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As the Cases Against Broad Trump Tariff Authority Head to the Supreme Court, What's at Stake and at Issue

A Ruling Against "IEEPA" Tariffs Would Have Relatively Limited Effect, but Okaying Presidents' Broad Unilateral Power to Set Tariffs Would Have Seismic Damaging Impact

The U.S. Supreme Court set a very speedy schedule to [hear a case](#) that combines [several](#) different [challenges](#) of President Trump's authority to impose his broadest tariffs. The high court will decide whether the April 2 "Reciprocal Tariffs" that apply to most countries in the world at rates ranging from 10 to 50% and the "Trafficking Tariffs" that apply to China (30%) and to non-U.S.-Mexico-Canada-Agreement-compliant goods from Canada (35%) and Mexico (25%) can continue. The court rescheduled other cases to hear oral arguments for this case on November 5. The core legal issues are whether the statute on which Trump relied, the International Emergency Economic Powers Act (IEEPA), provides authority to impose these tariffs and, if it does, whether the delegation of Congress' constitutional tariff authority is constitutionally permissible. The case also raises major policy and political questions: A ruling that IEEPA provides presidents broad, unbound tariff authority would dramatically expand presidential power overall, demolishing one of the starkest checks and balances in the U.S. Constitution in a way that would broadly undermine democratic accountability in the U.S. governance system. It also would empower a president operating without care or good intentions to do significant economic damage domestically and internationally.

The second half of this memo is a guide for non-lawyers that describes in accessible terms the main legal issues the Supreme Court will review. But first, let's consider the impact of different outcomes in this case. Counterintuitively, it actually may not mean much for businesses, workers, consumers, or other nations if the court rules against the tariffs! The administration has made clear that it intends to impose high tariffs and can use other statutes to do so. These other laws have more limits and/or procedural steps than IEEPA but could result in similar ends. Section 122 of the Trade Act of 1974 authorizes a president to impose 15% tariffs widely for 150 days to address balance of payments issues. (Extending beyond 150 days requires congressional approval.) Five months of Section 122 tariffs would provide time for the Commerce Department to do the investigation required by Section 232 of the Trade Act of 1962 for a president to impose tariffs for national security reasons. This is the basis for steel, aluminum, and other tariffs now in place. The U.S. Trade Representative could also use the time to do the investigation required for a president to impose tariffs using authority provided in Section 301 of the Trade Act of 1974, which is the basis for the China tariffs during the first Trump administration and President Biden's additional China tariffs. Tariffs based on Sections 232 and 301 have withstood previous court challenges, thus providing fairly reliable authority.¹ Some trade experts expected Trump to use these authorities in the first instance given he had said the tariffs' purpose was to expand domestic manufacturing capacity, which requires sending reliable signals to investors that tariffs will remain long enough to justify investment in domestic production.

¹ Notably, some recent Section 232 tariffs—like on kitchen cabinetry and upholstered furniture—seem hard to justify on national security grounds. Yet if those tariffs, which cover derivative products related to Section 232 on timber, were successfully challenged, Section 301 offers an open-ended alternative, if one with more procedural requirements.

While the Supreme Court ruling against the IEEPA tariffs may not make much difference, a Supreme Court decision that IEEPA allows a president to unilaterally impose tariffs—of any amount, on any and all countries, and for any time period—would be alarming. It would greatly boost presidential powers relative to Congress, thrashing a core constitutional check and balance.

Article I Section 8 of the U.S. Constitution includes two separate grants of *exclusive* congressional authority over trade:

“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises...” and “to regulate Commerce with foreign Nations...” (emphasis added)

It was not an accident that the Founders granted sole control over the substance of trade policy to Congress. A trigger for the Revolutionary War and U.S. independence from England was the unilateral imposition of tariffs on the colonies by King George to raise funds for his European wars. The Boston Tea Party was our nation’s first trade war! Having tariff and trade *policy* not set by one person—the president—but rather by a group elected by geographically distinct blocs of Americans—Congress—reflects the enormous impact international commercial policy has on a nation and the power associated with setting it. So does an additional check and balance on how that authority can be exercised: The Constitution grants exclusive authority over international *negotiations* with foreign sovereigns to the executive branch, meaning the legislative and executive branches must cooperate on trade agreements.

