



All three branches share the blame for Trump's harmful steel tariffs

Will Yeatman

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Late last month, the Court of International Trade affirmed President Trump's authority to impose steel tariffs. According to the panel of judges, Trump is permitted to be unreasonable when he imposes tariffs on steel.

In fact, the court's unfortunate decision — which was compelled by Supreme Court precedent — represents only the latest squall in a perfect storm of institutional failures by all three branches of government. Of the three, it's now up to the Supreme Court to put out-of-control statutory presidential power back in its place.

Congress made the first mistake. Although Article I of the Constitution grants the legislature the exclusive authority “to lay and collect” tariffs, Section 232 of the Trade Expansion Act of 1962 gives this power to the president to protect “national security.”

Congress failed to define the term “national security,” however, leaving that determination to the president. Nor did Congress confine the available remedies, merely calling for such decisions to be made “in the judgment of the President.”

Why would Congress give away the farm? The 1962 law was passed at the height of the Cold War, when national security issues were paramount in national politics. Relative to now, lawmakers also harbored greater faith in presidential self-restraint.

In line with these expectations, previous presidents rarely tapped their Section 232 powers to impose import restrictions and never for a product other than petroleum.

Well, the Cold War ended, but the law remained on the books. Then Trump came along and ushered in the second institutional failure, this time regarding the president's Article II duty that the laws be faithfully executed.

Having promised an “America First” trade policy, Trump sought to deliver, but congressional support was not forthcoming given the divisive nature of trade politics. So Trump dusted off the 1962 statute and, in March 2018, imposed a 25-percent tariff on steel.

But where's the national security "threat?" In 2017, the United States produced more than twice the amount of steel it imported. Moreover, our No. 1 source of steel imports is Canada, a country whose industrial base is by law incorporated into U.S. defense planning!

Thanks to global oversupply, steel prices are depressed, making the commodity cheap for military applications. Finally, as Secretary of Defense Jim Mattis advised during the Section 232 process, military requirements for steel represent only 3 percent of U.S. production.

Despite all evidence to the contrary, Trump declared that tariffs are necessary "to supply all the steel necessary for critical industries and national defense."

The president also seems to believe that the status quo of the international steel market undermines national security by "weakening our internal economy." But, again, this is demonstrably false. In the tit-for-tat world of trade protectionism, Trump's tariffs predictably engendered retaliation.

The upshot is that what's good for American steel is bad for many other American businesses reliant on imported steel. And economists overwhelmingly agree that the aggregate harm will be greater than the targeted benefits.

For example, one early nonpartisan estimate predicts a gain approximately 33,000 jobs in the metal sector. That's great news for domestic steel companies, but the same study estimates a loss of about 179,000 jobs in other sectors, amounting to a net loss of approximately 146,000 jobs.

Given these likely adverse macroeconomic effects, in addition to the fact that the military must now pay more for steel, there is a powerful case to be made that Trump's steel tariffs operate to the detriment of national security.

Surely the courts will strike down such an irresponsible exercise of a Cold War-era statute, right? The unsatisfying answer to this question brings us to our third institutional failure, the total abdication of oversight by Article III courts.

The president possesses two types of legal power: constitutional and statutory. The former is inherent to the office, while the latter type entails a grant from Congress. Even though these authorities are fundamentally different, the Supreme Court employs a similarly hands-off approach for reviewing exercises of both — and therein lies the problem.

For constitutional questions, it is entirely appropriate for the court to limit its review of presidential decision-making. However, statutory questions — such as the steel tariffs — are a different story.

For a president's execution of statutory power, the supremacy of law demands that courts have an opportunity to decide whether an erroneous rule of law was applied. It would be, for example, erroneous to apply a national security statute absent a plausible threat to security.

Indeed, courts typically undertake "hard look" review to ensure the reasonableness of statutory implementation by administrative agencies. But in a myopic 1992 decision, the Supreme Court exempted the president from "hard look" review.

As a result, a president is permitted to be unreasonable when executing laws passed by Congress because courts refuse to review the president's decisions for abuse of discretion.

Accordingly, the Court of International Trade, when presented with a legal challenge to the steel tariffs, "allow[ed] neither an inquiry into the President's motives nor a review of his fact-finding." Trump, therefore, is entitled to unreasonable "motives" and "fact-finding" as he wields his limitless tariff power.

And when he claims that there is a national security impetus for unilaterally imposing steel tariffs, the available evidence overwhelmingly indicates he is being unreasonable.

The bad news is that Congress' response is wholly incommensurate with the usurpation of the legislature's rightful authority.

In the Senate, Republicans in the majority have expressed some dissatisfaction with Trump's steel tariffs, but, according to news reports, the party's plan is to introduce legislation that would require more reporting when a president imposed statutory tariffs, but which would otherwise leave the president's power unchecked.

The worse news is that the administration is looking to leverage these tariff powers in other sectors, including car manufacturing.

In the meantime, the CIT ruling has now been appealed directly to the Supreme Court — bypassing the Federal Circuit Court of Appeals because that court is also bound by the high court's precedent, all while real damage is being done to steel importers in particular and the American economy in general.

The justices should take up the case and rethink their ultra-permissive approach to reviewing a president's actions pursuant to statute.

Will Yeatman is a research fellow at the Cato Institute's Robert A. Levy Center for Constitutional Studies.