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Presidential Authority over Trade: Imposing Tariffs and Duties

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Summary

The United States Constitution gives Congress the power to impose and collect taxes, tariffs, duties, and the like, and to regulate international commerce. While the Constitution gives the President authority to negotiate international agreements, it assigns him no specific power over international commerce and trade. Through legislation, however, Congress may delegate some of its power to the President, such as the power to modify tariffs under certain circumstances. Thus, because the President does not possess express constitutional authority to modify tariffs, he must find authority for tariff-related action in statute.

Prior to the early 1930s, Congress itself usually set tariff rates for imported products. Over time, however, Congress increasingly delegated authority to the President to reduce tariffs, subject to statutorily prescribed time periods, periodic review, and renewal. As the focus of international trade negotiations shifted from the imposition of tariffs to other non-tariff barriers to trade, such as antidumping duties, however, Congress was less inclined to authorize the President to implement such measures by presidential proclamation. Instead, Congress provided for legislative implementation of international trade agreements under an expedited procedure, so long as certain criteria were met. Over the past few decades, Congress has continued to enact various provisions governing the negotiation and implementation of trade agreements, but has not delegated to the President a general authority to modify tariff rates.

Congress's delegations of tariff and other trade-related powers to the President through legislation have been worded in various ways. A non-exhaustive list of sample statutory provisions that delegate some authority to the President to take trade-related action shows that most provisions require that the President make some threshold finding or determination before he may take some circumscribed trade-related action to counteract his finding. More recent statutes frequently begin with the word "Whenever" to set out this threshold determination before delineating the specific authority given to the President. These delegations of power are usually accompanied by clearly defined conditions and frequently include time restrictions.

When the President exercises powers over trade delegated to him by Congress, his actions might be challenged in court. These challenges often involve both procedural matters and substantive issues related to the scope of the President's authority under the Constitution and statute. As a threshold matter, a court must determine whether it has jurisdiction to review a challenge to a trade-related presidential proclamation. The jurisdictional statute of the U.S. Court of International Trade has been construed to vest that court with jurisdiction over challenges to trade-related presidential proclamations because the court has limited exclusive jurisdiction over specific matters arising under the Tariff Act of 1930 and possesses all of the equitable powers of a federal district court. As to the merits of such a challenge, a delegation of power by Congress will likely be upheld as constitutional so long as the statute asks the President to carry out the will of Congress as expressed in its statute, rather than to play a law-making role.

Once a court determines it has jurisdiction to review a case and that a delegation of power by Congress was constitutional, it will likely turn to whether the President acted within the scope of his delegated powers as defined by the words of the statute. While a court will probably not review the reasoning behind a President's determination that executive action is warranted, it will likely examine closely whether the selected means of executing the delegated powers bear a reasonable relationship to that determination.

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Introduction

The 2016 U.S. presidential election drew much attention to the country's trade policies[1] as candidates advanced trade proposals intended to improve the economy and the terms of certain trade agreements.[2] These proposals raise questions about the President's authority to act unilaterally in this area, especially his ability to impose tariffs on imported goods from certain countries, and continue to prompt debate post-election.[3] While tariffs fell out of favor in international trade negotiations by the 1970s,[4] the 2016 election cycle brought renewed consideration of the use of tariffs as a means to aid U.S. businesses. An understanding of the constitutional and statutory underpinnings of the tariff-making power, a cognizance of the role of tariffs in U.S. trade law over time, and an examination of the evolution of related trade legislation are necessary to evaluate any future executive actions with regard to U.S. trade policy.

In this vein, this report describes the constitutional framework establishing Congress's tariff powers, as well as the President's authority to act pursuant to specific legislation from Congress. It then provides examples of statutory provisions that delegate tariff powers to the President. Finally, it concludes with an overview of how the President's exercise of his delegated tariff powers may be challenged in the courts.

Constitutional Framework

Article I of the Constitution gives Congress the "Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States,"[5] and "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[6] Thus, Congress is constitutionally authorized to raise revenue through taxes, tariffs, duties, and the like, and to regulate international commerce.[7] As with all of

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[1] *See* Gene E. Godley, Paul Nathanson & Joshua C. Zive, *International Trade Policy: Post-Election Update 2016*, NAT'L L. REV., November 15, 2016, http://www.natlawreview.com/article/international-trade-policy-post-election-update-2016 ("The 2016 elections featured the most focus on U.S. international trade policy since 1992. President-elect Donald Trump placed harsh criticisms of the North American Free Trade Agreement (NAFTA), the Trans-Pacific Partnership (TPP) and China and made international trade the center of his economic agenda.").

[2] *See, e.g.*, Scott Calvert & John W. Miller, *Trump Repeats Threat to Seek 35% Import Tariff for Companies Moving Jobs Overseas*, WASH. POST (December 4, 2016, 11:20 AM), http://www.wsj.com/articles/trump-repeats-threat-to-seek-35-import-tariff-for-companies-moving-jobs-overseas-1480868360; Mahita Gajanan, *Donald Trump Warns of 35% Tariff for Companies That Move Abroad*, FORTUNE (December 4, 2016, 11:11 AM), http://fortune.com/2016/12/04/donald-trump-tariff-company-regulations; Maggie Haberman, *Donald Trump Says He Favors Big Tariffs on Chinese Exports*, N.Y. TIMES: FIRSTDRAFT (January 7, 2016, 11:21 AM), http://www.nytimes.com/politics/first-draft/2016/01/07/donald-trump-says-he-favors-big-tariffs-on-chinese-exports/?_r=0 ("Donald J. Trump said he would favor a 45 percent tariff on Chinese exports to the United States....").

