Picciotto, *Trump Floats 'More than' 60% Tariffs on Chinese Imports*, CNBC (Feb. 4, 2024, 1:49 PM), https://www.cnbc.com/2024/02/04/trump-floats-more-than-60percent-tariffs-on-chinese-imports.html [http://perma.cc/9NU2-8KXV] (reporting on these announcements).

73 *See, e.g.*, Jeff Stein, *Trump Vows Massive New Tariffs if Elected, Risking Global Economic War*, WASH. POST (Aug. 22, 2023, 2:00 PM), https://www.washingtonpost.com/business/2023/08/22/trump-trade-tariffs/ [http://perma.cc/JG82-T3RW] (recounting the history of Trump's trade policy during his first term).

74 Notice of Action and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 28710 (June 20, 2018) (inviting public comment on "[t]he imposition of an additional ad valorem duty of 25% on products from China classified in a list of 1,333 tariff[s]").

75 *See, e.g.*, Proclamation No. 9705, 83 Fed. Reg. 11625 (Mar. 8, 2018) ("I have decided to adjust the imports of steel articles by imposing a 25 percent ad valorem tariff on steel articles . . . imported from all countries except Canada and Mexico.").

76 Exec. Order No. 13,942, 85 Fed. Reg. 48637 (Aug. 11, 2020) (TikTok); Exec. Order No. 13,943, 85 Fed. Reg. 48641 (Aug. 11, 2020) (WeChat).

77 Meg Wagner & Brian Ries, *Trump Threatens Tariffs on Mexico over Immigration*, CNN (May 31, 2019, 6:25 PM), https://www.cnn.com/politics/live-news/trump-mexico-tariffs-immigration-2019/h_309934bbdeb473dcd2efad45b05eb01d [http://perma.cc/X5FS-9D94]; Glenn Thrush, *Trump Says He Plans to Withdraw from NAFTA*, N.Y. TIMES (Dec. 2, 2018), https://www.nytimes.com/2018/12/02/us/politics/trump-withdraw-nafta.html [http://perma.cc/6GCW-P796] (reporting on such threats).

Below, we consider how the courts dealt with these challenges. Here, though, we describe some of the executive branch's more notable claims of authority.

The first major challenge to these actions came in *American Institute for International Steel v. United States*. In that case, the plaintiffs challenged President Trump's imposition of tariffs on steel and aluminum on the grounds that the statute on which President Trump relied, section 232 of the Trade Expansion Act of 1962, was an unconstitutionally broad delegation of authority.[78] Section 232 allows the President to take action, such as imposing tariffs, on goods that are being imported "in such quantities or under such circumstances as to threaten to impair the national security."[79] There is no limit in the statute as to what types of tariffs or quotas the President may impose.

In defending that lawsuit, the Justice Department argued that the Supreme Court had already held that section 232 does not violate the nondelegation doctrine and that, in any event, section 232 contained an "intelligible principle" (the standard for a constitutional delegation).[80] The government went a step further, however, arguing that "[t]he President's coexistent constitutional foreign affairs and national security responsibilities compel the conclusion that Congress did not enact an unconstitutional statute by adding its Article I authority to the President's independent powers."[81] Claims such as this—that a statute supplemented the President's independent powers—are common for a range of foreign affairs issues, especially those that implicate armed conflict or the possibility thereof. The Constitution divides authority over the military's use of force between the President and Congress,[82] so courts often resolve challenges to that type of presidential action in part by recognizing that in the context of war powers and security more generally, the President acts with both his own constitutional authorities as well as any statutory authority Congress has delegated.[83]

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78 Am. Inst. Int'l Steel, Inc. v. United States, 806 F. App'x 982, 983-86 (Fed. Cir. 2020). In full disclosure, one of us (Meyer), represented the plaintiffs in this case.

79 19 U.S.C. § 1862.

80 Defendants' Motion for Judgement on the Pleadings and Opposition to Plaintiffs' Motion for Summary Judgment at 22-27, Am. Inst. Int'l Steel, Inc. v. United States, 376 F. Supp. 3d 1335 (Ct. Int'l Trade 2018) (No. 1-18-cv-00152).

81 *Id.* at 28.

82 *Cf.* U.S. CONST. art. I, § 8, cl. 15-16; U.S. CONST. art. II, § 2, cl. 1.

83 This framework was famously developed by Justice Jackson in his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*. 343 U.S. 579, 634 (1952) (Jackson, J., concurring). That decision struck down President Truman's seizure of steel mills during a labor dispute. While President Truman argued that the work stoppage endangered the war effort in Korea, the Court held that the President's constitutional authority over the war did not extend to a domestic

But in the context of a case about tariffs, this claim is extraordinary.[84] The text of the Constitution expressly allocates the power to tax, as well as the power to regulate foreign commerce, to Congress.[85] At the time of the Founding, there was no income tax, and most federal taxes were import duties. There is thus little question that the foreign affairs aspect of levying tariffs was not relevant to the constitutional allocation of authority between the President and Congress. Any power the President might have over tariffs was purely delegated. That the statute invites the President to evaluate a threat to national security as part of that delegation does not open the door to his constitutional authority; rather, it draws on his expertise. Further, the idea that statutory interpretation—which is, as the Supreme Court has reminded us, the crux of nondelegation analysis[86]—would be different because the President has constitutional authority over other kinds of foreign affairs issues represents a significant effort to expand extra-textual presidential foreign affairs powers into areas reserved to Congress.[87]

The government's position in *American Institute for International Steel* is not a one-off. Section 232 requires the President to determine what action to take within 90 days after receiving a report from the Secretary of Commerce recommending action, and to implement the action 15 days thereafter.[88] President Trump adhered to this deadline in imposing the tariffs on steel and aluminum, but months after that deadline had passed, he decided to impose additional tariffs on imports of steel and aluminum from Turkey.[89] In *Transpacific Steel LLC v. United States*, the plaintiffs argued, inter alia, that the additional tariffs were unlawful because

labor dispute and Congress has not granted the President any statutory authority. *See also* Dames & Moore v. Regan, 453 U.S. 654, 686 (1981) (applying *Youngstown* to uphold the President's suspension of claims in U.S. courts against Iran as part of an agreement to release U.S. hostages in Iran).

