

Intelligence MEMOS



From: Jon Johnson

To: Canadians Concerned About Section 232 Tariffs

Date: April 23, 2020

Re: **CONSTITUTIONAL CHALLENGE TO SECTION 232 – LAST CHANCE**

The challenge by the American Institute for International Steel, Inc. (AIIS) to the constitutionality of Section 232 of the *Trade Expansion Act of 1962* is entering its final stage.

The Trump administration has imposed 25 percent tariffs on imports of steel under the authority of Section 232, which empowers the president to “adjust” imports of an article that the Department of Commerce finds are threatening US national security. AIIS maintains that under Section 232, Congress has delegated legislative authority to the president. Delegating legislative authority is unconstitutional as it violates the US principle of separation of powers.

The AIIS challenge was first heard by the US Court of International Trade (CIT). The CIT considered itself bound by the 1976 US Supreme Court decision in *Federal Energy Administration v. Algonquin SNG, Inc. (Algonquin)* and for this reason alone denied the AIIS challenge. However, one judge expressed serious doubts about whether Section 232 is constitutional.

AIIS appealed the CIT decision to the US Court of Appeals, which on February 28 affirmed the CIT’s decision. Like the CIT, the Court of Appeals considered itself bound by *Algonquin*.

That case involved a narrow question as to whether Section 232 authorized the imposition of licence fees, which the Supreme Court upheld. However, the Court of Appeals considered that in *Algonquin* the Supreme Court had rejected the “nondelegation-doctrine challenge” of Section 232, which is the crux of the AIIS case. The Court of Appeals dismissed other AIIS arguments distinguishing *Algonquin*.

On March 25, AIIS filed a petition for a writ of certiorari with the Supreme Court. There is no automatic right of appeal from a Court of Appeals decision to the Supreme Court. Certiorari is a process to seek judicial review of a lower court decision. Whether to grant a petition is entirely at the Supreme Court’s discretion. Most petitions are denied.

AIIS advances a compelling case as to why the petition should be granted and the Court of Appeals decision overturned.

First, the definition of national security in Section 232 is so broad that it covers virtually any hiccup that might occur in the US economy.

Second, there is no limit in Section 232 on the powers of the president to “adjust” imports. These may take the form of tariffs, quotas, licence fees (as in *Algonquin*) or any combination of these, all of which fall within the exclusive powers of Congress under the Commerce Clause. The president’s choice of remedy need not be tied to any factual finding. The 25 percent tariff on steel was entirely “the product of presidential fiat, untethered to any statutory factor, or any upper or lower boundaries.”

Third, there is no possibility of judicial review. As the petition states, instead of Congress providing a judicial check, Section 232 is a “blank check for the President.”

Both the CIT and the Court of Appeals considered themselves bound by the higher court decision in *Algonquin*. Only the US Supreme Court can decide whether *Algonquin* applies or not, or whether *Algonquin* still is good law considering subsequent court decisions. It would be unfortunate for the Supreme Court to leave the important constitutional issue undecided.

If the Supreme Court denies the petition, Section 232 continues in full force and effect and a potential continuing threat to Canadian producers. If, however, the Supreme Court grants the petition and decides that Congress unconstitutionally delegated legislative authority to the president, Section 232 will cease to have any effect.

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