[3] *See, e.g.*, Roger Yu, *Trump's Tariff Tweets. What Can He Really Do?*, USA TODAY (December 6, 2016, 6:48 PM), http://www.usatoday.com/story/money/2016/12/06/trumps-tariff-tweets-what-can-he-really-do/95044162; Sara Hsu, *How Far Can Trump Go on Chinese Trade Policy?*, FORBES (November 14, 2016, 9:40 AM), http://www.forbes.com/sites/sarahsu/2016/11/14/how-far-can-trump-go-on-chinese-trade-policy/#2d2bdc232815.

[4] *See* U.S. Int'l Trade Comm'n, U.S. Trade Policy Since 1934, *in* Pub. 4094, THE ECONOMIC EFFECTS OF SIGNIFICANT U.S. IMPORT RESTRAINTS 60–61, 70–75 (2009); *see also* CRS Report RL33743, *Trade Promotion Authority (TPA) and the Role of Congress in Trade Policy*, by Ian F. Fergusson.

[5] U.S. CONST. art. I, §8, cl. 1.

[6] U.S. CONST. art. I, §8, cl. 3.

[7] *See* United States v. Yoshida Int'l, Inc., 526 F.2d 560, 571 (C.C.P.A. 1975) ("The people of the new United States, in adopting the Constitution, granted the power to 'lay and collect duties' and to 'regulate commerce' to the Congress, not to the Executive." (quoting U.S. CONST. art. I, §8, cls. 1, 3)).

its express constitutional powers, Congress has the accompanying authority to "make all Laws which shall be necessary and proper for carrying into Execution" these powers.[8]

Under Article II of the Constitution, the President has the "Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."[9] The Constitution, however, assigns no specific power over international commerce and trade to the President.[10] In other words, under the Constitution, the President has the authority to negotiate international trade agreements,[11] but Congress has sole authority over the regulation of foreign commerce and the imposition of tariffs. Thus, because the President does not possess express constitutional authority to modify tariffs, he must find authority for tariff-related action in statute.

Delegation of Tariff Powers to the President

Prior to the early 1930s, Congress itself usually set tariff rates for imported products.[12] In 1934, Congress for the first time expressly delegated to the President the authority to reduce tariffs in the Reciprocal Tariff Act.[13] This authority, however, was limited by statutorily prescribed time periods within which the President could exercise such power, and was subject to periodic review and renewal.[14]

From 1934 until 1974, Congress continued to enact legislation delegating some authority to the President to negotiate tariff rates with other countries within pre-approved levels, and to implement agreed-upon tariff rates through proclamation, rather than through congressional legislation.[15] As the focus of international trade negotiations shifted from the imposition of tariffs to other non-tariff barriers to trade, such as antidumping duties, Congress was less inclined to authorize the President to implement these non-tariff measures by presidential proclamation.[16] Instead, in the Trade Act of 1974, Congress provided for legislative implementation of international trade agreements under an expedited legislative procedure, now known as trade

[8] U.S. CONST. art. I, §8, cl. 18.

[9] U.S. CONST. art. II, §2, cl. 2.

[10] *See Yoshida Int'l*, 526 F.2d at 572 ("It is nonetheless clear that no undelegated power to regulate commerce, or to set tariffs, inheres in the Presidency.").

[11] *See* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2086 (2015) ("The President has the sole power to negotiate treaties...." (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) ("Into the field of negotiation the Senate cannot intrude, and Congress itself is powerless to invade it.")).

[12] *See* U.S. Int'l Trade Comm'n, *supra* note 4, at 65 ("Prior to the 1930 act, tariff changes were viewed as entirely the domain of Congress."); *see also* 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...."); Fergusson, *supra* note 4, at 2–3.

[13] *See* U.S. Int'l Trade Comm'n, *supra* note 4, at 65–67; *see also* Reciprocal Tariff Act of 1934, ch. 474, 48 Stat. 943 (codified as amended at 19 U.S.C. §1351(a)) ("[T]he President, whenever he finds as a fact that any existing duties or other import restrictions of the United States or any foreign country are unduly burdening and restricting the foreign trade of the United States ... is authorized from time to time ... [t]o proclaim such modifications of existing duties and other import restrictions, or such additional import restrictions, or such continuance, and for such minimum periods, of existing customs or excise treatment of any article covered by foreign trade agreements, as are required or appropriate to carry out any foreign trade agreement that the President has entered into hereunder.").

[14] Reciprocal Tariff Act of 1934, ch. 474, 48 Stat. 943 (codified as amended at 19 U.S.C. §1351(a)).

[15] *See, e.g.*, Trade Agreements Extension Act of 1948, ch. 678, 62 Stat. 1053; Trade Agreements Extension Act of 1958, P.L. 85-686, 72 Stat. 673; Trade Expansion Act of 1962, P.L. 87-794, 76 Stat. 872.

[16] *See* U.S. Int'l Trade Comm'n, *supra* note 4, at 60–61, 70–75; Shapiro & Brainard, *supra* note 12, at 9; *see also* Fergusson, *supra* note 4, at 2.

promotion authority,[17] so long as certain criteria were met.[18] Over the past few decades, Congress has continued to enact various provisions governing the negotiation and implementation of trade agreements, including free trade agreements, but has not delegated to the President a general authority to modify tariff rates outside of the confines of particular trade agreements or the trade promotion authority framework.[19]

Sample Provisions Delegating Tariff Powers to the President

Congress's delegations of tariff and other international trade-related powers to the President through legislation have been worded in various ways. A non-exhaustive list of sample statutory provisions that delegate some authority to the President to take trade-related action follows.