Allowing presidents to usurp Congress’ constitutional trade authority would be much more than a quaint concern for fans of the Federalist Papers. We have witnessed some of the implications recently: A president with unilateral tariff powers can dole out mighty punishment and favor to businesses, political supplicants, and foreign nations alike. A president inclined to exercise such power without care and/or based on corruption, whim, pettiness, or political sycophancy can cause real uncertainty in the domestic and global economy in ways that undermine the national interest.

It is worth noting that I support using tariffs as part of industrial policy to rebuild U.S. domestic manufacturing capacity, and I think the enormous U.S. global trade deficit is a serious problem that must be remedied along with the general state of imbalance in global trade flows. So, my take on the threats posed by U.S. presidents having unbound, unilateral tariff authority is coming from a very different place than the statements by defenders of our failed trade policy who always criticize tariffs. (If you are interested in how Congress and the executive branch have managed the sharp separation of powers on tariffs and trade since 1788, I recommend my 2013 book, [*The Rise and Fall of Fast Track Trade Authority*](#). Presidents have tried to persuade Congress to delegate ever-broader “trade” authority for some time. Trump’s current *presumption* of unbound tariff policy under IEEPA is on par with the moves of the previously greatest trade-authority-grabbing president, Richard Nixon. Nixon tried (and failed) to get Congress to grant him authority to simply *proclaim changes to U.S. law* to conform it with the terms of trade pacts that a president would be authorize to sign and enter into without specific congressional approval!)

Consider just one scenario if the Supreme Court were to endorse the administration’s open-ended understanding of IEEPA tariff authority. Congress could undertake a needed review of how to best rebuild domestic productive capacity, resilience and security with an open process gathering expertise and insights through investigations and hearings. After undertaking the hard work to build sufficient support to enact major trade legislation, Congress might pass a law strategically raising and lowering swaths of the U.S. Most Favored Nation tariff rate schedule to promote those goals. The day after signing this into law, a president could unilaterally rewrite it under the

administration's reading of IEEPA and unilaterally enact entirely different tariff rates on any and all products for any and all nations based on whatever whim, personal vendetta or interest in helping or hurting another country's leader may move him or her that day.

Given the pattern of recent Supreme Court rulings granting President Trump ever-expanding executive authority and powers, some observers worry that the court might overturn the lower court rulings and follow the logic of the dissent in the U.S. Court of Appeals for the Federal Circuit ruling. Yet, given the dire implications of altogether shredding Congress' Article I-8 tariff authority and related checks and balances, I wonder if there is a majority to be had on the Supreme Court for some middle road premised on IEEPA providing some tariff authority, but not the unbound, vast powers to enact President Trump's current IEEPA tariffs. That is where the specialty federal court initially hearing the case, the Court of International Trade (CIT), landed although based on logic that does not stand up. The Federal Circuit majority effectively landed in the same place, but on different grounds, including some shaky legal reasoning that (among other issues) seems detached from understanding how congressional tariff authority and its exercise are not the same as Congress tax authority and policymaking. In my view, the grounds to hold that IEEPA does not authorize the entirely unbounded reciprocal and trafficking tariffs is the Nondelegation Doctrine.

The Federal Circuit Appeals Court Ruling Previews the Supreme Court Arguments

The full name of the case that went through the Federal Circuit, usually referred to as *V.O.S. Selections Inc. v. Trump*, is lengthy because it is a consolidation of two different challenges against the IEEPA tariffs brought by several businesses and by 12 state attorneys general.² The Supreme Court review will combine that combined case with yet another challenge to the IEEPA tariffs that is known as "[Learning Resources](#)" for which there is not yet an appellate ruling.

