

Presidential Tariffs



By Paul Engel

December 22, 2025

- Does the President have the power to create tariffs?
- Did the Congress delegate its power to tax over to the President in IEEPA?
- The arguments in the SCOTUS case *Learning Resources, Inc. v. Trump* brings up some very interesting facts.

Love them or hate them, President Trump's tariffs have not only been a talking point, but have had an impact on most Americans. The question before SCOTUS in this case is whether or not the President has the power to create these tariffs in the first place.

Tariffs, Duties, and Taxes, Oh My!

Before we dive into oral arguments about these tariffs, I think it's important we define what a tariff is.

The list of items upon which a duty is imposed when they are imported into the United States, together with the rates at which such articles are taxed.

The term tariff is also used in reference to the actual custom or duty payable on such items.

[Tariff – The Free Legal Dictionary](#)

So a tariff is both a list of items that will be subject to a duty, and the duty to be paid. This is important because the Trump Administration is basing its power to impose both parts

of the tariff on the International Emergency Economic Powers Act (IEEPA), which states:

(a) In general

(1) At the times and to the extent specified in section 1701 of this title, the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise-

(A) investigate, regulate, or prohibit-

(i) any transactions in foreign exchange,

(ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof,

(iii) the importing or exporting of currency or securities, by any person, or with respect to any property, subject to the jurisdiction of the United States;

[50 USC §1702](#)

The major question presented to the court is: Does the term “regulate” include the power to tax?

GEN. D. JOHN SAUER, ESQ. On behalf of the federal parties

Arguments started with John Sauer, Solicitor General for the United States.

GENERAL SAUER: Mr. Chief Justice, and may it please the Court:

On April 2, President Trump determined that our exploding trade deficits had brought us to the brink of an economic and national security catastrophe. He further pronounced that the traffic of fentanyl and other opioids into our country has created a public health crisis, taking hundreds of thousands of American lives.

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President Trump determined that the nation's trade deficit has brought us to the brink of collapse. He also decided that the trafficking in fentanyl has created a public health crisis. This is the justification for his enacting tariffs under IEEPA, which states:

- 1701. Unusual and extraordinary threat; declaration of national emergency; exercise of Presidential authorities

(a) Any authority granted to the President by section 1702 of this title may be exercised to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat.

[50 USC §1701](#)

However, since the trade deficits have existed for decades, what has made them suddenly unusual and extraordinary? After all, for there to be an emergency there must be:

sudden, unforeseen happening which requires action to correct or to protect lives and/or property.

[Emergency – The Free Legal Dictionary](#)

And to invoke IEEPA, the threat must be substantially or in whole from outside of the United States. Yet foreign commerce, by definition, must include participants within the United States.

President Trump has declared that these emergencies are country-killing and not sustainable, that they threaten the bedrock of our national and economic security, and that fixing them will make America strong, financially viable, and a respected country again.

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President Trump declares these emergencies are country-killing and not sustainable, but not that they are unusual or extraordinary, which is necessary to invoke IEEPA. Neither are they sudden and unforeseen, to constitute an emergency.

Due to IEEPA tariffs, President Trump has negotiated agreements worth trillions of dollars with major trading partners, including most recently China. Unwinding those agreements, he warns, would expose us to ruthless trade retaliation by far more aggressive countries and drive America from strength to failure, with ruinous economic and national security consequences.

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Just because the President has negotiated agreements doesn't mean he had the legal authority to impose the tariffs he used to initiate the negotiations. Furthermore, since Congress is vested with the power to regulate commerce with foreign nations, these actions by the President are unconstitutional. And since none of the agreements included a treaty, they have no legal force within the United States.

In *Dames & Moore against Reagan*, this Court held that IEEPA's sweeping and unqualified language grants the President's actions the strongest presumption of validity and the widest latitude of judicial interpretation. Yet plaintiffs argue that tariffs, IEEPA's least blunt and most nimble tool, are virtually the only tool that Congress did not grant the President to deal with foreign emergencies.

That is wrong. The phrase "regulate importation" plainly embraces tariffs, which are among the most traditional and direct methods of regulating importation. And plaintiffs concede that IEEPA authorizes quotas and other tariff equivalents.

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Except no where else, that I am aware of, is the power to “regulate” understood to include the power to “tax,” but I’ll write more on that later.

The major questions doctrine does not apply here. IEEPA confers major powers to address major problems on the President, who is perhaps the most major actor in the realm of foreign affairs. And the nondelegation doctrine casts no doubt on IEEPA because Congress may assign the President broad authority regarding the conduct of foreign affairs, where he enjoys his own inherent Article II powers.

I welcome the Court’s questions.

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Enter the question of the Major Questions Doctrine, which the Cornell Legal Information Institute defines as:

The major questions doctrine is a structural principle of administrative law that restricts federal agencies from interpreting statutes and asserting broad policymaking powers of great economic or political significance without a clear congressional mandate.

