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AIIS Lawsuit Challenging Constitutionality Of Section 232 Steel Tariffs Questions & Answers

Why did you sue in the Court of International Trade?

The statute makes that Court the exclusive court for all trade cases, including constitutional challenges.

Why are you asking for a three judge court?

A statute and rule of the Court provide for it and the court having three judges on an important case like this simply makes sense. We also believe that a decision of a three judge court can be appealed directly to the Supreme Court, and it is in everyone's interest to resolve this issue quickly.

Will there be a trial in this case?

No—the facts are very simple and not in dispute. To the extent we rely on facts relating to problems from these tariffs that Congress failed to address in the statute, those problems were identified in numerous submissions to the Commerce Secretary, but disregarded by the President.

Are you asking the Court to disagree with President Trump's decision to impose tariffs or are you arguing that national security is not involved with steel imports?

No. Policy choices like that are the province of Congress. Our complaint is that the statute cannot constitutionally pass that responsibility off to the President with no guidance as to how to resolve the very difficult policy choices that imposing massive tariffs inevitably entails. Look at our complaint (paragraphs 24, 26 & 27) and you will see how little direction Congress gave on major issues.

Do you argue that the President did not follow the law as an alternative to your constitutional claim?

No. In our view, the Supreme Court has said that no court can review how the President exercised his wide discretion under statutes like this. In addition, the Justice Department a few months ago in a case claiming that the President violated Section 232 in ordering the 25% tariff on imports of steel, took the position that the courts could not review anything the President did under Section 232. We agree that, except for constitutional challenges like this, his actions are not subject to judicial review.

Is there any legal significance to the lack of judicial review?

Absolutely. The absence of any judicial review, on top of the open-ended statute, which gave the President unfettered discretion to do whatever he pleased to stem the tide of steel imports, is a violation of the principles of separation of powers and the system of checks and balances the Constitution protects. In other words, with no check from Congress in Section 232, and no check from the courts, the President could do whatever he pleases to fix the problem he perceives, which is not our system of government.

The main doctrine on which the complaint relies—excess delegation to the President violates the Constitution—has not won in the Supreme Court since 1935. What makes you think you have a chance here?

Three main reasons: First, in our view, there has never been a statute that has provided as little control over the President or any federal official and his unfettered discretion in a field that is incredibly complicated and in which very serious tradeoffs are inevitable. Second, unlike almost every other case, there is no judicial review of the President's decision, which means that neither Congress nor the courts can impose any check on him. Third, in March of this year, the Supreme Court granted review in *Gundy v US* on a delegation claim in a much less wide-open statute than section 232, suggesting that the Court is interested in the delegation issue, especially because the lower courts upheld the statute challenged there and no court found it unconstitutional.

Why is President Trump not a defendant?

Our complaint is not directed at the President but at the statute and the failure of Congress in 1962 to provide an intelligible principle to guide the use of tariffs and quotas under Section 232. One of our claims is that there is no judicial review of decisions of the President under Section 232, and so for that reason he does not need to be a defendant.

Why is Secretary Ross not a defendant since he recommended doing something about steel imports?

The law is clear that Secretary Ross only made a recommendation to do something about imports and if the President concurred, as he did, then the decision becomes that of the President alone.

Do you disagree with the finding that steel imports may threaten to impair the national security, which is the language of section 232, and are you asking the court to overturn that?

That is not our challenge. As you will see, aside from the fact that national security is a very broad term on its own, in Section 232(d), quoted in our complaint (para 8), Congress also allowed the President to bring in as part of a national security finding everything in our national economy, and so the term “national security” is almost without limits. That compounds the lack of limits on his choices of trade barriers and to whom and to what they apply.

What about the exclusion process that Commerce has established? Doesn't that eliminate the problem?

The law is clear that actions by a federal agency cannot cure unconstitutionally broad statutes like this one. Besides, there are 20,000 pending applications and they are each only for one product for one company. The process is also not available to many companies and workers that are being harmed by these tariffs. See complaint paragraph 25 for more problems with the process.

Who is being hurt by these tariffs besides those who actually pay them?

There are two groups of injured persons. First are those who actually pay the tariff directly or whose price for steel includes the tariff. Most of them can't pass on the costs to others and so they are injured. Second, many companies and others are indirectly injured by the tariffs because they reduce the amount of imported steel—the stated purpose of the tariff—and their economic livelihoods depend on handling large volumes of imported steel. The injured persons or entities in this indirect category include those who transport steel, ports through which steel is imported, stevedores, longshoremen, and other

workers whose wages depend on how much imported steel they handle, along with many others. Their losses are permanent and can never be recovered.

Are you asking for refunds of tariffs paid as part of this action?

No. In our view, those who have claims for refunds still have administrative steps to take before they can sue. Also, including those claims would slow the case down, which is not in anyone's interest.

What will happen to the tariffs if you win?

Customs will have to stop collecting them, and those who paid the excess tariffs will be entitled to refunds.

Why aren't you seeking a preliminary injunction?

The test for getting one is very high and we think we can get a decision on a permanent injunction just as fast as one on a preliminary injunction. And if we got a preliminary injunction, the US would appeal that and that would slow things down terribly.

Would a court ruling in your favor also impact the Section 232 tariffs on aluminum and the potential Section 232 tariffs on autos and auto parts?

Yes; all other tariffs or quotas already in effect or contemplated under Section 232 would be eliminated.

Senator Bob Corker has introduced a bill that would require congressional approval before any orders under Section 232 could be effective. Would that solve the problem?

It would solve the problem going forward for this statute, if it could be enacted over an almost certain presidential veto.