

## A Presidential Remedy Under Administrative Control—Why Section 337(j) Should be Repealed

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## COMMENTS

### **A Presidential Remedy Under Administrative Control— Why Section 337(j) should be Repealed**

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## INTRODUCTION

On July 26, 2005, President George W. Bush delegated the Review Power under Section 337(j) of the Tariff Act of 1930 to the Office of the United States Trade Representative (USTR).<sup>1</sup> This delegation is a major shift in unfair import trade practices that went largely unnoticed by legal scholars. Tracing its roots to the “elastic tariffs” of the Harding Administration, Section 337(j) has slowly evolved within America’s trade legislation as a tool for the President to quickly and decidedly protect American interests from unfair import trade practices. When the statute took on its present form in 1974, Section 337(j) served an exceptional purpose within the unfair import practices realm by matching the unique insights and perspectives of the President in foreign policy matters with an equally stout remedy—“veto” power over United States International Trade Commission’s (USITC) determinations. Furthermore, Section 337(j) was paired with Section 337(b)(2), which allows administrative agencies to provide persuasive input in USITC matters, to create two distinct tiers of influence in USITC matters. As such, by delegating the President’s powers under Section 337(j) to the USTR, the President has essentially elevated one administrative opinion above the rest—resulting in an administrative level of input being improperly paired with a presidential level of power.

This comment investigates the details behind this delegation of power, by reviewing the legislative history of Section 337 in view of the USTR delegation. Specifically, this comment will first discuss the legislative history of Section 337 as it developed through the passage of various acts of Congress. Second, this paper will discuss the subsequent development of the Review Power within the federal court system as it was utilized by the Office of the President. Lastly, this paper will discuss the delegation of Section 337(j) to the USTR, concluding that the power goes against the Legislature’s intent and that Section 337(j) should either be returned to the Office of the President, or repealed with the USTR’s input being placed under Section 337(b)(2).

## I. THE LEGISLATIVE HISTORY OF SECTION 337(J)

The Commerce Clause of the United States Constitution unambiguously delegates the exclusive power to regulate international trade and commerce to the legislative branch of government.<sup>2</sup> As such, the President may only act in matters of international trade when Congress has specifically provided the

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1. Assignment of Certain Functions Under Section 337 of the Tariff Act of 1930, 70 Fed. Reg. 43,251 (July 26, 2005).

2. See Kevin C. Kennedy, *Presidential Authority Under Section 337, Section 301, and the Escape Clause: The Case for Less Discretion*, 20 CORNELL INT’L L.J. 127, 128 (1987); see also U.S. CONST. art. I, § 8 cl. 3.

President with the authority to do so, and even then, the President can only act within the guidelines provided by the legislative text.<sup>3</sup> This section will review the Acts that helped mold Section 337(j), such as the Tariff Act of 1922,<sup>4</sup> The Tariff Act of 1930,<sup>5</sup> and the Trade Act of 1974.<sup>6</sup>

#### A. Tariff Act of 1922

In his message on December 6, 1921, President Warren G. Harding tasked Congress with finding a way to provide “flexibility and elasticity so that [tariff] rates may be adjusted to meet unusual and changing conditions which can not accurately be anticipated.”<sup>7</sup> Following the President’s suggestion, the Senate Finance Committee added provisions to the Tariff Act of 1922 known as “elastic tariffs,” which authorized the President: A) to modify tariff rates either upwards or downwards within pre-described limits; B) to change the basis for the assessment of *ad volorem* duties on selected items; C) to impose additional duties on the whole or any part of imports into the United States from any country that discriminates against the United States’ overseas commerce; and D) to impose penalty duties or prohibit the importation of particular goods for the purpose of preventing unfair method of competitions in the importation of goods.<sup>8</sup> These “elastic tariffs” served as an accompaniment to the Harding administration’s principle of scientific tariff protection; which sought to use tariffs to “equalize conditions of competition” between foreign countries and the United States.<sup>9</sup>

When discussing the need for Presidential intervention, the Senate Committee on Finance reported that the flexibility provided by the elastic tariffs would contribute to tariff stability and “prevent[] the accumulation of cases which ultimately force the upheaval of a general tariff revision.”<sup>10</sup> Furthermore, the Committee indicated that Section 316 should be interpreted broadly enough to “prevent every type and form of unfair practice and is therefore, a more adequate protection to American industry than any anti-dumping statute the country has ever had.”<sup>11</sup> This sentiment was also

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3. See Kennedy, *supra* note 2, at 128–29.

4. Tariff Act of 1922, ch. 356, § 316, 42 Stat. 858, 943–44, *repealed by* Tariff Act of 1930, ch. 497, § 337, 46 Stat. 703.

5. Tariff Act of 1930, ch. 497, § 337, 46 Stat. 703.

6. Trade Act of 1974, Pub. L. No. 93-618, § 341, 88 Stat. 1978 (1975) (amendment to the Tariff Act of 1930).

7. S. REP. NO. 67-595, at 3 (1922).

8. *Id.*

9. Alfred G. Musrey, *Tariff Act’s Section 337: Vehicle for the Protection and Extension of Monopolies*, 5 LAW & POL’Y INT’L BUS. 56, 60 (1973); *see also* S. REP. NO. 67-595, at 3 (1922).