84 Indeed, in a different context, the Supreme Court had already expressly rejected the idea that the nondelegation doctrine applies differently to the taxing power. *See* Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 222-23 (1989) (rejecting "the application of a different and stricter nondelegation doctrine" in cases involving the taxing power).

85 U.S. CONST. art. I, § 8, cl. 1.

86 Gundy v. United States, 139 S. Ct. 2116, 2119 (2019) ("[A] nondelegation inquiry always begins (and often almost ends) with statutory interpretation.").

87 *Cf. Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., dissenting) (noting that the nondelegation doctrine only applies in a more relaxed fashion when "the discretion is to be exercised over matters already within the scope of executive power.").

88 19 U.S.C. § 1862(c).

89 Proclamation No. 9772, 158 Fed. Reg. 40429 (Aug. 15, 2018).

President Trump had imposed them after the statutory deadline for presidential action.[90] The Court of International Trade agreed.[91]

On appeal to the Federal Circuit, the government argued that, notwithstanding the statutory deadline for presidential action, the President possesses an inherent authority to modify his actions.[92] The government argued that "[t]he President's authority to take continuing action is at its strongest when the President is exercising powers that are quintessentially executive in nature" such as "foreign policy and national security."[93] It bears repeating that the President was exercising the power to impose tariffs (e.g. the power to tax), a legislative power that the Constitution gives to Congress.

In several cases—*TikTok v. Trump* and *In re Section 301 Cases*, to name two—the government has argued that agency action taken pursuant to delegated authority over foreign commerce is not subject to ordinary analysis under the APA.[94] The APA, to be sure, contains an exception for military matters and foreign affairs.[95] But foreign commerce, despite its name, frequently involves regulation of commercial products, services, or acts *in the United States* that happen to originate overseas. Tariffs, for instance, are taxes on imports assessed within the United States—taxes, moreover, that are effectively paid by U.S. consumers. That such commercial regulations should be shielded from transparency in the same manner as military matters is a striking effort to further securitize foreign commerce.

Finally, the executive branch has also resisted efforts to subject the negotiation and conclusion of trade agreements to congressional supervision and control. In recent decades, the executive branch has

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90 466 F. Supp. 3d 1246, 1251-52 (Ct. Int'l Trade 2020).

91 *Id.*

92 Corrected Brief of Defendants-Appellants at 25-27, Transpacific Steel LLC v. United States, 4 F.4th 1306 (Fed. Cir. 2021) (No. 2020-2157).

93 *Id.* at 26.

94 Brief for Appellants at 25, TikTok, Inc. v. Trump, No. 20-5381 (D.C. Cir. filed Jan. 15, 2021), 2021 WL 147108. On appeal to the D.C. Circuit in *TikTok*, the government argued that requiring the evaluation of alternatives is unrealistic given the President's need to respond quickly to emergencies. *Id.* at 51-53. *See also In re* Section 301 Cases, 570 F. Supp. 3d 1306 (Ct. Int'l Trade 2022) (rejecting the government's arguments that USTR's promulgation of section 301 tariffs is unreviewable under the APA as either presidential action or as falling within the APA's foreign affairs exception); Universal Steel Prods., Inc. v. United States, 495 F. Supp. 3d 1336, 1344 (Ct. Int'l Trade 2021) (citing the government's argument that the Secretary of Commerce's national security determination under section 232 is not reviewable under the APA).

95 5 U.S.C. §§ 552(b)(1)(A), 553(a)(1).

negotiated a large number of "trade executive agreements" (TEAs).[96] As one of us has noted, many of these TEAs lack any obvious statutory authority—a necessity given the President's lack of any constitutional authority to enter into a sole executive agreement governing trade.[97] When challenged, USTR has justified its conclusion of these agreements in part by again drawing an analogy to areas of foreign affairs where the executive can enter into agreements without congressional consent, such as with respect to certain military matters.[98] More recently, the United States concluded what it intends to be the first of several trade agreements with Taiwan.[99] Congress passed legislation authorizing the agreement's entry into force, but in so doing, Congress also imposed a series of restrictions on future negotiations with Taiwan.[100] Specifically, the legislation requires USTR to give any proposed agreement with Congress for comment before tabling it with Taiwan, requires USTR to give Congress any proposals from Taiwan, and makes clear that legislation is necessary for any future agreement to enter into force even if the agreement does not require any changes to U.S. law.[101] In signing the bill, President Biden asserted that these requirements "raise constitutional concerns" and would be ignored where they "would impermissibly infringe upon [the President's] constitutional authority to negotiate with a foreign partner."[102]

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96 *See* Kathleen Claussen, *Trade's Mini-Deals*, 62 VA. J. INT'L L. 315, 320 (2022) (introducing and describing such agreements).

97 *Id.* at 326 ("Congress has granted permission on occasion for the president to enter into some TEAs within narrow parameters.").

98 *See* Kathleen Claussen & Timothy Meyer, *The President's (and USTR's) Trade Agreement Authority: From Fisheries to IPEF*, LAWFARE (July 18, 2022, 9:01 AM), https://www.lawfaremedia.org/article/presidents-and-ustrs-trade-agreement-authority-fisheries-ipef [http://perma.cc/GQP4-NEAR] ("The third and most common response [to the question of when the executive can enter into an agreement without congressional consent] is that Congress has to approve only those agreements that change U.S. law. Under this view, Congress does not need to consent to agreements that do not require a change to federal statutes.").

