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UNITED STATES COURT OF INTERNATIONAL TRADE

Case No. 18-00152

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In the Matter of:

AMERICAN INSTITUTE FOR INTERNATIONAL STEEL, INC. ET AL.,

Plaintiff,

v.

UNITED STATES AND KEVIN MCALEENAN, COMMISSIONER,

UNITED STATES CUSTOMS AND BORDER PROTECTION,

Defendants,

- - - - - x

U.S. Court of International Trade

One Federal Plaza

New York, NY 10278

December 19, 2018

10:30 AM

B E F O R E :

HON CLAIRE R. KELLY

JENNIFER CHOE-GROVES

GARY S. KATZMANN

U.S. INTERNATIONAL TRADE JUDGES

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P R O C E E D I N G S

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HON. CLAIRE R. KELLY: Please be seated.

CLERK: The United States Court of International Trade is now in session. The Honorable Claire R. Kelly, Jennifer Choe-Groves, and Gary S. Katzmann presiding before Court Number 18-00152, American Institute for International Steel, Inc. et al v. United States et al.

Will the attorneys please state their names for the record, starting with Plaintiff's counsel?

MR. MORRISON: Good morning, Your Honors. Alan Morrison. I'll be arguing for the Plaintiffs.

HON. CLAIRE R. KELLY: Good morning

MR. CAMERON: Donald Cameron, for AAIS.

MR. GORLICK: Gary Horlick for AAIS.

MR. PLANERT: Will Planert, for AAIS.

HON. CLAIRE R. KELLY: Good morning

MS. HOGAN: Good morning, Your Honor. Tara Hogan, on behalf of the United States. And with me is Jeanne Davidson, also on behalf of the United States.

HON. CLAIRE R. KELLY: Good morning. Welcome, everyone, to the Court of International Trade. My name is Claire Kelly. To my left is Judge Jennifer Choe-Groves, and to my right is Judge Gary Katzmann.

We're all ready to begin, so let's begin.

HON. CLAIRE R. KELLY: May it please the Court.

1 The question presented today is whether Section 232 of the
2 Trade Expansion Act of 1962 is an unconstitutional
3 delegation of legislative authority to the President, in
4 violation of principles of separation of powers.

5 To determine the answer to that question, we must
6 ask whether there is an intelligible principle in the
7 statute and whether there are any boundaries beyond which
8 the President may not go in carrying out the mission of the
9 statute.

10 As we pointed out in our reply brief, this case is
11 very much like United States against Lopez, in which the
12 Court struck down the Congress's efforts to establish a gun-
13 free zone around schools on the grounds that it violated the
14 Commerce Clause.

15 And the Court there was concerned, as it should be
16 here, with the question of are there any limits. And in
17 that case, the Court said because the Government was unable
18 to point to any limits on the power under the Commerce
19 Clause, analogizing it to the separation of powers issues
20 here. The Court said that that was obviously
21 unconstitutional, as exceeding the power of Congress and
22 because there were no limits under that theory.

23 HON. GARY S. KATZMANN: Now, Mr. Morrison, we
24 understand your argument. There is the case, the Algonquin
25 case. I think Algonquin and Whitman are really two of the

1 major cases that need to be addressed. And so, Algonquin,
2 of course, then Justice Marshall on writing for the court,
3 specifically adjudicated the nondelegation issue.

4 I've gone back and actually looked at the briefs
5 that were filed in the Supreme Court, both by the Government
6 by Amicus, by the Respondents, and the nondelegation issue
7 is clearly briefed and before the Court. Indeed, some of
8 the same arguments that are before this Court now were
9 specifically raised in those 1974 filings.

10 I understand, you know, your arguments, but we are
11 obviously not the United States Supreme Court, and we have
12 an obligation to follow precedent. Could you address that?

13 MR. MORRISON: Yes, Your Honor. I suspected this
14 was coming quite early and I'm ready to address it. So, the
15 first thing I would say about it is I too read the briefs,
16 and I was struck by the Government, who is the petitioner in
17 that case; it barely mentioned the delegation argument until
18 the end of its first brief.

19 HON. GARY S. KATZMANN: But then in the reply
20 brief --

21 MR. MORRISON: In its reply brief, extensively.

22 HON. GARY S. KATZMANN: -- it's excessive
23 language.

24 MR. MORRISON: Extensively.

25 HON. GARY S. KATZMANN: Right.

1 MR. MORRISON: So, there's no question that in the
2 context of that case, the delegation argument was raised and
3 decided. But of course, the important point about that case
4 is that the challenge by the Respondents -- Plaintiffs in
5 that case -- was a very narrow one.

6 They said only that the authority of the President
7 to impose, in that case licensing fees, was not permitted
8 under the statute, and that to construe the statute to
9 permit, in addition to quotas, licensing fees -- and I would
10 suppose tariffs as well, since they are monetary extractions
11 -- that that would be an unconstitutional delegation.

12 And in that context, the Court said no, it was
13 quite clear that that was permitted, and it was authorized.
14 And if I may, Your Honor, the very sentence which the
15 Government relies upon in that case on Page 559 of the
16 Court's opinion, it says the statute is sufficient to meet
17 any delegation attack. But it's in the very sentence where
18 it said, even if you agree to allow it to have licensing
19 fees.

20 HON. GARY S. KATZMANN:

21 MR. MORRISON: So, it was in that context, the
22 very narrow context, not a challenge to the statute as a
23 whole, indeed, they agreed that there was -- that everything
24 was entirely proper. They made no challenge to the breadth
25 of 232(b) and (d). There was no question about remedies or

1 any kind of differential treatment or tariffs, or any
2 question about the amount. The only question was very
3 narrowly that as from the face of their complaint, the
4 delegation argument was a defense to a claim there.

5 Second, I would say that the Court at the end of
6 the opinion specifically says, we're not saying anything
7 more than the -- that the President can do anything the
8 President wants. What we're saying is that in this case,
9 that choice of remedy did not run into a delegation problem
10 and did not allow it -- and it was authorized under the
11 statute.

12 Furthermore, if the Plaintiff in that case had
13 made a challenge of the kind we're making here, saying the
14 President can do anything he wants -- he could treat tariffs
15 differently than in quotas, he can impose any amount he
16 wants, he can disregard differences in products, he can
17 disregard countries -- the Court would have, and should
18 have, I suggest, to properly say, we'll wait for that case
19 until it comes along.

20 Our case is a facial challenge to the statute. No
21 President has ever used 232 in the way that President Trump
22 has used it here. We're not saying that --

23 HON. JENNIFER CHOE-GROVES: Doesn't Algonquin, in
24 the page that you just cited -- doesn't it say that the
25 statute gives the President broad power, that it's far from

1 unbounded. Doesn't the Supreme Court say that in Algonquin?

2 MR. MORRISON: It says -- yeah, it says that. I
3 agree that there are words in there that you could look at.
4 But I suggest to you that the proper reading of Algonquin is
5 that it's in the context of the narrow challenge.

6 One other very important distinguishing factor
7 about Algonquin. In that case, there was judicial review of
8 what the President had done as a matter of law. The Court
9 there decided the statutory question.

10 Since that time, the Court has made it clear that
11 the end run, not suing the President used in Algonquin --
12 they sued the Federal Energy Administration -- would no
13 longer work. That you could not get judicial review by
14 suing the person who was not the President. You can't do
15 that anymore. And the Government and we agree that none of
16 the President's determinations under the statute are
17 judicially reviewable.

18 HON. CLAIRE R. KELLY: Can I ask you, you would
19 say that's not reviewable in an APA type of way, but is
20 there any review available if the President clearly
21 misunderstood the statute or his role, or failed to follow a
22 procedural requirement? With that be reviewable?

23 MR. MORRISON: Let's start with the procedural
24 requirements. We believe that it would be reviewable. If
25 the President had issued this order without having an

1 investigation by the Commerce Department, or if the Defense
2 Department had not been consulted, or if the President had
3 not done it within the time limits permitted, that would be
4 reviewable. But that's no review of substance. It's a --

5 HON. CLAIRE R. KELLY: Okay.

6 MR. MORRISON: The Government's -- we've said to
7 the Government -- I'm sorry, Your Honor.

8 HON. CLAIRE R. KELLY: So, but what if -- let's
9 take an example. Let's say the President, in your view,
10 clearly misunderstood the statute and put tariffs on
11 something that you believe this could not conceivably be
12 connected to national security. Would there be a challenge
13 there?

14 MR. MORRISON: No, Your Honor.

15 HON. CLAIRE R. KELLY: Okay. Why not?

16 MR. MORRISON: Because the statute -- the
17 definition of national security, particularly when you look
18 at 232(d), which goes on for two extremely long sentences
19 which I won't try to quote for Your Honors here --

20 HON. CLAIRE R. KELLY: That's okay. We've read
21 it.

22 MR. MORRISON: But not in one breath.

23 HON. CLAIRE R. KELLY: No.

24 MR. MORRISON: No. Or two or three.

25 HON. CLAIRE R. KELLY: I'd have to be sitting

1 down, yes.