10. S. REP. NO. 67-595, at 3.

11. *Id.*

championed by the bill's sponsor, Senator Smoot, who hailed Section 316 was "an anti-dumping law with teeth in it – one which will reach all forms of unfair competition in importation."<sup>12</sup>

One piece of legislation added to the Tariff Act of 1922 by the Senate Finance Committee was Section 316(a), which established:

That unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States, are hereby declared unlawful, and *when found by the President to exist shall be dealt with* (emphasis added).<sup>13</sup>

As stated in the statutory text, Section 316 of the Tariff Act of 1922 empowered the President with the ability to determine whether unfair methods of competition exist. When such conditions are found to the President's satisfaction, the Act enabled the President to "deal with" those instances by implementing a number of available remedies.<sup>14</sup>

To enforce this broadly defined protection for American businesses, Section 316 empowered the President with two remedy options. First, the President was able to "determine the rate of additional duty, not exceeding 50 nor less than 10 per centum of the value of such articles . . . which will offset such [unlawful] method or act."<sup>15</sup> Second, Section 316 permitted the President to exclude violating products from entry into the United States when he was "satisfied . . . extreme cases of unfair methods or acts [existed]."<sup>16</sup> While the Senate Committee Report promoted the flexibility provided by Section 316,<sup>17</sup> the idea of giving the President power to exclude items from import, even when limited to "extreme" cases, was still considered controversial at the time.<sup>18</sup>

In addition to vesting power in the President, the Tariff Act of 1922 also tasked the United States Tariff Commission (a precursor of the present day USITC) with "assist[ing] the President in making any decisions under [Section

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12. 67 Cong. Rec. 5,879 (1922).

13. Tariff Act of 1922 § 316(a).

14. *Id.*

15. Tariff Act of 1922 § 316(e).

16. *Id.* ("[I]n what [the President] shall be satisfied and find are extreme cases of unfair methods or acts as aforesaid, he shall direct that such articles . . . shall be excluded from entry into the United States.").

17. S. REP. NO. 67-595, at 3.

18. John F. McDermid, *The Trade Act of 1974: Section 337 of the Tariff Act and the Public Interest*, 11 VAND. J. TRANSNAT'L L. 421, 425 n.14 (1978).

316].”<sup>19</sup> As such, the Tariff Commission fulfilled a supporting role, being given the necessary powers to investigate alleged violations, but yielding to the President for a final decision.<sup>20</sup>

Upon receiving the Tariff Commission’s recommendations under Section 316, the President is able to accept the recommendations, reject the recommendations, or create his own findings based upon the collected evidence.<sup>21</sup> One unique element of the system under Section 316 was that while the President’s decision was not subject to judicial review, the accused party was given an opportunity to appeal the Tariff Commission’s recommendation to the Court of Customs Appeals before the recommendation was submitted to the President.<sup>22</sup>

### B. Tariff Act Of 1930

The Tariff Act of 1930 marked the next major statutory step for the Review Power established by Section 316. Specifically, the Tariff Act of 1930 repealed the Tariff Act of 1922 and replaced Section 316 with Section 337.<sup>23</sup> Under the Tariff Act of 1930, Section 337 retained many of the same provisions as the older Section 316 and continued to vest the decision-making power for matters regarding unfair trade in the office of the President.<sup>24</sup> Section 337 also retained the same operative language as Section 316,<sup>25</sup> declaring unlawful all “methods of competition and unfair acts in the importation of articles into the United States” that tend to “injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States.”<sup>26</sup>

While the Tariff Act of 1922 was, itself, considered a change from earlier free-trade theory to a more protectionist trade theory,<sup>27</sup> the Tariff Act of 1930

19. Tariff Act of 1922 § 316(b).

20. McDermid, *supra* note 18, at 424 (“Section 316 required the [Tariff] Commission . . . to make findings and recommendations that were appealable to the Court of Customs and Patent Appeals (CCPA), and, on certiorari, to the Supreme Court. Following the time period provided for appeal, the Commission’s advisory findings were sent to the President.”).

21. *Id.*; Musrey, *supra* note 9, at 61 (“Traditionally, however, the President has never excluded merchandise under Section 337 or [Section 316] except upon the Commission’s recommendation.”).

22. McDermid, *supra* note 18, at 424; Mursey, *supra* note 9, at 57.

23. McDermid, *supra* note 18, at 432; *see also* Tariff Act of 1930 § 337.

24. Compare Tariff Act of 1922 § 316(a)–(d), with Tariff Act of 1930 § 337(a)–(d).

25. McDermid, *supra* note 18, at 432 (“The operative language of section 316 was not changed when the statute was amended by the passage of section 337 of the Tariff Act of 1930.”).