99 Agreement Between the American Institute in Taiwan and the Taipei Economic and Cultural Representative Office in the United States Regarding Trade Between the United States of America and Taiwan, Taiwan-U.S., May 18, 2023, https://ustr.gov/sites/default/files/2023-05/AIT-TECRO%20Trade%20Agreement%20May%202023.pdf [http://perma.cc/8LHJ-X7Q3].

100 United States-Taiwan Initiative on 21st-Century Trade First Agreement Implementation Act, Pub. L. No 118-13, §§ 3(b), (e), 137 Stat. 63. Paradoxically, shared views on the security threat posed by China buttressed bipartisan support for a bill to rein in executive overreach in the context of a liberalizing trade agreement with Taiwan.

101 *Id.*

102 *See* Press Release, President Joe Biden, Statement from President Joe Biden on H.R. 4004, the United States-Taiwan Initiative on 21st-Century Trade First Agreement Implementation Act (Aug. 7, 2023), https://www.whitehouse.gov/briefing-room/statements-

B. *Judicial Acquiescence to Executive Dominance*

While courts are free to reject the government's litigating position on the subject of the foreign commerce power, circuit courts have largely acquiesced in the executive branch's efforts to securitize, and thus constitutionalize, foreign commerce.[103]

The clearest example is the Federal Circuit's opinion in *Transpacific Steel*.[104] While the Federal Circuit did not explicitly embrace the government's argument that a statute regulating foreign commerce should be interpreted in light of the President's inherent constitutional authority over foreign affairs, it might as well have. As noted above, section 232 imposes deadlines. After receiving a finding from the Commerce Secretary that imports threaten national security, the President has 90 days to determine whether he concurs and, if he does, what action to take.[105] Section 232 then provides that "the President shall implement that action no later than the date that is 15 days" after the President formally concurs with the Secretary's determination.[106] Because President Trump imposed additional duties on Turkish imports well after the deadline, a unanimous three-judge panel of the Court of International Trade (CIT) determined that he acted without authority.[107] The CIT placed particular importance on the fact that in 1988, Congress had amended section 232 to impose the time limits on presidential action.[108] Congress's concern was that, in the absence of time limits, Presidents had endlessly modified actions often taken years in the past that lacked any current procedures requiring their justification.[109]

In a 2–1 decision, the Federal Circuit disagreed.[110] The majority reasoned that the command to act within 15 days was really two

releases/2023/08/07/statement-from-president-joe-biden-on-h-r-4004-the-united-states-taiwan-initiative-on-21st-century-trade-first-agreement-implementation-act/ [http://perma.cc/59S4-8M75].

103 *See, e.g.*, Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States, 63 F.4th 25 (Fed. Cir. 2023) (upholding the President's authority to determine how national security duties imposed under the 1962 Trade Expansion Act should be treated under the Tariff Act of 1930); Transpacific Steel LLC v. United States, 4 F.4th 1306, 1330-33 (Fed. Cir. 2021) (holding that the executive branch may impose tariffs without regard to time limits for executive action imposed by Congress).

104 *Transpacific Steel LLC*, 4 F.4th at 1310.

105 19 U.S.C. § 1862(c).

106 *Id.*

107 Transpacific Steel LLC v. United States, 466 F. Supp. 3d 1246 (Ct. Int'l Trade 2020).

108 *Id.* at 1249.

109 In that sense, the amendments to section 232 are similar to amendments made to the National Emergencies Act a decade earlier that only allow the President to declare an emergency for one year.

110 *Transpacific Steel LLC*, 4 F.4th at 1336.

commands, a command to act and a command to do so within 15 days.[111] The fact that the President ignored the second command did not mean that he lacked the power to comply with the first command.[112] Moreover, the Federal Circuit held that the term "action" in section 232 could refer to a "plan of action or course of action," rather than individual actions.[113] The court cited the President's pre-1988 practice of modifying his actions as evidence that Congress intended the President to possess the same authority even after the time limits were imposed in 1988. Thus, according to the Federal Circuit, once the Commerce Secretary finds that an import threatens national security, the President possesses an indefinite power to regulate that article so long as he announces general principles for regulation within the initial statutory period for presidential action.[114] The court rejected the argument that this reading of the statute violated the nondelegation doctrine in three sentences.[115]

Judge Reyna disagreed with this statutory interpretation, largely for the same reasons given by the Court of International Trade in its decision striking down the President's action.[116] More importantly, though, Judge Reyna highlighted the constitutional dimensions of the majority's statutory reasoning, writing: "I fear that the majority effectively accomplishes what not even Congress can legitimately do, reassign to the President its Constitutionally vested power over the Tariff."[117]

In its decision in *American Institute for International Steel*, the Federal Circuit was more direct, albeit in dicta, about constitutionalizing presidential control over foreign commerce. There, the court rejected the plaintiffs' nondelegation challenge on precedential grounds, arguing that the case could not be sufficiently distinguished from a 1976 Supreme Court case.[118] Anticipating the Supreme Court's possible revival of the

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111 *Id.* at 1320.

112 *See id.* ("A violation of the temporal obligation imposed by the second directive does not necessarily negate the primary obligation imposed by—let alone the grant of authority implicit in—the first directive.").

113 *Id.* at 1321.

114 The court said that some untimely actions might be beyond the President's authority but offered no clues as to how to identify those actions. *Id.* at 1323.

115 *Id.* at 1332-33 ("For the foregoing reasons, we reverse the Trade Court's determination that Proclamation 9772 violated § 1862.").

116 As a result of the Court of International Trade sitting in a special three-judge panel, six judges considered whether the President could act outside of section 232's time limits. Four said no and two said yes, but the two prevailed by virtue of being on the appeals court. *See Transpacific Steel LLC*, 4 F.4th 1306, *Transpacific Steel LLC*, 466 F. Supp. 3d 1246.

117 *Transpacific Steel LLC*, 4 F.4th at 1342 (Reyna, J., dissenting).