What can be culled from these examples is that most of the provisions require the President to make some threshold finding or determination before he may take some circumscribed trade-related action to counteract his finding. For example, under the International Emergency Economic Powers Act of 1977, certain importation/exportation powers were given to the President if he first "declares a national emergency ... to deal with an unusual and extraordinary threat."[20] Similarly, in the Trade Expansion Act of 1962, if the Secretary of Commerce determines that "an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security," then the President is authorized to take certain "actions necessary to adjust the imports of such article."[21] More recent statutes frequently begin with the word "Whenever" to set out this threshold determination before delineating the specific authority given to the President. As the following list illustrates, these delegations of power are usually accompanied by clearly defined conditions and frequently include time restrictions.

- **Trading with the Enemy Act of 1917 §5(b)(1)(B):**[22] "During the time of war, 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, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States." This is an example of a fairly broadly worded authority that can be exercised only "[d]uring the time of war."

[17] Trade promotion authority, formerly known as "fast track," establishes procedures for Congress's "consideration of non-tariff agreements" and "call[s] for an up-or-down vote within strict deadlines if the president consulted with Congress during the negotiation of an agreement." Shapiro & Brainard, *supra* note 12, at 9–10.

[18] *See* Trade Act of 1974, P.L. 93-618, §151, 88 Stat. 2001 (codified as amended at 19 U.S.C. §2191); *see also* Fergusson, *supra* note 4, at 2, 8.

[19] *See, e.g.*, Omnibus Trade and Competitiveness Act of 1988, P.L. 100-418, §1206, 102 Stat. 1151 (codified as amended at 19 U.S.C. §3006); *see also* Fergusson, *supra* note 4, at 8.

[20] International Emergency Economic Powers Act of 1977, P.L. 95-223, §203(a)(1)(B), 91 Stat. 1626 (codified as amended at 50 U.S.C. §1702(a)(1)(B)).

[21] Trade Expansion Act of 1962, P.L. 87-794, §232(b)–(c), 76 Stat. 877 (codified as amended at 19 U.S.C. §1862(b)–(c)).

[22] Trading with the Enemy Act of 1917, ch. 106, §5(b)(1)(B), 40 Stat. 415 (codified as amended at 50 U.S.C. §4305(b)(1)(B)).

- **Tariff Act of 1930 §338(a):**[23] "The President when he finds that the public interest will be served shall by proclamation specify and declare new or additional duties as hereinafter provided upon articles wholly or in part the growth or product of, or imported in a vessel of, any foreign country whenever he shall find as a fact that such country—(1) Imposes, directly or indirectly, upon the disposition in or transportation in transit through or reexportation from such country of any article wholly or in part the growth or product of the United States any unreasonable charge, exaction, regulation, or limitation which is not equally enforced upon the like articles of every foreign country; or (2) Discriminates in fact against the commerce of the United States...."
- **Trade Expansion Act of 1962 §232(b)–(c):**[24] If the Secretary of Commerce "finds that an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security," then the President is authorized to take "such other actions as the President deems necessary to adjust the imports of such article so that such imports will not threaten to impair the national security" (subject to certain procedural requirements).
- **Trade Act of 1974 §122:**[25] "Whenever fundamental international payments problems require special import measures to restrict imports—(1) to deal with large and serious United States balance-of-payments deficits, (2) to prevent an imminent and significant depreciation of the dollar in foreign exchange markets, or (3) to cooperate with other countries in correcting an international balance-of-payments disequilibrium, the President shall proclaim, for a period not exceeding 150 days (unless such period is extended by Act of Congress)—(A) a temporary import surcharge, not to exceed 15 percent ad valorem, in the form of duties (in addition to those already imposed, if any) on articles imported into the United States; (B) temporary limitations through the use of quotas on the importation of articles into the United States; or (C) both a temporary import surcharge described in Subparagraph (A) and temporary limitations described in subparagraph (B)." This example clearly expresses a time period restriction ("for a period not exceeding 150 days") and the permissible tariff range ("not to exceed 15 percent ad valorem"). This section also authorizes the President "to proclaim, for a period of 150 days (unless such period is extended by Act of Congress)—(A) a temporary reduction (of not more than 5 percent ad valorem) in the rate of duty on any article; and (B) a temporary increase in the value or quantity of articles which may be imported under any import restriction, or a temporary suspension of any import restriction."
- **Trade Act of 1974 §123(a):**[26] "Whenever—(1) any action taken [that is related to relief from injury caused by import competition, the enforcement of U.S. rights under trade agreements, or the trade relations with countries not receiving nondiscriminatory treatment occur]; or (2) any judicial or administrative tariff reclassification that becomes final after August 23, 1988; increases or imposes

[23] Tariff Act of 1930, ch. 497, §338(a), 46 Stat. 704 (codified at 19 U.S.C. §1338(a)).

[24] Trade Expansion Act of 1962, P.L. 87-794, §232(b)–(c), 76 Stat. 877 (codified as amended at 19 U.S.C. §1862(b)–(c)).

[25] Trade Act of 1974, P.L. 93-618, §122, 88 Stat. 2001 (codified as amended at 19 U.S.C. §2132).

[26] *Id.* §123(a) (codified as amended at 19 U.S.C. §2133(a)).

any duty or other import restriction, the President ... may proclaim such modification or continuance of any existing duty, or such continuance of existing duty-free or excise treatment, as he determines to be required or appropriate to carry out any such agreement."

