EMBARGOED FOR RELEASE: 10:00 AM EASTERN ON WEDNESDAY JUNE 27

IN THE UNITED STATES COURT OF INTERNATIONAL TRADE

AMERICAN INSTITUTE FOR INTERNATIONAL STEEL, INC., SIM-TEX, LP, and KURT ORBAN PARTNERS, LLC Plaintiffs, v. UNITED STATES and KEVIN K. MCALEENAN, Commissioner, United States Customs and Border Protection, Defendants.	Court No. 18-00152

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR THREE-JUDGE PANEL

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June 27, 2018

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This action challenges the constitutionality of section 232 of the Trade Expansion Act of 1962, as amended, 19 U.S.C. § 1862 ("section 232") on the ground that it constitutes an improper delegation of legislative authority to the President, in violation of Article I, section 1 of the Constitution and the doctrine of separation of powers and the system of checks and balances that the Constitution protects. The specific claim before this Court arises from the actions of the President, through proclamations issued under section 232, in which he imposed a 25% tariff increase on steel products imported into the United States from most but not all countries.

The Plaintiffs are a non-profit membership organization (the American Institute for International Steel, Inc.) whose members depend on imported steel for their businesses, and two of its members. The Plaintiffs are more fully described in paragraphs 1–3 of the complaint; their injuries are described in paragraphs 28–30 of the complaint. The defendants are the United States and the Commissioner of the U.S. Customs and Border Protection, who is sued only to assure that there is an individual against whom an injunction can run. The complaint asserts that

section 232 is unconstitutional, and hence the President's proclamations based on it are unconstitutional. The complaint seeks both a declaration of unconstitutionality and an injunction against the President's proclamations, which include the 25% tariff increase.

This Court has jurisdiction over the claims under 28 U.S.C. §§ 1581(i)(2) and (4). Section 255 of title 28 provides as follows with respect to cases over which this Court has jurisdiction:

> (a) Upon application of any party to a civil action, or upon his own initiative, the chief judge of the Court of International Trade shall designate any three judges of the court to hear and determine any civil action which the chief judge finds: (1) raises an issue of the constitutionality of an Act of Congress, a proclamation of the President or an Executive order; or (2) has broad or significant implications in the administration or interpretation of the customs laws.
>
> (b) A majority of the three judges designated may hear and determine the civil action and all questions pending therein.

28 U.S.C. § 255; *see also* Rule 77(e)(2) of this Court: "Assignment to Three-Judge Panel. A case may be assigned by the chief judge to a three-judge panel either on motion, or on the chief judge's own initiative, when the chief judge finds that the case raises an issue of the constitutionality of a federal statute, a proclamation of the President, or an Executive order; or has broad or significant implications in the administration or interpretation of the law."

This complaint raises an issue of the constitutionality of both an Act of Congress (section 232) and proclamations of the President made under the authority of that Act, and has significant implications for the administration of the customs laws. Accordingly, the Chief Judge of this Court should find that section 255 is satisfied and therefore should designate three judges of this Court to hear and determine this action, provided that Plaintiffs have asserted a non-frivolous constitutional claim. As we now show, Plaintiffs have alleged a substantial constitutional claim that fully satisfies this requirement.

ARGUMENT

The Supreme Court recently addressed a situation very close to this one in *Shapiro v. McManus*, 136 S. Ct. 450 (2015), and its ruling on what constitutes a substantial constitutional question directly supports Plaintiffs' motion. The complaint in *Shapiro* alleged that the recent redistricting in Maryland was a partisan gerrymander that violated the First Amendment, and plaintiffs sought the convening of a three-judge panel under 28 U.S.C. §§ 2281 and 2284. The district court refused to request a three-judge panel and instead dismissed the case. Maryland defended that ruling before the Supreme Court on two bases. First, it cited the following language in section 2284(b)(1) (for which there is nothing comparable in section 255) – "unless [the district judge] determines that three judges are not required" – from which it argued that the district judge had discretion not to ask for a three-judge panel. The Supreme Court, in a unanimous opinion authored by Justice Antonin Scalia, rejected that reading and said that the quoted phrase provided no basis for refusing to convene a three-judge panel. *Id.* at 454-455.