118 In *Fed. Energy Admin. v. Algonquin SNG, Inc.*, the Supreme Court rejected a claim that section 232 did not grant the President authority to impose license fees. 426 U.S. 548 (1976).

nondelegation doctrine, however, the Federal Circuit mused about the issues it would wish to consider in a future nondelegation challenge:

> Such issues might include the significance of text, history, and precedent bearing on circumstances in which Congress, exercising its constitutional power, strengthens authority within the President's 'independent' constitutional power. The Supreme Court has recognized that the President has some independent constitutional authority over national security and dealings with foreign nations, including in the form of executive agreements.[119]

That the President has independent constitutional authority over "national security" and in "dealings with foreign nations" that bear on the regulation of foreign commerce is, at best, not obvious. With respect to delegated authority, section 232 empowers the President to regulate imports for reasons of "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 . . . ."[120] The power delegated is thus applicable entirely within the territory of the United States, involves a commercial act (importing products), and may be done for purely economic reasons. The only connection to "national security" is that the statute uses the term "national security" to define this set of considerations. But they can hardly be said to be "national security" considerations in any constitutional sense.[121] They are simply matters of economic regulation. The Federal Circuit's dicta thus fits comfortably into a line of cases in which courts have suggested that the veneer of national security or foreign affairs serves to suspend the operation of the normal constitutional structure.[122]

In so doing, however, the Supreme Court rejected the idea that nondelegation concerns required construing the statute narrowly—a finding that the Federal Circuit interpreted as foreclosing a facial nondelegation challenge, despite the fact that the Supreme Court had not ruled on such a challenge in *Algonquin*. *Id.* at 558.

119 Am. Inst. Int'l Steel, Inc. v. United States, 806 F. App'x 982, 990 (Fed. Cir. 2020) (internal citations omitted).

120 19 U.S.C. § 1862(d).

121 Indeed, unlike tariffs and foreign commerce, which the Constitution explicitly gives Congress authority to regulate, the Constitution nowhere refers to "national security."

122 *See, e.g.*, United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315 (1936) (holding that normal domestic constitutional rules limiting congressional delegations do not apply to foreign affairs); Zschernig v. Miller, 389 U.S. 429, 436-38 (1968) (holding that a state inheritance law that did not conflict with any treaty or statute was nonetheless unconstitutional as intruding into foreign affairs); *see also* Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1906-11 (2015) (discussing "foreign affairs

The Supreme Court, for its part, has denied review in cases challenging these recent trade policies, allowing the executive branch's claims of mixed constitutional and statutory power to stand.[123] In a globalized economy, foreign commerce and domestic commerce are difficult to disentangle.[124] As a result, these decisions risk turning statutory delegations of the foreign commerce power into quasi-constitutional executive powers over the domestic economy.

Given the courts' unwillingness to course-correct, Congress must do so. We turn to a path forward for Congress in the next Part.

III. EMPOWERING CONGRESS

We conclude by proposing three sets of statutory reforms to ensure that economic security is governed by Congress's will as expressed through statute, rather than by the kind of constitutional and quasi-constitutional executive powers that the executive branch has claimed and to which the courts have too often acquiesced. First, Congress should pass legislation imposing new disciplines on the statutory economic security authorities identified above that the executive branch has used to impose tariffs or other restrictions on foreign commerce (for shorthand, we refer to this authority as "tariff" authority even though it also encompasses other kinds of trade restrictions such as embargoes or quotas). Second, Congress should pass a statute imposing limits on the executive branch's ability to rely on international agreements as a basis for making changes to U.S. law (including the breadth of executive branch action that has legal force) unless Congress has authorized or approved the agreements in question. Third, to address the judicial acquiescence to executive dominance over foreign commerce, Congress should reorganize judicial review of executive branch trade actions by, for example, vesting appellate review of such actions in the D.C. Circuit,

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exceptionalism," the doctrine that normal domestic legal rules are suspended or operate differently when foreign affairs are involved); Aziz Z. Huq, *Against National Security Exceptionalism*, 2009 S. CT. REV. 225 (2009) (discussing a similar concept, here deemed "national security exceptionalism").

123 *See, e.g.*, Am. Inst. Int'l Steel, Inc. v. United States, 141 S. Ct. 133 (2020); Transpacific Steel LLC v. United States, 142 S. Ct. 1414 (2022); Oman Fasteners, LLC v. United States, 144 S. Ct. 561 (2024).

124 *See* Timothy Meyer & Ganesh Sitaraman, *The National Security Consequences of the Major Questions Doctrine*, 122 MICH. L. REV. 55, 82 (2023) (discussing the difficulties in addressing the differences between foreign and domestic affairs); Nicholas R. Parillo, *Nondelegation, Original Meaning, and Foreign Affairs: Congress's Delegation of Power to Lay Embargoes in 1794*, 172 U. PA. L. REV. (forthcoming 2024).

rather than the Federal Circuit, or by allowing direct appeal to the Supreme Court of the judgment of three-judge panels of the CIT.

We acknowledge the challenges Congress would face in passing these proposals, especially in imposing new statutory limits on the executive branch's agreement and tariff authorities. Although members of Congress want to regain control over foreign commerce, they also support (or at least do not wish to publicly oppose) many of the uses to which the executive branch has put its broad authority, such as an aggressive stance toward China or protecting American workers. The possibility of a presidential veto of any bill either raises the threshold for passage or requires crafting a set of limits to which a sitting President is willing to agree. For these reasons, a variety of reform bills introduced during the Trump administration languished.[125]

But these obstacles can be overcome. While we offer these proposals in isolation, their passage would likely be part of a larger bill on trade that would offer the executive branch the powers it wants, such as approval of existing trade agreements, trade promotion authority, increased funding for trade adjustment assistance, or even policies unrelated to international trade. Reform of the nation's trade authorities is commonly accomplished through just such omnibus trade acts.[126]

Perhaps ironically, economic security could provide the bridge to passage of such legislation. Congress, after all, wants to promote the economic security and health of the nation as much as the President does. The Omnibus Trade and Competitiveness Act of 1988 was prompted by just such concerns.[127] Since the COVID-19 pandemic, Congress has also worked with the Biden Administration to pass a number of package bills

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125 *See* Kathleen Claussen, *Trade War Battles: Congress Reconsiders Its Role*, LAWFARE (Aug. 5, 2018, 11:00 AM), https://www.lawfaremedia.org/article/trade-war-battles-congress-reconsiders-its-role [http://perma.cc/2NVE-5RQW] ("Regardless of which path Congress chooses, the biggest challenge is not opposition from particular members but, rather, the veto that would probably result, raising the threshold for enactment.").