- **Trade Act of 1974 §301:**[27] Delegates authority to the Executive to modify certain tariff rates when "the rights of the United States under any trade agreement are being denied" or "an act, policy, or practice of a foreign country ... (i) violates, or is inconsistent with, the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or (ii) is unjustifiable and burdens or restricts United States commerce."
- **Trade Act of 1974 §501:**[28] "The President may provide duty-free treatment for any eligible article from any beneficiary developing country in accordance with the provisions of this subchapter" after considering certain conditions. This is an example of a statute authorizing the President to grant certain duty preferences.[29]
- **International Emergency Economic Powers Act of 1977 §203(a)(1)(B):**[30] If the President "declares a national emergency" "to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States" under Section 202(a) (50 U.S.C. §1701(a)), "the President may ... investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States." In exercising this power, Section 204 (19 U.S.C. §1703) specifies that "The President, in every possible instance, shall consult with the Congress before exercising any of the authorities granted by this chapter and shall consult regularly with the Congress so long as such authorities are exercised."
- **North American Free Trade Agreement Implementation Act §201(a)(1) (1993):**[31] "The President may proclaim—(A) such modifications or continuation of any duty, (B) such continuation of duty-free or excise treatment, or (C) such additional duties, as the President determines to be necessary or appropriate to carry out or apply [specified] articles ... of the Agreement." This is an example of

[27] *Id.* §301 (codified as amended at 19 U.S.C. §2411).

[28] *Id.* §501 (codified as amended at 19 U.S.C. §2461).

[29] *See also* African Growth and Opportunity Act, P.L. 106-200, §111(b), 114 Stat. 257 (2000) (codified as amended at 19 U.S.C. §2466a(b)) ("The President may provide duty-free treatment for any article described in section 2463(b)(1)(B) through (G) of this title that is the growth, product, or manufacture of a beneficiary sub-Saharan African country described in subsection (a) of this section, if, after receiving the advice of the International Trade Commission in accordance with section 2463(e) of this title, the President determines that such article is not import-sensitive in the context of imports from beneficiary sub-Saharan African countries.").

[30] International Emergency Economic Powers Act of 1977, P.L. 95-223, §203(a)(1)(B), 91 Stat. 1626 (codified as amended at 50 U.S.C. §1702(a)(1)(B)).

[31] North American Free Trade Agreement Implementation Act, P.L. 103-182, §201, 107 Stat. 2068 (1993) (codified as amended at 19 U.S.C. §3331(a)(1)).

an Agreement-specific delegation that allows the President to act within the confines of the Agreement.

- **North American Free Trade Agreement Implementation Act §201(b)(1) (1993):**[32] "[T]he President may proclaim—(A) such modifications or continuation of any duty, (B) such modifications as the United States may agree to with Mexico or Canada regarding the staging of any duty treatment set forth in Annex 302.2 of the Agreement, (C) such continuation of duty-free or excise treatment, or (D) such additional duties, as the President determines to be necessary or appropriate to maintain the general level of reciprocal and mutually advantageous concessions with respect to Canada or Mexico provided for by the Agreement." This is another example of an Agreement-specific delegation that allows the President to act within the confines of the Agreement.
- **Uruguay Round Agreements Act §111(a) (1994):**[33] "[T]he President shall have the authority to proclaim—(1) such other modification of any duty, (2) such other staged rate reduction, or (3) such additional duties, as the President determines to be necessary or appropriate to carry out Schedule XX." This is another example of an Agreement-specific delegation that allows the President to act within the confines of the Agreement.
- **Dominican Republic-Central America Free Trade §201(a) (2005):**[34] "The President may proclaim—(A) such modifications or continuation of any duty, (B) such continuation of duty-free or excise treatment, or (C) such additional duties, as the President determines to be necessary or appropriate to carry out or apply [specified] articles ..., and [specified] Annexes ... of the Agreement." This is an example of limited tariff-reduction authority under the implementing legislation of a free trade agreement, and is another example of an Agreement-specific delegation that allows the President to act within the confines of the Agreement.
- **Bipartisan Congressional Trade Priorities and Accountability Act of 2015 §103(a):**[35] "Whenever the President determines that one or more existing duties or other import restrictions of any foreign country or the United States are unduly burdening and restricting the foreign trade of the United States and that the purposes, policies, priorities, and objectives of this chapter will be promoted thereby, the President ... may ... proclaim—(i) such modification or continuance of any existing duty, (ii) such continuance of existing duty-free or excise treatment, or (iii) such additional duties, as the President determines to be required or appropriate to carry out any such trade agreement.... The President shall notify Congress of the President's intention to enter into an agreement under this subsection." This authority is subject to the following restrictions: "No proclamation may be made under paragraph (1) that—(A) reduces any rate of duty (other than a rate of duty that does not exceed 5 percent ad valorem on June 29, 2015) to a rate of duty which is less than 50 percent of the rate of such duty that applies on June 29, 2015; (B) reduces the rate of duty below that applicable

[32] *Id.* §201(b)(1) (codified as amended at 19 U.S.C. §3331(b)(1)).

[33] Uruguay Round Agreements Act, P.L. 103-465 §111(a), 108 Stat. 4819 (1994) (codified at 19 U.S.C. §3521(a)).

[34] Dominican Republic-Central America Free Trade, P.L. 109-53, §201(a), 119 Stat. 467 (2005), (codified at 19 U.S.C. §4031(a)).

[35] Bipartisan Congressional Trade Priorities and Accountability Act of 2015, P.L. 114-26, §103(a), 129 Stat. 333 (codified at 19 U.S.C.A. §4202(a)).

under the Uruguay Round Agreements or a successor agreement, on any import sensitive agricultural product; or (C) increases any rate of duty above the rate that applied on June 29, 2015." This act is the most recent example of trade promotion authority legislation, but also includes tariff-modifying authority with set ranges and timelines.[36]

Challenges to the Exercise of the President's Authority

When the President exercises trade-related powers delegated to him by Congress, his actions might be challenged in court. Certain legal issues commonly emerge from such challenges, including whether the federal courts have jurisdiction to review the President's exercise of delegated power, and, if so, which court; whether Congress's delegation of power was constitutional; whether a President's course of action falls within the scope of the specific powers delegated to him by Congress; and whether the action taken by the President bears a reasonable relation to the power delegated. The following discussion of court challenges to presidential proclamations highlights how the courts have addressed these issues.