[Major Questions Doctrine – Cornell Legal Information Institute](#)

So the second question the court has to answer is whether or not the President imposing tariffs is a broad policymaking power or not.

NEAL K. KATYAL, ESQ. On behalf of the private parties

Next we’ll hear arguments from Neal Katyal on behalf of the private parties.

1. KATYAL: Thank you, Mr. Chief Justice, and may it please the Court:

Tariffs are taxes. They take dollars from Americans' pockets and deposit them in the U.S. Treasury. Our founders gave that taxing power to Congress alone. Yet, here, the President bypassed Congress and imposed one of the largest tax increases in our lifetimes.

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Mr. Katyal is correct, tariffs include duties, which are a form of taxation, and specifically delegated to Congress in Article I, Section 8, Clause 1:

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises,...

[U.S. Constitution, Article I, Section 8](#), Clause 1

So does IEEPA give the President the power to impose duties on imports, which he did with these tariffs?

Many doctrines explain why this is illegal, like the presumption that Congress speaks clearly when it imposes taxes and duties and the major questions doctrine.

But it comes down to common sense. It's simply implausible that in enacting IEEPA Congress handed the President the power to overhaul the entire tariff system and the American economy in the process, allowing him to set and reset tariffs on any and every product from any and every country at any and all times.

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I think Mr. Katyal is being a bit hyperbolic to claim that the President is attempting to overhaul the entire tariff system and the American economy. Still, I think there is a point when it comes to Congress speaking clearly when it imposes taxes and duties.

IEEPA is a sanction statute. It's not a tax statute where

Congress gave away the store. Congress knows exactly how to delegate its tariff powers. Every time for 238 years, it's done so explicitly, always with real limits. IEEPA looks nothing like those laws. It uses "regulate," which Congress has used hundreds of times, never once to include tariffs. And it lacks the limits of every other tariff statute. And that is why, even though presidents have used IEEPA to impose economic sanctions thousands of times, no president in IEEPA's 50-year lifetime has ever tried to impose tariffs.

And the President bypassed statutes that do address tariffs, like Section 122 for large and serious trade deficits, but that imposes a clear guardrail, 15 percent cap, 150-day limit.

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Again the point is raised, does the power to regulate include the power to tax? And what about Mr. Katyal's claims that Donald Trump bypassed statutes that include the power to issue tariffs? Were they left behind because of their limitations? And do their limitations add the power to tax onto the power to regulate?

This is Youngstown at its lowest ebb. If the government wins, another president could declare a climate emergency and impose huge tariffs without fines or – without floors or ceilings, as Justice Gorsuch said. My friend's answer? This administration would declare it a hoax. The next president may not quite say that. This is an open-ended power to junk the tariff laws and is certainly not conveyed by the – by the word "regulate."

I welcome the Court's questions.

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I almost think the Mr. Katyal is being a bit hyperbolic again, until I remembered Presidents Obama and Biden, and their attempt to enforce carbon and other taxes in support of their hoax: Man-made global warming schemes.

BENJAMIN GUTMAN, ESQ. On behalf of the state parties

Last up is Benjamin Gutman on behalf of the states who joined the suit. During his argument, Mr. Gutman focused on questions about licensing and licensing fees.

1. GUTMAN: Mr. Chief Justice, and may it please the Court:

I'd like to begin by picking up with the exchanges with Justice Barrett and Justice Gorsuch about licenses and license fees because I think we ended on the right note, but I just wanted to make sure that our – that at least my client's position is clear on this.

Licenses are different from license fees, and I am not aware of any history in the five decades that IEEPA has been in force of any fees charged for the licenses under this statute.

This is a statute that – licenses can be used, for example, the President might ban certain transactions with a foreign country but then grant licenses to do them for humanitarian reasons, but, as far as I'm aware, there's never been a fee charged for that.

And I do welcome the Court's questions, but I think that's – I just want to

make –

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I'm not sure why Mr. Gutman focused on this one topic, but I think we'll see the discussion expand under questioning.

Major Questions Doctrine

As I mentioned, one of the points used by the state and private parties is that President Trump violated the Major Questions Doctrine. Solicitor General Sauer defends the President's position.

JUSTICE THOMAS: Would you spend a few minutes on why exactly the major question doctrine doesn't apply to the President in this case?

GENERAL SAUER: Yes, Justice Thomas. And I may make two or three points on that front.

First of all, though the major questions doctrine may apply to the President in other contexts, specifically in the foreign affairs context, where he has his own inherent Article II authority, it's a particularly poor fit to apply the major questions doctrine, and that's for at least two reasons.

So that's one reason, one reason just as a matter of common-sense interpretation you would expect Congress to grant major powers to the President, who has his own broad range of major authority, Article – inherent Article II authority in this context.

