

Congress Takes 1st Steps Toward Defying Biden On Trade

By Jennifer Doherty

Law360 (April 20, 2023, 11:26 PM EDT) -- The House Ways and Means Committee voted against President Joe Biden's moratorium on new solar product tariffs Thursday, and experts are watching the legislation's progress as a potential indicator of more congressional trade policing to come.

Lawmakers have limited options for combating what some of them have termed the White House's "go-it-alone" trade strategy, which has seen the Office of the U.S. Trade Representative and U.S. Department of Commerce pursue new trade frameworks without the legislative parameters Congress usually sets on such negotiations.

Last month, Rep. Bill Posey, R-Fla., and 10 bipartisan co-sponsors introduced a resolution that would quash Commerce's rule implementing a two-year block on new solar cell duties. The fate of that legislation, House Joint Resolution 39, could foretell the likelihood of further action on other issues that have ruffled congressional feathers, such as the administration's push to count an executive-level agreement with Japan on critical minerals as a free trade agreement.

"If Congress, on a bipartisan basis, passes a resolution disapproving of what the administration did in the solar dumping case, I think it could be an indicator of the willingness of Congress to use the Congressional Review Act in [the critical minerals] case as well," Warren S. Payne, a senior adviser at Mayer Brown LLP, told Law360.

Under the CRA, Congress can use resolutions to overturn certain executive branch rules. The statute has already been invoked in the current session to challenge an Environmental Protection Agency rule expanding the government's authority under the Clean Water Act and a U.S. Department of Labor rule relating to retirement investment plans.

Seeking deals with international partners without giving Congress an official seat at the negotiating table runs afoul of the Constitution, lawmakers from both sides of the aisle have repeatedly told Biden and U.S. Trade Representative Katherine Tai in letters, hearings and speeches since 2021.

But lawmakers' complaints reached a fever pitch following the critical minerals deal, which Rep. Earl Blumenauer, D-Ore., equated to "crossing the Rubicon" in a statement.

The agreement, which will not be incorporated into U.S. law through legislation, is being treated by USTR as a sort of sector-specific subcategory of free trade agreement, deals that are generally

negotiated by the executive branch only after lawmakers have granted the president Trade Promotion Authority.

Other lawmakers have also voiced their opposition to the critical minerals deal and a related rule from the U.S. Department of the Treasury. Sen. Ron Wyden, D-Ore., and Rep. Richard Neal, D-Mass., called the deal "unacceptable" while Rep. Suzan DelBene, D-Wash., said it "undermines Congress' constitutional authority to regulate foreign commerce."

On the Republican side, Sen. Mike Crapo of Idaho said the agreement showed the administration's "only commitment is to bypass the American people," and Ways and Means Committee Chair Jason Smith, R-Mo., accused the White House of negotiating "fake trade agreements in secret."

Ways and Means Trade Subcommittee Chair Adrian Smith, R-Neb., was among the few who explicitly promised congressional action in response to the Treasury rule.

The guidance outlined battery and critical mineral sourcing requirements for automakers hoping to qualify their electric vehicles for consumer tax credits under the Inflation Reduction Act. To qualify, the EV batteries must contain set minimum amounts of critical minerals sourced from within the U.S. or a country with a free trade agreement with the U.S.

The Treasury interpreted the IRA's reference to free trade agreements to include the Japan critical minerals deal.

"The administration should expect to answer to a bipartisan coalition of members who share this concern," Smith said. "This is unacceptable and unconstitutional, and I intend to use every tool at my disposal to stop this blatant executive overreach."

A spokeswoman for Smith's office emphasized the "bipartisan, bicameral" nature of concerns about the proposed rule, but declined to elaborate on plans to address it.

A frequently contrarian Democrat, Sen. Joe Manchin of West Virginia, stood out in his explicit threat to sue the Biden administration over the Treasury's approach EV tax credits.

But the senator would face an uphill battle to establish his standing to challenge the regulation, which only directly implicates automakers, if he did resort to litigation, according to Payne.

Manchin himself appeared to take a step back from his litigious posture after the rule came out, issuing a statement condemning the measure as "horrific" and contrary to the Inflation Reduction Act's aim to bring manufacturing back to the U.S. But the only action he called for was public input.

"The guidance includes a 60-day comment period and I ask for every American to comment. My comment is simple: Stop this now — just follow the law," the senator said.

Beyond a potential lawsuit or a subsequent CRA resolution, Congress always has the option of amending the underlying statute directly.

But getting lawmakers to row in the same direction on either a resolution or a statutory amendment could prove to be a tall order, given the broad array of criticisms concerning the critical minerals deal and proposed EV rule, according to Stephen Kho, a partner at Akin Gump Strauss Hauer & Feld LLP.

Kho pointed to at least three different categories of complaints, including lawmakers engaged in a "turf battle" with the White House over their role in trade, Democrats who bemoaned the mineral deal's lack of labor and environmental safeguards, and others, including Manchin, who assailed what they saw as a perversion of the IRA's domestic manufacturing objectives.

"It's easy to point out the problems," Kho said. "It's harder to come up with solutions. I'm not sure we've seen this Congress really coming up with solutions."

Solutions were even less likely when no one on the Hill could agree on the fundamental trade objectives, he added.

And disgruntled lawmakers could still elect to scrap the Inflation Reduction Act entirely, Payne pointed out, an idea that has been popular with some Republicans since it was introduced.

"It's too early to say with confidence whether this frustration is enough that Republicans would be willing to make such a limited, targeted change to the Inflation Reduction Act as opposed to just repealing it outright," he said.

Meanwhile, the Biden administration is working on a similar critical minerals deal with the European Union. For that agreement, EU representatives have told U.S. media outlets they need to secure a mandate from their member states.

"It's pretty lopsided to have one side of the negotiation have that kind of buy-in from their legislative branch and the other does not," Payne told Law360. "I think that would add fuel to congressional frustration about the lack of consultation and lack of transparency and lack of congressional involvement in the negotiation and approval."

--Editing by Jill Coffey and Emily Kokoll.