Jurisdiction

As a threshold matter, a court must determine whether it has jurisdiction to review a challenge to a presidential proclamation issued pursuant to a congressional delegation of power. In *Cornet Stores v. Morton*, a case involving a challenge to a presidential proclamation that imposed a 10% surcharge duty on certain imported merchandise in light of a declared national emergency, the plaintiffs sought recovery of the import surcharges they had paid, relying on the jurisdictional provisions of the Trading with the Enemy Act of 1917.[37] Both the district court and the U.S. Court of Appeals for the Ninth Circuit dismissed the matter, finding it fell within the exclusive jurisdiction of the former Court of Customs and Patent Appeals Court (Customs Court), which has since been replaced at the trial level by the U.S. Court of International Trade (CIT).[38] Thus, a challenge to a trade-related presidential proclamation may need to be filed at a specific court like the CIT. The CIT's jurisdictional statute[39] vests that court with jurisdiction over certain challenges to presidential proclamations issued under trade-related powers delegated to the Executive by Congress. Indeed, today, with some exceptions,[40] challenges to presidential proclamations

[36] Earlier examples include the Bipartisan Trade Promotion Authority Act of 2002, P.L. 107-210, 116 Stat. 993 (codified at 19 U.S.C. §3801 *et seq.*).

[37] Cornet Stores v. Morton, 632 F.2d 96, 97 (9th Cir. 1980).

[38] *Id.* at 99 ("Customs Court jurisdiction is not defeated because a statute or regulation serves other ends in addition to recognized customs purposes, so long as there exists 'a substantial relation to traditional customs purposes.'" (quoting Jerlian Watch Co. v. U.S. Dep't of Commerce, 597 F.2d 687, 690 (9th Cir. 1979))); *see also* E. States Petroleum Corp. v. Rogers, 280 F.2d 611, 613 (D.C. Cir. 1960) ("We think the District Court correctly decided that it lacked jurisdiction. Under the distribution of judicial power which Congress has established, the Customs Court has 'exclusive jurisdiction to review on protest the decisions of any collector of customs.'" (quoting 28 U.S.C. §1583 (1958))).

[39] 28 U.S.C. §§1581–85.

[40] A subset of challenges to presidential proclamations that involve more than import tariffs alone have gone to the U.S. District Court for the District of Columbia, with appeals going to the U.S. Court of Appeals for the District of Columbia Circuit. For example, in *Federal Energy Administration v. Algonquin SNG, Inc.*, a challenge to a presidential proclamation that raised license fees on imported oil under the authority of section 232(b) of the Trade Expansion Act of 1962, as amended by the Trade Act of 1974, was brought in the U.S. District Court for the District of Columbia. Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548 (1976). Jurisdiction was contested at the district court level, but (continued...)

involving tariffs and other trade-related issues are filed at the CIT, with appeals going to the U.S. Court of Appeals for the Federal Circuit (Federal Circuit). The following describes a few such challenges.

In *U.S. Cane Sugar Refiners' Association v. Block*, an association of sugar refiners brought a challenge to a presidential proclamation that imposed quotas on the importation of sugar into the United States.[41] The proclamation was issued under Section 201 of the Trade Expansion Act of 1962.[42] The government argued that the CIT lacked jurisdiction over the challenge because the Association had not followed the statutory scheme of the Tariff Act, which requires that parties exhaust their options at the administrative agency level before turning to the courts.[43] The CIT found, however, that such an exercise would require the plaintiff "to attempt to import over-quota sugar simply in order to obtain a protestable exclusion of the merchandise ... before seeking judicial review of the validity of the proclamation imposing the quota in a suit for injunctive and declarative relief."[44] Determining that exhaustion was an unreasonable requirement in light of the need for "expeditious resolution" of this case, the court exercised jurisdiction after concluding the Association had no other remedy reasonably available to it.[45] On appeal, the former Customs Court affirmed the CIT's exercise of jurisdiction over the case in a footnote:

> Respecting jurisdiction ..., we note the provision of injunctive powers to the [CIT] in the Customs Courts Act of 1980 and the special circumstances of this case which, absent that provision, would have required Association to present its case to the District Court. We are persuaded that in this case, involving the potential for immediate injury and irreparable harm to an industry and a substantial impact on the national economy, the delay inherent in proceeding under [the usual route requiring the exhaustion of remedies at the administrative level] makes relief under that provision manifestly inadequate and, accordingly, the court has jurisdiction in this case under [19 U.S.C.] § 1581(i).[46]

(...continued)

the court concluded that the license fee program at issue did not solely involve the imposition of tariffs under trade law. *See* Algonquin SNG, Inc. v. Fed. Energy Admin., 518 F.2d 1051, 1063 (D.C. Cir. 1975) ("It is necessary to identify as best we can the precise category into which this program falls. If it is a tariff or duty as plaintiffs might, but expressly do not, contend, jurisdiction to hear this case would lie in the Customs Court under 28 U.S.C. § 1582.... If it is a tax, the delegation of which power by Congress is improper, the plaintiffs are met with the Anti-Injunction Act which, except for certain limited exceptions, is a bar to suits for the purpose of restraining the assessment or collection of a tax. 26 U.S.C. § 7421 (a). It is our judgement that the license fee program is one of a number of possible actions covered in the non-defined phrase 'to adjust imports' contained in Section 232 (b) and that the program including the fee is a regulatory measure enacted for the protection of national security.... As such, we believe our jurisdiction to decide the validity of the fee is predicated on 28 U.S.C. §§ 1331 or 1340."). Therefore, the court exercised federal-question jurisdiction under 28 U.S.C. §1331 because the license fee program involved a question of national security. It is notable that the plaintiffs also alleged that the Government violated the National Environmental Policy Act of 1969, P.L. 91-190, 83 Stat. 852 (1970) (codified at 42 U.S.C. §4321 *et seq.*), because it did not prepare an environmental impact statement prior to the imposition of the license fees. *See Algonquin SNG*, 426 U.S. at 556. Thus, the plaintiffs in this case did not ground their challenge exclusively in the trade acts over which the CIT has exclusive jurisdiction, allowing them to pursue their challenge in the District Court for the District of Columbia.