126 *See, e.g.*, Price-Anderson Amendments Act of 1988, Pub. L. No. 100-408, 102 Stat. 1066 (addressing various issues related to trade and competitiveness); Trade Agreement Act of 1979, Pub. L. No. 96-36, 93 Stat. 144 (aiming to foster free and fair international trade by providing the President with the authority to reduce or eliminate barriers to trade through negotiation of trade agreements with foreign countries); Trade Act of 2002, Pub. L. No. 107-210, 116 Stat. 933 (addressing issues of international trade); Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (addressing issues related to international trade such as trade negotiations, trade adjustment assistance, and trade enforcement).

127 *See* Kent Hughes, *American Trade Politics: From the Omnibus Act of 1988 to the Trade Act of 2002*, WILSON CTR. PROJECT ON AM. & THE GLOB. ECON. 2-3 (Nov. 17, 2003), https://www.wilsoncenter.org/sites/default/files/media/documents/event/tradehughes.pdf [http://perma.cc/V6N5-LRJV].

aimed at promoting economic resilience.[128] Put differently, while the executive branch has used economic security as a justification to push back against statutory limits on commercial delegations, it does not own the concept. In practice, reclaiming the foreign commerce power includes asserting Congress's right to promote economic security on its own.

A. *Tariffs*

The President's authority to impose tariffs (or other restrictions on trade) should be subject to at least two procedural requirements: (1) notification to Congress upon the imposition of the restriction and (2) an automatic sunset of the measures—without renewal authority—after a certain period, such as 90 or 180 days. This proposal should not apply to ordinary administrative delegations of authority, such as those to the Secretary of Commerce to impose antidumping and countervailing duties. Those delegations are already subject to a range of administrative procedures and judicial review thereof.[129] Rather, we propose this reform to the extent Congress maintains certain of the relatively unconstrained economic security delegations to executive branch officers, such as section 232,[130] section 301(b),[131] and IEEPA.[132]

The advantages of such a statute are straightforward. The President does not have any constitutional authority to impose tariffs, nor does he have any constitutional authority to impose restrictions on trade in the

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128 *See, e.g.*, Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818 (investing in domestic energy production, promoting green energy, and raising revenue); CHIPS Act of 2022, Pub. L. No. 117-167, 136 Stat. 1366 (boosting the domestic research and manufacturing of semiconductors to strengthen the supply chain); Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (providing $1.2 trillion for infrastructure and transportation repairs and improvements).

129 *An Introduction to U.S. Trade Remedies*, U.S. DEP'T OF COM., INT'L TRADE ADMIN. enforcement.trade.gov/intro/index.html [http://perma.cc/6R77-7HX4] (last visited Apr. 19, 2024).

130 *See infra* Part II.A; Trade Expansion Act of 1962, Pub. L. No. 87-794, § 232, 76 Stat. 872, 877 (1962).

131 Section 301 of the Trade Act of 1974 is divided into "mandatory action[s]," which consist primarily of responding to violations of trade agreements, and "discretionary action[s]," which address acts of foreign countries that are "unreasonable or discriminatory and burden[] or restrict[]" U.S. commerce. The limitation should only apply to the discretionary portions, as those are the actions that lack adequate legal safeguards. Trade Act of 1974, Pub. L. No. 93-618, § 301(b), 88 Stat. 1978.

132 In 2017, Senator Mike Lee introduced a bill that had essentially this structure, and a companion bill was later introduced in the House of Representatives. *See* Global Trade and Accountability Act of 2017, S. 177, 115th Cong. (2017); Global Trade Accountability Act of 2018, H.R. 5281, 115th Cong. (2018). Senator Lee's bill named a variety of additional statutory authorities to which the bill would apply.

face of congressional regulation on the subject.[133] As Part II made clear, the President has used his constitutional authority over foreign affairs to push the limits of broadly-worded delegations and to deflect efforts to get courts to read such delegations narrowly for separation of powers reasons. A clear statutory withdrawal of tariff authority would thus be effective as a means of blunting the President's efforts, in effect, to constitutionalize control of foreign commerce and to wage trade war.[134]

This structure avoids two other problems. The first is the problem created by *INS v. Chadha*, in which the Supreme Court held the legislative veto unconstitutional.[135] As a result, congressional disapproval resolutions are treated as ordinary legislation. Thus, the President can veto the disapproval legislation, depriving it of force unless Congress can override the veto. In effect, requiring disapproval of the President's action requires Congress to muster supermajorities in a situation in which it opposes the President and his likely use of the bully pulpit. The automatic sunset of the President's authority to impose tariffs changes the dynamic entirely. The President must affirmatively seek congressional authorization for tariffs, but that authorization need only be approved by a simple majority of both houses. Adding fast track provisions to legislation to extend the President's tariffs would further ensure that Congress can exercise its constitutional role in a manner consistent with the possibility that the President may need to act quickly.

