

Policy Backgrounder

Tariffs: Supreme Court Oral Argument

The Supreme Court heard oral arguments in the case of *Learning Resources v. Trump*, which consolidates two cases on the extent of the President's authority to impose the "Liberation Day" tariffs and the fentanyl-related tariffs on Canada, China, and Mexico. Oral argument largely centered on questions of statutory interpretation and the extent of the President's and Congress' powers.

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- The principal arguments concerned whether the words "regulate imports" in the International Emergency Economic Powers Act (IEEPA) encompass "tariffs." The Administration argues the President's powers are broad; plaintiffs respond that tariffs are a tax and that only Congress can impose a tax.
- The "major questions doctrine" (Congress must speak clearly when delegating its inherent powers to the Executive Branch) will likely feature in the decision and may be essential to the views of some Justices, including Justice Neil Gorsuch.
- Several key Justices' questioning seemed sharper against the Administration, perhaps raising the question of whether the Court will invalidate at least some of the tariffs.
- The Supreme Court seems unlikely to address the question of refunds to other parties beyond the plaintiffs directly in its opinion but is cognizant of the issue.
- Whatever the outcome, businesses should prepare for the likelihood that the Administration's policy in favor of tariffs will continue, even if it loses in these cases.

Oral Argument

The Supreme Court¹ heard oral arguments in the case of [Learning Resources v. Trump](#), which consolidates two cases (including *Trump v. V.O.S. Selections, Inc.*) heard on appeal from the Federal Circuit on the extent of the President's authority to impose tariffs under the [International Emergency Economic Powers Act](#) (IEEPA). The tariffs at issue include the “[Liberation Day](#)” reciprocal tariffs and the [fentanyl-related](#) tariffs imposed on Canada, China, and Mexico. Each was imposed after declaration of a national emergency under IEEPA.

The Federal Circuit overturned the tariffs as beyond the President's authority (a tariff is a tax) but sent a procedural issue back to the lower court for further proceedings. However, the Administration immediately appealed to the Supreme Court, which accepted the case. A concurring opinion at the Federal Circuit had stronger arguments against the President's authority; four dissenters wrote that the case did not meet the standards for summary judgment and should have a trial on the merits.

Presidential Powers and Statutory Interpretation

Oral argument, which lasted much longer than the scheduled 80 minutes, centered less on the economic impact of the tariffs but on the interpretation of statutory language both of IEEPA and of its predecessor statute the Trading with the Enemy Act (TWEA). Much of the discussion turned on verbs and nouns and their inclusion or omission from the statute and what this indicates about Congress' intent in passing IEEPA. The case may be viewed as a question between Article I (Congress' exclusive power to tax) and Article II (the President's powers in foreign affairs as discussed in the 1936 case of [US v. Curtiss-Wright](#)).

To avoid the implication that tariffs are taxes and thus can be imposed only by Congress, the government argued that the tariffs are “regulatory” rather than revenue raising and thus that the taxation power is not at issue here (a point which Justice Sonia Sotomayor challenged sharply). At the very end of oral argument, Solicitor General John Sauer sought to link this to the recent trade deal with China, suggesting that greater access to rare earth minerals and a promise to reduce precursor chemicals to fentanyl production shows that these types of tariffs work.

The Government's principal argument in statutory interpretation is that because IEEPA gives the power to “regulate” imports, this encompasses tariffs as a “natural” meaning of the statute. Plaintiffs (and the Federal Circuit) disagree with this analysis, seeing tariffs as a tax in the sole authority of Congress. The Administration points to the 1975 [Yoshida](#) case, in which an appellate court upheld President Nixon's imposition of tariffs in 1971 based on language from TWEA carried into IEEPA when it was enacted in 1977. (Justice Kavanaugh said the understanding of the Nixon Administration tariffs and *Yoshida* were central questions for him.)

¹ As the Supreme Court has not released a formal transcript of oral argument, any quotations in this Backgrounder are based on direct CED research and should not be considered an official record of oral argument.

Further, calling these tariffs merely “regulatory” is a different argument than Administration officials have made in asserting the amount of revenue they are expected to raise – which brings the issue much closer to the taxing power that belongs to Congress. As the Chief Justice noted, the “vehicle [of the tariffs] is imposition of taxes on Americans; that has always been Congress’ power.” (The Chief Justice also commented that “a significant reduction of the deficit sounds like raising revenue.”) And as Justice Kagan stated, IEEPA contains nothing relating to raising revenue; the statute “just doesn’t have the verb you [the Solicitor General] want.”