[41] U.S. Cane Sugar Refiners' Ass'n v. Block, 544 F. Supp. 883, 886–87 (Ct. Int'l Trade 1982).

[42] Trade Expansion Act of 1962, P.L. 87-794, §201, 76 Stat. 877 (codified as amended at 19 U.S.C. §1821).

[43] *U.S. Cane Sugar Refiners' Ass'n*, 544 F. Supp. at 886–87.

[44] *Id.* at 887.

[45] *See id.* at 885, 887 ("[T]here is no relief which plaintiff may be granted at the administrative level. Under these circumstances, requiring the exhaustion of administrative remedies would be inequitable and an insistence of a useless formality. It is well established that exhaustion of remedies will not be required if administrative review would be futile.").

[46] U.S. Cane Sugar Refiners' Ass'n v. Block, 683 F.2d 399, 402 n.5 (C.C.P.A. 1982).

More recently, however, the CIT declined to exercise its jurisdiction over a challenge to a presidential proclamation. In *Michael Simon Design, Inc. v. United States*,[47] the plaintiffs challenged a presidential proclamation adopting the International Trade Commission's (Commission's) recommended modifications to the Harmonized Tariff Schedule of the United States pursuant to powers delegated to him by the Omnibus Trade and Competitiveness Act of 1988.[48] The plaintiffs brought their challenge under the Administrative Procedure Act (APA).[49] Because the Commission's recommendations were not final agency action for purposes of the APA, but were merely advisory in nature, the CIT held the final action was the presidential proclamation itself, which is not subject to APA review because the President is not an "agency" whose actions constitute "agency action.[50] The Federal Circuit affirmed on the same grounds.[51]

To reconcile the outcome of these cases, it is important to note that the U.S. Cane Sugar Refiners' Association's challenge sought declaratory and injunctive relief under the jurisdictional statute of the CIT itself, while the *Michael Simon Design* case challenged the presidential proclamation under the APA. The CIT has limited exclusive jurisdiction over specific matters arising under the Tariff Act of 1930,[52] and also possesses "residual jurisdiction" over related trade matters under 28 U.S.C. §1581(i). Further, the CIT "possess[es] all the powers in law and equity of, or as conferred by statute upon, a district court of the United States," including declaratory and injunctive relief.[53] Thus, combining the CIT's equitable powers under Section 1585 with its residual jurisdiction under Section 1581(i), the Association was able to establish jurisdiction in that court. By contrast, the *Michael Simon Design* plaintiffs proceeded by filing a challenge to administrative action under the APA. Challenging a presidential proclamation in this fashion will likely fail because, although an administrative agency may serve an advisory role in the issuance of a presidential proclamation, the President will be considered the ultimate actor for jurisdictional purposes. Therefore, the law underlying a claim for relief based on a trade-related executive action is crucial to determining which court has jurisdiction to review the challenge.

Challenges to the Constitutionality of a Congressional Delegation

Early challenges to the President's exercise of tariff powers delegated to him by Congress addressed whether the delegation was constitutional in the first instance. These cases established the principles guiding this inquiry, while clarifying the constitutional parameters of Congress's ability to apportion some part of its exclusive tariff powers to the President. One such case, *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892), involved the Tariff Act of 1890,[54] which

[47] Michael Simon Design, Inc. v. United States, 609 F.3d 1335, 1337 (Fed. Cir. 2010).

[48] Omnibus Trade and Competitiveness Act of 1988, P.L. 100-418, §1206(a), 102 Stat. 1151 (codified as amended at 19 U.S.C. §3006(a)).

[49] 5 U.S.C. §§551 *et seq*.

[50] *Michael Simon Design*, 609 F.3d at 1337–38.

[51] *Id.* at 1338 ("Because the acts that the appellants complain of are either non-final or not agency actions, and because judicial review is precluded even outside the APA framework due to the discretionary nature of the President's authority under section 3006(a), we affirm the trial court's dismissal of the appellants' actions."); *see also* Franklin v. Massachusetts, 505 U.S. 788, 796 (1992) ("We hold that the final action complained of is that of the President, and the President is not an agency within the meaning of the Act. Accordingly, there is no final agency action that may be reviewed under the APA standards.").

[52] *See* 28 U.S.C. §1581(a)–(h).

[53] *Id.* §1585.

[54] Tariff Act of 1890, ch. 1244, 26 Stat. 567.

contained a "free list" of 300 items that would be exempt from import duties "unless otherwise specifically provided for in this act."[55] Section 3 of the act included the following language:

> [W]henever and so often as the president shall be satisfied that the government of any country producing and exporting [certain products], imposes duties or other exactions upon the agricultural or other products of the United States, which in view of the free introduction of such sugar, molasses, coffee, tea, and hides into the United States he may deem to be reciprocally unequal and unreasonable, *he shall have the power, and it shall be his duty, to suspend, by proclamation to that effect, the provisions of this act relating to the free introduction of such sugar, molasses, coffee, tea, and hides, the production of such country, for such time as he shall deem just*, and in such case and during such suspension duties shall be levied, collected, and paid upon sugar, molasses, coffee, tea, and hides, the product of or exported from such designated country.[56]

