

# Intelligence MEMOS



From: Jon Johnson  
To: Canadians Concerned About Section 232 Tariffs  
Date: September 25 2018  
Re: **IMPORTANT RULING IN CONSTITUTIONAL CHALLENGE TO SECTION 232**

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Tariffs imposed (steel and aluminum) or threatened (automotive goods) under Section 232 of the *Trade Expansion Act of 1962* are the club the Trump administration is using to extract concessions from trading partners including Canada, Mexico, the EU, Korea and Japan. A ruling last week, however, could have important implications for that mechanism.

The American Institute for International Steel, Inc. and others (AIIS plaintiffs), are challenging the constitutionality of Section 232 in the US Court of International Trade (USCIT), saying Section 232 lacks an “intelligible principle” to guide the US Secretary of Commerce in determining whether imports of an article threaten national security and to guide the president in actions to be taken against those imports. On August 16, the AIIS plaintiffs filed a supplemental memorandum citing the doubling of tariffs on steel imported from Turkey, absent any justification, as further underscoring the absence of any “intelligible principle” in Section 232 to guide the president in the actions that he can take.

The AIIS plaintiffs requested that the USCIT establish a three-judge panel to hear the complaint rather than a single judge because of the constitutional issues involved. The three-judge panel has the important procedural advantage of providing for an appeal directly to the US Supreme Court, bypassing lower courts. The defendants (the US government and the commissioner of US customs and border protection) maintained that a three-judge panel should not be established because the plaintiffs’ constitutional challenge faced a “steep uphill climb.”

On September 14, the defendants filed a motion requesting that the AIIS complaint be dismissed. The motion maintained that there was ample guidance in Section 232 to guide the commerce secretary in determining whether imports of steel were threatening national security and to guide the president in actions to be taken. The motion curiously cited the temporary exemption for steel from Canada and Mexico without mentioning that the exemption only lasted a month and tariffs are now being imposed against imports of steel from both these countries.

The motion maintains that the fact that the president has independent constitutional authority over foreign affairs and national security is fatal to AIIS’s constitutional challenge. The motion also points to the fact there have been only two cases where statutes have been struck down as unconstitutional delegations of legislative authority and cites several cases (disputed by AIIS) that support the constitutionality of Section 232.

On September 19, five days after the defendants’ motion to dismiss, the USCIT granted the request for a three-judge panel. It seems that the USCIT does not think that the AIIS constitutional challenge faces quite the “steep uphill climb” that the defendants maintain.

The decision of the three-judge panel will be critical not only for AIIS but also for the future of the Section 232 tariffs. Stay tuned.

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