May 2020: International Trade Update

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June 4, 2020

Will the Non-Delegation Doctrine Be Reinvigorated?

A recurring question in American trade law is whether various statutory delegations of authority to the President to take actions against imports—such as imposing duties, fees, or quotas—violate Article I of the Constitution, which vests "all legislative Powers" in Congress, including the power "To lay and collect Taxes, Duties, Imposts and Excises." For two centuries, the Supreme Court has mostly rejected such "non-delegation" challenges to trade statutes. But in the past year, five justices have signaled a potential willingness to re-invigorate the non-delegation doctrine. A recent trade decision by the Federal Circuit will give them that opportunity.

Origins of the Non-Delegation Doctrine

The non-delegation doctrine traces its origins to trade cases dating back 200 years. In *The Brig Aurora*, 7 Cranch 382 (1813), the Supreme Court upheld a delegation to the President of the power to issue a proclamation that would revive a statutory ban on imports from Great Britain or France. Eighty years later, in *Field v. Clark*, 143 U.S. 649 (1892), the Supreme Court relied on *The Brig Aurora* to uphold a delegation to the President of the power to suspend statutory provisions that exempted foreign sugar, molasses, coffee, tea, and hides from import duties. But even as it upheld that provision, the Court emphatically declared that the principle that "Congress cannot delegate legislative power to the President" is "universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Id.* at 692.

Then, in *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928), the Supreme Court relied on *Field v. Clark* to uphold a delegation to the President of the authority to raise tariffs on imported merchandise to equalize differences in production costs between foreign merchandise and domestic goods. While it reaffirmed the principle that Congress cannot delegate legislative power to the President, the Court also recognized the need for flexibility and practicality in setting duties, explaining that Congress could delegate discretion to the Executive Branch to *implement* laws that Congress enacts, especially in realms—like trade—where fine technical distinctions must be drawn and redrawn rapidly as circumstances fluctuate. *Id.* at 404–05. To distinguish permissible delegations from impermissible ones, the Court stated that "[i]f Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power." *Id.* at 409.

In the decades since *J.W. Hampton*, the Court has repeatedly drawn on the "intelligible principle" test to uphold grants of power to the President against non-delegation challenges. *E.g., Whitman v. American Trucking Ass'n*, 531 U.S. 457, 474–75 (2001) (collecting

cases). Indeed, since the 1930s, no non-delegation challenge to a statute has been successful in the Supreme Court. But that may be about to change.

Shifting Sentiments at the Supreme Court

Last year, in *Gundy v. United States*, 139 S. Ct. 2116 (2019), the Court, sitting with only eight members (Justice Kavanaugh took no part in the case), again denied a non-delegation challenge, this time to a delegation to the Attorney General of the power to determine whether to impose registration requirements on sex offenders. But the "intelligible principle" test no longer mustered a majority of the Court.

Justice Kagan, writing for a plurality of four justices, invoked that test to uphold the delegation. *Id*. at 2129–30. In dissent, Justice Gorsuch, writing for himself, Chief Justice Roberts, and Justice Thomas, argued that the "intelligible principle" test "has been abused to permit delegations of legislative power that on any other conceivable account should be held unconstitutional" and that the Court should return to first principles and reinvigorate the non-delegation doctrine to more carefully police delegations of legislative power to the Executive Branch. *Id*. at 2133–42. Justice Alito concurred in the judgment to uphold the delegation, but he refused to join the plurality opinion and instead wrote that he "would support" reconsideration of the non-delegation doctrine, just as the dissenters sought. *Id*. at 2131. Then, five months after *Gundy*, Justice Kavanaugh opined that Justice Gorsuch's "scholarly analysis of the Constitution's nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases," especially in cases where major national policy decisions have been delegated to the Executive Branch. *Paul v. United States*, 140 S. Ct. 342 (2019).

Thus, in the past year, five justices—Chief Justice Roberts, Justice Thomas, Justice Alito, Justice Gorsuch, and Justice Kennedy—have written or signed opinions signaling that they are open to revitalizing the nondelegation doctrine. A new trade case now presents that opportunity.

A New Challenge in the Federal Circuit

In March 2018, President Trump imposed a 25% tariff on imported steel. He did so under Section 232 of the Trade Expansion Act of 1962, which empowers the President to "adjust the imports" of an article if the Secretary of Commerce finds that the article's import into the United States threatens to impair national security. In 1976, the Supreme Court relied on the "intelligible principle" test of *J.W. Hampton* to uphold Section 232 against a non-delegation challenge after President Ford had invoked the statute to impose license fees on petroleum imports. *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 538 (1976).

In 2019, a three-judge panel of the U.S. Court of International Trade held that *Algonquin* foreclosed any non-delegation challenge to President Trump's steel tariffs under Section 232. *American Institute for Int'l Steel, Inc. v. United States*, 376 F. Supp. 3d 1335 (CIT 2019). Judge Katzmann concurred "dubitante." He felt bound by *Algonquin*, but he expressed "grave doubts" about its correctness, *id*. at 1346–47, as he viewed Section 232 as granting "virtually unbridled discretion to the President with respect to the power over trade that is reserved by the Constitution to Congress," *id*. at 1352. As he asked at the end of his opinion: "If the delegation permitted by section 232, as now revealed, does not constitute excessive delegation in violation of the constitution, what would?" *Id*.

Earlier this year, the Federal Circuit affirmed that ruling because it considered *Algonquin* to be controlling. *American Institute for Int'l Steel, Inc. v. United States*, --- F. App'x ----, 2020 WL 967925 (Fed. Cir. Feb. 28, 2020). It noted that, in *Gundy* and *Paul*, five members of the Supreme Court had recently expressed interest in reconsidering the non-delegation doctrine, but it recognized that "such expressions give us neither a license to disregard the currently governing precedent nor a substitute standard to apply." *Id*. at *7. The Federal Circuit's obligation was to follow the Supreme Court's holdings and leave to the Supreme Court the "prerogative of overruling its own decisions." *Id*.

To the Supreme Court

On March 25, 2020, the American Institute for International Steel petitioned the Supreme Court for a writ of certiorari. The petition asked the Court to take up the invitations in *Gundy* and *Paul* to reevaluate the non-delegation doctrine, distinguish or overrule *Algonguin*, and strike down Section 232 as unconstitutional. Three amicus briefs—by Basrai Farms, the Cato Institute, and the New Civil Liberties Alliance—support the petition. Given the non-delegation doctrine's origins in trade cases, it is fitting that a trade case may bring about its revitalization. In the coming months, the Supreme Court will decide whether to grant certiorari and reassess the non-delegation doctrine. If it does, then there may be significant ramifications for trade law and the many statutes that grant the Executive Branch powers to impose various duties on imports.