2 MR. MORRISON: There would be no challenge, and
3 there would be no --

4 HON. CLAIRE R. KELLY: So, let me ask you this.
5 Let's say Subsection (d) wasn't there?

6 MR. MORRISON: Yes.

7 HON. CLAIRE R. KELLY: Right? Just take it out of
8 the statute. Does the statute still have a problem?

9 MR. MORRISON: Yes. It would be less of a problem
10 on the front end, the trigger end, because national security
11 in a limited sense might have some limiting principle. But
12 it wouldn't solve the remedial problem if the President can
13 do anything he wants.

14 I would suggest, Your Honors, suppose that the
15 President, instead of doing -- imposing tariffs or imports,
16 he purported to change the environmental laws, the Clean Air
17 Act, under that, saying I'm using this authority to do the
18 Clean Air Act. I suppose in that situation there might be a
19 mandamus remedy, but only if he did something along those
20 extraordinary lines.

21 HON. CLAIRE R. KELLY: When you say... Let's talk
22 a little bit about the remedies. When you say do anything
23 he wants... So, give me some examples. So, he could just
24 tariffs, he could choose quotas, he could choose licenses,
25 he could exempt some countries and then not exempt other

1 countries. He could -- he certainly could reach a number of
2 products. But --

3 MR. MORRISON: Under the steel heading, yes.

4 HON. CLAIRE R. KELLY: Right. But don't we want
5 the President to have the power to have some flexibility in
6 time of a national emergency to say, you know what, a
7 tariff's not going to do it; we're going to have to have a
8 quota? Isn't that a reasonable thing to do in furtherance
9 of national security?

10 MR. MORRISON: Well, I would say first, the
11 President has not declared this to be a national emergency.
12 This is an economic protection statute for the steel
13 industry. That's what it's all about, and there's no
14 question about it.

15 Second, with respect to tariffs, not only can he
16 choose tariffs or imports, he could impose an embargo. But
17 in this case, he can choose any number he wants.

18 HON. CLAIRE R. KELLY: Mm hmm.

19 MR. MORRISON: Take it right out of the air, 25
20 percent. And then do what he did to Turkey. Four months,
21 six months into the process, he doubles the tariff on
22 Turkey. No justification required. No explanation
23 required. He can do that. He did what he did here, which
24 is to remove the tariffs originally imposed on some
25 countries, with or without any other form of agreement. No

1 standards, no limits whatsoever. Anything that in his
2 judgment -- the word that the Government uses -- is okay.
3 No judicial review. And that's the problem with the
4 statute.

5 HON. GARY S. KATZMANN: Can I -- Mr. Morrison,
6 understand that this is a facial challenge to the statute.
7 It is interesting, of course, to go and dip into the record
8 and read Exhibit 8, the letter from the Secretary of
9 Defense.

10 MR. MORRISON: Yes, Your Honor.

11 HON. GARY S. KATZMANN: And there, the Secretary
12 of Defense says, "As noted in both Section 32 reports, the
13 U.S. Military requirements for steel and aluminum each only
14 represent about three percent of U.S. production.
15 Therefore, the Department of Defense does not believe that
16 the findings in the reports impact the ability of Department
17 of Defense programs to require the steel or aluminum
18 necessary to meet national defense requirements."

19 What relevance is this document? Which is
20 intriguing because basically, the department of defense is
21 saying that the tariffs are not necessary for national
22 defense on national defense grounds?

23 MR. MORRISON: I think it shows... First is the
24 President is not bound by that determination. If there were
25 an APA challenge, he would have to explain that away. He

1 doesn't have to do that here.

2 But second, I think the fact that the President
3 can impose, consistent with this statute because of its
4 breadth, the sanctions, the tariffs that he's imposed here,
5 demonstrates that this is not about national security.

6 The Defense Department says it's not about
7 national security. The statute says it's not about national
8 security. When we look at what the President did with
9 respect to specific steel products, you know, steel is not
10 simply one product.

11 There are, according to the Commerce Department,
12 177 different categories of steel products, some of which
13 have no defense needs at all, many of which the United
14 States is capable of providing all the needs. Some of them
15 are products that come from outside. All of this shows that
16 this is an economic protection statute, that this is not
17 about national security in the sense that which we
18 understand it.

19 HON. CLAIRE R. KELLY: But I'm --

20 HON. GARY S. KATZMANN: No, I understand -- I'm
21 sorry. Go ahead.

22 HON. CLAIRE R. KELLY: (indiscernible)

23 HON. GARY S. KATZMANN: Well, I understand your
24 arguments and, you know, the policy arguments that in your
25 view the President has acted in a way which is effectively

1 unbounded and unlimited. Why isn't the answer a
2 Congressional amendment?

3 This was done, as you know, with respect to
4 petroleum. The statute was amended in 1980, whereby the
5 Congress can basically express in a resolution of
6 disapproval actions by the President in the area of
7 petroleum under 232.

8 Why isn't the answer in this case, in terms of the
9 separation of powers, to say, okay, this is a matter for the
10 Congress to rectify?

11 MR. MORRISON: Well, there's no question that
12 Congress could pass a statute, amending 232 to bring it in
13 line with the Constitution. That, of course, would not do
14 anything with respect to the billions of dollars in tariffs
15 that have already been imposed.

16 Second, I doubt that the President would sign that
17 into law. The President, as all presidents do, like power.
18 He has used this statute for ends he believes are
19 appropriate. So, there's no reason to think that the
20 Congress could get the two-thirds votes to pass that.

21 The amendment Your Honor referred to -- and I
22 think Your Honor did say this -- it applies only to
23 petroleum. And it's a little unclear, but I'll assume for
24 the moment that it's not an unconstitutional legislative
25 veto, but that it is, at best, Congress's disapproval, which

1 the President is free to disregard, or if both Houses pass
2 it in the form of a bill, he'll veto the bill.

3 So, for all those reasons, of course Congress has
4 the power to rectify this going forward, and perhaps it
5 will. It hasn't shown any inclination to do that, and --

6 HON. GARY S. KATZMANN: There have been
7 legislative proposals.

8 MR. MORRISON: Yes, yes.

9 HON. GARY S. KATZMANN: Yes, recently.

10 MR. MORRISON: Proposals.

11 HON. GARY S. KATZMANN: Yeah, right.

12 MR. MORRISON: They won't resolve this case. They
13 won't get the tariffs back that have been paid. They won't
14 give the workers who lost their jobs back their jobs. It
15 won't stop the continuing burden on U.S. importers'
16 businesses that are using steel. None of that will change.

17 HON. CLAIRE R. KELLY: Mr. Morrison, as you
18 pointed -- as you correctly pointed out, the challenge
19 before us is not so much about what the President did in
20 this case, but rather whether Congress can, in this statute,
21 give to a president the power to basically regulate imports
22 because of national security.

23 MR. MORRISON: For anything he wants to do with
24 them. That is there's no --

25 HON. JENNIFER CHOE-GROVES: Doesn't the

1 legislative history talk about giving the President latitude
2 for national security interests --

3 MR. MORRISON: Yes, it does.

4 HON. JENNIFER CHOE-GROVES: -- and for foreign
5 affairs?

6 MR. MORRISON: There's no question that Congress
7 intended to give the President the latitude. I don't know
8 whether Congress ever intended to give the President this
9 kind of latitude. But that doesn't really matter.

10 The question is not legislative history. The
11 question is whether what Congress did can essentially turn
12 over to the President the power to regulate Commerce by
13 tariffs, quotas, in any amount and any way he wants.

14 HON. CLAIRE R. KELLY: So, that kind of gets to
15 what I think was Judge Katzmann's Whitman question, which
16 is, so, what's our intelligible principle here? It's
17 national security. And I guess this is why you're focusing
18 on the remedies, because the national security part would
19 seem like an intelligible principle, right? It has to be to
20 threaten to impair national security. That means something,
21 right?

22 MR. MORRISON: Well, it might mean something if we
23 didn't have 232(d), which is the economic growth --

24 HON. CLAIRE R. KELLY: Well, that's why I asked
25 you about 232(d)?

1 MR. MORRISON: Yes.

2 HON. CLAIRE R. KELLY: Which kind of gives you an
3 argument which says because they said more.

4 MR. MORRISON: Not more, much more.

5 HON. CLAIRE R. KELLY: There's -- much more.
6 Okay, so they said much more?

7 MR. MORRISON: And indeed, in this case, which we
8 say is illustrative of the power of the President. We are
9 clear that all of the examples that we give in our briefs
10 and in our complaint are to show the breadth of the power of
11 the President under this provision. We're not arguing that
12 he did anything improper --

13 HON. CLAIRE R. KELLY: But even that second
14 sentence of 232(d), where it says the President shall be
15 concerned about economics, basically. It does still tie it
16 to national security. It talks about looking at particular
17 industries -- might as well look at the actual language
18 here, right? Recognized the close relation of economic
19 welfare of the nation to our national security, take into
20 consideration the impact or foreign competition on economic
21 welfare of individual domestic industries.

