

Policy Backgrounder

Federal Circuit Tariff Ruling: More Uncertainty

Late on August 29, the Federal Circuit largely upheld a decision of the Court of International Trade (CIT) that the President cannot impose the fentanyl-related tariffs on China, Mexico, and Canada and the “Liberation Day” tariffs using the International Economic Emergency Powers Act (IEEPA). However, a portion of the case was remanded to the lower court for further consideration, and the case will eventually be appealed to the Supreme Court, adding further uncertainty to an already-complex landscape on tariffs.

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- The Federal Circuit held that Congress’ grant to the President of “authority to ‘regulate imports’” does not confer authority to impose tariffs because tariffs are a tax, and the Constitution gives the power of taxation to Congress; “[a]bsent a valid delegation by Congress, the President has no authority to impose taxes.”
 - However, the court remanded the case to consider new standards largely disfavoring universal injunctions in the Supreme Court decision from June in [Trump v. CASA, Inc.](#)
 - Rather than endorsing the tariffs directly, the dissenters state that the important questions at issue “have not justified summary judgment” that the CIT imposed.
 - The Administration has requested the Supreme Court to take up the case with oral argument in early November; the Supreme Court has not yet ruled on the request.
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The Federal Circuit's Decision

The [Federal Circuit](#) is a specialized appeals court, equal to the other US Courts of Appeals, that hears cases in a variety of areas, including regarding patents, trademarks, veterans' benefits and hears appeals from, among other courts, the CIT. On May 28, the Court of International Trade ruled in *V.O.S. Selections, Inc. v. Trump* that the President exceeded his authority under IEEPA in imposing tariffs on Canada, China, and Mexico relating to national emergencies on fentanyl imports and tariffs on a large number of countries because of a declared national emergency on trade deficits. The decision was almost immediately stayed, and the Federal Circuit agreed to hear the appeal *en banc* (all of its judges participating).

Late on August 29, the Federal Circuit [upheld](#) most of the CIT's decision, remanding part of it for further consideration. Seven judges joined the majority opinion, four joined a concurrence, and four dissented (one judge did not participate). The court delayed its ruling from taking effect until October 14 – after the Supreme Court begins its new Term – to give time for an appeal.

Most basically, the Federal Circuit held that Congress' grant to the President in IEEPA of "authority to 'regulate imports'" does not confer authority to impose tariffs. This is so because tariffs are a tax, and the Constitution gives the power of taxation (the "power of the purse") to Congress; as a result, "[a]bsent a valid delegation by Congress, the President has no authority to impose taxes." As the court wrote, "[t]ariffs are a tax, and the Framers of the Constitution expressly contemplated the exclusive grant of taxing power to the legislative branch; when Patrick Henry expressed concern that the President 'may easily become king,' James Madison retorted that this would be impossible because Congress controlled taxation."

More specifically, the court wrote, "[s]etting tariff policy" is a "core Congressional function," and in fact "Congress has carefully constructed tariff schedules," resulting in the adoption of the Harmonized Tariff Schedule of the United States (HTSUS). Further, Congress explicitly [provided](#) that "[e]ach modification or change made to the [HTSUS] by the President under authority of law" "shall be considered to be statutory provisions of law for all purposes."

Thus, the decision concludes that both the fentanyl-related tariffs (which the decision refers to as the "Trafficking Tariffs") and the trade deficit-related tariffs (which the decision refers to as the "Reciprocal Tariffs") exceed the President's powers under IEEPA. In support of this conclusion, the decision includes a lengthy history of tariffs and IEEPA, while carefully noting that it is "not addressing" tariff policy nor deciding "whether IEEPA authorizes any tariffs at all."

Instead, the court simply ruled that "none of these actions [those that IEEPA permits to the President] explicitly include the power to impose tariffs, duties, or the like, or the power to tax." It drew a contrast with other statutes that include the words "tariff" and "tax" that when delegating authority to the President "affirmatively granted such power and included clear limits on that power." The court also drew a contrast with President Nixon's use of IEEPA's predecessor statute, the 1917 [Trading With the Enemy Act](#) (TWEA), noting that Nixon's use of TWEA in 1971 to impose tariffs was limited in "time, scope, and nature," unlike these tariffs.

Partial Remand

However, on one important point, the court remanded the case to the CIT for further consideration: the applicability of the remedy. The Constitution [provides](#) that “all Duties, Imposts and Excises shall be uniform throughout the United States.” Using this Uniformity Clause, the CIT gave a nationwide injunction against the tariffs rather than just applying it to the plaintiffs. However, the Federal Circuit vacated this on the ground that the CIT needs to consider how this fits into the new standards governing (and largely disfavoring) universal injunctions in June’s Supreme Court decision in [Trump v. CASA, Inc.](#) The Federal Circuit decision seems to imply that the court believes the Uniformity Clause would prevail, but the lower court does need to consider the issue. Unless the Supreme Court takes up (and decides) the entire case on an expedited schedule, as the Administration is requesting, this will likely delay proceedings, as the CIT must hold a hearing and issue a ruling, appealed to the Federal Circuit.

