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It's Now Or Never In Push To Undo Trump's Security Tariffs

By **Alex Lawson**

Law360 (April 15, 2020, 9:07 PM EDT) -- The contentious fight over a national security law used by President Donald Trump to set sweeping tariffs has returned to a U.S. Supreme Court that has expressed a willingness to check executive power, but the court may be constrained by its own precedent.

Observers have long expected that only the high court will be able to resolve the case over the constitutionality of Section 232 of the Trade Expansion Act of 1962, which Trump used in March 2018 to set levies on steel and aluminum. Steel importers challenged the move, arguing that the law violates the so-called nondelegation doctrine by effectively giving away congressional trade authority to the White House, and the justices have now been asked for a second time to intervene.

Lower courts have expressed reservations about the broad powers given to the president under Section 232 but have nevertheless backed the government, citing a 1976 Supreme Court case, Federal Energy Administration v. Algonquin, that upheld the law against a similar challenge.

Spearheading the case against the administration is the American Institute for International Steel, which previously filed for high court consideration one year ago after losing at the U.S. Court of International Trade. The justices eventually turned the petition away, likely on procedural grounds, sending the group to the Federal Circuit, which dealt AIIS another loss in late February.

AIIS returned to the high court with a fresh certiorari petition last month, urging the justices to either reverse the holding in Algonquin or decide that it does not apply to the new case.

“The cert petition here is very forthright. It was very honest and clear about the barriers [the petitioners] face and what they have to overcome and convince the court to do,” Neville Peterson LLP partner John Peterson told Law360. “That kind of honesty and clarity with the Supreme Court would increase the chances of it getting picked up.”

A fairly recent Supreme Court decision, coupled with the general difficulty of nondelegation cases — there hasn’t been a successful such claim since 1935 — would seem to put the AIIS petition in peril. But the justices last year also gave clear signs that they are looking to revisit the nondelegation question if they can find the proper vehicle.

That signal came in Gundy v. U.S., which upheld the retroactive application of a sex offender registry law. But separate opinions from Justices Neil Gorsuch and Samuel Alito made clear that the court would

look to reconsider the issue with a more orderly set of facts and a full panel, as Justice Brett Kavanaugh did not participate in the Gundy ruling.

The question is whether the AIIS case would be a palatable vehicle for the justices to consider putting another check on the so-called administrative state by ruling that Section 232 endows the president with too much power without an "intelligible principle" to guide his decision-making.

Barnes Richardson & Colburn LLP partner Lawrence Friedman told Law360 that the Section 232 case presents a “clean” question of business regulation that can fit squarely into the conservative justices’ calculus.

“It’s a better vehicle for the Supreme Court than Gundy was,” Friedman said. “It is a business regulation that doesn’t necessarily impact a lot of individual behavior. They are not saying to people ‘you can or cannot water your grass on a certain day.’ It doesn’t affect individual liberties or personal interests, so that favors their taking it up and considering it.”

Another factor weighing in the importers’ favor is the broad policy implications of an uptick in the usage of Section 232. The law had laid mostly dormant for several decades before Trump dusted it off a few months into his presidency, when the Commerce Department began investigating the security threat posed by foreign steel and aluminum.

The White House has also used the law to declare imports of cars and auto parts a security risk, but has thus far declined to put tariffs on those goods. Numerous other Section 232 probes have been launched, creating unease for critics who have accused Trump of using national security as a pretext for pushing a protectionist agenda.

“One of the grounds that the Supreme Court accepts cert for is if the case is of significant national importance. They could argue that this meets those grounds,” Morgan Lewis & Bockius LLP partner Kenneth J. Nunnenkamp told Law360.

But there are a few factors that will pose obstacles to AIIS as it pushes for high court review. For one, Section 232 is a law intended to safeguard national security, an area of policy where the executive branch has been given plenty of leeway by the courts.

If the justices are squeamish about intruding upon the White House’s security powers, they may be inclined to wait for a nondelegation claim to arise in an area more prone to administrative-law sparring, such as labor or the environment.

“We are talking about an issue that is at the intersection of national security and executive branch power,” Akin Gump Strauss Hauer & Feld LLP attorney Devin Sikes said. “Historically, the Supreme Court has been hesitant to wade too quickly into such issues. That’s one reason that would militate against the justices granting cert.”

Sikes also nodded to the ongoing effort by Senate Finance Committee Chairman Chuck Grassley, R-Iowa, to put forward a bill that would reform Section 232 by giving lawmakers a role in administering national security tariffs.

That process has moved slowly, as Grassley has been working to iron out the differences between bills from Sens. Rob Portman, R-Ohio, and Pat Toomey, R-Pa., for well over a year. But the chairman

confirmed as recently as January that he was still working on introducing legislation this year.

Any bill would have to gather enough support to override a likely veto from Trump, which complicates any legislative strategy to reform the law. But the mere hint of pending legislative action could still give the high court pause, Sikes said.

“The justices will make sure that whatever case they take actually has an impact, and if there is the potential that the law that they might interpret will be rewritten within a matter of a few months or a year, that also might weigh against them taking the case up,” he said.

Forecasting what will be picked up by the court is an imprecise science even for the most skilled court watchers, and the politics of Trump’s trade aggression only further cloud the situation.

On the one hand, the court’s liberal wing could fancy an opportunity to strike back at one of Trump’s signature trade moves, but in doing so could leave the door ajar for attacks against future administrations as they accept delegations of power from Congress. Conversely, the conservative bloc could cut the legs out from the “administrative state,” but it would have to defy a sitting Republican president to do it.

“Those votes would tell us whether they are outcome-oriented or doctrinally oriented,” Nunnenkamp said. “If you doctrinally believe the nondelegation doctrine should be examined, then you want to take this case.”

--Editing by Aaron Pelc.