The *V.O.S.* case previews the issues well. On May 28, [the Court of International Trade ruled](#) that IEEPA does not allow either the reciprocal or fentanyl tariffs and issued a national injunction. The administration appealed. On August 29, a [majority of the Federal Circuit Court of Appeals agreed](#) with the CIT ruling *en banc* given its importance. The administration appealed and on September 9, the Supreme court agreed to take the case and combined it was a direct-to-Supreme-Court appeal of the District Court for the District of Colombia ruling on the Learning Resources case.

The Federal Circuit ruling reflects the complexity of the issues in question. Seven of the appellate judges ruled that IEEPA does not provide authority to enact the Reciprocal and Fentanyl tariffs. But only four held that IEEPA does not allow *any* tariffs. And the majority opinion affirmed the CIT decision in part, but also vacated in part and remanded in part:

² *V.O.S. Selections, Inc., Plastic Services and Products, LLC, d/b/a Genova Pipe, MicroKits, LLC, FishUSA Inc., Terry Precision Cycling LLC v. Donald J. Trump, in His Official Capacity as President of the United States, Executive Office of the President, United States, Rodney S. Scott, Commissioner for United States Customs and Border Protection, in His Official Capacity as Commissioner of the United States Customs and Border Protection, Jamieson Greer, in His Official Capacity as United States Trade Representative, Office of the United States Trade Representative, Howard Lutnick, in His Official Capacity as Secretary of Commerce, United States Customs and Border Protection and State of Oregon, State of Arizona, State of Colorado, State of Connecticut, State of Delaware, State of Illinois, State of Maine, State of Minnesota, State of Nevada, State of New Mexico, State of New York, State of Vermont v. President Donald J. Trump, United States Department of Homeland Security, Kristi Noem, Secretary of Homeland Security, in Her Official Capacity as Secretary of the Department of Homeland Security, United States Customs and Border Protection, Rodney S. Scott, Commissioner for United States Customs and Border Protection, in His Official Capacity as Commissioner for U.S. Customs and Border Protection, United States.*

“We affirm the CIT’s holding that the Trafficking and Reciprocal Tariffs imposed by the Challenged Executive Orders exceed the authority delegated to the President by IEEPA’s text. We also affirm the CIT’s grant of declaratory relief that the orders are ‘invalid as contrary to law.’ We vacate the CIT’s grant of a permanent injunction universally enjoining the enforcement of the Trafficking and Reciprocal Tariffs and remand for the CIT to reevaluate the propriety of granting injunctive relief and the proper scope of such relief, after considering all four eBay factors and the Supreme Court’s holding in CASA.” [CASA is the case about birthright citizenship from June 2025 in which the Supreme Court greatly limited federal courts’ ability to issue national injunctions.³]

Four judges, notably two Obama and two Bush II appointees—so not a MAGA political ruling—wrote a 60-page dissenting opinion concluding that IEEPA *does* provide authority for the current expansive tariffs. They make some strong points that, in my view, dispatch some of the logic on which the majority relies in coming to what I think is the right conclusion. In non-technical terms, their holding could sum up to: In the way IEEPA is written and its context relating to timing of other court cases and legislation, Congress left room for a president to use it for expansive tariffs.

“IEEPA embodies an eyes-open congressional grant of broad emergency authority in this foreign-affairs realm... In short, the majority’s efforts at narrowing the section 203 tariff authorization (beyond the limits prescribed by section 202), besides being insufficiently defined, have no proper foundation in the statute... IEEPA itself supplies no basis for whatever affirmative requirement of temporariness the majority has in mind as a ground for invalidating the tariffs at issue... The suggested constraints of some kind of cap in duty amount and some limitation of what products may be covered fare no better.”

That, of course, begs the question of why Congress does not now act to clarify what tariff authority, if any, IEEPA does provide presidents. Given the Republican House and Senate majorities’ unwillingness to curtail or even criticize Trump’s authority or conduct related to most everything, the chance that will happen any time soon are slim to none!

