



“Emergency” Tariffs: Where things stand? What comes next?

Earlier this year, President Trump became the first US president to declare tariffs on imports under a 1977 law called the *International Economic Emergency Powers Act* (IEEPA). While not the only tariff authority the president has relied on, a *New York Times* analysis estimates that IEEPA tariffs affected just under 30% of all imports, and consulting firm PwC estimates the government collected approximately \$108 billion in duties through the end of October.

These IEEPA tariffs have been the subject of controversy and are the subject of ongoing litigation, culminating in oral argument in the Supreme Court on November 5. Here, we discuss where things stand with these “emergency” tariffs and where they might be headed.

IEEPA

Under the Constitution, Congress has the power to impose taxes and tariffs, but may grant tariff authority to the president through legislation. While a number of statutes expressly grant this authority, IEEPA does not. Rather, it provides the President with the authority “to deal with an unusual and extraordinary threat ... to the national security, foreign policy, or economy of the United States” by “regulating” foreign commerce.

Even so, President Trump relied on IEEPA to announce tariffs on foreign goods in two buckets: (1) tariffs directed to specific “emergencies” as defined by the President; and (2) so-called “reciprocal tariffs” aimed at trade imbalances with dozens of nations. Because the statutory text of IEEPA does not expressly authorize tariffs, it also does not limit the size or duration of such tariffs, making it a remarkably powerful presidential tool.

The litigation

Because IEEPA does not specifically authorize tariffs, a number of states and small businesses sued the administration, arguing the tariffs exceed the President’s authority under IEEPA. The Court of International Trade, a specialized trade court, agreed, ruling them invalid; and the Federal Circuit Court of Appeals, a specialized appeals court, affirmed that ruling. Unsurprisingly, the Trump administration sought Supreme Court review.

While oral argument is not necessarily a strong predictor of outcomes, the oral argument before the Supreme Court on November 5 did not go well for the administration. Justices

of all ideological stripes found it hard to square the President’s actions with the statutory text and the constitutional structure under which Congress is the ultimate authority on tariffs. The pundits and the public betting markets agree that the government stands a less than 50% chance of prevailing in this case.

What comes next?

The most pressing question is one that remains hardest to answer. If the government prevails, then the president’s power to tariff under IEEPA will become established law and the administrative can continue as it has begun – announcing emergencies and imposing snap tariffs.

If the challengers win, that leaves, to quote Justice Barrett, “a mess.” The Court could announce a ruling that is prospective only, permitting the government to retain duties already collected. It could send the case back to the trade court to fashion a remedy, possibly including a means for businesses to seek refunds, as they can under existing tariff statutes. That would leave the administration free to impose future tariffs under other legal authorities, but those authorities generally constrain the scope of tariffs in size and/or duration, making it easier for businesses to plan ahead.

For now, all we can say is keep your lawyers on speed dial for when the Supreme Court issues its opinion. That ruling will determine the legitimacy of IEEPA tariffs and whether and how businesses can recoup duties paid in tariffs ultimately ruled to be unlawful. In other words, stay tuned.

This article was produced exclusively for Mailers Hub by David Joyce and David Swetnam-Burland of Brann & Isaacson.

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