That ability to act quickly is the second feature of this mechanism. When quick action is necessary, the President remains able to impose any measures otherwise authorized under any of the covered statutes. Commercial matters are considerably less likely to require the speed and secrecy that have often been used to justify executive dominance of (noncommercial) foreign affairs.[136] Indeed, Congress itself has recognized this. Section 232, for example, provides 270 days—nine months—for the Secretary of Commerce to make an initial determination as to whether imports are a threat to national security, hardly suggesting a great deal of

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133 The Neutrality Crisis of 1793–94, for example, suggests that the President might be able to impose outright restrictions on trade with combatants when Congress is in recess, although Congress retains primary authority to regulate such commerce once it reconvenes. *See* Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 327-29 (2001) (analyzing Washington's decision to announce a policy of neutrality while Congress was out of session).

134 *See* Timothy Meyer & Ganesh Sitaraman, *Trade and the Separation of Powers*, 107 CALIF. L. REV. 583, 644-49 (2019) (arguing that Congress has the constitutional power to initiate trade wars but has ceded ground to the executive branch).

135 462 U.S. 919 (1983).

136 Meyer & Sitaraman, *supra* note 134, at 630.

urgency.[137] But, sometimes, swift action may be necessary. For those eventualities, the proposal would permit the President to act quickly. Congress would then have to determine whether to extend the President's actions or let them lapse.

This arrangement also effectively restores the constitutional balance at least arguably reflected in the Founding Era-events around the Neutrality Crisis. Sai Prakash and Michael Ramsey argue that the President had the constitutional authority to announce U.S. policy, but that lawmaking responsibility remained with Congress.[138] Indeed, this understanding of presidential power—that the President should act to preserve U.S. interests as he understands them until such time as Congress can act—is consistent with President Truman's actions at the time of the seizure of the steel mills at issue in *Youngstown*.[139] Our proposal would have Congress empower the President to act in those situations in which the demands of security call for swift action for which the executive branch is best suited, without sacrificing Congress's role.

B. *Trade Agreements*

Although rarely the subject of litigation, trade agreements and their negotiations have increasingly become a flashpoint for tension between the executive branch and Congress. In recent decades, the executive branch has concluded hundreds of commercial agreements—often with significant geopolitical and foreign affairs implications—that were neither authorized nor approved by Congress.[140] Congress should clarify and reform the executive branch's trade agreement authorities by imposing bright-line rules via statute. While the President may enjoy constitutional control over negotiations, Congress is free under Article I, section 8 to dictate the contents of the resulting agreements and their legal force in the United States. We propose a statute that would do just that.

Congress should prohibit the executive branch from relying on any international agreement as the legal basis under which any good or service is imported into the United States, exported from the United States, or regulated while in the United States, unless Congress has either

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137 19 U.S.C. § 1862(b).

138 Indeed, they say that as a legal matter President Washington's Neutrality Proclamation was nonbinding, and that Washington himself understood it this way. Prakash & Ramsey, *supra* note 133, at 297, 327-29, 327 n.415.

139 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 583 (1952).

140 *See* Kathleen Claussen & Timothy Meyer, *The New U.S.-Taiwan Trade Agreement and Its Approval*, LAWFARE (July 5, 2023, 10:30 AM), https://www.lawfaremedia.org/article/the-new-u.s.-taiwan-trade-agreement-and-its-approval [http://perma.cc/CDM4-Q9H4].

explicitly authorized the agreement in advance or approved it after its conclusion. Such a prohibition would include relying on the international agreement directly and as the legal basis for a presidential proclamation, regulation, or modification of any covered rule or schedule.[141]

This proposal has several features. First, it preserves congressional control over the manner in which commercial rules are created, while also maintaining the flexibility associated with the use of executive agreements. Congress would retain the power to authorize the executive branch to bring trade agreements into force without the need to return to Congress for a vote. The proposal merely requires that Congress explicitly authorize the scope of such agreements. The proposal also prevents the executive branch from relying on unapproved or unauthorized trade executive agreements to fill gaps in its delegated authority. Similarly, it prevents chains of trade agreements in which one authorized or approved agreement provides the legal basis for a series of subsequent, unauthorized agreements that implement each other. Instead, each agreement that has any legal effect within the United States must either be explicitly authorized in advance or approved before coming into force, although the approval process can provide an opportunity for Congress to authorize implementing agreements to the extent they wish.

Second, the proposal only applies to agreements that create binding obligations on the United States. As such, it does not implicate nonbinding statements, diplomatic negotiations, or even nonbinding instruments used to coordinate policy among countries. From a domestic law point of view, nonbinding instruments—to the extent that they are given the force of law domestically at all—are given force either through legislation or executive action under other delegated authority. Under this rule, the limits in these other delegations provide a meaningful check on executive overreach, rather than limits on the use of nonbinding instruments. This rule thus puts binding agreements and nonbinding agreements on par with one another. Each can only be implemented domestically to the extent that Congress has so authorized.

Third, the proposal provides bright-line guidance. The executive branch would likely take advantage of vague standards by asserting that they do not apply or otherwise do not constrain the executive branch. A bright-line rule is likely to be both underinclusive, insofar as it would not

141 A complete statutory proposal would include additional provisions designed to prevent the executive branch from circumventing this core prohibition. It could also prohibit the executive branch from entering into agreements that prohibit the United States from changing commercial rules.

capture all actions in which the executive branch might engage that should require congressional approval, and overinclusive, insofar as some executive action that is unobjectionable may be caught up by the rule. This tradeoff, though, is necessary given the executive branch's history of interpreting congressional restraints as narrowly as possible, as well as the reality that Congress will not have nearly as many opportunities to interpret the rule as the executive will.

Fourth, the proposal avoids any possible constitutional objection based on the President's foreign affairs powers. The proposal does not limit the President's ability to negotiate, nor does it even limit the President's ability to enter into agreements (although Congress surely can limit the President's authority to enter into agreements in the context of foreign commerce). Rather, it merely limits the executive branch's ability to implement agreements within the United States—a power that falls within the core of Congress's plenary authority over commerce.

