



Written by [Selwyn Duke](#) on March 10, 2018

Method Matters: Was Trump's Institution of Tariffs Unconstitutional?

President Trump's decision to place tariffs on imported steel and aluminum has been accurately [hailed](#) as a "promise kept." But is it also an example of a political system broken and a constitution violated? This question is not just a rhetorical criticism of the president, but implies something far worse: a whole ruling class out of touch with fundamental governing principles.



Much has been said, and screamed, about the wisdom or lack thereof of imposing tariffs. But whether the levies represent economic wisdom or whimsy, little has been said about an even more important matter: Who actually has the legitimate constitutional power to impose them?

This may seem an academic question, but there's a reason why some of us stress adherence to the Constitution: It is the contract the American people have with one another, the guarantor of our rights and freedoms. Render it null and void via repeated violation, make it fashionable to play fast and loose with its provisions, and those rights and freedoms are in jeopardy — even those we hold most dear.

Now, on tariffs the Constitution is crystal clear, stating, "The Congress shall have the Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."

As *National Review's* Jay Cost [writes](#) about the above, "That is, Congress, not the president, was vested with the power to levy tariffs. At the time of ratification, everybody expected that the first taxes from Congress would be 'imposts' — tariffs on imported goods. That is exactly what happened, with the Tariff of 1789.

Cost is one of the few commentators sounding the alarm about this constitutional trespass, asking, "Why in the world does the president have the power to levy tariffs in the first place?" *Liberal Vox* [addressed](#) this question on Thursday, correctly explaining that "over the past century, Congress has shifted many of the powers to raise and lower tariffs to the executive branch."

It then continues, "There are many ways the president can impose tariffs without congressional approval," and names a few:

- Through the Trading With the Enemy Act of 1917, the president can impose a tariff during a time of war. But the country doesn't need to be at war with a specific country — just generally somewhere where the tariffs would apply. (This is how Richard Nixon imposed a 10 percent tariff in 1971, citing the Korean War.)
- The Trade Act of 1974 allows the president to implement a 15 percent tariff for 150 days if there is "an adverse impact on national security from imports." After 150 days, the trade policy would



need congressional approval.

- There's the International Emergency Economic Powers Act of 1977, which would allow the president to implement tariffs during a national emergency.

Vox then informs, "Trump's White House cited Section 232 of the [Trade Expansion Act of 1962](#), a provision that gives the secretary of commerce the authority to investigate and determine the impacts of any import on the national security of the United States — and the president the power to adjust tariffs accordingly."

This is all so wonky, involving so much dizzying detail, that it's easy to be distracted from the only relevant point: No matter how well-written or impressive-sounding the law, can Congress legitimately delegate its constitutional powers to others?

Let's analogize: Can Congress legitimately pass legislation granting the Supreme Court the power to enact law? (One could be forgiven for supposing the courts fancy that they already have this power.) Can the SCOTUS legitimately rule that Congress shall henceforth have the power to adjudicate cases? Can the executive branch legitimately decree that Congress shall have the power to enforce law?

This would be ridiculous, but no more so than asserting that Congress can legitimately transfer its constitutional power to levy tariffs, or any other power, to another governmental branch. Claiming otherwise is to say that Congress has the rightful power to create laws contrary to the Constitution. Of course, it does not.

Realize that saying "Congress' power" doesn't imply ownership in the way I own my car or refrigerator. I can junk, sell or give away those things. A constitutional power is more like how a soldier's government-issued rifle is "his gun": He has the right to carry it and even use it under prescribed circumstances, but he has no right to give it away. It is on loan.

Government power in the United States is derived from the people. What this means is that constitutional powers can only be transferred or altered with the people's consent, and this can only be legitimately done through the Amendment process. In other words, a government branch's power is its to use — not to give away.

Congress' tariff transference reflects a wider phenomenon: Congress is the only branch of government that has grown less powerful over the last century — because it's the only branch that willingly, and sometimes anxiously, relinquishes its power. Why is this? Jay Cost got at the reason when explaining why Congress assented to President Franklin Roosevelt's request that it transfer its trade authority to him. "It was as if Congress threw up its hands in exasperation and said to the president, 'We cannot handle our authority responsibly. Please take it off our hands, for we will screw things up and lose reelection,'" wrote Cost.

Congress is supposed to be the most powerful of the three federal branches because it's the one most answerable to the people (the House's members run for re-election every two years). Yet this is precisely why it's the most cowardly: The frequent threat of being voted from office makes career politicians reluctant to make controversial decisions. They'd rather pass the buck.

This is why legislators let judges run roughshod over the Constitution. The Congress could rein them in, by eliminating rogue federal courts below the SCOTUS and limiting the appellate jurisdiction of the latter. But then congressmen would have to make tough decisions on divisive matters — marriage, DACA, ObamaCare, etc. — and incur voter wrath at election time. (Regarding issues outside the federal



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government's enumerated powers, the decision should be that it is none of the federal government's business.) Congressmen would instead rather puff up their chests and posture, let judges render opinions, then throw up their hands and say, "Well, we tried! But the courts have ruled! And the law is the law!" Of course, the voters don't know civics and are none the wiser, so the ruse works.

Congress is like a soldier who gives away "his gun" because he doesn't want the responsibility it brings. Unlike a soldier, unfortunately, this doesn't mean a dishonorable discharge. Instead, voter apathy and ignorance allow politicians to continue "serving us" even while being AWOL when the most significant battles need to be fought.

Photo of President Trump signing proclamations imposing tariffs on steel and aluminum imports: AP Images



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