The limits of taxation authority were raised recently in several cases about whether Congress can delegate taxation powers to the Executive Branch. In [FCC v. Consumers’ Research](#), some of the most conservative Justices said they could not (“Taxation ranks among the government’s greatest powers”) and quotes Alexander Hamilton from The Federalist Papers on the point. How will those Justices rule here? Justice Gorsuch came closest to tipping his hand on the point in noting that Congress has the power to tax and raising questions about the extent to which that power can be delegated.

Arguing for the plaintiffs, former Solicitor General Neal Katyal began by stating that “[t]ariffs are taxes,” and the “Founders gave that power to Congress alone. He highlighted the major questions doctrine as well in his opening remarks, a sign of how critical it will be to sway the decision. On statutory interpretation, he stated that “IEEPA is a sanctions statute, not a tax statute” and that Congress knows how to delegate its tax powers, which it did not do here. He said that if Congress were to approve the tariffs, it would lead to “open-ended power” for the President, the “lowest ebb” of the *Youngstown* case in which the Supreme Court prevented President Truman from nationalizing a steel plant during the Korean War on national security grounds. (That decision contained Justice Robert Jackson’s famous line that “emergency powers tend to kindle emergencies,” which several Justices quoted today.) The Solicitor General of Oregon, Benjamin Gutman, argued for the 12 plaintiff states.

The Court also benefits from 44 *amicus curiae* [briefs](#) submitted on the cases, including one [analyzing](#) a separate tariff law (Section 122) that could substitute for IEEPA in imposing tariffs on an emergency basis, a brief from former US Trade Representative Carla Hills [opposing](#) the use of IEEPA for the tariffs, and one from Professor Aditya Banzai [analyzing](#) the text of IEEPA in the context of its predecessor statute and war powers. A group of 32 former Federal judges broadly [support](#) the plaintiffs and argue that courts can review the grounds for the declarations of national emergencies. At various points in the argument, several Justices alluded to arguments contained in these *amici* briefs. Justice Kavanaugh alluded to material in an *amicus* [brief](#) from law professor Chad Squitieri arguing that both Chief Justice John Marshall and James Madison understood tariffs as a means to “regulate” commerce.

The Major Questions Doctrine

The Justices are, of course, free to write opinions about anything in (or beyond) the briefs in the case. The absence of questions on a particular matter in oral argument does not mean that matter will not appear in the decision itself and can even be dispositive there. Still, some issues

raised in the litigation were perhaps surprising by their absence. The Court did not discuss the procedural question of whether the case should have been remanded for summary judgment (perhaps recognizing the need for certainty on the question given the large sums of revenue potentially at stake). Somewhat more surprisingly the Court did not really address the fentanyl-related tariffs specifically, except for a question from Justice Barrett and the Solicitor General's point at the end of oral argument; one could make an argument that the fentanyl-related tariffs are more closely related to a national security emergency than a longstanding trade deficit

More broadly, the Court did not discuss the legitimacy of the emergency declarations and only glancingly discussed whether they would be subject to judicial review. (The Administration [argues](#) that emergency declarations are not subject to review because courts “lack the institutional competence to determine when foreign affairs pose an unusual and extraordinary threat [.]” Plaintiffs seized on this point, arguing that in grants of emergency authority – because they are grants of *emergency* authority – Congress must speak with greater clarity, and thus that Congress could and should have specified that the grant of powers includes tariffs if Congress intended it to.

This leads to an important – and perhaps decisive question – that of the “major questions doctrine.” The doctrine, exemplified in [West Virginia v. EPA](#), states that when Congress delegates legislative powers to the Executive Branch, it must speak plainly. That case included language that the Court “typically greet[s] assertions of extravagant statutory power over the national economy” with “skepticism” (internal quotation omitted). The Administration suggests that previous cases show the doctrine only applies to agency action, not Presidential action and (perhaps more convincingly) that the doctrine does not apply in foreign affairs. This, however, gets to the question of whether “foreign-facing” (the Administration’s term) tariffs apply when they are paid by US companies and individuals, in the manner of a tax. To that end, Justice Gorsuch pressed Solicitor General Sauer hard on the major questions doctrine, asking what would limit Congress from delegating all authority in tariffs or other areas covered by the Constitution, even declaration of war, to the President? For similar reasons, Justice Gorsuch said to Neil Katyal, counsel for plaintiffs, that “I kind of think you might” need the major questions doctrine to win the case. Similarly, if Chief Justice Roberts joins an opinion against the tariffs, his views on the major questions doctrine could be a likely reason.