26. Tariff Act of 1930 § 337(a).

27. H.R. REP. NO. 71-7, at 3 (1929) (The Tariff Act of 1922 “effected a change from a tariff made under the general free-trade theory to that made under the protective theory.”).

advanced the protectionist theory even further.<sup>28</sup> Particularly, the Tariff Act of 1930 eliminated the President's ability to impose additional duties on violating items, leaving only one remedy – exclusion – for Section 337 violations.<sup>29</sup> To justify this change in policy, the Senate Committee on Finance reported “the imposition of penalty duties to offset [Section 337] violations is entirely inadequate to prevent further violations. The effective remedy is to exclude from entry the articles concerned in the violation.”<sup>30</sup>

The Tariff Commission's responsibilities remained unchanged under the Tariff Act of 1930. Similar to the duties prescribed in the Tariff Act of 1922, the Tariff Commission was tasked with “assist[ing] the President in making any decisions under [Section 337].”<sup>31</sup> However, the ability for the accused party to appeal underwent some changes. Under the Tariff Act of 1930, the accused party could no longer appeal a Tariff Commission recommendation all the way to the Supreme Court.<sup>32</sup> Rather, the Senate Committee on Finance reported that since the President is not bound by the Tariff Commission's recommendation, there is no case or controversy for an Article III court to have jurisdiction.<sup>33</sup> Therefore, the Court of Customs and Patent Appeals was the only appellate option to appeal Tariff Commission recommendations.<sup>34</sup>

### C. Trade Act of 1974

The third major step in the statutory evolution of the Review Power took place with the passage of the Trade Act of 1974.<sup>35</sup> The Trade Act of 1974 amended the Tariff Act of 1930, bringing about sweeping changes to Section 337 and establishing the modern administrative layout we now know.

The Trade Act of 1974 (then known as the Trade Reform Act of 1973) was initially proposed by President Richard Nixon on April 10, 1973.<sup>36</sup> In his letter to Congress, President Nixon asked, among other things, for laws allowing for

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28. McDermid, *supra* note 18, at 432 (The Tariff Act of 1930 “represented one of the most protectionist pieces of legislation in United States history.”).

29. *Id.*; *see also* S. REP. NO. 71-37, at 68 (1929).

30. S. REP. NO. 71-37, at 68; *see also* McDermid *supra* note 18, at 432. (“The deletion of the duty remedy, which at least could have had the effect of raising the price of the imported merchandise to ‘fair’ levels, and the substitution of exclusion, which also attacked fair traded goods, led the Commission and the President into a new era of potential protectionism.”).

31. Tariff Act of 1930 § 337(b).

32. S. REP. NO. 71-37, at 67; *see also* Musrey, *supra* note 9, at 61.

33. S. REP. NO. 71-37, at 67.

34. *Id.*

35. *See generally* Trade Act of 1974.

36. H.R. Doc. No. 93-80, at 1 (1973) (Message of the President introducing the Trade Reform Act of 1973 to Congress).

more expeditious investigations and decisions in unfair import cases.<sup>37</sup> In particular, the President's proposed bill suggested limiting Section 337 to patent infringement cases while authorizing the Federal Trade Commission (FTC), to regulate other forms of unfair methods of competition in import trade.<sup>38</sup>

During extensive hearings by the Senate Committee on Finance, the proposed changes to Section 337 were generally met with criticism. Nearly all witnesses that commented on Section 337 called for its repeal, citing, among other things, the USITC's inability to hear equitable defenses such as determining the validity of the patents in question.<sup>39</sup> In view of this feedback, the Senate Committee on Finance extensively revised Section 337 in order to "assure a swift and certain response to . . . unfair foreign trade practices."<sup>40</sup> The amended bill was ultimately sent to the conference committee and passed as the Trade Act of 1974.<sup>41</sup>

As amended by the Trade Act of 1974, Section 337: 1) replaced the Tariff Commission with the USITC; 2) established the USITC as the primary decision-making body for all matters under Section 337; 3) provided the USITC with additional remedies for dealing with unfair methods of competition; 4) instructed the USITC to consult with other agencies when making a determination; 5) indicated that all legal and equitable defenses may be presented for all cases; 6) instructed the USTIC to take into account the public health and welfare when making determinations; and 7) granted the President disapproval power over USITC decisions for "policy reasons."<sup>42</sup>

As the Senate Finance Committee established during the legislation of the bill, "the public interest must be paramount in the administration of [Section 337]."<sup>43</sup> In furtherance of this goal, Section 337 requires the USITC to take into account a number of public interest factors, such as: 1) the effect of an order upon the public health and welfare; 2) the effect on the competitive conditions in the U.S economy; 3) the effect on production of like or directly competitive articles in the United States; and 4) the effect on U.S. consumers.<sup>44</sup>

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37. *Id.* at 11–12.

38. *Id.*

39. *Digest of Testimony Received on H.R. 10710: The Trade Reform Act of 1973 Before the S. Comm. on Finance*, 93<sup>rd</sup> Cong. (1974).

40. S. REP. NO. 93-1208, at 31 (1974).

41. Trade Act of 1974 § 337.

42. See generally, Edward R. Easton & Jeffrey S. Neeley, *Unfair Competition in U.S. Import Trade: Developments since the Trade Act of 1974*, 5 INT'L TRADE L.J. 203 (1979–80); see also McDermid, *supra* note 18, at 439–40; Trade Act of 1974 § 337(d).