Does IEEPA Allow Any Tariffs?

The Supreme Court will face the same core question with which the judges handling this case to date have wrangled: Does IEEPA’s language granting a president authority to “*investigate, regulate... or prohibit*” “**importation and exportation**” (emphasis added) delegate authority to enact tariffs? In addition to the direct question of whether the statute allows tariffs at all, another critical issue is whether Congress was sufficiently clear in providing that authority if that may be what was intended. The latter goes to a key argument in this case that I discuss briefly below, which is called the Major Questions Doctrine. In simple terms, that doctrine limits ‘reading in’ authorities that Congress has not specifically and clearly grant in a statute when it comes to actions with significant national implications, which the Trump reciprocal and trafficking tariffs certainly have.

Because the press coverage has focused on the majority holdings, I want to surface some of the logic and arguments provided in the Federal Circuit dissent that provide convincing counterpoints. To start with, a lot of ink has been spilled in briefs and opinions on the fact that IEEPA does not include the words “tariff” or “duty” while various other statutes delegating tariff authority to the president, like the aforementioned Sections 122 and 301, specifically do. But the Supreme Court has

³ “On remand, the CIT should consider in the first instance whether its grant of a universal injunction comports with the standards out- lined by the Supreme Court in CASA.” Federal Circuit majority opinion at 44.

previously held that a part of Section 232 that does not reference tariffs but rather authority to “adjust imports” delegates tariff authority. True, Section 232 does explicitly mention duties in other sections. Yet, the contrasting absence of the magic word in the challenged section was not controlling but rather an operational analysis of how one would “adjust imports.”

“The Supreme Court’s decision in Federal Energy Administration v. Algonquin SNG, Inc. supports this interpretation. 426 U.S. 548 (1976). The Court there held that the language ‘adjust imports’ in section 232(b) of the Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 872, 877 (codified as amended at 19 U.S.C. § 1862(b)–(c)), is not confined to ‘imposition of quotas’ but includes ‘imposition of monetary exactions—i.e., license fees and duties.’ Algonquin, 426 U.S. at 561–62. The Court readily deemed such exactions to be within the natural scope of the language as a means of ‘adjust[ing] imports,’ id. at 561, though section 232(b) makes no reference to ‘duties.’”

The Federal Circuit dissent also makes a compelling point based on recent Supreme Court jurisprudence related to how Congress is—and is not—required to describe delegated authority.

“But as the Supreme Court recently reiterated, ‘Congress need not state its intent in any particular way, or use magic words,’ even to waive sovereign immunity, explaining that (on the particular issue presented) ‘even if Congress typically confers the authority to settle claims by use of the term ‘settle,’ that standard practice does not bind legislators to specific words or formulations.’ Soto v. United States, 605 U.S. 360, 371 (2025) (internal quotations and citation omitted). Context can establish the authorization without a particular word. Id. at 368. Here, the usage in the other cited statutes is hardly surprising, because Congress in those statutes was overwhelmingly focused on tariff issues. In contrast, Congress in IEEPA (as in TWEA) was focused on the subject of emergencies and giving plainly broad emergency authority regarding foreign property. In this context, breadth is the proper lesson, without need for a listing of specific common tools for achieving the evident legislative objective.”

The dissent also makes a point that is common sense to trade wonks but seems to have been lost on the Federal Circuit majority: One of the main ways to “regulate...importation” is to use tariffs. While it is true that, at the time of the nation’s founding, a main role of tariffs was to generate revenue to fund government functions, that has since ceased to be the case. (And despite President Trump’s ever-changing explanation of the purpose of his tariffs, which now includes generating revenue, today, tariffs are mainly used to regulate trade including by imposing countervailing duties to keep out or try to price-equalize unfairly traded goods and/or to create a protected domestic market for targeted goods as a part of a broader industrial policy, as President Biden attempted for domestic-made solar products and electric vehicles.)

