Intelligence MEMOS

From: Jon Johnson

To: Canadians Concerned About Section 232 Tariffs

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Re: **December 19 Hearing in Constitutional Challenge to Section 232**

Last September, the US Court of International Trade decided that the constitutional complaint filed by The American Institute for International Steel, Inc. against the Trump administration's steel and aluminum tariffs would be heard by a three-judge panel.

The hearing took place on December 19. As is apparent from the **transcript** of the hearing, constitutional issues were front and centre in the minds of the three judges.

The defendants, the US government and the commissioner of US customs and border protection, argued that the court (as a lower court) was bound by the US Supreme Court decision in *Federal Energy Administration v. Algonquin SNG, Inc.* to uphold Section 232 as constitutional. The plaintiffs countered that *Algonquin* did not have this effect but merely decided that the president could impose an import licencing scheme under Section 232.

The court appeared to accept that there was enough of an "intelligible principle" in Section 232 because the president's powers under Section 232 are only triggered by a determination by the Secretary of Commerce that imports of an article are imperilling national security. However, the court was troubled by the very broad definition of "national security' set out in Section 232(d) that includes language such as "without excluding other factors" and appears to permit the president to do whatever he likes. The defendants argued that Section 232 only gives power to the president to "adjust imports."

The defendants' position on adjusting imports brings us to the question of the absence of judicial review. How can it be determined whether the president is merely adjusting imports if judicial review is not available? The plaintiffs noted that, unlike when *Algonquin* was decided, judicial review is not available in this case to challenge the actions of the president. The defendants countered that the president's subjective determinations would not be subject to judicial review in any event. The court interjected that the problem here is not fact-finding by the president, but policy decisions being made by the president.

The court asked the defendants whether the president could take the action against steel under the inherent powers of the president over national security. The defendants conceded that the inherent powers of the president would not permit this. However, the defendants maintained that congressional delegations of authority to the president must be more liberally interpreted in areas like national security where the president has inherent authority. One judge countered with an opinion expressed by Supreme Court Justice Jackson in the steel seizure case (*Youngstown Sheet and Tube Co. v. Sawyer*) that the president's inherent power is at its lowest ebb in an area like trade specifically assigned to Congress.

The court was also struck by the statement of the Secretary of Defense that US military requirements for steel and aluminum each amounted to only 3 percent of US production. The defendants responded by maintaining that national defence was merely a subset of national security.

It is not possible from a transcript to predict which way the court will end up deciding. However, the court was clearly troubled by the expansive language of Section 232 and the absence of judicial review.

Any decision by the court will be appealed to the US Supreme Court. Stay tuned.

Jon Johnson is a former advisor to the Canadian government during NAFTA negotiations and is a Senior Fellow at the C.D. Howe Institute.

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