Preparing for Supreme Court Review

The majority likely wrote its opinion deliberately to survive Supreme Court review. For instance, the court confirmed (and the dissenting judges agreed) that it has subject-matter jurisdiction, presumably to avoid attempts to avoid a decision by arguing that the court does not have jurisdiction. It also approached the decision from a perspective at least congruent with originalist jurisprudence – looking back to the original meaning of the text at the time the Constitution was adopted, which several Supreme Court Justices use in deciding cases. And while the court also uses the legislative history of IEEPA to advance its views, it was also careful to note that this constituted “additional support . . . Even without the legislative history, we would reach the same conclusion.” This is an appeal to those Justices for whom originalism means that courts should not consider legislative history, but only the text itself, in interpreting statutes.

The court also drew an important distinction between the power to tax and the power to “regulate” (the verb in IEEPA), arguing that if the terms were confused, then, for instance, the authority of the Securities and Exchange Commission to regulate securities markets would extend to taxation. Finally, the court pointed to a line of recent Supreme Court cases by stating that the Government’s argument “also runs afoul of the major questions doctrine,” the Court’s doctrine that Congress must be quite clear in delegating resolution of “major questions” to agencies. This doctrine has been used, for instance, in [West Virginia v. EPA](#) to nullify EPA’s broad regulation of greenhouse gases and in [Biden v. Nebraska](#) to end an attempt at broad student loan forgiveness. In this case, the Federal Circuit noted that the “economic impact of the tariffs is predicted to be many times greater” than that of other programs which Supreme Court said implicate the “major questions” doctrine. The argument is designed to give the Supreme Court ample reason to reject the tariffs on that ground alone should it wish.

Concurring Opinion

Judge Cunningham, joined by three judges, filed an [opinion](#) supporting the majority opinion but adding additional views generally stronger against the Government’s arguments in favor of the tariffs. The judges wrote that “[t]he Government’s interpretation of IEEPA would be a

functionally limitless delegation of Congressional taxation authority.” The opinion also notes that President Trump had asked Congress in 2019 to pass a Reciprocal Tariffs Act, providing an indication that the power to impose these tariffs is not in IEEPA. In the concurring judges’ view, IEEPA “did not unambiguously delegate” this power to the President, so imposing the tariffs is an unconstitutional delegation of power to the President.

Dissent

The four dissenting judges agreed with the majority on the important questions of jurisdiction and standing (the right to bring a case) but “disagree on the question of the tariffs’ legality.” But rather than endorsing the tariffs directly, the dissenters state that the majority’s arguments and the important questions at issue “have not justified summary judgment” that the CIT granted. Because the Supreme Court has often upheld broad delegations of tariff and foreign relations authority, “on the present state of governing law, we would reverse the CIT’s summary judgment and remand for further proceedings on any issues of unlawfulness that plaintiffs have preserved. We therefore respectfully dissent.” In other words, the lower court should have held a trial on the merits rather than granting summary judgment. One hint, however, of some dissenters’ views is that because imports could be barred altogether, “[t]axing through tariffs is a less extreme, more flexible tool for pursuing the same objective of controlling the amount or price of imports [.]” But this gets to the important question of the power of the purse -- can only Congress impose this tax or can the President as well using emergency power under IEEPA?

Next Steps

The Administration has [stated](#) it will ask for an “expedited ruling” in the case. The President suggested that the US might have to “[unwind](#)” the agreements on tariffs with the EU, Japan, South Korea, and others if the Administration loses the case. The Solicitor General, in asking the Supreme Court to review the case with oral argument in early November, was more [dramatic](#): “The stakes in this case could not be higher. The President and his Cabinet officials have determined that the tariffs are promoting peace and unprecedented economic prosperity, and that the denial of tariff authority would expose our nation to trade retaliation without effective defenses and thrust America back to the brink of economic catastrophe.”

The Supreme Court has a number of options: it could accept the request for an expedited ruling now or at the beginning of its Term in October, it could continue the stay (thus keeping the tariffs in effect after October 14), or it could delay hearing the case until the remand from the CIT is heard and decided by the Federal Circuit. It is difficult to predict what the Court will do, but in many instances, the Court likes to consider a complete record before a final decision, so it may wish to wait until the question on remand has been decided. However, the Administration’s request, and the stakes at issue, may encourage an earlier schedule.

Despite the clear majority in the Federal Circuit, the dissent and the partial remand introduce more uncertainty. While it seems unlikely that the Supreme Court would let tariffs expire and then impose them again if it upholds the President’s authority, meaning the tariffs would likely

remain in effect until a final decision, but leaving open the possibility of a decision against the tariffs. However, prospects for the quick resolution of this litigation are likely more remote than before the Federal Circuit delivered a divided opinion. Both sides agree that the stakes in this case could not be higher – the scope of the President’s authority to act in a declared national emergency and the shifting of a power to tax from Congress to the President.

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