One plain-language argument particularly struck me. No one contests that IEEPA allows bans on importation. Indeed, that is a regular use of the statute. For instance, [IEEPA is the basis for President Biden’s embargoes](#) on certain goods from Russia after the 2022 Ukraine invasion. But if banning importation and exportation was the only intent of IEEPA, why would the word regulate be included, and what else would it mean? As the Federal Circuit dissent notes:

“[T]here is every reason to understand ‘regulate’ to include, not exclude, such an ordinary tool of import regulation as tariffing. Although a similar conclusion presumably would not be justified for some or many other uses of the word ‘regulate’ in the United States

Code, See Maj. Op. at 29–30, that fact does not weaken the conclusion that “regulate” as used in the IEEPA statute includes tariffs.”

I have spotlighted some particular issues. Sorting out what “regulate...importation” means also requires parsing legislative history. It starts with IEEPA’s predecessor statute, the Trading with the Enemy Act of 1917 (TWEA), which also included “*importation and exportation*” as activities a president could “*investigate, regulate... or prohibit*.” Nixon used TWEA to impose 10% across-the-board tariffs in 1971, which resulted in a challenge by a zipper importer, Yoshida International. The *Yoshida II* ruling was that TWEA’s “regulate...importation” language that is replicated exactly in IEEPA *did* authorize Nixon’s tariffs. Thus all of the briefs and rulings are replete with arguments about why the *Yoshida II* case law on the same language means either that IEEPA allows tariffs, or is not applicable. (The argument for the latter is that Congress enacted IEEPA subsequent to *Yoshida II* and required its use to be preceded by a declaration under the National Emergency Act so as to limit presidential emergency action relative to TWEA.)

The gap between trade thinking and general judicial smarts is also reflected in the majority opinion and various briefs via repeated conflation between Congress’ tax authority and Congress’ tariff authority. This is the basis for four of the judges in the Federal Circuit’s majority ruling to conclude IEEPA authorizes no tariffs at all. A related argument is about how Congress granting authority to regulate is not the same as granting the power to tax. Yet, Congress explicitly granting authority to “regulate... importation” in addition to authority to “prohibit” “importation and exportation” underscores how Congress’ constitutional tariff authority does not operate the same as Congress’ tax authority. The two authorities having distinct bodies of case law. This problematic conflation undergirds the Federal Circuit majority’s logic for holding that, even if IEEPA allows tariffs, it would do violence to the Nondelegation Doctrine to allow IEEPA to authorize these tariffs.

Ultimately, the CIT and the Federal Circuit majority avoided having to definitively answer this question. The CIT ruled Congress’ enactment of Section 122 displaced whatever tariff authority IEEPA might have provided with respect to emergencies related to trade imbalances. The Federal Circuit jumped to the more pertinent question: Whether IEEPA authorized these specific, pervasive, open-ended reciprocal and trafficking tariffs.

“We are not addressing whether the President’s actions should have been taken as a matter of policy. Nor are we deciding whether IEEPA authorizes any tariffs at all. Rather, the only issue we resolve on appeal is whether the Trafficking Tariffs and Reciprocal Tariffs imposed by the Challenged Executive Orders are authorized by IEEPA. We conclude they are not.”

Does IEEPA Allow These Tariffs?

Assuming for the moment that the Supreme Court might follow the logic of the Federal Circuit dissent, not the majority, and find IEEPA does authorize the specific tariffs in question, it still must decide if such a delegation of tariff authority would be constitutional. Two principles come into play: the Nondelegation Doctrine and the Major Questions Doctrine. The Major Questions Doctrine argumentation hangs on what “regulate...importation” is (or is not) understood to mean.