22 MR. MORRISON: That's what it did here.

23 HON. CLAIRE R. KELLY: Right.

24 MR. MORRISON: An individual domestic industry.

25 HON. CLAIRE R. KELLY: But so, there's still,

1 though, a tie to national security. So, I suspect, and I
2 guess the Government will make some argument like this, that
3 well, you're talking about the steel industry, the steel
4 industry's important, we want to preserve that for our
5 national security. And there's a line of reasoning you can
6 follow there, no?

7 MR. MORRISON: Well, I suppose if that were the
8 only defect in the statute.

9 HON. CLAIRE R. KELLY: Mm hmm.

10 MR. MORRISON: If it said that the President can
11 do, for example, what the statute said in Hampton, that he
12 can raise it by no more than 50 percent, tariff by no more
13 than 50 percent, then maybe we would have a different
14 situation.

15 As we tried to point out, Your Honor, the breadth
16 is on the front end, the trigger. A trigger, by the way,
17 it's a word that's in Algonquin and also in the Amalgamated
18 Meat Cutters case, the case which I commend the Court's
19 attention because of the breadth of Judge Leventhal's
20 thoughtful -- very thoughtful opinion about the separation
21 of powers concerns there.

22 If we had a broad trigger and a narrow remedy, or
23 a narrow trigger and a somewhat broader remedy, we might
24 have a different. But in this situation, we have
25 essentially the President can do anything he wants with

1 regard to the economy.

2 Suppose we had a statute that said the President
3 can adjust any rates, deductions and interest income with
4 respect to the foreign tax provisions of the United States
5 Tax Code? That would be an intelligible principle, I
6 suppose. We know exactly what Congress meant. But what we
7 think that that's a proper authority to give to the
8 President? I suggest to you not. But this is about seeing
9 that the separation of powers is enforced.

10 HON. CLAIRE R. KELLY: But since we're not the
11 Supreme Court and we can't change the precedent that's out
12 there -- perhaps you'll make this argument to them -- but
13 what cases can we rely upon to do that, though, because you
14 have cases like Whitman?

15 MR. MORRISON: Well, I want to turn back to a
16 point that I was making earlier, which is in regard to
17 judicial review. In effect, the statute has been amended by
18 eliminating judicial review. And for that reason, I don't
19 think the Court is bound.

20 There was full judicial review, not only in
21 Algonquin, but in -- obviously, in cases like Whitman,
22 Hampton, Field v. Clark. Every one of the cases that's come
23 to this Court --

24 HON. CLAIRE R. KELLY: Except not -- not the War
25 Brides case?

1 MR. MORRISON: Yes.

2 HON. CLAIRE R. KELLY: There wasn't judicial
3 review on that.

4 MR. MORRISON: Yeah. There was no judicial review
5 there. But it was not a separation of powers challenge in
6 the way this is. That is, the Court has said in *Yakus*, and
7 again in *Skinner* and *Mistretta* and *American Power*, that the
8 reason we have judicial review is so that the -- is so that
9 the Court can ensure that the law has been met.

10 In *Yakus* the Court said there will be a violation
11 of separation of powers if it is impossible for the Court to
12 determine whether the will of the Congress has been obeyed.

13 HON. CLAIRE R. KELLY: The Court and Congress and
14 the public.

15 MR. MORRISON: And Congress --

16 HON. CLAIRE R. KELLY: -- and the public.

17 MR. MORRISON: Well, of course, Congress too.

18 HON. CLAIRE R. KELLY: Right? Because Congress
19 could do something about it.

20 MR. MORRISON: And the public. But the Congress
21 has no authority to do anything other than pass another
22 statute, which it always has authority to do. But in our
23 system of separation of powers, if the Court is not is not
24 able, permitted by statute, to guard the principles of
25 separation of powers, then no one will be there to do it.

1 Judicial

2 HON. CLAIRE R. KELLY: So, does the intelligible
3 principle mean different things, depending on whether
4 there's judicial review?

5 MR. MORRISON: I think it does, and I think it
6 means... Actually, I want to -- this case which created the
7 judicial review, the intelligible principle, Hampton case,
8 that was a case in which the statute allowed the President
9 to adjust tariffs if he found that there was unequal cost of
10 production. Narrow trigger to begin with. Probably
11 country-specific, but at least certainly narrow. And then
12 the Court said, the statute said, only can raise it by --
13 tariffs by 50 percent.

14 It was in that context that the Court said
15 Congress has been perfectly clear and perfectly
16 intelligible. And that's because it looked at the narrow
17 confines of that statute.

18 And if I can leave the Court with one message
19 today, it's that when you're looking at these other cases,
20 don't look at the conclusory statements. Adequate,
21 boundless; those are conclusions. Look at the specifics of
22 the statute. That's what we've tried to do here and to show
23 the Court that on the front end, national security means
24 almost anything the President wants. And on the back end,
25 the President can do anything he wants, as he's done here.

1 HON. GARY S. KATZMANN: But you go to Justice
2 Scalia's opinion in Whitman, and he says, you know, in 80
3 years, there have been only two cases, which on
4 nondelegation grounds have invalidated acts of Congress.

5 And then with respect to the question of
6 intelligible principle, he said this Court has never
7 required a determinant amount for the assessment of
8 intelligible principle.

9 So, the argument would be, in this case, there is
10 no determinant amount that's required, and that the
11 President has this latitude in imposing tariffs.

12 MR. MORRISON: The first thing I want to say about
13 that is that in Whitman, of course, there was full judicial
14 review. The challenge there was the -- the challenger said
15 that Congress hasn't said how much is too much, or how much
16 is enough.

17 And in that context, the Court looked to the
18 specifics of the statute. It had to be an air pollutant
19 that was already regulated. There were -- it said what the
20 conditions of health were. And the Court said, of course
21 you don't have to say how much is too much. But it was a
22 very narrow trigger and there were very potential limits,
23 plus there was judicial review.

24 Second, as the Court pointed out in Lopez, no
25 court had struck down as in excess of the Commerce Clause a

1 Federal statute for, in that case, 60 years. Here, we have
2 a little more. We have 80-plus years. But as the Court
3 said in Lopez, there has to be some limit that -- even
4 Justice Scalia said many times, you can't simply turn over
5 the power to legislate to the President. That's not
6 consistent with separation of powers. Just like in Lopez,
7 turning over the Commerce Clause without bounds is
8 inconsistent with Federalism.

9 And for those reasons, we say, here, the test we
10 have is very simple. If you are unable to identify, as the
11 Government has been unable to identify, a single thing that
12 the President cannot do within the bounds of this statute,
13 never said anything he's done here is improper, then the
14 statute has no principles.

15 HON. CLAIRE R. KELLY: So, let me ask you two
16 questions. I see the yellow light's on and I want to make
17 sure I get to these. One is, if you could speak to the
18 argument that the President has certain inherent powers in
19 this area.

20 And the other is regarding the point that you just
21 made -- and I'm sorry, it's going to be a little bit of a
22 long question. You know, I was looking at the statute and
23 thinking, okay, what can the President do here, right? You
24 know, what could be kind of shocking that you think that
25 that would go too far, right? Could the President say, you

1 know, make some argument that some industry -- and I'll just
2 pick peanut butter, right? Just -- I'm not picking on the
3 peanut butter industry, just some other industry, right?

4 So peanut butter, you know, decides the President
5 wants to, you know, worry about jobs in the peanut butter
6 industry and that somehow, he can make a national security
7 connection and have some sort of embargo on peanut butter,
8 right, and that he could do that. That would be able to be
9 challenged as a clear misconstruction of the statute,
10 wouldn't it?

11 MR. MORRISON: I do not believe so, and I think
12 you'll ask the Government, they will agree with my answer.

13 HON. CLAIRE R. KELLY: I'm going to ask them.
14 Great. Okay.

15 MR. MORRISON: Let me turn to the first --

16 HON. CLAIRE R. KELLY: Yeah, the first question,
17 please.

18 MR. MORRISON: -- Your Honor's shorter first
19 question. In the Yoshida case, the Court of Customs and
20 Patent Appeals said there is no inherent Foreign Affairs
21 authority over the President over tariffs and over
22 regulating Commerce. The Constitution specifically provides
23 that the Congress shall have those powers.

