Intelligence MEMOS

From: Jon Johnson

To: Canadians Concerned About Section 232 Tariffs

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Re: **Court Ruling on Constitutional Challenge to Section 232**

The US Court of International Trade issued on March 25 an **opinion** on the constitutional challenge to Section 232 of the Trade Expansion Act of 1962 brought by the American Institute for International Steel, Inc. (AIIS). The opinion, representing the views of two of the judges (hereafter the "majority"), denied the motion for summary judgment brought by AIIS. The third judge wrote a separate "dubitante" opinion that supported the denial of the motion but expressed grave doubts about whether Section 232 is constitutional.

The majority accepted the defendants' argument that the court (as a lower court) was bound by the US Supreme Court decision in *Federal Energy Administration v. Algonquin SNG, Inc*. and rejected plaintiff's argument that the decision in *Algonquin* did not apply.

AIIS had argued that, unlike when *Algonquin* was decided, judicial review is not available in this case to challenge the actions of the president. The majority countered that by "committing the determinations of … what remedial action to take, if any, to the judgment of the president, Congress precluded an inquiry for rationality, fact finding, or abuse of discretion."

This chilling observation is hardly a ringing endorsement of Section 232.

A dubitante opinion is issued when a judge disagrees with the decision but cannot record an open dissent. In his dubitante opinion, Gary Katzmann said he believed that the court was constrained by the Supreme Court decision in *Algonquin*. However, Katzmann noted that the Supreme Court emphasized that its *Algonquin* holding was limited and should not lead to the conclusion that any act that the president might take affecting imports would be authorized under Section 232.

The dubitante opinion emphasized the importance of the separation of powers in the US Constitution and the proposition that it is a "breach of the national law if Congress gives up its legislative powers and transfers it to the President." After enumerating numerous deficiencies with Section 232, Katzmann's opinion found it "difficult to escape the conclusion that the statute has permitted the transfer of power to the president in violation of the separation of powers," and concluded by asking: "If the delegation permitted by section 232, as now revealed, does not constitute excessive delegation in violation of the Constitution, what would?"

The US Supreme Court is not bound by its prior decisions and could declare Section 232 unconstitutional. However, while the question at the conclusion of the dubitante opinion is compelling, the Supreme Court can adopt any number of reasons to find that Section 232 does not constitute an unconstitutional delegation of legislative authority to the president.

Congressional concerns with Section 232 are coming to a head. The Section 232 tariffs imposed on imports of steel and aluminum from Canada and Mexico are presenting a major political impediment to the approval of the USMCA. Also, Commerce Secretary Wilbur Ross has now delivered a report to the White House that effectively empowers President Trump to impose whatever tariffs he chooses on autos and auto parts. AIIS has performed a considerable public service by bringing forward the manifest deficiencies with Section 232 and in persuading at least one judge to agree. The Congress clearly has the power to fix Section 232 and the ball is now in its court.

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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