Fifth, advance authorization to enter into agreements should be construed to include the authority to terminate, amend, or modify such agreements. Agreements that are approved by Congress after the fact, though, would not necessarily be subject to modification, amendment, or termination, nor could they provide the legal basis for implementing agreements. Rather, such acts or instruments would be subject to the same rules as any other unauthorized trade agreement; namely, they would have to be submitted for approval before they could have domestic legal effect. Congress could and should, however, routinely include a provision in legislation approving trade agreements that explicitly delimit the scope of authority to amend, modify, or terminate the agreement, as well as to enter into any implementing agreements.

C. *Courts*

As discussed above, a major difficulty Congress confronts in pushing back against the securitization of economic regulation is an unwillingness by the courts to enforce limits in statutory delegations.[142] This unwillingness puts Congress in the position of having to use the legislative process directly if it wishes to overturn executive action with which it disagrees. Even in the best of times, legislatively overturning executive action is burdensome due to the likely need to muster two-thirds of both chambers to override a presidential veto, and political polarization has largely put those kinds of supermajorities out of reach. Reforming the

142 *See supra* Part II.

judicial review process of the foreign commerce statutes would thus go a long way toward allowing Congress a greater say in the regulation of foreign commerce.

One straightforward solution to this problem would be to remove the Federal Circuit's exclusive appellate jurisdiction over most trade cases. Under 28 U.S.C. § 1581, the CIT has exclusive jurisdiction over a wide range of executive trade actions, such as antidumping and countervailing duty cases, cases involving "revenue from imports or tonnage; tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue," and "embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety."[143] The CIT is effectively a specialized district court dealing with cases that arise at the intersection of foreign commerce and administrative law.[144]

The Federal Circuit, in turn, has exclusive jurisdiction over "an appeal from a final decision of the United States Court of International Trade."[145] The Federal Circuit is also a specialized court, but (unfortunately for trade lawyers) a court that primarily specializes in intellectual property matters.[146] In 2018, Judge Timothy Dyk of the Federal Circuit estimated that patent cases alone consumed more than half the court's docket and more than 80 percent of the court's time.[147] The result is something of a mismatch, with expertise on (not to mention the time devoted to) international trade matters lying with the court of first instance rather than the appellate court.

The Federal Circuit's exclusive appellate jurisdiction over most trade matters creates two more problems. First, the fact that the Federal Circuit

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143 28 U.S.C. § 1581(i)(1).

144 28 U.S.C. § 1585 ("The Court of International Trade shall possess all the powers in law and equity of, or as conferred by statute upon, a district court of the United States."); *see* Timothy Meyer, *A New Era at the Court of International Trade: Endemic, Executive Orders, and Enforcement*, 56 VAND. J. TRANSNAT'L L. 983, 984-85 (2023) ("[CIT] is a unique federal court—a specialized Article III court of first instance with exclusive jurisdiction over a set of international trade issues that usually involve agencies of the United States as the defendant."); Aram A. Gavoor, *The Unintended Consequences of International Trade Law Adjudicatory Exceptionalism*, 56 VAND. J. TRANSNAT'L L. 995, 996-98 (2023).

145 28 U.S.C. § 1295(a)(5).

146 *See* 28 U.S.C. §§ 1295(a)(1), (4)(A)–(B) (describing the appellate jurisdiction of the Federal Circuit, which includes appeals from the Patent Trial and Appeal Board, the Trademark Trial and Appeal Board, and civil patent claims); Judge Biographies, FED. CIR., https://cafc.uscourts.gov/home/the-court/judges/judge-biographies/ [http://perma.cc/FZ7B-ME8R] (showing that twelve of the nineteen circuit judges mention patent or intellectual property law experience in their biographies, while only one mentions a specialty in international trade law) (last visited Mar. 1, 2024).

147 Timothy Dyk, *Federal Circuit Jurisdiction: Looking Back and Thinking Forward*, 67 AM. U.L. REV. 971, 973 (2018).

has exclusive jurisdiction over most trade matters means that circuit splits—a key factor that the Supreme Court looks for in deciding which cases to take—are hard to come by.[148] This is not to say that the Supreme Court ignores the Federal Circuit. To the contrary, a 2016 estimate by Judge Dyk found that, as compared to other circuit courts, the Federal Circuit had the highest percentage of its cases reviewed by the Supreme Court.[149] But a disproportionate number of those cases were patent cases.[150] Given that patent cases dominate the Federal Circuit's docket, it is hardly a surprise that they also are more likely to attract Supreme Court review. But the importance of patent cases in the Federal Circuit does have the potential to reinforce the view at the Supreme Court that it is the patent cases that merit review, given the absence of circuit splits as a guide to what other issues might be important.

Second, running review of CIT decisions through the Federal Circuit further siloes the kinds of administrative law and statutory interpretation questions that are the bread and butter of international trade law practice in U.S. courts.[151] The Federal Circuit's historically high reversal rate (albeit one that has moved closer to the median in recent years) also suggests that the Federal Circuit itself may be out of step with its sister circuits, further exacerbating the effect of this siloing.[152] Two layers of review in specialized courts with exclusive jurisdiction discourages lawyers from framing overarching administrative law and statutory interpretation questions in ways that relate to trends at the Supreme Court and the generalist circuit courts.[153]

Indeed, the siloing effect may be worse than is apparent just from looking at the circuit court level. Even within the Federal Circuit, recent trade cases involving separation of powers concerns—specifically those involving section 232—have been resolved by the same two or three judges. Judge Richard Taranto wrote the opinion for the Federal Circuit in

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148 Timothy Dyk, *Thoughts on the Relationship Between the Supreme Court and the Federal Circuit*, 16 CHI.-KENT J. INTELL. PROP. 67, 75 (2016) ("Very few of the Federal Circuit cases reviewed by the Supreme Court involve circuit splits. By my estimation, only one over the last decade.").