43. S. REP. NO. 93-1208, at 193.

44. Easton & Neeley, *supra* note 42, at 203, 231–32.

Section 337 also requires that the USITC refuse to issue a remedy if the burdens to the public interest were found to outweigh the anticipated effectiveness of the remedy.<sup>45</sup> According to the Commission, these changes to the decision making process “made clear that [S]ection 337 must be enforced so as to reflect the public interest and must not be used as a vehicle for protecting private rights at the possible expense of the public health and welfare.”<sup>46</sup>

The Trade Act of 1974 also marked the return of a more flexible remedy system. Instead of the all-or-nothing scheme dictated under the protectionist Tariff Act of 1930, the Trade Act of 1974 provided the USITC with a greater range of remedies to combat unfair methods of foreign trade. Specifically, the USITC may issue: (1) a temporary exclusion order; (2) a permanent exclusion order; or (3) a cease and desist order.<sup>47</sup> Also note, the temporary and permanent exclusion orders are in rem remedies,<sup>48</sup> which allow the USITC to more effectively combat infringing items owned by foreign companies or manufactured overseas. With more provisions available to the USITC, the Commission is able to appropriately address a greater variety of violations under Section 337.

Another change to Section 337 included the addition of Section 337(b)(2), which required the USITC to “consult with, and seek advice and information from” various federal agencies, such as the Federal Trade Commission (FTC) and the Department of Justice.<sup>49</sup> The Senate Committee felt that the various agencies would “have significant information, as well as sound advice” about the types of impact that a particular remedy may have on the consumers and competitive conditions surrounding a particular item.<sup>50</sup> It is important to note that while the statutory language requires that the USITC consult with other agencies that may have relevant information, the statute does not explicitly require that the USITC follow the information provided by those agencies.

Finally, the Trade Act of 1974 fundamentally changed the role of the President under Section 337. Instead of making binding decisions based on

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45. S. REP. NO. 93-1298, at 197.

The Committee believes that the public health and welfare and the assurance of competitive conditions in the United States economy must be the overriding considerations in the administration of this statute. . . . Should the Commission find that issuing an exclusion order would have a greater adverse impact on the public health and welfare . . . then the Committee feels that such exclusion order should not be issued.

46. McDermid, *supra* note 18, at 439–40.

47. Harvey Kaye & Paul Plaia, Jr., *The Filing and Defending of Section 337 Actions*, 6 N.C.J. INT’L L. & COM. REG. 463, 468 (1980–81).

48. *Id.* (“The [temporary exclusion order] and [permanent exclusion order] are in rem remedies, while the cease and desist order is an in personam remedy.”).

49. Trade Act of 1974 § 337(b)(2).

50. S. REP. NO. 93-1298, at 195.

information and recommendations presented by the USITC, the President was placed in a more passive role, having only the power to disapprove affirmative USITC decisions for “policy reasons.”<sup>51</sup> Specifically, Section 337 requires that all affirmative determinations made by the USITC be forwarded to the President, where he or she has sixty-days to disprove the remedy for “policy reasons.”<sup>52</sup> If the President chooses to disapprove a remedy, the remedy proposed by the USITC “shall have no force or effect.”<sup>53</sup> However, if the President does not act or indicates approval for the measure, the remedy becomes final and may be enforced.<sup>54</sup>

The Senate Finance Committee reported that the President’s disapproval provision was necessary since “the granting of relief against imports could have a very direct and substantial impact on United States foreign relations,”<sup>55</sup> as such, “the President would often be able to best see the impact which the relief ordered by the [USITC] may have upon the public health.”<sup>56</sup>

Together, Sections 337(b)(2) and 337(j) create two distinct tiers of influence within Section 337. Section 337(j) separates and elevates Presidential input apart from other administrative input by pairing it with an incredibly strong remedy – the ability to stop the USITC decisions from going into effect. Meanwhile, Section 337(b)(2) indicates that “advice and information” from “other departments and agencies” is only persuasive in nature.

## II. LATER DEVELOPMENTS OF PRESIDENTIAL REVIEW POWER

After Section 337(j) took on its modern form with the passage of the Trade Act of 1974,<sup>57</sup> the Review Power began the second phase of its development, namely, the interpretation of the statutory language within the federal court system. Given Section 337(j)’s extremely broad language, the statutory text provides little guidance regarding the practical limits of the Review Power.<sup>58</sup> As such, we are forced to look to the specific uses of the Review Power—and the federal court cases related to those uses—to develop a set of “canons” applicable to the Review Power in actual practice. This type of review also

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51. Trade Act of 1974 § 337(g); Easton & Neeley, *supra* note 42, at 205–06.

52. Easton & Neeley, *supra* note 42, at 205; *See* 19 U.S.C. § 1337(j)(2) (2012).

53. *See* 19 U.S.C. § 1337(j)(2) (2012).

54. Jack Q. Lever, Jr., *Unfair Methods of Competition in Import Trade: Actions Before The International Trade Commission*, 41 BUS. LAW. 1165, 1179 (1986).

55. S. REP. NO. 93-1208, at 199.

56. *Id.*

57. *See generally* Trade Act of 1974.

