



## Hauling the 'tariff man' before the Supreme Court

Simon Lester

April 9, 2019

President Trump, the self-declared "tariff man," has threatened to use tariffs again. This time, it was to force Mexico to stop the flow of drugs and migrants across the border: "If Mexico doesn't give the help, that's okay, we're going to tariff their cars coming into the United States," Trump said.

What do car tariffs have to do with drug smuggling or immigration? In normal times, not much, but in the Trump administration, tariffs have been tied to just about everything. Fortunately, there may be an opportunity for the Supreme Court to weigh in on this issue soon and provide some needed checks and balances.

Trump and his trade team have given us a multitude of rationalizations for tariffs, which, in their minds, have a veritable Swiss Army knife of functions.

In the past, Trump has said that tariffs:

- are necessary for national security;
- provide negotiating leverage in trade talks;
- raise revenue; and
- protect domestic industries.

Now, Trump tells us they can solve the border crisis. They are the Veg-o-Matic of the policy world.

But why does Trump even have the authority to impose tariffs? Article I, Section 8 of the Constitution gives that power to Congress, stating that "The Congress shall have Power To lay and collect ... Duties" and "to regulate Commerce with foreign Nations."

Over the years, however, Congress has delegated some of its power over trade to the executive branch. As a result, presidents have the power to negotiate tariff liberalization with other countries through trade agreements, and they also have power to raise tariffs for various purposes.

One key delegation of congressional power over tariffs took place in Section 232 of the Trade Act of 1962, which gave the executive branch, with the president as the ultimate decision-maker, the power to restrict imports on the basis of "national security" concerns.

The provision was mostly used to target petroleum-related products back when oil embargoes were a threat and had fallen into disuse recently. But the Trump administration revived it and has used it as the basis for imposing tariffs and quotas on steel and aluminum imports.

Recently, the Commerce Department investigated imports of autos and auto parts on the same basis, examining whether imports of these products undermine the national security of the United States.

It is hard to see how Honda Civics threaten the security of Americans, but the administration is offering a broad rationale that anything affecting "economic security" also affects national security.

Commerce has submitted its still-confidential report to the president on auto imports that could give him the authority to impose tariffs on those products as well.

Knowing he has the authority to impose these tariffs, Trump has decided to use them as a tool to bludgeon our trading partners with; in this case, to coerce them into doing what we want on non-trade policies, such as migration and drug smuggling.

This particular threat may be an idle one. Trump has a stream-of-consciousness style of talking and much of what he says passes by quickly and is soon forgotten. Trump may or may not impose tariffs on autos and auto parts, and his suggestion for car tariffs to solve the border crisis may tell us little about the likelihood of this happening.

But the larger issue of a president's power to impose tariffs on the basis of national security is still out there. Congress is considering several pieces of legislation to rein it in, but it may be difficult to override a presidential veto.

Fortunately, Section 232 may soon be subject to judicial scrutiny, as an ongoing legal challenge could make its way to the Supreme Court.

The U.S. Court of International Trade recently heard a complaint about this statute based on the theory that Section 232 is an improper delegation of power from Congress to the executive branch because it offers too much discretion and too little guidance on presidential action.

The court rejected the challenge, relying heavily on an old Supreme Court precedent, but the plaintiffs have already announced they would appeal.

This means the Supreme Court will have an opportunity to set out some limits on the delegation of congressional power over trade, and in doing so could help rein in the abuse of the Section 232 statute for protectionist and other purposes.

There are no guarantees about how the Supreme Court will see the issue of delegation of powers, of course. But Trump's statements about using auto tariffs as a threat against Mexico on border issues make clear how far the abuse of Section 232 has gone.

In effect, he is hurting his own case and giving the Supreme Court more reason to make sure he is exercising his power within the bounds of the Constitution.

*Simon Lester is the associate director of the Cato Institute's Herbert A. Stifel Center for Trade Policy Studies. Follow him on Twitter: @snlester.*