149 *Id.* at 68 ("[T]he Supreme Court was significantly more likely to review cases from our court and the D.C. Circuit than from any of the other circuits.").

150 *Id.* at 67.

151 *See* Gavoor, *supra* note 144, at 996-98 (2023) (discussing the costs of specialization, including creating a growing divide between CIT precedent and other streams of law).

152 *See* Dyk, *supra* note 148, at 71-72 ("Over the last ten terms, [the Federal Circuit's] reversal rate has averaged around 70%, just slightly above the circuit median of 66.7%.").

153 *See id.* at 76-77 (explaining that a "significant proportion" of the Federal Circuit cases reviewed by the Supreme Court "involve reconciling [Federal Circuit] jurisprudence with jurisprudence in other areas").

American Institute for International Steel,[154] *Transpacific Steel*,[155] *PrimeSource Building Products, Inc. v. United States*,[156] and *Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*.[157] In each case, Judge Taranto was joined by either or both of Judges Kara Stoll and Raymond Chen. Significantly, although the cases all involved section 232, they dealt with different issues, suggesting little need to funnel the cases to the same set of judges.

Given that international trade law cases in federal court are primarily statutory interpretation and administrative law cases, it would make more sense to assign jurisdiction to the D.C. Circuit. As the premier administrative law circuit in the country, running appeals through the D.C. Circuit would force the bar and the CIT to approach these administrative law cases in the same manner as other administrative law cases. It would thus reduce the siloing effect. Increasing Supreme Court scrutiny of trade cases would also be desirable and would be more likely if petitions for certiorari came from the D.C. Circuit.[158]

Additionally, or as an alternative, the Supreme Court could treat a circuit court's reversal of a three-judge panel of the CIT as equivalent to a circuit split for purposes of considering whether to grant certiorari. The CIT is the only federal court specializing in international trade matters, and thus presumptively has greater subject matter expertise than the circuit court (whether the Federal Circuit or the D.C. Circuit). Moreover, the CIT's organic statute allows it to sit in three-judge panels to address constitutional challenges to international trade statutes or executive action, as well as suits with "broad or significant implications in the administration or interpretation of the customs laws."[159] A disagreement between a CIT panel and a circuit court panel over the application of the nation's trade laws should thus send the same kind of signal to the Supreme Court that a division among circuits sends.[160]

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154 806 Fed. App'x 982 (Fed. Cir. 2020), *cert. denied*, 141 S. Ct. 133 (2020).

155 4 F.4th 1306 (Fed. Cir. 2021), *cert. denied*, 142 S. Ct. 1414 (2022).

156 59 F.4th 1255 (Fed. Cir. 2023), *cert. denied*, 144 S. Ct. 345 (2023).

157 63 F.4th 25 (Fed. Cir. 2023). In each case, Judge Karen Stoll was on the panel and joined his opinion. The Federal Circuit comprises 12 active judges, in addition to several senior judges. 28 U.S.C. § 44.

158 Eliminating exclusive jurisdiction completely is another option. But eliminating exclusive appellate jurisdiction would likely require eliminating the CIT's exclusive jurisdiction in the first instance. This would come at the cost of specialization and, perhaps more importantly, at the expense of the uniformity of the customs laws.

159 28 U.S.C. § 255.

160 Indeed, in cases like *Transpacific Steel*, it may be that a majority of judges are overruled by a minority, sending an especially strong signal that review is warranted. In that case, two judges on the Federal Circuit reversed a unanimous three-judge CIT panel over a dissent from the third judge on the Federal Circuit panel.

Tinkering with certiorari standards, of course, ultimately leaves the Supreme Court to decide how many trade cases it wants to hear. If Congress wished to mandate the Supreme Court's involvement, it could require that appeals from three-judge panels of the CIT go directly to the Supreme Court, rather than to a circuit court. Federal law already allows parties to directly appeal to the Supreme Court from the judgment of a three-judge district court granting injunctive relief.[161] That statute currently does not apply to the CIT's three-judge panels for a number of reasons.[162] Amending federal law to run such appeals to the Supreme Court, though, would guarantee that separation of powers issues implicated by foreign commerce receive the same attention as other separation of powers issues.

CONCLUSION

Foreign commerce is a legislative area in which executive dominance is both particularly pernicious and highly likely. With respect to the former, the Constitution makes economic regulation, both foreign and domestic, Congress's domain. This is a sensible allocation of authority, given the diverse set of economic interests represented in Congress.[163] The executive branch supremacy that this Article has identified risks limiting the set of economic interests represented in the policymaking process. The overlap between the President's non-commercial national security and foreign affairs powers and Congress's plenary authority over foreign commerce can lead both the executive branch and the courts to blur the boundary—to Congress's and the nation's detriment. The emergence of economic security as an organizing principle has only made that tendency more frequent. But statutory foreign commerce powers, like all statutory powers, remain beholden to Congress. This Article has shown how Congress may begin to re-take control of the country's

161 28 U.S.C. § 1253.

162 First, the CIT is arguably not a "district court" as that term is used in 28 U.S.C. § 1253. Rather, federal law grants the CIT the same powers as district courts. 28 U.S.C. § 1585 ("The Court of International Trade shall possess all the powers in law and equity of, or as conferred by statute upon, a district court of the United States."). Second, 28 U.S.C. § 1253 applies "[e]xcept as otherwise provided by law". However, 28 U.S.C. § 1295 gives the Federal Circuit exclusive jurisdiction over appeals from the CIT, arguably removing the CIT's three-judge panels from the ambit of 28 U.S.C. § 1253. These statutes would need to be amended to allow direct appeal from three-judge panels of the CIT.

163 *See* Meyer & Sitaraman, *supra* note 134, at 591 (arguing that Congress's smaller constituencies and more frequent, direct elections make it better suited to reflect the diverse economic interests of the country).

economic security and, with it, re-establish its power over U.S. foreign commerce.