In other words, Congress delegated to the President authority to reinstate tariffs on otherwise duty-free items if he determined "that the government of any country producing and exporting [the covered articles], imposes duties or other exactions upon the agricultural or other products of the United States, which in view of the free introduction of such [articles] into the United States he may deem to be reciprocally unequal and unreasonable."[57]

After the President exercised this delegated power by suspending the duty-free treatment of certain articles, several U.S.-based importers of textile goods challenged the resulting duties that were assessed and collected.[58] The importers claimed, among other things, that Section 3 of the act was unconstitutional "so far as it authorize[d] the president to suspend the provisions of the act relating to the free introduction of sugar, molasses, coffee, tea, and hides," because it "delegat[ed] to him both legislative and treaty-making powers, and, being an essential part of the system established by congress, the entire act must be declared null and void."[59]

The Supreme Court disagreed. While observing "[t]hat congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution,"[60] the Court found the act in question "is not inconsistent with that principle" because "[i]t does not, in any real sense, invest the president with the power of legislation."[61] In support, the Court noted that "congress itself determined that the provisions of the act ... should be suspended as to any country producing and exporting them that imposed exactions and duties on the agricultural and other products of the United States."[62] Furthermore, "Congress itself prescribed, in advance, the duties to be levied, collected, and paid on sugar, molasses, coffee, tea, or hides, produced by or exported from such designated country while the suspension lasted. Nothing involving the expediency or the just operation of such legislation was left to the determination of the president."[63]

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[55] *Id.* §2, 26 Stat. at 567, 602–12.

[56] *Id.* §3, 26 Stat. at 612 (emphasis added).

[57] *Id.*

[58] *See* Marshall Field & Co. v. Clark, 143 U.S. 649 (1892).

[59] *Id.* at 681.

[60] *Id.* at 692.

[61] *Id.*

[62] *Id.*

[63] *Id.* at 692–63; *id.* at 693 ("As the suspension was absolutely required when the president ascertained the existence of a particular fact, it cannot be said that in ascertaining that fact, and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws. Legislative power was exercised when congress declared that the suspension should take effect upon a named contingency. What the president was required to do was simply in (continued...)

In 1928, a similar challenge was brought in the Customs Court in *J.W. Hampton, Jr., & Co. v. United States*.[64] In *Hampton*, an importer challenged an increase in duties on certain imported goods as a result of a presidential proclamation issued under Section 315 of the Tariff Act of 1922, which provides:

> [W]henever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this act do not equalize the said differences in costs of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and *determine and proclaim the changes in classifications or increases or decreases in any rate of duty provided in this act* shown by said ascertained differences in such costs of production necessary to equalize the same.[65]

Similar to *Marshall Field*, the importer in this case argued that, because Section 315 was an unlawful delegation of Congress's legislative powers to the President, it was unconstitutional.[66] Once again, the Supreme Court disagreed, concluding:

> If Congress shall lay down by legislative act an *intelligible principle to which the person or body authorized to fix such rates is directed to conform*, such legislative action is not a forbidden delegation of legislative power. If it is thought wise to vary the customs duties according to changing conditions of production at home and abroad, it may authorize the Chief Executive to carry out this purpose, with the advisory assistance of a Tariff Commission appointed under congressional authority.[67]

As is evident from these cases, a delegation by Congress will likely be upheld as constitutional so long as the statute allows the President to act as the "agent" of the legislative department, rather than play a law-making role.[68] In other words, a constitutional delegation of tariff powers is one in which the President is simply asked to carry out the will of Congress as expressed in its statute.[69]

These principles were reaffirmed in *Federal Energy Administration v. Algonquin SNG, Inc.*,[70] which involved a challenge brought in federal district court to a presidential proclamation that raised license fees on imported oil under the authority of Section 232(b) of the Trade Expansion

(...continued)

execution of the act of congress. It was not the making of law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect.").

[64] J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928).

[65] Tariff Act of 1922, ch. 356, §315, 42 Stat. 858, 941 (emphasis added).

[66] *See Hampton*, 276 U.S. at 404.

[67] *Id.* at 409 (emphasis added).

[68] *See* Clinton v. City of N.Y., 524 U.S. 417, 438 (1998) ("There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes."). In *Clinton v. City of New York*, the Supreme Court held that the Line Item Veto Act of 1996, P.L. 104-130, 110 Stat. 1200 (repealed 1998), was unconstitutional. Contrasting the delegation of power in the Line Item Veto Act with that of the Tariff Act of 1890, which the court upheld in *Marshall Field*, the Court explained "whenever the President suspended an exemption under the Tariff Act, he was executing the policy that Congress had embodied in the statute. In contrast, whenever the President cancels an item of new direct spending or a limited tax benefit he is rejecting the policy judgment made by Congress and relying on his own policy judgment." *Id.* at 444.

[69] *See* United States v. Yoshida Int'l, Inc., 526 F.2d 560, 580–81 (C.C.P.A. 1975) ("The Supreme Court in *Hampton & Co. v. United States*, dealing with non-emergency conditions, found those delegations proper which laid down an 'intelligible principle' under which the President was to act.") (internal citations omitted).

[70] Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 550 (1976).