The second ground, which is applicable to this case, is that, despite the statutory command, a three-judge panel need not be convened if the complaint presents a question that is "constitutionally insubstantial." *Id.* at 455. Plaintiffs agree that they must meet that test here, but as *Shapiro* makes clear, the hurdle, which the Court there described as a "low bar," is not a significant one to overcome. *Id.* at 456. The district judge in *Shapiro* had "dismissed petitioners' complaint not because he thought he lacked jurisdiction, but because he concluded that the allegations failed to state a claim for relief on the merits." *Id.* at 455. That, held the Court, was error. The proper test is that found in *Goosby v. Osser*, 409 U.S. 512 (1973), which the *Shapiro* Court said

> clarified that " '[c]onstitutional insubstantiality' for this purpose has been equated with such concepts as 'essentially fictitious,' 'wholly insubstantial,' 'obviously

> frivolous,' and 'obviously without merit.' " 409 U.S., at 518, 93 S. Ct. 854 (citations omitted). And the adverbs were no mere throwaways; "[t]he limiting words 'wholly' and 'obviously' have cogent legal significance." Ibid.

Id. at 456. The State claimed that a prior decision of the Supreme Court on political gerrymandering foreclosed the claim in *Shapiro*, but the Court pointed to a concurring opinion in the case on which the State relied as sufficient to state a claim that was constitutionally substantial. *Id.*

In this case, Plaintiffs allege that Congress has failed to provide the "intelligible principle" required by *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928), to defeat a claim of an unconstitutional delegation of legislative power to the President. They specifically allege that section 232 provides no guidance as to how the President is to decide the many complex and multi-faceted questions presented in determining "the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of [steel] and its derivatives so that such imports will not threaten to impair the national security." Section 232(c)(1)(A)(ii).

Defendants will surely argue that the decision in *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976), makes the claim here "constitutionally insubstantial." As we now show, that decision does not come close to foreclosing the claim here.

There are two principal reasons why the decision in *Algonquin* does not control this case. First, the specific challenge there was to the President's decision to impose license fees on imported oil. The plaintiffs' legal objection there was that section 232 allowed only the use of quotas or other quantitative means of control. In that context, the plaintiffs argued that reading the statute to permit the imposition of a monetary means of control, *i.e.*, licensing fees, would render the statute so broad as to violate the nondelegation doctrine. *Algonquin*, 426 U.S. at 559, 561. In order to avoid the delegation problem, the plaintiffs urged the Court to construe section

232 to allow only quotas or quantitative means of adjusting imports, rather than duties or licensing fees. The Court declined to do so, and in the course of so ruling it concluded that the government's reading of the statute created no delegation problem with section 232. *Id.* at 558-559.

On the merits of the delegation claim there, Algonquin's argument was essentially an avoidance claim and, as such, was extremely weak and hardly compares with the claim of Plaintiffs here. Surely, if Congress had listed all three remedies in section 232, and directed the President to choose the most appropriate one under the circumstances, there would have been no delegation issue in *Algonquin*. And since the plaintiff in *Algonquin* never suggested that the remedy chosen was unknown in the law, such that Congress could not have anticipated it being used, the actual statute – even without the choice of remedies specified – was no more vulnerable to an excessive delegation claim than if Congress had given the President an express choice among specified remedies.

