

As President Trump Announces New Tariffs, Federal Circuit Questions “Breathtaking” Scope of Trump's Claimed Tariff Authority

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Yesterday, the US Court of Appeals for the Federal Circuit, sitting en banc, heard nearly two hours of oral argument in *V.O.S. Selections, Inc. v. Trump*. Argument focused on whether the president has the authority to issue tariffs under the International Emergency Economic Powers Act (IEEPA). The Court appeared split on whether the president's emergency declarations¹ authorize global reciprocal tariffs under the IEEPA and principles of constitutional law, with a majority of the judges expressing doubts.

Whatever the decision, it will almost certainly be appealed to the Supreme Court. As several members of the en banc court alluded to at argument, the president's recent global tariffs under IEEPA reflect a fundamental shift in the US approach to global trade. Even if the IEEPA tariffs do not stand, the Trump administration is poised to use other laws to implement its intended tariff policies. As a result, corporations, governments, and markets must account for ongoing uncertainty regarding the status of US trade policy.

I. Argument Recap

As Jenner & Block has reported, the *V.O.S. Selections* and *Oregon* cases represent a challenge to President Trump's use of IEEPA to impose extraordinary “reciprocal tariffs” on global imports. Under IEEPA, the president may “regulate . . . [the] importation” of foreign goods to “deal with any unusual and extraordinary threat” from abroad to the nation's “national security, foreign policy, or economy,” if a national emergency exists. The case also implicates fundamental questions about the separation of powers and the limits on the president's authority to direct US trade policy.

The question before the en banc court on appeal is whether President Trump's global reciprocal tariffs exceed his authority under IEEPA. The appeal follows a decision by the Court of International Trade (CIT) to enjoin the tariffs, a decision that the Federal Circuit put on hold pending appeal.

During oral argument, the Department of Justice advocated for a broad reading of the president's authority under IEEPA. According to the government, the text and history of the IEEPA, which

permits the president to “regulate . . . importation” in response to a national emergency, authorizes the president’s actions. In support, the government pointed to more limited tariffs imposed by President Nixon in the 1970s under IEEPA’s predecessor statute, which were upheld in *U.S. v. Yoshida*, a 1975 decision by the Federal Circuit. The government argued that when Congress enacted the IEEPA it ratified *Yoshida* and authorized the president to impose this type of emergency tariff.

A majority of the en banc court appeared skeptical of this argument, noting that IEEPA does not use the word “tariff” at all, while *Yoshida* itself prohibited the president from engaging in a wholesale re-writing of tariff schedules enacted by Congress. One judge reasoned that if *Yoshida* governed, so should its limitations, suggesting that even if the Court concluded that IEEPA authorized the president to regulate some tariffs, the statute likely would not support the president’s imposition of the tariffs at issue in the case. In response, the government argued that the law must be interpreted not only according to its plain text, but also in light of the president’s broad authority under Article II. Ultimately, however, the Court appeared split on whether the word “regulate” includes the power to impose global tariffs without express congressional authorization. A majority of the judges seemed to suggest that it did not.

Plaintiffs first argued that IEEPA’s text does not mention the word “tariff,” and suggested that even if the Court were to conclude that the president’s authority to “regulate . . . importation” under the statute allowed the president to regulate tariffs, that authority would not extend to authorizing the president to *impose* new tariffs. Instead, Plaintiffs argued that IEEPA should be read in concert with Section 122 of the Trade Act of 1974, which permits the president to regulate trade involving “fundamental international payment problems,” including “large and serious balance-of-payments deficits.”

Further, Plaintiffs pressed the point that no matter the Court’s view of what the statute allows, the tariffs at issue are unlawful because no national emergency justifies the president’s reliance on IEEPA. Allowing the tariffs to go into effect under the president’s emergency declaration, they argued, would give the president “as sweeping a power as is imaginable,” reflecting a “breathtaking” assertion of authority over international trade that no prior president has ever interpreted IEEPA to allow. Many judges appeared to agree, with several expressing skepticism that the United States’ longstanding trade deficit gives rise to a national emergency that could justify the new tariff regime.

Plaintiffs also argued that interpreting IEEPA to permit President Trump’s actions is impermissible under the Constitution. Under the federal court-developed Major Questions Doctrine, courts may strike down actions taken by the executive when they are so significant that Congress should be required to approve them. In response, the government noted the doctrine has only applied in the domestic context, while the Constitution gives the president more latitude with respect to foreign affairs.

Last, Plaintiffs asserted that permitting the president to exercise this much latitude over international trade violates separation of powers principles, as it contravenes the constitutional provision assigning authority over tariffs and taxation to Congress. In this instance, Plaintiffs argued, upholding the new tariff regime would create essentially unbounded authority in the president to circumvent Congress in an area that the Constitution specifically designates to the legislature. Plaintiffs argued that the doctrine of constitutional avoidance therefore would caution in favor of the Court interpreting the president's authority under IEEPA narrowly.

In its rebuttal, the government argued that national emergencies are generally not subject to second-guessing by the courts. One Federal Circuit judge queried whether there were any limits on a president's authority at all, if as the government suggested, the declaration of a national emergency is not judicially reviewable. The government replied that Congress is empowered to check executive action through legislation—it just has not yet done so. Whether the government's explanation of the balance of power between branches of government will satisfy the en banc court remains to be seen.

Given the importance of these issues, no less than 20 amici filed briefs with the Federal Circuit in the case, including a group of economists represented by Jenner & Block. Marshalling substantial evidence, the amici explained that trade deficits are neither unusual nor extraordinary and pose no threat to national security or the economy. They note that many countries have trade deficits and that the United States has maintained persistent trade deficits for the past 50 years.

The Federal Circuit is likely to issue its opinion soon, having set a highly expedited briefing schedule. It is unlikely that the Federal Circuit's opinion will be the final word on the legality of President Trump's tariff regime, however, as the losing party will likely appeal to the Supreme Court.

II. What These Rulings Mean for Companies Affected by IEEPA Tariffs

Given the current stay of the CIT's order, IEEPA tariffs remain in effect for now. Even if the courts ultimately rule that the IEEPA tariffs at issue are void, the Trump administration already has stated that it is planning other means to impose reciprocal and retaliatory tariffs. This includes using a provision of the Trade Act of 1974 that allows for tariffs of up to 15% for 150 days to address trade imbalances, followed by individualized tariffs against each major trading partner to counter unfair foreign trade practices.

As a result, corporations, foreign governments, and markets must account for the possibility that the legality of the administration's tariff policy will remain unsettled, deepening the uncertainty and volatility that has come to characterize US trade policy. Companies should take this time to check their supplier and purchaser contracts to determine where tariff liability lies, re-negotiate terms where possible, and set prospective tariff allocations.

Jenner & Block will continue to monitor these and other cases concerning tariffs under IEEPA and provide updates as appropriate. We also stand ready to assist our clients as they navigate their way

through these difficult issues.

Footnotes

[1] These tariffs include those imposed through Executive Order 14193 against goods from Canada (Imposing Duties to Address the Flow of Illicit Drugs Across Our Northern Border), Executive Order 14194 against Mexico (Imposing Duties to Address the Flow of Illicit Drugs Across Our Southern Border), Executive Order 14195 against China (Imposing Duties to Address the Synthetic Opioid Supply Chain in the People’s Republic of China), “reciprocal” tariffs on all global imports through Executive Order 14157 (Regulating Imports with A Reciprocal Tariff to Rectify Trade Practices that Contribute to Large and Persistent Annual United States Goods Trade Deficits), as well as a number of retaliatory tariffs specifically targeting China.

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