58. Kennedy, *supra* note 2, at 132 (“[T]he statute nowhere defines ‘policy reasons’ the Court of Appeals for the Federal Circuit has stated that ‘policy reasons’ do not include the merits of the ITC’s determination.”).

provides insight into the types of considerations Presidents have taken into account when utilizing the Review Power. As such, this comment will investigate each of the five instances where the Review Power was exercised by the Office of the President to determine how the scope of the power has evolved and what considerations the President has taken into account.<sup>59</sup>

*A. Certain Stainless Steel Pipe and Tube (1978)*

The first use of the Review Power under Section 337(j)—as amended by the Trade Act of 1974—occurred when President Jimmy Carter disapproved the USITC decision in *Certain Stainless Steel Pipe and Tube*.<sup>60</sup> In *Certain Stainless Steel Pipe and Tube*, a group of domestic manufacturers filed suit for unfair methods of competition against thirty-one Japanese manufactures, exporters, and distributors of stainless steel products.<sup>61</sup> In the suit, the domestic manufacturers alleged the Japanese manufacturers were selling products below the cost of production to gain market share in the United States.<sup>62</sup> After reviewing the facts of the case, the USITC determined the pricing methods of the foreign manufacturers constituted unfair competition under Section 337 and issued a cease and desist order requiring “certain manufacturers, exporters, and importers of Japanese welded stainless steel pipe and tube to cease and desist from selling such products for consumption in the United States at prices below the . . . cost of production.”<sup>63</sup>

Within the sixty-day statutory period, President Carter disapproved the USITC’s order indicating his decision was based on “policy reasons.”<sup>64</sup> In the disapproval letter, President Carter stated the following policy factors were taken into account:

- (1) The detrimental effect of the imposition of the remedy on the national

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59. Since 1974, an affirmative USITC decision has been disapproved by the President on six occasions. See generally *Certain Welded Stainless Steel Pipe and Tube*, 43 Fed. Reg. 17,789 (Apr. 22, 1978) (presidential disapproval of USITC determination); *Certain Multi-ply Headboxes*, 46 Fed. Reg. 32,361 (June 22, 1981) (presidential disapproval of an USITC determination); *Certain Molded-In Sandwich Panel Inserts and Methods for Their Installation*, 47 Fed. Reg. 29,919-02 (July 9, 1982) (presidential disapproval of an USITC determination); *Determination of the President Regarding Certain Alkaline Batteries*, 50 Fed. Reg. 1,655 (Jan. 11, 1985); *Presidential Disapproval of a Section 337 Determination*, 52 Fed. Reg. 46,011 (Dec. 3, 1987); Letter from Michael B. G. Froman, United States Trade Rep., to Irving A. Williamson, Chairman, USITC (Aug. 3, 2013), available at [http://www.ustr.gov/sites/default/files/08032013%20Letter\\_1.PDF](http://www.ustr.gov/sites/default/files/08032013%20Letter_1.PDF).

60. See generally *Certain Welded Stainless Steel Pipe and Tube*, Inv. No. 337-TA-29, USITC Pub. 863 (Feb. 1978) (commission determination and action).

61. *Id.*

62. *Id.*

63. *Certain Welded Stainless Steel Pipe and Tube*, 43 Fed. Reg. 17,789 (Apr. 22, 1978) (presidential disapproval of USITC determination) [hereinafter *Stainless Steel Pipe Disapproval*].

64. *Id.*

economic interest; (2) The detrimental effect of the imposition of the remedy on the international economic relations of the United States; (3) The need to avoid duplication and conflicts in the administration of the unfair trade practice laws of the United States; [and] (4) The probable lack of any significant benefit to the U.S. producers or consumers to counterbalance the above considerations.<sup>65</sup>

After reviewing each of the four factors in view of the facts of the case, President Carter listed some of the more prominent reasons to disapprove the remedy, namely, the lack of benefit to the United States welded stainless steel pipe industry and the effect such a ban would have on the United States trade relationship with Japan.<sup>66</sup> More specifically, President Carter indicated the USITC's decision "would be viewed by our trading partners as a precedent and a departure from internationally agreed procedures for dealing with below cost sales."<sup>67</sup> The President also remarked that such actions would likely "invite retaliation against the United States exports."<sup>68</sup> While the factors laid out by President Carter were not formally required by Section 337, the President's reasoning did appear to confirm the Senate Finance Committee's indication that "granting of relief against imports could have a very direct and substantial impact on United States foreign relations," and that "the President would often be able to best see the impact . . . [the remedy] may have upon the public health."<sup>69</sup>

#### *B. Certain Multi-Ply Headboxes (1981)*

The second use of the Presidential Review Power occurred in the matter of *Certain Multi-ply Headboxes*.<sup>70</sup> In *Certain Multi-ply Headboxes*, a domestic manufacturer of papermaking products filed a complaint with the USITC under Section 337 alleging the accused headboxes infringed a number of the domestic manufacturer's patents.<sup>71</sup> After completing an investigation, the USITC determined the headboxes infringed the patents in question and issued an exclusion order banning any infringing headboxes from entering the United States.<sup>72</sup>

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65. *Id.*

66. *Id.* at 17,790.

67. *Id.*

68. *Id.*

69. S. REP. NO. 93-1208, at 199 (1974).

70. See generally *Certain Headboxes and Papermaking Machine Forming Sections for the Continuous Production of Paper, and Components Thereof*, Inv. No. 337-TA-82, USITC Pub. 1138 (Apr. 1981) (commission determination).