More fundamentally, unlike the plaintiffs in *Algonquin*, who alleged that *the President* had exceeded the limits imposed by Congress by using licensing fees rather than quotas, Plaintiffs here allege that *Congress* violated the nondelegation doctrine by providing *no* meaningful limits on how the President should or must exercise his authority to "adjust imports." As paragraphs 24 to 27 of the complaint demonstrate, the steel industry is extraordinarily varied in its products and its requirements, as well as in its relation to national security. The problem under section 232 is that Congress failed to provide any "intelligible principles" to guide the President in determining how to adjust imports after he concluded that imports of steel products may threaten to impair the national security, as capaciously defined in section 232(d). Indeed, section 232(d)'s definition of "national security" bears no relationship to an ordinary

understanding of that term, instead permitting the President to regulate or tax any imported article in the entire U.S. economy for any reason, including "the economic welfare of the Nation . . . the economic welfare of individual domestic industries; and any substantial unemployment, decrease in revenues of government, loss of skills or investment," or any "other factors" he wishes.

For example, as paragraph 24 of the complaint shows, the steel industry is far from being a monolith, but has 157 sub-categories of imported products with wide variations among their uses, availabilities in the United States, quality requirements, and relation to national security, among other differences. Despite the necessity for an intelligible principle as to how to handle these very significant differences, section 232 has nothing resembling an answer. Furthermore, imposing large tariffs on imported steel has many adverse impacts on users of steel and others throughout the economy (paragraph 27 of the complaint), but section 232 gives no guidance to the President on whether he must or must not or may take these adverse effects into account and if so, how. Finally, steel imports come from many countries, some of which are close allies and some of which share borders with the United States (paragraph 26 of the complaint). Yet section 232 does not provide any directions on how the President is to take these facts into account, if at all, when he is imposing tariffs on steel imports. This difference between the essentially binary choice in *Algonquin*, in which nondelegation was invoked as a tool of statutory interpretation to choose between two possible readings of the available remedies, and the limitless untethered discretion that the President has under section 232 and that plaintiffs challenge here, makes *Algonquin* of almost no relevance to this challenge.

Second, Algonquin sued a federal agency under the Administrative Procedure Act (APA) to overturn an order of the President. Defendants did not argue that APA review was not

available, and in fact the courts there fully reviewed and then rejected the claim that the order was not authorized by the statute. But subsequent to *Algonquin*, the Supreme Court has precluded all judicial review of Presidential decisions in two cases involving statutes very similar to section 232. *Franklin v. Massachusetts*, 505 U.S. 788 (1992); *Dalton v. Specter*, 511 U.S. 462 (1994). In both cases, plaintiffs made various claims under the relevant statutes, but the Court refused to consider the merits. It held that, under those statutes, it is only the decision of the President that can be challenged, but that the President is not an agency for purposes of the APA, and there is no other basis to review the President's decision. Therefore, under those decisions, claims that orders of the President violate section 232 are nonreviewable.

The ability of the courts to engage in the full panoply of judicial review in *Algonquin* is highly significant in the context of Plaintiffs' delegation and separation of powers claims here. One way that parties such as Plaintiffs, who object to government action taken pursuant to a federal statute, can protect their rights is by taking the government to court and having Article III judges review what the government did and assure that it conformed to the substantive law and the APA. Indeed, the Supreme Court has made clear that the extent of the deference given Congress under the "intelligible principle" standard depends in part on the availability of judicial review of claims that the government has exceeded its statutory authority. *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 218-19 (1989) (reaffirming "our longstanding principle that so long as Congress provides an administrative agency with standards guiding its actions such that a court could ' "ascertain whether the will of Congress has been obeyed," ' no delegation of legislative authority trenching on the principle of separation of powers has occurred") (citations omitted); *Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO v. Connally*, 337 F. Supp. 737, 759-60 (D.D.C. 1971) (Leventhal for three-judge panel)

(nondelegation "prevents judicial review from becoming merely an exercise at large by providing the courts with some measure against which to judge the official action that has been challenged") (quoting *Arizona v. California*, 373 U.S. 546, 626 (1963)).

