

“Steel” Subject to Tariffs: Federal Circuit Upholds Constitutionality of Section 232

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In a February 28, 2020, [decision](#), the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) affirmed a [judgment](#) of the U.S. Court of International Trade (CIT) upholding the constitutionality of Congress’s delegation of tariff authority to the executive branch in [Section 232\(b\) of the Trade Expansion Act of 1962](#) (generally referred to as “Section 232”). The decision leaves in place tariffs on imports of [steel](#) and [aluminum](#) that the Administration imposed for national security purposes in March 2018, and subsequently [expanded](#) in February 2020. In affirming the CIT’s judgment in *American Institute for International Steel (AIIS) v. United States*, the Federal Circuit determined that Section 232 did not violate the Constitution’s separation of powers by delegating too much of Congress’s authority over commerce to the executive branch. The court thus rejected the constitutional challenge by trade associations representing U.S. steel importers, relying almost exclusively on the Supreme Court’s 1976 [decision](#) in *Federal Energy Administration v. Algonquin SNG, Inc.* The Federal Circuit agreed with the CIT that the case was controlled by *Algonquin*, which held that Section 232 did not violate the nondelegation doctrine.

This Legal Sidebar (1) provides background on Section 232; (2) discusses the CIT’s decision in *AIIS*; (3) examines the Federal Circuit’s decision on appeal; and (4) identifies several implications for Congress.

Background on Section 232

[Section 232](#) authorizes the President to “adjust the imports” of products and their derivatives to address threats to national security. The President’s authority is triggered if the U.S. Department of Commerce (Commerce) conducts an investigation and concludes that the articles are “being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security.” If Commerce makes such a finding, Section 232 gives the President significant discretion to take action, for such time as he deems necessary, to “adjust the imports” of a product and its derivatives. The statute provides that Commerce and the President shall consider a variety of factors when determining whether certain imports threaten national security, and how to adjust them if necessary. It characterizes national security concerns broadly, stating that:

In the administration of this section, the Secretary [of Commerce] and the President shall further recognize the close relation of the economic welfare of the Nation to our national security, and shall

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take into consideration the impact of foreign competition on the economic welfare of individual domestic industries; and any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports shall be considered, without excluding other factors, in determining whether such weakening of our internal economy may impair the national security.

The Supreme Court addressed the scope of Section 232's delegation of authority to the President in *Algonquin*, which involved a challenge to President Ford's imposition of quotas and license fees on imports of petroleum and petroleum products under Section 232. In that case, the Supreme Court addressed the nondelegation issue before ruling on whether the President's imposition of license fees on imports fell within the scope of authority provided to the President, rejecting the "suggestion that [the Court] must construe § 232(b) narrowly in order to avoid 'a serious question of unconstitutional delegation of legislative power.'" The Court then determined that Section 232 set forth an "intelligible principle" to guide the President's decisionmaking by establishing clear preconditions for action and limiting, to an extent, the President's discretion to act in response to a Section 232 investigation. This, the Court wrote, made the delegation constitutional. The Court concluded: "Even if § 232(b) is read to authorize the imposition of a license fee system, the standards that it provides the President in its implementation are clearly sufficient to meet any delegation doctrine attack."

The CIT's Decision in *AIIS*

On March 8, 2018, following a Commerce [investigation](#), President Trump issued two proclamations imposing 25% and 10% tariffs on U.S. imports of certain [steel](#) and [aluminum](#) products, respectively, using authority delegated to him under Section 232. The President sought to justify the tariffs on the ground that the imports threatened national security by harming the U.S. steel and aluminum industries. These actions, as well as requests for exemptions from the tariffs for imports from some countries, have led to [legal challenges](#) before domestic and international tribunals.

The *AIIS* case began in June 2018 when the plaintiffs sought an injunction to prevent these tariff increases, challenging the constitutionality of Section 232 before the CIT. The plaintiffs argued that Congress's broad delegation of its power over commerce to the President in the Act violated the Constitution's separation of powers. They [maintained](#) that "Congress created an unconstitutional regime in [S]ection 232, in which there are essentially no limits or guidelines on the trigger or the remedies available to the President, and no alternative protections to assure that the President stays within the law, instead of making the law himself."

On March 25, 2019, the CIT issued an [opinion](#) rejecting the plaintiffs' arguments that Congress delegated too much of its legislative power to the President in Section 232, in violation of the separation of powers established in the Constitution. In granting the United States' motion for judgment on the pleadings, the court held that it was bound by *Algonquin's* holding that Section 232 did not amount to an unconstitutional delegation because it established an "intelligible principle" to guide presidential action. Nonetheless, one member of the three-judge CIT panel, Judge Katzmman, wrote separately to express his significant concerns about the ruling without openly dissenting. Judge Katzmman wrote that he was bound to follow Supreme Court precedent and uphold the delegation, but questioned whether the nondelegation doctrine retained any significant meaning if a delegation as broad as that in Section 232 was permissible.