24 And in cases like Skinner, where the Court has
25 talked about the fact that there is no higher standard for

1 Federal taxes on a delegation, so there's no lower standard
2 here. There is one delegation doctrine. And so therefore,
3 the fact that they didn't involve Foreign Affairs -- which,
4 of course, this doesn't really involve Foreign Affairs, as
5 Your Honors have made it clear from the questions and from
6 the Defense Department's recognition from 232(d) -- we don't
7 even have to grasp that.

8 But finally, the President has not claimed any
9 inherent authority to do what he has done here. He has
10 relied solely on the statutes that Congress has given him.

11 HON. GARY S. KATZMANN: Can I ask him
12 (indiscernible).

13 HON. CLAIRE R. KELLY: Please, go ahead.

14 HON. GARY S. KATZMANN: The Gundy -- I wanted to
15 ask you about Gundy. Of course, in your initial filing, you
16 talk about the Gundy case, that it's -- of course, oral
17 argument was held in October -- that it's suggestive that
18 perhaps the nondelegation, the doctrine is not dead.

19 Two related questions. One, in your view, should
20 we postpone adjudication of this case until we know how the
21 Supreme Court deals with Gundy? They may not, of course,
22 reach the nondelegation issue.

23 And secondly, sort of wearing your focusorial hat,
24 a lot of the nondelegation commentary, as you know, has
25 said, well, you know, this is a two-edged sword. That it's

1 an invitation to perhaps revisit, reopen, some of the post-
2 New Deal programs by limiting the latitude for executive
3 action.

4 So, if you could first answer the Gundy question?
5 And then with respect to the latter question, what would be
6 the narrow holding that you would propose to this Court that
7 would be responsive to those who are concerned about opening
8 up the -- you know, the patterns of history post-New Deal?

9 MR. MORRISON: The narrowest holding is when there
10 are no boundaries, there is no proper delegation, and
11 especially when there is no judicial review. In every one
12 of these cases, the standard regulatory cases, Whitman --
13 and you can go through all the rest of the trade cases. All
14 the cases that have come to Court, there has been judicial
15 review. It's not required in every case, but the Court has
16 time and again remarked... And by the way, there is
17 judicial review. The Government will tell you there is no
18 holding, and we agree there's no holding on it. But there's
19 very strong dicta on that, as there was in Algonquin. There
20 was judicial review in Algonquin.

21 With respect to Gundy, of course, I can't predict
22 how that's going to come out or when it's going to come out.
23 I still think that it's important, because at least it's a
24 stop sign in the road for saying - the Court -- the doctrine
25 is dead. Obviously, four justices didn't think the doctrine

1 was dead. They granted review. Your Honors can read the
2 transcript of the oral argument. Very difficult to tell
3 from that what's going to happen. And there will be a
4 decision. It's impossible to tell when it will come down,
5 and so I wouldn't --

6 HON. GARY S. KATZMANN: It could come down in
7 June.

8 MR. MORRISON: -- suggest to Your Honors to do
9 something or not do something. I would hope Your Honors
10 would deliberate on the case and perhaps wait until Gundy
11 comes down to hand down your decision. Although, if you
12 wish to do a decision in the meantime, you might help the
13 Court decide Gundy.

14 HON. CLAIRE R. KELLY: Judge Choe-Groves?

15 HON. JENNIFER CHOE-GROVES: Yeah, you keep saying,
16 counsel, that the President's power under 232 is limitless.
17 But doesn't Algonquin look directly at the statute at the
18 time, which was before the 1980 amendment under (c), 232(c),
19 where it said that there were limiting factors in play, and
20 that is now the equivalent of our 232(d) in front of us now,
21 under the new -- the amended statute?

22 The Court has already looked at this. The Supreme
23 Court has already looked at this and found that the
24 President's powers are not limited -- limitless.

25 MR. MORRISON: But it looked at it in a context

1 very different in two respects. First, there was judicial
2 review at the time. And second, the challenge was so
3 different from the challenge that's being made here, they
4 looked at it and said it is not boundless with respect to
5 remedy, because the only question there was could you impose
6 licensing fees in addition to quotas.

7 And in that sense, it was not unbounded because
8 nobody thought about the notion here, that the tariff limits
9 can be put at any limits the President wants. The President
10 can impose tariffs, embargos, and that he can disregard
11 differences in products, he can treat same products
12 differently, he can treat one country worse than the other,
13 all without any justification, let alone worrying about the
14 side effects of all this, because Congress has said not a
15 word about any of this in 232.

16 HON. CLAIRE R. KELLY: Thank you, Mr. Morrison. I
17 understand that you've reserved five minutes for rebuttal,
18 so...

19 MR. MORRISON: Thank you.

20 HON. CLAIRE R. KELLY: I didn't mention that
21 before.

22 MR. MORRISON: Thank you, Your Honor.

23 HON. CLAIRE R. KELLY: Thank you.

24 MS. HOGAN: Good morning, Your Honors. May it
25 please the Court.

1 Plaintiffs invite this Court to take two
2 extraordinary actions. The first, Plaintiffs asked this
3 court to strike down a statute as an unconstitutional
4 delegation of authority, something the Supreme Court has
5 done only twice in its history. And in doing so, Plaintiffs
6 invite this Court to disregard binding Supreme Court
7 precedent. We respectfully submit that this Court must
8 decline both invitations.

9 The Supreme Court has already held that Section
10 232 establishes -- I'm sorry -- that Section 232 "easily
11 fulfills the intelligible principle requirement necessary to
12 guide the President's actions and therefore constitutes a
13 valid delegation of authority." Algonquin has not been
14 overturned, and this Court is bound to follow it.

15 There were three factors that the Supreme Court
16 found relevance in its intelligible principle analysis.
17 First, the Court found that 232 establishes clear
18 preconditions to the President's actions. Namely, there is
19 an investigation by, now, the Secretary of Commerce, and the
20 Secretary of Commerce must make an affirmative finding that
21 either the quantity or circumstances of imports of a certain
22 article threaten to impair the national security. It is
23 only then that the President can act.

24 Second, the action that is authorized is only that
25 that the President deems necessary to adjust imports in

1 order to address the threat of impairment to our national
2 security.

3 And third, the Supreme Court found relevant that
4 in what is now currently Section (d), Congress identified
5 numerous factors to help guide the President's judgment and
6 discretion. There --

7 HON. JENNIFER CHOE-GROVES: Well, what about
8 Plaintiffs' argument that all of that is dicta and that
9 that's not binding on our Court?

10 MS. HOGAN: Even if this -- even if it were dicta,
11 of course, this Court as a subordinate Court is required to
12 follow the reasoned dicta of the Supreme Court. But there's
13 no reason to believe that it was dicta.

14 The issue of the constitutionality of the statute
15 was raised in the District Court. It was addressed by the
16 District Court, it was squarely addressed by the Supreme
17 Court, and it was necessary for the Supreme Court to reach
18 the question of whether the President had exceeded his
19 statutory authority in that case. It was necessary for the
20 Court to first address the constitutional question.

21 So, it was not dicta. It was a necessary
22 predicate and the Court can certainly read the opinion where
23 that's the reason why the Supreme Court starts off its
24 analysis with this, is that first we want to get rid of any
25 suggestion that there's a constitutional problem here.

1 There's not. And having satisfied itself that Section 232,
2 again, "easily fulfills the intelligible principle test" --

3 HON. GARY S. KATZMANN: Now, your brother, as
4 you've heard and, you know, in the briefs, has said, well,
5 actually Algonquin arose in a different context. It arose
6 in the context where it was thought, and indeed it was the
7 case, that some form of judicial review was available.

8 We're in a different world now, where there is no
9 judicial review available. And as a result, there have been
10 presidential actions which, so it is argued, really defy any
11 kind of rational basis. How do you respond to that?

12 MS. HOGAN: We would respond by saying that the
13 availability of judicial review and the scope of that
14 judicial review has not changed since Algonquin. Again, you
15 know, the particular claim that was raised in Algonquin was
16 that the President had exceeded his statutory authority,
17 that the statute did not permit the President to impose this
18 licensing scheme.

19 That kind of claim, that the President has
20 exceeded his statutory authority, under the Circuit's
21 precedent in, as most recently affirmed in *Silfab Solar* and
22 *Maple Leaf* in 1985, that would still be subject to judicial
23 review.

24 What is not subject to judicial review and what
25 has never been subject to judicial review is the President's

1 findings of fact in subjective determinations. As early as
2 1940, and then George S. Bush, a case that we cited, the
3 Supreme Court made that clear, that the President's findings
4 of fact and subjective determinations are not subject to
5 review. That was the case at the time of Algonquin, and it
6 remains to be the case.