It is not only *Franklin* and *Dalton* that demonstrate that judicial review of section 232 orders is precluded, but it is the official position of the United States that there is never judicial review of orders under section 232. Thus, in a lawsuit before this Court challenging the same 25% tariff increase on steel imports that is at issue here, the plaintiffs claimed that the President exceeded his statutory authority under section 232. In Defendants' Motion to Dismiss, Docket No. 30, pp. 2, 14-19 (Mar. 28, 2018), in *Severstal Export GMBH, et al. v. United States, et al.*, No. 18-00057 (Ct. Int'l Trade 2018), the Department of Justice explicitly took the position that the President's "exercise of discretion" under 232 is not subject to judicial review by any court. Complaint paragraph 13. Plaintiffs in this case agree with that position; however, it does not apply to actions such as this, which challenge the constitutionality of section 232, not the President's actions under it.[1]

The preclusion of judicial review of the bases of presidential decisions under section 232 includes not only whether section 232 has been violated, but whether all of the other requirements under the APA have been satisfied under 5 U.S.C. § 706 and the many decisions applying it. As a result, *Dalton* and *Franklin* eliminate the possibility that, if a court found an intelligible principle in section 232, it would have the power to conclude that the President had

[1] To be sure, in *Severstal*, the Court did not accept the government's non reviewability argument, but rejected the claim there that the President had exceeded his statutory powers under section 232 on the merits. *Severstal*, No. 18-00057, 2018 WL1705298 at *7-8 (Ct. Intl. Trade Apr.. Plaintiffs note that there was no claim on improper delegation or separation of powers in *Severstal*, and Plaintiffs' constitutional claim here, unlike the complaint in *Severstal*, is directed against section 232, which Congress enacted, and not against the President on the ground that he acted in a manner not authorized by section 232.

not followed it or had otherwise not complied with the requirements of the APA. Thus, it is the combination of the absence of judicial review and the lack of an intelligible principle governing section 232, as made clear by the President's standardless determinations regarding steel imports, which separate this case from *Algonquin.*

There is one other fact that supports the conclusion that Plaintiffs have stated a valid nondelegation claim and therefore that they readily surpass the "low bar" to convene a three-judge panel. On March 5, 2018, the Supreme Court granted certiorari in a delegation case, *Gundy v. United States*, No. 17-8086. *Gundy v. United States*, 138 S. Ct. 1260 (2018). The question presented is whether the statute authorizing the Attorney General to decide whether to apply the provisions of the federal Sex Offender Registration and Notification Act to offenses that occurred before that Act was passed violates the delegation doctrine. As the briefs filed by petitioner and a dozen amici in *Gundy* show, the nondelegation doctrine is very much alive. And, although the substantive statutes in *Gundy* and this case present different aspects of the delegation doctrine, the fact of the grant there further underscores the legitimacy of this constitutional challenge and the necessity for the Chief Judge to designate three members of this Court to hear this case.

This motion does not ask the Court to decide the constitutional questions presented or even definitively rule that *Algonquin* is not controlling. As the decision in *Shapiro v. McManus* makes clear, this Court may not require full briefing and argument on the merits of Plaintiffs' constitutional claim when deciding whether to appoint a three-judge panel. That briefing will come when the parties move for summary judgment on the purely legal question of whether section 232 violates the delegation doctrine and the principles of separation of powers and checks and balances established by the Constitution.

Section 255 and Rule 77(e)(2) of this Court provide a further basis for convening a three-judge panel: when the case "has broad or significant implications in the administration" of the customs laws." It is hard to imagine a more significant case than one that challenges the authority of section 232 and of the tariff based on it, which affects countless businesses and individuals in the United State and abroad, both directly and indirectly. Furthermore, as noted in paragraphs 17 and 25 of the complaint, there is a process by which certain affected parties can seek an exemption from the tariff increase, and there have been nearly 20,000 applications filed already, each of which would have to be individually decided, unless section 232 is found to be unconstitutional.

CONCLUSION

For the foregoing reasons, the Chief Judge of this Court should designate three judges of this Court to hear and determine this action.

Respectfully Submitted,

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