Another aspect of the doctrine concerns how the Court applied it in [Biden v. Nebraska](#), in which the Court acknowledged that the Education Department had waived student loans in the past – but never to the level contemplated in that case. Expect that case to figure in the eventual opinion of the Court on the application of the doctrine. Another potentially important case is [Dames & Moore v. Regan](#), a case about the limits of delegation of powers in the context of IEEPA arising out of the national emergency President Carter declared after the seizure of the US Embassy in Iran in 1979. A second case, on tariff authority under Section 232 of the Trade Expansion Act of 1962, is [FEA v. Algonquin](#) (1976), which interpreted favorably to the President a statute giving the President power to “adjust imports”; Justice Kavanaugh referenced the case several times. One possible outcome, therefore, is a decision in favor of plaintiffs on major questions and nondelegation grounds, which the three more liberal Justices (Sotomayor,

Kagan, and Jackson) might be likely to join (or to issue concurring opinions) on the grounds of limiting Presidential power.

Justice Barrett's Views

Justice Barrett asked why the “unusual and extraordinary threat” covered so many countries; the Solicitor General responded simply that the emergency (of trade deficits) is so broad and could only be addressed with tariffs. She also engaged in deep textual analysis, focusing on IEEPA’s power to grant licenses, asking whether this would cover fees and asking why the President did not structure the tariffs as a licensing fee if in the Solicitor General’s view there is no real difference between licensing and tariffs? This raises the question of whether the tariffs could potentially be recharacterized as licenses within the clear authority of IEEPA – but what would the extent of the licensing power be? To pay for the cost of providing the related government service or a broader authority? Still, she also questioned the President’s use of broad authority to impose tariffs.

Refunds?

Several Justices, notably Justice Barrett, discussed the question of refunds if the tariffs are found to be invalid. It would be unusual for the Court to order refunds (other than to the specific plaintiffs in the case in upholding an earlier decision of the Court of International Trade) for all affected plaintiffs. But the Court must also address the Uniformity Clause providing that “duties” must be “uniform throughout the United States.” It could address the issue on remand, likely in future litigation in the Court of Federal Claims (another specialized court operating on similar lines to the Court of International Trade).

Title 19 of the US Code gives procedures for refunds; Justice Barrett commented that “it seems like [a refund process] could be a mess.” In theory, having tariffs as a separate line item on customs invoices would make electronic refunds easy. In practice, this could easily involve the Department of Homeland Security preparing a way for tens of thousands of refunds to be processed; in an extreme scenario, importers would have to sue to obtain the refunds. The potential “mess,” however, could also support the view that whether tariffs are specifically included in IEEPA authority is a “major question on which Congress must speak clearly.

Further, it seems unlikely that the overall direction of tariff policy would change even if the Court rules for the plaintiffs. Beyond the President’s powers under Section 232 of the Trade Expansion Act of 1962 (sectoral tariffs) and Section 301 of the Trade Act of 1974 (country tariffs), the President could seek to impose tariffs under [Section 122](#) of the Trade Act, giving the President power to impose tariffs of 15% for up to 150 days to address “large and serious United States balance-of-payments deficits” – precisely the argument underlying the “Liberation Day” tariffs for which he declared a national emergency. Or the President could try to use Section 338 of the Tariff Act of 1930 (counsel for plaintiffs and Justice Alito discussed whether that provision was still valid law, but the issue is not decisive to the current case.

The questions of refunds for tariffs paid under the Liberation Day and fentanyl-related tariffs frameworks raise significant issues for business. Businesses may wish to set a contingency plan in case tariffs affecting their businesses (for instance, in North America) are overturned. Still, any normalization of supply chains could take some time – first, because a refunds process may be slow to be implemented; second, because some supply chains have already shifted since the pandemic and in response to the current tariffs, with many businesses focused on achieving more resilient or even redundant supply chains in the face of uncertainty; and third, because the continuation of broad tariff policy could mean little difference in practice for businesses in some industries. The Administration could also argue that the framework agreements it has negotiated are separate legally from the Liberation Day tariffs, essentially leaving them in place and giving other countries a difficult choice as to whether to continue to abide by those frameworks even after a decision to invalidate the original tariffs that led to their negotiation.

Timing?

Despite a continued push for the use of tariff powers, a victory for the plaintiffs would at least set some limits on the bounds of the President's emergency powers. It is impossible to say when the Court may rule. Its urgency in accepting the case for oral argument, and the large stakes (both to importers and the public fisc) might suggest the Court could act quickly. On the other hand, the issues are complex, and Justices may wish more time to write on them. Broadly speaking, a narrower victory – or a decisive victory – for either side might be issued more quickly; a more nuanced decision could take longer. In any event, businesses should prepare for a continued period of uncertainty and should expect that the Administration will seek to continue its policy in favor of extensive tariffs even in the event of a defeat in this case. While from the business perspective, the impact is on the effect of tariffs on the economy, from the legal perspective, the case is fundamentally about the extent of powers of each of the branches: the President, Congress, and the courts. How the Court ultimately rules on those issues will also have tremendous – if currently unknown – implications for business.

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