7 So, I'm not clear what the Plaintiffs mean --

8 HON. CLAIRE R. KELLY: Well, there would be no APA
9 kind of review, where they would have to make a rational
10 connection between the record and what was done.

11 MS. HOGAN: Right. But the Supreme Court in
12 Franklin and Dalton, in identifying that the President's
13 actions are not subject to APA review, was doing no more
14 than saying, we're not going to read into the -- we're not
15 going to read into the APA statute a right to review the
16 President's actions when there is this long-standing line of
17 authority saying that those are not subject to review. We
18 won't inclusively read that into the statute.

19 So, again, even the cases the Plaintiffs rely upon
20 say no more than --

21 HON. CLAIRE R. KELLY: So, you could review the
22 President for exceeding his statutory authority here?

23 MS. HOGAN: That is what Maple Leaf and Silfab say
24 --

25 HON. CLAIRE R. KELLY: So, what would that case

1 look like here, do you think? So, use my peanut butter
2 example.

3 MS. HOGAN: So, the Plaintiff could raise a
4 challenge that the -- for example, that the investigation
5 was on almond butter, and the President imposed --

6 HON. CLAIRE R. KELLY: Okay, so that's kind of
7 procedural. So, let's say if the plaintiff had -- was a
8 different plaintiff and had some sort of colorable claim
9 that what the President had done was purely economic
10 regulation protectionism to protect a particular industry,
11 and to the extent that Subsection (d) of the statute is so
12 broad that it connects any kind of economic concern to
13 national security that the President asserted he had the
14 authority to do that, is there ever a point at which one
15 could say that the President misunderstood the power given
16 to him, or exceeded his authority, and that a Court could
17 review that?

18 So, kind of like a service dog claim. So, Judge
19 Restani had the service dog claim. The case has been
20 withdrawn or dismissed. Would there ever be room for that?

21 MS. HOGAN: Again, I think you need to look at it
22 in -- so, there's first the national security determination
23 on whether the President concurs with the Secretary's
24 finding.

25 HON. CLAIRE R. KELLY: Mm hmm.

1 MS. HOGAN: So, I get -- even in that situation,
2 you know, you could -- you have to start with the premise
3 that the Secretary of Commerce has found there to be an
4 impairment of national security.

5 With respect to the -- we'll call the remedy -- I
6 think you can think of examples. The Independent Gasoline
7 Marketers from 1980 is a perfect example, where what the
8 President did was to impose fees domestically, and the
9 District Court for the District of Columbia said, actually,
10 that is not adjusting imports; that is a misconstruction of
11 the statutes.

12 So, there are bounds to what the President can do,
13 but in terms of can the Court look behind the President's
14 national security determination, that's not subject to
15 judicial review, and it has never been that case.

16 HON. GARY S. KATZMANN: Now, just returning to
17 first principles, so you -- you know, you whip out the
18 Constitution, you go to Article I, Section 1. All
19 legislative powers herein granted shall be vested in the
20 Congress of the United States.

21 Then you go to Section 8. The Congress shall have
22 the power to lay and collect taxes, duties, imposts and
23 excises, et cetera, also to regulate commerce with foreign
24 nations.

25 Then you go to the Hampton case. And it's

1 interesting, as you know, a lot of these nondelegation cases
2 have really arisen in the context of trade, you know,
3 historically, dating back to the 1800s.

4 So, Chief Justice Taft in Hampton says, well, this
5 is a delegation which is limited by intelligible principle.
6 Essentially, the equalization of domestic and import
7 pricing. And then also in the context of, you know, the 50
8 percent statute.

9 And then you have a series of statutes in the
10 trade area, accountability and duty, and if you're dumping -
11 - you know, go down the list -- which set forth principles
12 for adjudication which can be reviewed. And this is an area
13 of trade -- this is the area of the legislature.

14 Now, how do you respond to the argument that this
15 232 legislation -- it's so broad, it encompasses, really,
16 any kind of, you know, economic interest that it swallows
17 what has been understood to be the role of the Congress,
18 which is to impose and collect taxes, duties, excises, and
19 to govern the tariff area? It swallows the area. And so,
20 is it an unconstitutionally broad delegation of power?

21 MS. HOGAN: So, I have two responses. The first
22 would be that, of course, to go back to what the Supreme
23 Court said in *Algonquin*, which was that the Section (d)
24 factors do meaningfully constrain the President's
25 discretion. So, I think we have to start there. But even

1 apart from Algonquin, we disagree that it swallows the rule.
2 The statute does set forth factors and does illicitly
3 acknowledge the connection between the health of our
4 internal economy and our national security.

5 So, the suggestion that our national economy is
6 somehow untethered to our national security is not reading
7 what the statute says.

8 HON. GARY S. KATZMANN: All right. But what we
9 now know -- and it may not have been known at the time of
10 Algonquin -- but as the record in this case demonstrates, so
11 the argument goes -- I mean, I haven't decided anything in
12 my own mind -- as the letter from the Secretary of Defense
13 demonstrates, the President, under the statute, is not bound
14 to do anything. He can ignore whatever he wants to ignore.
15 He can take into account whatever he wants to take into
16 account.

17 So, this is far different from the traditional
18 tariff legislation that populates the books. And so, it is
19 an unconstitutionally broad delegation of authority.

20 MS. HOGAN: So, I want to make clear that there is
21 a distinction between national defense, which is a narrower
22 category, and national security. And that's a distinction
23 that is found in the statute itself.

24 So, I think to the extent that the Secretary of
25 Defense is saying that, you know, we have what we need for

1 national defense needs does not answer the question about
2 whether there, nonetheless, might be a threat to our
3 national security, which is a broader category.

4 The notion of -- I mean, the way that Congress has
5 set up the statute is for the President to receive -- the
6 Secretary of Commerce is required to conduct an
7 investigation, and that provides advice to the President.
8 It's not the only advice that the President can take, but
9 it's one which Congress has required the President to
10 consider.

11 But we can look at lots of other statutes that
12 were found -- where either there were no -- but, you know,
13 going back to Field v. Clark, right, so that in 1982 there
14 was no Advisory Commission. The President on his own could
15 make that determination.

16 And we can also look at statutes such as Curtiss-
17 Wright, the 1936 decision, where there were no factors to
18 guide the President's discretion as to when the President
19 was to ban the export of arms.

20 HON. GARY S. KATZMANN: But in cases like Field v.
21 Clark, you know, there's this phrase, well, the President is
22 not the lawmaker but the law administrator. And it's almost
23 a ministerial -- the reference is ministerial act by
24 President. This is not what's -- the actions under the
25 Statute 232.

1 MS. HOGAN: They certainly are --

2 HON. GARY S. KATZMANN: And then in, you know, in
3 2018 are not ministerial acts. But...

4 MS. HOGAN: They are certainly not ministerial
5 acts, Your Honor.

6 HON. GARY S. KATZMANN: Yeah.

7 MS. HOGAN: And that's -- that was Congress's
8 intent. Congress wanted the President, who would have
9 probably access to more national security information than
10 the Congress would, to have the flexibility to react quickly
11 and to have the flexibility to use the tools that were
12 available to him to address whatever national security
13 threat might arise.

14 And the notion that there has to be mathematical
15 precision or formulas has never been the law -- the Court
16 for Customs Appeals, Custom and Patent Appeals in 1959 in
17 the Star-Kist case, so that specifically the delegation
18 doctrine does not require mathematical formulas. It does
19 not require precision.

20 That is another example of a trade statute that
21 provided no factors to the President, but simply said that
22 the President could identify the policy to expand foreign
23 markets for U.S. exports, and said, here's the tool that the
24 President may use is through negotiation of foreign trade
25 agreements with other countries, and that there was a limit

1 to how much the tariff could be increased or decreased. But
2 there was no factors that Congress gave to the President to
3 determine what free-trade agreements might be in our best
4 interests, or you know, how the President should determine
5 whether the actions would improve our market access in
6 foreign markets. And that was a statute that the CCPA, the
7 predecessor to the Federal Circuit found to be a
8 constitutional delegation of authority.

9 So, we have examples of cases in which both -- you
10 know, as Plaintiffs called the trigger, is something that is
11 really a judgment call by the President, where the President
12 isn't even guided by factors, and where the President can
13 take -- and again, Yoshida, it's hard to understand how
14 Plaintiffs can get past -- well, certainly it can't get past
15 Algonquin -- but also to get past Yoshida, which has even
16 more breadth, where Congress had provided no factors, but
17 upon a determination or a finding of a national emergency,
18 the President could essentially affect any imports. And the
19 plaintiffs in that case were importers of zippers. And the
20 CCPA again found that it -- because the President understood
21 when he was supposed to act and what he could do, that the
22 intelligible principle --

23 HON. CLAIRE R. KELLY: But, so -- I can see your
24 point that the trigger of national security provides some
25 guidance or boundaries, and the President's actions have to

1 be tethered to that. But when you're talking about what the
2 President then gets to do afterwards, the Plaintiffs'
3 argument is that he can do anything. He could basically
4 distinguish between countries, not distinguish between
5 countries, distinguish between products. I think it's only
6 left -- well, I guess I'm borrowing from somebody's brief --
7 it's only left up to his imagination about what he would
8 like to do. And that may or may not also be a negotiating,
9 basically a trade negotiating tactic.

