

Justices Face Sticky Question In New Tariff Authority Fight

By **Alex Lawson**

Law360 (November 24, 2021, 6:21 PM EST) -- The U.S. Supreme Court has declined to examine the limits of the president's national security tariff power in recent years, but a new petition drawing interest from the trade bar frames its question in a way that the justices may not be able to ignore.

On its face, the dispute is a granular one. Importer Transpacific Steel LLC has for years been fighting the government's decision to double the 25% steel tariff imposed in 2018 under Section 232 of the Trade Expansion Act of 1962, arguing that the hike came long after the Cold War-era statute's deadlines had lapsed.

The company succeeded at the U.S. Court of International Trade, which ruled that Section 232 gives the president broad authority to restrict trade for national security reasons, but only within the timelines written into the law. The Federal Circuit took a looser reading of those deadlines, allowing the tariff hike to stand and teeing up a bid for high court review.

Transpacific's brief offers the justices a two-pronged query: It argues that the Federal Circuit was incorrect in its lax reading of the deadlines, but if that reading is correct, then Section 232 itself must be considered an unconstitutional delegation of congressional authority over trade.

"It's got as good a shot as anything coming out of the trade bar," Neville Peterson LLP partner John Peterson told Law360. "It's interesting because [the court] could affirm the time limits and reverse the Federal Circuit and in so doing save the constitutionality of Section 232, or if they agree that the Federal Circuit majority was right, then they get this question of constitutional delegation staring them in the face."

The Transpacific brief is the latest in a series of challenges to the Section 232 tariffs, which were applied by former President Donald Trump and have been maintained and defended in court by the Biden administration.

Section 232 allows the president 105 days to set trade restrictions once certain imports have been deemed a security risk by the U.S. Department of Commerce. That timeline was honored when Trump set a 25% tariff on imported steel in 2018. But five months later, Trump doubled the levy on Turkish imports, prompting the suit from Transpacific.

The CIT ruled that while Section 232 grants the president enormous power, the deadlines Congress added in 1988 at least require action within a certain time frame. But the Federal Circuit disagreed,

saying that the deadlines require the president to make a decision on restricting imports within a certain period, but also allow for more adjustments once that decision has been made.

While the high court has turned away recent bids that sought to strike down Section 232 as unconstitutional on its face, the Transpacific case poses a more specific question about the firmness of the law's deadlines.

"They have created a maybe-appealing path to do this on a narrow basis, looking at the statutory question and unless there is a real desire in the court to rein in the delegation from Congress, that's probably the more likely approach," Barnes Richardson & Colburn LLP partner Lawrence Friedman told Law360.

Sheer math weighs against the high court taking up the Transpacific petition, as the justices take up just a sliver of the petitions submitted to them in a given term.

It's also possible that the court has no interest in assessing the constitutionality of the law, as it denied two such challenges to the law in 2019 and 2020. And the narrower question of whether the Federal Circuit misread the strength of Section 232's guidelines may be too obscure for the justices to take up, according to Peterson.

"I think it is a strong argument, but the Supreme Court is not a court of error, and the argument that the lower court got it wrong usually isn't sufficient to stir them into taking up a case," he told Law360.

While the bar waits for action on the Transpacific petition, some have already begun to ponder the implications of such a narrow reading of Section 232's deadlines.

In a post on the SCIF blog maintained by George Mason University's National Security Institute, Morgan Lewis & Bockius LLP partner Kenneth J. Nunnenkamp said that even though the Transpacific petition looks to restrict the president's ability to raise tariffs after the fact, it could also be used to curb the rescission of tariffs after trade tensions have cooled.

"Is the logical extension of petitioners' position that the president lacks further authority to make adjustments of any kind, including removing or reducing tariffs or quotas? If so, does this mean only Congressional action (or the passage of time) can remove or reduce these extraordinary tariffs, once imposed?" Nunnenkamp wrote.

Ultimately, the question of whether the high court will take up the Transpacific petition is a toss-up. The court has been generally unwilling to examine pure trade cases, which originate from just a single avenue — eliminating concerns over a circuit split — and which often turn on weedy legal concepts.

But there has been a tremendous amount of interest on the scope of Section 232, and Peterson noted that members of Congress are likely to weigh in through amicus filings and that the court could be swayed if consensus compels them to act.

"Maybe if they can get a couple of amicus briefs penned by some of these people in the Supreme Court golden circle, the lawyers who tend to get their petitions granted more often, I think it's a worthy effort," Peterson told Law360.

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