But the Nondelegation Doctrine is a test I think the reciprocal and trafficking tariffs cannot meet. It requires that, for a delegation of authority to be constitutional, Congress must set out an intelligible principle that includes “both ‘the general policy’” that the President “must pursue and ‘the boundaries of [its] delegated authority.’” (*FCC v. Consumers’ Research.*, 145 S. Ct. 2482, 2497 (2025))

The Federal Circuit majority makes a key point targeting what I think is the greatest weakness of the administration's claim for unbound IEEPA tariff authority plainly:

“The administration’s understanding of the scope of the tariff authority provided by IEEPA would make it an unconstitutional delegation.”

Whether or not IEEPA *could* provide constitutionally valid authority for presidential tariff use, which would be premised on textual and case law analysis, how this administration has used its claimed IEEPA authority makes the Nondelegation Doctrine case simple. In its briefs, and in statements by administration officials, it is clear that the administration believes IEEPA provides unlimited tariff authority to the president. And it has acted accordingly, simply vaporizing Congress's constitutional tariff authority.

The administration's stated understanding of the scope of IEEPA tariff authority and its conduct—tariffs on, off, and sideways on the whole world at ever-changing rates and shapes for open-ended durations; tariffs on countries with which the United States has trade surpluses, including Brazil, over solidarity with failed coup-leader and former president Jair Bolsonaro; tariffs explicitly described as a means to generate revenue (aka tax), not regulate trade; and no formal procedures for any of it—provide the most compelling case against IEEPA providing a constitutionally permissible delegation of Congress Article I-8 tariff authority.

As the Federal Circuit majority notes:

“These tariffs apply to nearly all articles imported into the United States (and, in the case of the Reciprocal Tariffs, apply to almost all countries), impose high rates which are ever-changing and exceed those set out in the HTSUS, and are not limited in duration. The Trafficking and Reciprocal Tariffs assert an expansive authority that is beyond the express limitations of Yoshida II’s holding and, thus, beyond the authority delegated to the President by IEEPA.”

The reference to Yoshida relates to part of the holding in that case: “...Yoshida II *was explicit in its view that an unbounded tariff authority would not be permitted...*” But even if that holding did not exist, delegation without limitations or boundaries of Congress's constitutional trade authority would not be constitutional given the Nondelegation Doctrine.

The Federal Circuit dissent's effort to deal with the Nondelegation Doctrine and the lack of “boundaries of delegated authority” relies on two points. First, the dissenting judges argue that Congress did set boundaries on IEEPA by requiring that a president declare an emergency under the National Emergencies Act, that such an emergency have international causes, and that Congress has the option of a privileged vote to end the emergency. But the conditions for triggering the authority and a president's potential use of any of its economic tools is certainly not the same as bounds on the specific delegation of Congress' constitutional tariff authority. Second, it argues that presidents' extra authority and discretion in matters of foreign policy somehow nullify normal considerations about boundaries. There is no “foreign policy” exception to the Nondelegation Doctrine.

Rather, my trade wonk brain slides back into searching for *any* congressional tariff authority that would remain in the rubble of Article I-8 if the administration's notion of boundless IEEPA tariff authority were allowed. Just one scenario to consider: Imagine Congress does the heavy lifting to enact a new schedule of U.S. Most Favored Nation tariffs aimed at addressing whatever national

goals and interests by reshaping trade flows. (This would be a way to more permanently raise tariffs on goods for which we seek more domestic production and to diversify import sources, which could be achieved by cutting tariffs for preferred partners.) Under the administration's open-ended understanding of IEEPA tariff authority, the day after that law was signed by the president, he or she could unilaterally rewrite it by executive order using IEEPA to enact entirely different tariff rates on any and all products with respect to any and all countries.

Notably, [the administration's brief to the Supreme Court](#) does not help on these basic delegation and separation of powers issues. Oddly, it makes the argument that, if the Supreme Court rules that IEEPA does not allow these tariffs, the United States would be pitched into an economic disaster, unable to pay back all of the tariff revenue it had collected. Hum, how does framing the president's IEEPA tariffs as a tax-generating revenue help their case?

Stay tuned!