10 Now, maybe it's a trade negotiation tactic that is
11 in furtherance of a national security goal, but the
12 combination of that breadth of power without judicial review
13 -- and judicial review in an APA type way, not a judicial
14 review that you've exceeded your authority, but a judicial
15 review that there some sort of connection between what
16 you've done and the goal that Congress gave you.

17 I understand why you might want the flexibility,
18 but isn't it really problematic for you not to have that
19 type of judicial review?

20 MS. HOGAN: It's not, Your Honor. Again, the
21 notion that the Courts can look at a statute and determine
22 whether it's an unconstitutional delegation of authority,
23 and make a finding of that, and the notion -- the principle
24 that the President's subjective determinations and findings
25 of fact are not subject to judicial review are two --

1 HON. CLAIRE R. KELLY: It's not really findings of
2 fact, is it? It's a policy decision. That's the problem,
3 right? Isn't it that making policy choices based upon --
4 granted, based upon facts, but ultimately saying I think
5 this is the best way to do this, which -- fine. I
6 understand why Congress might want to do that.

7 But where there's no judicial review and there's
8 this concern that anything could be done, and it overlaps
9 with something that is regulated by Commerce, as Judge
10 Katzmann points out, provided by the Constitution, then
11 doesn't that become a real problem. Isn't it the
12 combination of things?

13 So, even if you find an intelligible principle of
14 the trigger and you say, well, you want to give the
15 President flexibility and the relationship with foreign
16 nations, but the combination of these things, and no
17 meaningful judicial review, is what creates the problem.
18 So, it's not the traditional nondelegation case.

19 MS. HOGAN: Well, this is a quintessential
20 traditional nondelegation case. And again, I think we have
21 to go back to Algonquin, where the Supreme Court said that
22 the President's leeway is far from unbounded. There is a
23 limit to what the President can do, because the President's
24 actions are limited to adjusting imports. Is there a
25 flexibility in what the President can do there? Absolutely.

1 But it's for --

2 HON. GARY S. KATZMANN: Are there any limitations?
3 What are the limitations?

4 HON. CLAIRE R. KELLY: What would one be?

5 HON. GARY S. KATZMANN: Yeah.

6 MR. MORRISON: Well, the limitations is that the
7 President can only adjust imports, and it has to be imports
8 of the article or the derivative found to be threatening to
9 impair the national security. So, it can't be, you know, a
10 tariff on everything. It can't, you know --

11 HON. JENNIFER CHOE-GROVES: But doesn't (d) also
12 talk about -- in addition to national security, it talks
13 about -- without excluding other relevant factors. Doesn't
14 that give the President unlimited power to consider
15 anything, in addition to national security?

16 MS. HOGAN: Well, the term relevant necessarily
17 ties the statute to its statutory objective. And we can
18 look at the Opp Cotton Mills case, that had very similar
19 language, where the Supreme Court said, other factors or
20 other relevant factors necessarily is tied to the statutory
21 objectives. So, there is a tether to the purpose of the
22 statute.

23 But again, I think you also have to look at cases
24 in which the Court -- I'm sorry -- in which Congress has
25 provided no factors to guide the President, and found --

1 HON. JENNIFER CHOE-GROVES: Well --

2 HON. GARY S. KATZMANN: (indiscernible)

3 HON. CLAIRE R. KELLY: But that's the problem in
4 Subsection (d), because if you just say national security, I
5 think people might start with a less expansive view. But
6 when you add the second part of Subsection (d), in
7 particular the part that says -- well, I'll start from -- "I
8 shall take into consideration the impact of competition of
9 the economic welfare of individual domestic industries."
10 Okay. So, fine.

11 So, steel industry, we're worried about its
12 welfare; that's important for national security. Maybe some
13 tech industries. We're worried about their welfare; that's
14 important for national security. Okay.

15 But then you say, "...and any substantial
16 employment, decrease in revenues of the Government, loss of
17 skills", right? So, now we can reach industries where
18 people get skills, because we need skilled people, right, to
19 be in a variety of industries to operate all sorts of
20 things.

21 So -- "...or other serious effects resulting from
22 the displacement of any domestic products by excessive
23 imports." I don't know what that could be. So, isn't that
24 the problem, that it's not just that we're looking at one
25 particular industry and saying, okay, we don't want to lose

1 that industry? But really, you could look at this and say,
2 I have power to regulate any imports, any imports, in any
3 way I want, and do it in any way I want. And so, it's
4 really a power to regulate trade.

5 MS. HOGAN: It's in the -- again, I think you have
6 to start with the limitations that Congress has placed,
7 which is that the Secretary of Commerce has to identify an
8 article that is subject to the investigation and make a
9 conclusion that that article is threatening to impair either
10 the quantity or circumstance of the imports of that article
11 are threatening to impair the national security.

12 Those factors --

13 HON. JENNIFER CHOE-GROVES: But both the --

14 HON. CLAIRE R. KELLY: Yeah, the Secretary and the
15 President, when they do that, we need to recognize all these
16 things, right? So, when the Secretary is conducting its
17 investigation, it's not going to say, oh, come on now, it's
18 peanut butter, right? It's going to read the whole statute
19 and say, okay, I'll look into it.

20 MS. HOGAN: I don't think that the Court can
21 assume that the, you know -- in looking at this as the
22 constitutionality of the statute, we cannot assume that
23 either the Secretary or the President isn't going to take
24 its obligations under the statute seriously.

25 HON. CLAIRE R. KELLY: I totally think that

1 they're going to take it seriously. In fact, I'm not
2 concerned at all with what happened here, because the case
3 here is strictly what type of power they have, right? I'm
4 going to assume everyone's going to act in good faith and
5 exercise their power. The question is, is how much power we
6 can give them.

7 MS. HOGAN: Well -- and I would suggest that the
8 question of what -- how much power --

9 HON. CLAIRE R. KELLY: The acting Congress could
10 give them. Sorry.

11 MS. HOGAN: We can look at the statute and say,
12 here's the bounds of what Congress has said the President
13 can do. I'm sorry, I've lost my train of thought.

14 HON. CLAIRE R. KELLY: Well, I guess my concern is
15 that at some point, even though, you know, you start with
16 what -- it would be hard to argue it's not an intelligible
17 principle, national security, right, furtherance of national
18 security, given the precedent.

19 But then you seem to expand it and say consider
20 this and consider this and consider that. Is there any
21 limit on what kind of power you can give away? Some ways,
22 by making -- by saying more, you created more power problem.
23 And then without judicial review, it seems that you've give
24 away -- or Congress has given away an awful lot. And maybe
25 it should be able to do that.

1 MS. HOGAN: The power -- if we're talking about
2 what the power is, and the power is, one, to make a judgment
3 call, and two, to adjust imports if there is an affirmative
4 finding and if the President concurs.

5 So, there is a limitation to what the President
6 can do. The President can only adjust imports of the
7 article. The fact that there is this broad understanding of
8 national security is Congress's intent.

9 HON. CLAIRE R. KELLY: Right. But that's the
10 problem, right? So, I mean, Congress intended to give all
11 this away. The question is whether Congress can intend to
12 do that. Why can they do that? Have they done too much?

13 MS. HOGAN: Right. And we would say again, if you
14 look at Yoshida, that's a perfect example of what was found
15 to be permissible under the Delegation Doctrine, and at
16 least in my view, seems to be even broader in terms of what
17 the President can do.

18 HON. GARY S. KATZMANN: And just as a matter of
19 historical reference, how often has a President invoked
20 Section (d) in imposing with respect to tariffs?

21 MS. HOGAN: With respect to tariffs?

22 HON. GARY S. KATZMANN: Yes.

23 MS. HOGAN: Specifically? This might be the first
24 case that involves tariffs specifically. There certainly
25 have been fees, which I think are --

1 HON. GARY S. KATZMANN: Like Algonquin.

2 MS. HOGAN: -- monetary exactions. What I can say
3 that there have been 28 investigations since 1962, and of
4 those 28 investigations, 16 of them, the Secretary -- either
5 previously the Secretary of Treasury or the Secretary of
6 Commerce found that there was no threat to the impairment of
7 the national security.

8 So, in half of those cases, the President never
9 got to the point of even being able to execute the power,
10 which demonstrates that there is a meaningful constraint on
11 the President's power here.