71. *Id.*

72. *Id.* ("The issuance of an exclusion order . . . preventing importation of multi-ply headboxes

In response, President Ronald Reagan disapproved the exclusion order indicating the remedy was unnecessarily broad and would result in an unnecessary burden to foreign manufacturers not involved in the present case.<sup>73</sup> The President also expressed his belief that the patent holder was entitled to a remedy; however, due to the President's inability to modify the USITC's order, he was compelled to disapprove it entirely.<sup>74</sup> Specifically, President Regan indicated in his disapproval letter that "[a]n exclusion order directed only to the respondent's products, or a narrowly drafted cease and desist order would appear to be entirely justified."<sup>75</sup>

The disapproval in *Certain Multi-ply Headboxes* helped define the scope of the Review Power on two fronts. First, the disapproval by President Regan established that the President did not have authority to revise a USITC remedy, and therefore, could only utilize his disapproval power under Section 337(j) to accept or reject the remedy wholesale.<sup>76</sup> Second, President Reagan's suggestions on how the remedy might be modified to avoid future public policy concerns raised the questions as to whether, and to what extent, a remedy proposed by the USITC could be modified once it had been disapproved by the President.<sup>77</sup> Unsure of how to proceed, the USITC ultimately instituted a new investigation and issued a new, limited exclusion order based on the President's statement.<sup>78</sup>

### C. *Certain Molded-In Sandwich Panel Inserts* (1982)

After raising the issue in *Certain Multi-ply Headboxes*, the question as to whether USITC remedies can be modified after a Presidential disapproval was finally resolved in *Certain Molded-In Sandwich Panel Inserts*.<sup>79</sup> In *Certain Molded-In Sandwich Panel Inserts*, a domestic company filed a complaint with the USITC alleging imported "panel inserts" infringed the claims of two of their U.S. patents.<sup>80</sup> After finding the products infringed the patents in question, the

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and papermaking machine forming sections for the continuous production of paper, and components thereof, made in accordance with claims 1, 12, 15, 16, and 22.").

73. See generally *Certain Multi-ply Headboxes*, 46 Fed. Reg. 32,361 (June 22, 1981) (presidential disapproval of USITC determination) [hereinafter *Headboxes Disapproval*].

74. *Id.* ("My decision does not mean that the patent holder in this case is not entitled to a remedy. However, I do not have the authority to revise the USITC's remedy.").

75. *Id.*

76. HARVEY KAYE & CHRISTOPHER A. DUNN, 2 INTERNATIONAL TRADE PRACTICE § 9:3 (1997)

77. *Id.*

78. *Id.*

79. See generally *Certain Molded-In Sandwich Panel Inserts and Methods for Their Installation*, Inv. No. 337-TA-99, USITC Pub. 1297 (Oct. 1982).

80. *Id.*

USITC issued a remedy including, among other things, a cease and desist order disallowing three domestic purchasers of imported panel inserts from using imported products when practicing a process infringing the relevant patents.<sup>81</sup>

President Reagan ultimately disapproved the USITC determination, indicating that “directing the three [domestic] purchasers not to use imported products when practicing a process . . . that infringes a process patent may not be in compliance with U.S. international obligations” since the remedy may “result in less favorable treatment . . . being accorded imported products than the treatment being accorded domestic products.”<sup>82</sup> As was the case in *Certain Stainless Steel Pipe and Tube*, the President relied upon his unique insight in foreign relations—here the principal of national treatment—to overturn a USITC remedy.

Similar to *Headboxes*, President Regan provided a suggestion in his disapproval letter regarding how the USITC’s remedy could be modified to avoid future disapproval and overcome the public policy concerns.<sup>83</sup> More particularly, the President indicated that remedies “which would fully protect the legitimate patent rights of the petitioner without unnecessarily discriminating against imported products” would not likely be met with another rejection.<sup>84</sup>

In response, the USITC chose to modify the remedy to meet President Regan’s suggestions.<sup>85</sup> In the subsequently filed appeal—*Young Engineers v. USITC*—the United States Federal Circuit confirmed the USITC’s actions, holding that disapprovals under Section 337(j) only apply to the USITC’s *remedy* and not to the *determination* that a violation has occurred.<sup>86</sup> The court went so far as to say “the validity of [the USITC’s] determination of violation is unaffected by presidential disapproval,”<sup>87</sup> and therefore “[t]he President may disapprove only ‘for policy reasons,’ not because of the merits of the investigation.”<sup>88</sup> In all, the *Young Engineers* court established, among other things, that the USITC is allowed to modify a remedy that has been disapproved under Section 337(j) without having to re-try the case.<sup>89</sup>

The court’s findings in *Young Engineers* rely mostly on the statutory text

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81. *Id.*

82. *Certain Molded-In Sandwich Panel Inserts and Methods of Their Installation*, 47 Fed. Reg. 29,919 (July 9, 1982) (presidential disapproval of an USITC determination).

83. *Id.*

84. *Id.*

85. KAYE & DUNN, *supra* note 76.

86. *Young Eng’rs v. USITC*, 721 F.2d 1305, 1313 (1983) (emphasis added).