After the CIT issued its decision in *AIIS*, the plaintiffs [filed a petition for a writ of certiorari](#) with the Supreme Court seeking review of the CIT's decision and arguing, among other things, that only the Supreme Court could decide whether to overrule its precedent in *Algonquin*. After the Supreme Court [denied certiorari](#), the plaintiffs appealed to the Federal Circuit.

The Federal Circuit's Decision on Appeal

On February 28, 2020, the Federal Circuit [ruled upon](#) the plaintiffs' appeal of the CIT's decision. Like the CIT, the Federal Circuit rested its decision upholding the constitutionality of Section 232 on Supreme Court precedent, determining that the Court's decision in *Algonquin* applied to the case and, consequently, that the Act did not violate the nondelegation doctrine. The Federal Circuit did not embark on its own analysis of whether, if the Supreme Court had not decided *Algonquin*, Section 232 would be constitutional.

As to the plaintiffs' argument that *Algonquin* did not control their case, the Federal Circuit [disagreed](#), noting that the "[*Algonquin*] Court's rejection of the nondelegation-doctrine challenge to section 232 was a necessary step in the Court's rationale for ultimately construing the statute as it did, and the constitutional ruling is therefore binding precedent." The Federal Circuit also rejected the plaintiffs' attempts to distinguish *Algonquin* from their own case. For example, the court rejected the argument that *Algonquin* was distinguishable because the case involved licensing fees instead of tariffs. Both, the court stated, were "[monetary exactions](#)," and the *Algonquin* decision was not tied to the form of presidential action authorized. Moreover, the plaintiffs also lodged a facial challenge to Section 232, and thus had to show there was no application of the law that would be constitutional—a position that the Supreme Court had rejected in *Algonquin* when it upheld President Ford's imposition of license fees. The Federal Circuit thus affirmed the CIT's judgment, determining that it was bound by Supreme Court precedent.

Implications for Congress

Nondelegation-doctrine challenges, which generally argue that Congress has delegated authority to the executive branch without providing an "intelligible principle" to govern the Executive's exercise of that discretion, have not been successful [since 1935](#). If the plaintiffs seek and the Supreme Court grants certiorari in *AIIS* to review the Federal Circuit's decision, the Court might be asked to reconsider *Algonquin* as well as its earlier precedents on the nondelegation doctrine, such as *J.W. Hampton, Jr. & Co. v. United States*. Last term, five Supreme Court Justices [indicated](#) they may be willing to revisit the long-dormant nondelegation doctrine. However, predicting whether the Court will overrule a prior decision [is difficult](#). Moreover, it may be difficult for the Court to establish an alternative workable standard for determining when a congressional delegation of authority violates the Constitution, although at least [one Justice](#) has proposed an approach.

Additionally, although the Federal Circuit, relying on Supreme Court precedent, affirmed that Section 232 on its face did not offend the Constitution's nondelegation doctrine, a recent [CIT decision](#) in a separate ongoing case suggests some limits to the scope of the President's authority under Section 232. In *Transpacific Steel LLC v. United States*, a U.S. company that imports steel products from various countries, including Turkey, is seeking the refund of the allegedly excess Section 232 duties it paid on imports of Turkish steel. In a [decision](#) denying the United States' motion to dismiss the company's complaint, the CIT indicated that the President's power to impose tariffs under Section 232, while broad, is not unlimited. Specifically, the court suggested that the President must closely adhere to the procedural requirements of the statute when exercising such authority. The court also determined that the company established a plausible argument that the Executive violated constitutional guarantees of equal protection under the Fifth Amendment's Due Process Clause when imposing, without a rational basis, the additional steel tariffs only on imports from Turkey, and no other countries, in August 2018. Thus, while the Federal Circuit rejected a facial challenge to Section 232's constitutionality in *AIIS*, the CIT's decision in *Transpacific Steel* indicates that courts might scrutinize whether the executive branch has followed the proper procedures, including meeting statutory deadlines, when exercising Section 232 authority.

In addition, Congress has constitutional authority over [tariffs](#) and "[Commerce](#) with foreign Nations." Congress could pass legislation that imposes a different trade remedy or it could amend or repeal Section

232. [Several bills](#) introduced in recent Congresses would provide for additional congressional oversight over the Executive's use of Section 232, including by allowing for a congressional joint disapproval resolution to overrule presidential actions pursuant to the statute, or to require congressional approval of presidential actions taken under Section 232.

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