12 HON. GARY S. KATZMANN: And of the other -- was it
13 12 cases of the 28? What happened?

14 MS. HOGAN: So, they're -- excuse me. Most of the
15 cases have dealt with petroleum, so we've had embargoes on
16 oil from Libya, from Iran. There have been voluntary
17 restraint agreements that the President reached with other
18 countries prior to the WTO. There have been, obviously, the
19 important license program that was at issue in Algonquin.
20 So, there's been a number of different ways that this has
21 been used.

22 HON. GARY S. KATZMANN: In the petroleum area, of
23 course, there's now -- presidential action is subject to the
24 possibility of congressional override or disapproval.

25 MS. HOGAN: Right. The Subsection (f) sort of

1 demonstrates that, you know, this is Congress and the
2 President working together, and where Congress feels that
3 the President should have less power in his discretion to be
4 more constrained. Congress has the power to, either through
5 the normal legislative process, or the fast-track provision
6 of Subsection (f), use that.

7 And again, I don't think we can assume that the
8 President is going to veto -- that Congress isn't going to
9 be able to execute its will, if it desires to take other
10 action.

11 HON. JENNIFER CHOE-GROVES: So, could Congress
12 step in and prevent the steel tariffs from taking effect if
13 they wanted to, or change it with respect to different
14 countries, or announce -- could they step in and do that?

15 MS. HOGAN: Sure. It's always within Congress's
16 prerogative to do so.

17 HON. JENNIFER CHOE-GROVES: And is it your
18 position that that's what should happen here if they knew
19 that the President's actions were inappropriate? Should
20 they do that at this point?

21 MS. HOGAN: If Congress disagrees with what the
22 President is done, that's the power that Congress has.

23 HON. JENNIFER CHOE-GROVES: You mentioned --

24 HON. CLAIRE R. KELLY: I'm sorry. You can finish
25 the answer. I'm sorry.

1 MS. HOGAN: No, I was finished.

2 HON. CLAIRE R. KELLY: You speak in your briefs
3 about the kind of -- the President has some inherent
4 authority in this area. Just to be clear, if there weren't
5 this statute, he couldn't do this, right?

6 MS. HOGAN: We are not arguing that the President
7 had inherent authority to do this. But what we are arguing
8 is that in the areas in which the President enjoys inherent
9 authority in the cases of national security, foreign
10 commerce, foreign trade, the Supreme Court has long
11 recognized that the delegations can be broader and can be
12 more flexible than when we were dealing with the domestic
13 realm.

14 And again, I would direct the Court specifically
15 to the Curtiss-Wright export case from 1936, where the Court
16 found the statute that -- essentially delegated to the
17 President the determination to ban exports if the President
18 determined that peace between warring nations might be
19 promoted. An inherent judgment call.

20 In that piece, what the Court said is that it went
21 through the history of essentially our country's existence
22 and noted all the times in which Congress has authorized the
23 President to take actions related to foreign trade, o lay
24 embargos, to adjust or eliminate duties. And the Court said
25 that this practice, this long-standing practice "goes a long

1 way in the direction of proving the presence of unassailable
2 grounds for the constitutionality of this process."

3 So, there is a more relaxed standard when we are
4 talking about delegations in the areas in which the
5 President acts as Commander in Chief, as the country's
6 representative to other nations.

7 HON. CLAIRE R. KELLY: So, you would argue that
8 the intelligible principle might mean something different,
9 depending upon context, in terms of whether we're talking
10 about the President's -- areas where the President
11 traditionally has some inherent authority?

12 Would you concede that depending upon the
13 availability of judicial review that the intelligible
14 principle might have different meaning as well there, too?
15 It might expand and contract, like it does for when we're
16 dealing with inherent authority as well?

17 MS. HOGAN: The Supreme Court has never found that
18 the presence or unavailability of APA style review or any
19 other form of (indiscernible) --

20 HON. CLAIRE R. KELLY: Although, I mean, if you go
21 back to Yakus -- I mean, I know there's some -- Justice
22 Rehnquist in the Benzene case, or if you go to Yakus it
23 talks about -- so that Congress, the public and the courts
24 can know that the standards have been met. I'm sorry, I'm
25 not quoting exactly, but...

1 MS. HOGAN: So, two points. The first would be
2 that -- and none of those cases were cases in which the
3 President had -- those were cases all involving the domestic
4 realm. None of them involved cases that were related to an
5 authority that the President inherently had, and we think
6 that that is a distinction that matters.

7 The intelligible principle has -- I would also
8 submit that the intelligible principle test can be met by
9 the standards set forth in Maple Leaf and in Silfab, that
10 the Courts can know whether the President has exceeded his
11 statutory authority because we have an intelligible
12 principle through the statute.

13 And finally, I think there --

14 HON. GARY S. KATZMANN: Again, where you have the
15 Secretary of Defense, you know, saying that only three
16 percent of domestic production is needed for American
17 military needs, I -- you know, I scratch my head a little
18 bit about sort of the -- you know, the rationality of the --
19 of presidential action, which ignores that.

20 MS. HOGAN: Well, Your Honor, of course, the
21 Plaintiffs have not challenged the proclamations here.
22 They've taken the much harder, in our view, task of trying
23 to convince this Court that the statute itself is
24 unconstitutional.

25 But again, I think there is this notion that the

1 national defense is a subset of national security. And even
2 if we currently have the capacity that we need to meet our
3 national defense requirements, we also need those factories
4 to keep working. And so, there is sort of an economic
5 component of needing --

6 HON. GARY S. KATZMANN: And in terms of, you know,
7 the Curtiss-Wright, I mean, subsequent to that you had the
8 Steel Seizure cases, Steel Seizure case, and Mr. Justice
9 Jackson, in his concurrence, talks about when the
10 President's power is at its lowest ebb.

11 So, the argument here would be that in an area
12 which is consumed and sort of governed by the Constitution
13 that is the area of trade, that the President's power is,
14 you know, similarly limited. I'll just toss that out, you
15 know.

16 MR. MORRISON: Well, we would say that the area of
17 foreign trade is within the President's realm. And in fact,
18 in Yoshida, where the issue was tariffs and duties, the CCPA
19 said it's not even a question that this is within the well
20 the foreign trade and foreign commerce.

21 So, we do think that this is not an area in which
22 the President has only the authority granted to it --
23 granted to him by the statute. And I guess what we're --
24 just to put a little bit of a spin on it, I think the
25 argument that we are making is that when the area in which

1 the Congress has delegated to the President is an area in
2 which the President already enjoys some inherent authority,
3 the delegation itself can simply be broader and more
4 flexible than what we might require if it were purely a
5 domestic issue, such as in Yakus.

6 I think that my time is up, but can I add just one
7 case that I do think is important to the Court's --

8 HON. CLAIRE R. KELLY: You reserved time for your
9 summary rebuttal, too.

10 MR. MORRISON: Yes. Okay.

11 HON. CLAIRE R. KELLY: But move quickly please.
12 Yeah.

13 MR. MORRISON: So, I just want to identify
14 Florsheim Shoes, which again is a case in which the Federal
15 Circuit both found a constitutional delegation of authority
16 and acknowledged that the President, in his discretionary
17 determinations about whether to withdraw preferential
18 treatment to certain imports, was not subject to judicial
19 review. Those two principles can exist simultaneously.
20 Florsheim is the example of that.

21 Thank you, Your Honors.

22 MR. MORRISON: Thank you, Your Honors. I'll make
23 several points. First, on the George Bush case that the
24 Government relies on, that was before Algonquin, and nobody
25 at Algonquin cited the case as suggesting that the matter

1 was not reviewable. And that was because that was in the
2 time when they could do an end run by suing -- not suing the
3 President; by suing the responsible officer. And so, that
4 case, that doesn't help the Government at all.

5 Second, I listened very hard when the Government
6 asked -- Judge Kelly -- tried to respond to your peanut
7 butter example, and I did not hear an answer. I did not
8 hear whether it was judicially reviewable or anything else.
9 And that's because the Government does not have an answer to
10 that question.

11 HON. CLAIRE R. KELLY: I'm going to ask them again
12 when she gets back up.

13 MR. MORRISON: I hope so, Your Honor.

14 Third, Independent Gas case, that was a case -- I
15 pointed out to you, even though it was a trade case under a
16 statute, it was not filed in this Court. It was filed in
17 the District Court for the District of Columbia. And the
18 Government never raised the justiciability point, and the
19 Government never took an appeal from that.

20 And maybe that's the case, as I suggested before,
21 that if the Government imposed something not on imports,
22 which they didn't do -- they purported to impose a licensing
23 fee or quotas on domestic production of oil -- that would be
24 like the Civil Rights case or amending the Clean Air Act.
25 Okay.

1 But that's not what we're talking about here.
2 These are clear imports, and within the world of imports
3 there are no limits or boundaries.