87. *Id.*

88. *Id.*

89. *See generally id.*

and follow the general guidelines put forth by the Senate Committee of Finance when drafting the Review Power into legislation. Specifically, the Committee indicated that “[t]he President’s power to intervene would not be for the purpose of reversing a [USITC] finding of a violation of section 337; such finding is determined solely by the [USITC], subject to judicial review.”<sup>90</sup>

#### *D. Certain Alkaline Batteries (1984)*

The next utilization of the Review Power occurred in *Certain Alkaline Batteries*.<sup>91</sup> In *Certain Alkaline Batteries*, Duracell filed a complaint alleging the importation of certain gray goods violated Section 337.<sup>92</sup> The USITC found in favor of Duracell and issued a general exclusion order prohibiting the entry of the infringing batteries into the United States.<sup>93</sup>

Within the sixty-day period, President Regan disapproved the remedy for interpreting the Lanham Act in a way that was “at odds with the longstanding regulatory interpretation by the Department of the Treasury” such that “[a]llowing the [USITC]’s determination in this case to stand could be viewed as an alteration of that interpretation.”<sup>94</sup> This determination is yet another example of the President using his unique insight—this time in inter-agency relationships—to render a decision of the USITC ineffective.

In light of the disapproval, Duracell filed for appeal in the Federal Circuit Court alleging the President’s decision was in violation of *Young Engineers* since the disapproval relied upon the merits of the case and not on public policy grounds.<sup>95</sup>

The resulting appellate decision, *Duracell v. USITC*, helped mold the Review Power even further.<sup>96</sup> First, the court confirmed that decisions by the President under Section 337(j) are “not reviewable either directly or indirectly [by the] court.”<sup>97</sup> In the opinion, the *Duracell* court looked to Section 337(c), which indicates that a person adversely affected by a final USITC determination may appeal “within 60 days after the determination becomes

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90. S. REP. NO. 93-1208, at 199 (1974).

91. *See generally* *Certain Alkaline Batteries*, Inv. No. 337-TA-165, USITC Pub. 1616 (Nov. 1984) (commission determination).

92. *Id.*

93. *Id.*

94. Determination of the President Regarding Certain Alkaline Batteries, 50 Fed. Reg. 1,655 (Jan.1985).

95. *See generally* *Duracell, Inc. v. USITC*, 778 F.2d 1578 (1985).

96. *Id.*

97. *Id.* at 1581; 19 U.S.C. § 1337(c) (2012) (“Any person adversely affected by a final determination of the Commission . . . of this section may appeal such determination, within 60 days . . . to the United States Court of Appeals.”).

final.”<sup>98</sup> The court reasoned that since the President disapproved the determination before it could go into effect, the decision was never “final” and therefore no appeal is possible for lack of jurisdiction.<sup>99</sup>

Second, the *Duracell* Court addressed the question of what constituted a “policy reason” under Section 337(j). Specifically, the *Duracell* court held that “[t]here is no requirement in [S]ection 337 . . . that the President articulate or detail the reasons for his disapproval of a [USITC] determination. It is sufficient that the President disapprove the determination for *his* policy reasons (emphasis original),” which the court admits “is a broad concept.”<sup>100</sup>

In view of the *Duracell* decision, the ability of the President to disapprove a USITC decision for “policy reasons” appears almost unlimited in scope. Although the President’s ability to act was slightly narrowed in *Young Engineers*,<sup>101</sup> the ruling in *Duracell* essentially renders such a determination moot since the President is not required to articulate his reasons for disapproving a decision during the decision making process.

#### *E. Certain Dynamic Random Access Memories (1987)*

The fifth and final use of the Review Power by the Office of the President occurred in the matter of *Certain Dynamic Random Access Memories*.<sup>102</sup> In this particular case, Texas Instruments (TI) filed suit under Section 337 claiming Samsung violated a TI patent generally directed toward Dynamic Random Access Memories (DRAMs). After concluding Samsung had infringed TI’s patents, the USITC issued a limited exclusion order “prohibiting the unlicensed importation of infringing DRAMs . . . manufactured by Samsung.”<sup>103</sup> The order also excluded from entry “[c]omputers, facsimile machines, telecommunications switching equipment, and printers, *whether manufactured by Samsung or any other firm*, that contain . . . [infringing] DRAMs manufactured by Samsung. (emphasis added).”<sup>104</sup>

98. *Id.*

99. *Duracell*, 788 F.2d at 1580–81.

100. *Id.* at 1581–82 (“Policy is a broad concept which includes, but is not limited to: ‘[i]mpact on United States foreign relations, economic and political . . . [and] upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers.’” (quoting S. REP. NO. 1298, 93d Cong., 2d Sess. 199, reprinted in 1974 U.S. Code CONG. & AD. NEWS 7186)).

101. *See also*, *Young Eng’rs*, 721 F.2d at 1313.

102. *See generally* *Certain Dynamic Random Access Memories, Components Thereof and Products Containing Same*, Inv. No. 337-TA-242, USITC Pub. 2034 (Nov. 1987) (commission determination) [hereinafter *Random Access Memory Determination*]; *Presidential Disapproval of a Section 337 Determination*, 52 Fed. Reg. 46,011 [hereinafter *Random Access Memory Disapproval*].

103. *Random Access Memory Disapproval*, *supra* note 102 at 46,012.