Act of 1962, as amended by the Trade Act of 1974. The license fees were challenged by eight states and their governors, 10 utility companies, and a Member of Congress, who argued that the fees were beyond the President's authority and were an unconstitutional delegation of power by Congress. The Supreme Court again disagreed. Drawing upon the "intelligible principle" test articulated in *Hampton*, the Court upheld the delegation of power in Section 232(b) because it "establishe[d] clear preconditions to Presidential action."[71]

Challenges as to Whether the President Acted Within the Scope of the Delegated Power

Once a court has determined it has jurisdiction to review a case and that a delegation of power by Congress was constitutional, the issue of whether the President's action fell within the scope of the power delegated to him might arise. In *United States v. Yoshida International*, an importer of zippers from Japan challenged a presidential proclamation that imposed an import duty surcharge of 10%.[72] The proclamation followed a declaration of a national emergency by the President. The Customs Court observed that Section 5(b) of the Trading with the Enemy Act of 1917[73] contained a broad, express delegation of power.[74] In light of this broad, express delegation, the court concluded that "[i]t appears incontestable that § 5(b) does in fact delegate to the President, for use during war or during national emergency only, the power to 'regulate importation.' The plain and unambiguous wording of the statute permits no other interpretation."[75]

The court's inquiry did not end there; it went on to note that, "Though courts will not normally review the essentially political questions surrounding the declaration or continuance of a national emergency, they will not hesitate to review the actions taken in response thereto or in reliance thereon."[76] Therefore, the court went on to examine whether the "means of execution of the delegated power are permissible."[77] To guide this inquiry, the court articulated the following test: "A standard inherently applicable to the exercise of delegated emergency powers is the extent to which the action taken bears a reasonable relation to the power delegated and to the emergency giving rise to the action."[78] Accordingly, "[t]he nature of the power determines what may be done and the nature of the emergency restricts the how of its doing, i.e., the means of execution."[79]

Similarly, in *U.S. Cane Sugar Refiners' Association*, the CIT and the Customs Court both upheld a presidential proclamation imposing quotas on imports of sugar under Section 201 of the Trade Expansion Act of 1962. The Customs Court described the dispositive issue as "whether the

[71] *Id.* at 558.

[72] *Yoshida Int'l*, 526 F.2d at 566.

[73] Trading with the Enemy Act of 1917, ch. 106, §5(b), 40 Stat. 415 (codified as amended at 50 U.S.C. §4305(b)).

[74] *See Yoshida Int'l*, 526 F.2d at 573 (noting that section 5(b) "provides that the President may, during 'any' period of national emergency declared by him, through 'any' agency he designates, or 'otherwise,' and under 'any' rules he prescribes, by means of instructions, licenses, 'or otherwise,' 'regulate,' 'prevent' or 'prohibit' the importation of 'any' property in which 'any' foreign country or a national thereof has 'any' interest, and that the President may, in the manner provided, take 'other and further measures,' not inconsistent with the statute, for the 'enforcement' of the Act").

[75] *Id.* at 573.

[76] *Id.* at 579.

[77] *Id.* at 574.

[78] *Id.* at 578; *see also id.* at 579 ("The President's choice of means of execution must also bear a reasonable relation to the particular emergency confronted.").

[79] *Id.* at 578–79.

President acted within his delegated authority in issuing Proclamation 4941."[80] In reaching its conclusion that the President acted within the scope of the powers delegated to him by Congress, the court noted that "[t]he President's action being authorized by the statute on which he relied, his motives, his reasoning, his finding of facts requiring the action, and his judgment, are immune from judicial scrutiny."[81] That is, so long as the President's action is authorized by statute, his reasoning for determining that action is necessary will likely not be reviewed by the court.

Both cases demonstrate that while courts will not review the reasoning behind a threshold determination made by the President, such as the existence of a national emergency, or the fact-finding involved in arriving at that determination, they will closely review whether the action taken in response bears a reasonable relationship to that determination.[82]

Options for Congress

These sample statutory provisions and court cases highlight several considerations for drafting new legislation or amending older statutes that delegate tariff-modifying powers to the President. First, to be upheld as constitutional, the delegation by Congress should not bestow law-making powers upon the President. In other words, a delegation should empower the President to act as the agent of the legislative department by carrying out its will, as clearly expressed in the statute. The test likely to be used by the courts to determine whether a delegation is constitutional is whether Congress has included in the statute an "intelligible principle to which the [President] is directed to conform."[83] If so, the delegation will likely be upheld as constitutional.

Second, courts will generally not examine the President's decisionmaking process in arriving at a determination that some condition exists that triggers his ability to take action under the statute.[84] This condition precedent, frequently denoted by "Whenever ..." language at the beginning of the statute, should be carefully drafted to define the conditions under which the President is authorized to act. The language that defines the scope of the delegated power trigged by the condition as set forth in the statute, however, will likely be subject to closer scrutiny by the courts. Indeed, courts will likely begin by determining whether the President acted within the scope of his delegated power as defined by the words of the statute.

Third, the closest scrutiny will likely be reserved for an examination of the President's selected means of executing his delegated powers to determine whether his actions are permissible. While this appears to be in the hands of the Executive, Congress can assist in this determination by providing clearly defined limitations on the authorized means of exercising the delegated powers, including time restrictions and durations, tariff ranges, and the like, to circumscribe clearly the trade-related action that is being authorized. The courts will likely examine the President's selected means of execution to determine whether they "bear a reasonable relation" to the condition precedent that allows the President to act.[85] By providing limitations and descriptions of these actions in the statute itself, Congress can increase the likelihood that a court will find the

[80] U.S. Cane Sugar Refiners' Ass'n v. Block, 683 F.2d 399, 402 (C.C.P.A. 1982).

[81] *Id.* at 404.

[82] *See Yoshida Int'l*, 526 F.2d at 580 ("[T]he President's action in imposing the surcharge bore an eminently reasonable relationship to the emergency confronted.").

[83] J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

[84] *See U.S. Cane Sugar Refiners' Ass'n*, 683 F.2d at 404 ("The President's action being authorized by the statute on which he relied, his motives, his reasoning, his finding of facts requiring the action, and his judgment, are immune from judicial scrutiny.").

[85] *See Yoshida Int'l*, 526 F.2d at 573.

President's actions to be authorized, so long as he adheres to the conditions set forth in the statute.

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