4 The Star-Kist case, which the Government relies
5 on, there was... In that case, the only remedy that was
6 available under the statute was to take it on and off of the
7 duty list. That clearly is a narrow limitation on remedy.

8 Similarly, in the Yashoda case, the only remedy
9 they had was they could cancel tariff concessions. They
10 could not increase the existing tariffs by 10 percent.

11 The Government talks about the Congress and the
12 President working together. Yes. But in the Line Item Veto
13 case, Clinton against New York City, Congress passed a
14 statute which gave additional powers to the President. And
15 the Government put forth the same answer. Well, the
16 Congress and the President are working together, Justice
17 Jackson; they're at the apex. The Court said there are
18 limits.

19 And that's the problem here. That even if the
20 Congress said, as Your Honor spoke a moment ago -- intended
21 to give the President all the power he's exercised here,
22 that's not the end of the inquiry. The question is, does
23 that exceed the power that the Congress has under the
24 Constitution? As long as we're going to have our
25 operational powers and not turn over the power of running

1 the government in the international trade area to the
2 President.

3 Curtiss-Wright. The Government has long relied on
4 Curtiss-Wright. But if you read the (indiscernible) case
5 from two years, the Supreme Court Justice Kennedy's opinion,
6 although upholding the power of the President there because
7 it was not a power that Congress had under the Constitution,
8 that is dealing with passports. Justice Kennedy there
9 specifically said the Government has gone too far in relying
10 on Curtiss-Wright for all sorts of things in which it
11 doesn't stand. And so, I think if Your Honors read that,
12 you'll see that Curtiss-Wright was not a problem.

13 In addition, the delegation there, if you look at
14 the statute, was quite narrow, certainly nowhere near the
15 breadth of it here.

16 The Government says -- Florsheim. Florsheim is a
17 very important case that the Government... Well, in that
18 case, the only remedy was to eliminate concessions or not.
19 There was no authority to adjust tariffs. Again, the same
20 kind of narrowing at the remedy and, if Your Honors will
21 read the statute, at the open end it was not a very broad
22 delegation to begin. But the other country had to have done
23 something that I'll call generically unfair trade practices.

24 HON. CLAIRE R. KELLY: Mr. Morrison, let me ask
25 you -- it's kind of a bit of a more general question, but a

1 lot seems to hinge, or you're putting a lot of emphasis on
2 the remedy problem. That the President has so many tools in
3 his toolbox and can use any mix of them that he likes. And
4 I understand that.

5 But let me ask you about your remedy issue. What
6 about the idea that some things are committed to the
7 discretion of an agency? We know when the APA committed to
8 agency discretion by law. We don't see a lot of cases, but
9 there is kind of this view that some have that, look, the
10 Courts may not be your remedy, right? That's if we commit
11 some things to the discretion of the executive.

12 And what's your response to the argument that, you
13 know, this is committed to the President's discretion
14 because it's national security in terms of the remedies that
15 he sues. And so, while it might not work in some other
16 context, sometimes we put up with that. And there may not
17 be a chance to review it in the courts.

18 MR. MORRISON: let me answer that in several ways.
19 First, we focused on the remedy because in some ways it's
20 the most visual and easy to understand the various choices.
21 It's harder to understand what national security are and
22 what limitations there are under 32(d).

23 By the way, I would point out that in 232(d), the
24 words "other factors" appear twice. The first time with the
25 word relevant, and the second time without the word

1 relevant. I don't what the significance of it is, but it
2 suggests to me that it's vastly expansive. So, we had the
3 very, very expensive front-end definition. We have the --
4 it's very open-ended remedies. And we have absence of
5 judicial review. And as Your Honor said, it's the
6 combination that's so important in assessing the validity of
7 this statute.

8 The last thing I want to say is about national
9 security and foreign affairs. In today's world, there is
10 very little the Federal Government does. It doesn't have
11 some international implication, some foreign affairs
12 connection. And just as the Court in the Skinner said,
13 there's no special hard rule for tax cases in terms of
14 delegation.

15 We think that what the sauce -- what's good for
16 the goose is good for the gander. And there's no harsher --
17 in income tax cases, but there's nothing different when
18 there's foreign affairs. Surely, we wouldn't let the --
19 turn over the President the power to regulate all commerce
20 in foreign affairs. And that's essentially what they've
21 done here, at least with respect to imports.

22 So, for all those reasons, Your Honors, if there
23 are no further questions, I submit that we have a statute
24 without limits and that if this isn't the place to step in,
25 it's hard to imagine any place that there is.

1 HON. CLAIRE R. KELLY: Thank you.

2 MR. MORRISON: Thank you, Your Honor.

3 MS. HOGAN: Plaintiffs complain that within the
4 world of imports, the President can do whatever he wants.
5 And I would submit that within the world of imports is one
6 of the boundaries that Congress has identified for the
7 President.

8 Again, it has - the President can only adjust
9 imports and the President can only adjust imports of an
10 article found to be threatening to -- either the quantity or
11 the circumstances are threatening to impair the national
12 security. Those are the boundaries. That is the
13 intelligible principle that the Court could look at and say
14 whether the President has gone outside those bounds or not.

15 That was what happened in the Independent Gasoline
16 Marketers case from 1980. And I think to answer their
17 question about what happened there, I think actually the
18 Congress then passed its 1980 legislation to give itself
19 back the power to undo the President's actions in that case.

20 We do think Curtiss-Wright is a really relevant
21 case. It was a case that was decided only one year after
22 Schechter and Panama Refining. And it was a case in which
23 both -- there was an inherently -- an inherent judgment call
24 about whether the export -- whether an export band would
25 promote the peace between the nations at war in the

1 (indiscernible), and also gave the Present authority to make
2 whatever exemptions that the President wanted to that export
3 ban. So, that's a very broad delegation of authority.

4 There was a case that was a nondelegation
5 challenge, and one that goes back through the history of,
6 you know, starting with the Brig Aurora, Steel v. Clark;
7 J.W. Hampton is a case that's directly on point, and the
8 Court should find it to be persuasive, as well as Algonquin.

9 Finally, with the notion of independent authority,
10 again, the Courts have -- in Star-Kist, the Court
11 specifically said that the precedent recognizes the
12 flexibility allowable to the President when the legislation
13 affects his conduct of foreign affairs. So, that is a
14 principle that is found in Supreme Court precedent and it
15 should be read into the statute.

16 HON. CLAIRE R. KELLY: And so, I'll ask my
17 question.

18 MS. HOGAN: Yes.

19 HON. CLAIRE R. KELLY: So, but I thought I heard
20 an answer. I'll go back and listen to the tape. But just
21 give me a chance to say it again. What about the example
22 where the President arguably -- or there's at least a
23 colorable claim that the President has really stretched the
24 limits of perhaps going beyond his power -- or just
25 misunderstanding what it is Congress gave to him in terms of

1 power, with the service dog case, but not that case, right?
2 So, perhaps changed the facts a little bit.

3 Would there be review for that? Not just for
4 exceeding his authority, but the President seriously
5 misunderstood his power?

6 MS. HOGAN: Right. And that is what Maple Leaf
7 says, a serious misconstruction of the statute --

8 HON. CLAIRE R. KELLY: Okay.

9 MS. HOGAN: -- would be something that --

10 HON. CLAIRE R. KELLY: So, there might be a review
11 of that?

12 MR. MORRISON: Yes.

13 HON. CLAIRE R. KELLY: Okay.

14 MS. HOGAN: Yes.

15 HON. CLAIRE R. KELLY: Thank you.

16 HON. GARY S. KATZMANN: And what's your view on
17 Gundy, whether --

18 MS. HOGAN: So, our view on Gundy -- or maybe it's
19 Gundy --

20 HON. GARY S. KATZMANN: Yeah.

21 MS. HOGAN: -- is that -- of course, that's a
22 decision that has not yet been issued. We don't believe
23 that there's any reason why this Court would need to do for
24 its decision on this case, particularly given that we
25 already have a Supreme Court case directly addressing this

1 particular statute. Gundy is -- it's a criminal statute.
2 The issues are a little bit different. So, I don't think
3 that the Court can read anything or should read anything
4 into either the grant of cert or the arguments made. But
5 there's certainly no reason why this Court needs to delay
6 its decision in this case.

7 HON. CLAIRE R. KELLY: Thank you.

8 MS. HOGAN: For these reasons, we would
9 respectfully request that the Court dismiss the complaint.
10 Thank you.

11 HON. CLAIRE R. KELLY: Counsel, thank you very
12 much for your preparation and your argument. The matter is
13 submitted, and we're adjourned.

14 CLERK: All rise. This Honorable Court now --
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C E R T I F I C A T I O N

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I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

Sonya Ledanski Hyde

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