104. *Id.*

President Reagan disapproved the exclusion, using similar rationale to that in *Headboxes*.<sup>105</sup> Specifically, the President disapproved the remedy indicating it was too broad and would result in the “unnecessary disruption of trade in computers, facsimile machines, telecommunications switching equipment, and printers.”<sup>106</sup> Building on the previously established canons, the President disapproved the remedy wholesale for policy reasons and provided input for the USITC to fashion a subsequent remedy.

#### F. Summarizing the Review Power

The disapproval in *Certain Dynamic Random Access Memories* marked the final instance where the Office of the President utilized the Review Power under Section 337(j). As such, the Review Power, as it was understood after *Certain Dynamic Random Access Memories*, is the Review Power that was ultimately delegated to the USTR. In all, a number of “canons” can be drawn from past Review Power uses, such as: 1) Presidential decisions under Section 337 are not subject to judicial review;<sup>107</sup> 2) a Presidential disapproval applies only to the remedy, not the USITC’s determination that Section 337 has been violated;<sup>108</sup> 3) the President’s decision to disapprove a remedy cannot rely on the merits of the case;<sup>109</sup> 4) the President need not articulate his policy reasons for disapproval;<sup>110</sup> 5) the President cannot revise a USITC remedy, but must accept or reject USITC decisions wholesale;<sup>111</sup> and 6) the phrase “policy reasons” has not been specifically defined, but has been deemed broad in scope.<sup>112</sup> In all, the scope of the Review Power appears best articulated by Judge Edward Smith in his holding for *Duracell*: “[i]nasmuch as the President acted timely, stated that he was acting for policy reasons, and stated reasons other than the merits[,] . . . our inquiry must end.”<sup>113</sup>

### III. ASSIGNMENT OF THE REVIEW POWER TO THE UNITED STATES TRADE REPRESENTATIVE (2005)

On July 21, 2005, President George W. Bush assigned the powers vested in the President under Section 337(j)(1)(B), Section 337(j)(2), and Section

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105. Compare *Headboxes Disapproval*, *supra* note 73, with *Random Access Memory Disapproval*, *supra* note 103.

106. *Random Access Memory Disapproval*, *supra* note 103 at 46,102.

107. *Duracell v. USITC* 778 F.2d at 1581.

108. *Young Eng’rs v. USITC*, 721 F.2d 1313 (1983).

109. *Id.*

110. *Duracell*, 778 F.2d at 1581.

111. See generally *Headboxes Disapproval*, *supra* note 73.

112. *Duracell v. USITC*, 778 F.2d at 1581–82.

113. *Id.*

337(j)(4) to the USTR.<sup>114</sup> President Bush indicated that such a delegation was allowed under Section 301, Title 3 of the United States Code, which generally authorizes the President “to designate and empower the head of any department or agency in the executive branch . . . to perform . . . any function which is vested in the President by law.”<sup>115</sup> In short, the President granted the USTR the ability to overturn affirmative USITC remedies in future cases.

This delegation of power constitutes a major shift for Section 337 and almost directly contradicts Congress’ primary reasons for allowing the President to overrule USITC remedies. Unlike Congress’ initial intent, where Section 337(j) was given a uniquely powerful remedy—a veto—to match the President’s unique perspective and knowledge regarding the public’s welfare,<sup>116</sup> Section 337(j) now resides in the care of an administrative head while retaining its powerful remedy. Stated differently, the President’s delegation has improperly matched a presidential level remedy with an administrative level of information and accountability.

This deficiency becomes even more pronounced when the delegation of power to the USTR is viewed within the greater fabric of Section 337. As stated above, Congress specifically provided guidelines by which administrative “advice and information” was to be taken into account in Section 337(b)(2). However, the Review Power as it is currently interpreted above (i.e., extremely broad in scope and not subject to judicial review), is far in excess to the purely persuasive role Congress explicitly provided for administrative agencies in Section 337(b)(2).

Still further, the types of considerations cited by past Presidents extend beyond the expertise of the USTR. While the majority of disapprovals are trade based (*Certain Multi-ply Headboxes*, *Certain Stainless Steel Pipe and Tube*, and *Certain Dynamic Random Access Memories*); other disapprovals took into consideration factors, as Congress has already indicated, the President is best situated to assess.<sup>117</sup> For example, the President is ideally placed to assess potential issues regarding inter-agency relations (*Certain Alkaline Batteries*), foreign relations (*Certain Stainless Steel Pipe and Tube*), and treaty obligations (*Certain Molded-In Sandwich Panel Inserts*).

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114. Assignment of Certain Functions Under Section 337 of the Tariff Act of 1930, 70 Fed. Reg. 43251 (2005).

115. 3 U.S.C. § 301 (2012); (This paper will not discuss the potential Administrative Law issues that may arise in the delegation of the President’s Powers under Section 337(j)).

116. S. REP. NO. 93-1208, at 199 (1974).

117. *Id.*

## CONCLUSION

In all, the delegation of the Review Power under Section 337(j) to the USTR contradicts the legislative intent of the statute and improperly joins an administrative entity with a remedy intended for the President. Given that Congress explicitly provided an avenue through which administrative entities can provide information and suggestions during a USITC investigation, it is proper that Section 337 should be repealed and the USTR provided access to USITC proceedings via Section 337(b)(2). Such a re-assignment would allow the USTR to continue to advocate for potential trade issues while maintaining the balance between administrative entities that Congress initially provided.

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