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Except Article II of the Constitution does not delegate to the President any real foreign affairs powers; he can only make treaties with the advice and consent of the Senate:

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur;

[U.S. Constitution, Article II, Section 2](#), Clause 2

Appoint ambassadors, again, only with the advice and consent of the Senate:

and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors,

[U.S. Constitution, Article II, Section 2](#), Clause 2

And he can receive ambassadors and other public ministers.

he shall receive Ambassadors and other public Ministers;

[U.S. Constitution, Article II, Section 2](#), Clause 2

But nowhere in the Constitution is the President given the power to conduct foreign affairs outside of these three powers. Justice Kagan seemed to catch on to this idea.

JUSTICE KAGAN: Can I interrupt you, General, there? And I know that you have a second question, and I – I want to let you get to that. But just on that first reason, it seemed to depend a lot on the President's inherent Article II powers. And I'm wondering what exactly – which – which powers you're speaking of there, because tariffs, one would naturally think, is – are – are the power to impose taxes, the power to regulate foreign commerce. These are not things that are thought of as Article II powers. They are quintessential Article I powers.

So what kind of Article II powers are you relying on when you gave the answer about major questions to Justice Thomas?

GENERAL SAUER: I would refer to what the Court said, for example, in *Egan, Department of Navy against Egan*. That's a generally accepted view that the President has broad authority in the foreign affairs realm. Now there's been debates about exactly how far it goes and how to draw the boundary between the President and Congress, but *Egan*, *Garamendi*, other cases, *Curtiss-Wright*, the Court has recognized the President has broad inherent authority to address foreign situations, foreign affairs, foreign policy, including foreign-arising emergencies.

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So the President does not have Article II powers to conduct foreign affairs, but powers made up by courts. Interesting. Next, let's look at the non-delegation doctrine.

Non-Delegation Doctrine

To understand the non-delegation doctrine, we need to start with a definition.

The non-delegation doctrine is a constitutional principle that Congress cannot delegate its legislative powers to another branch of government or to private entities. The doctrine primarily arises in administrative law and constitutional law, addressing the limits of Congress's ability to authorize agencies to make rules with the force of law.

[Non-Delegation Doctrine – Cornell Legal Information Institute](#)

Keep this in mind, as it will be essential to understanding the questioning we are about to delve into.

Justice Gorsuch had a somewhat heated discussion with Solicitor General Sauer about the non-delegation doctrine.

That's the gist of it, as I understand it, why we should disregard both major questions and nondelegation.

So could Congress delegate to the President the power to regulate commerce with foreign nations as he sees fit –

GENERAL SAUER: We don't –

JUSTICE GORSUCH: – to lay and collect duties as he sees fit?

GENERAL SAUER: We – we don't – we don't assert that here. That would be a much harder case. Now, in 1790 –

JUSTICE GORSUCH: Isn't that the logic of your – of your view, though?

GENERAL SAUER: I don't think so, because we're dealing with a statute that was a carefully crafted compromise. It does have all the limitations that I just talked about.

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Interesting position for Mr. Sauer. If this statute is as

carefully crafted as he claimed, then we have to assume that since Congress didn't include the power to establish duties, they didn't intend to delegate that power to the President.

Then Justice Gorsuch gets into the question of foreign affairs.

JUSTICE GORSUCH: – I want you to explain to me how you draw the line, because you say we shouldn't be concerned because this is foreign affairs and the President has inherent authority and so delegation off the books more or less.

GENERAL SAUER: Or at least –

JUSTICE GORSUCH: And if that's true, what would – what would prohibit Congress from just abdicating all responsibility to regulate foreign commerce, for that matter, declare war, to the President?

GENERAL SAUER: We don't contend that he could do that. If it did –

JUSTICE GORSUCH: Why not?

GENERAL SAUER: Well, because we're dealing with a statute, again, that has a whole list of limitations.

JUSTICE GORSUCH: I'm not asking about the statute. General, I'm not asking about the statute. I'm asking for your theory of the Constitution and why the major questions and nondelegation, what bite it would have in that case.

GENERAL SAUER: Yes. I would say, by then, you would move from the area where there's enormous deference to the President in actually both the political branches, where, here, there's inherent authority, and pile on top of that there's a broad delegation of the duty and –

JUSTICE GORSUCH: You're saying there's inherent authority in foreign affairs, all foreign affairs, so regulate commerce,

duties and – and – and – and tariffs and war. It's inherent authority all the way down, you say. Fine.

Congress decides tomorrow, well, we're tired of this legislating business. We're just going to hand it all off to the President. What would stop Congress from doing that?

GENERAL SAUER: That would be different than a situation where there are metes and bounds, so to speak. It would be a wholesale abdication.

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While it may be a different statue, the underlying question Justice Gorsuch seems to be asking is, how far can Congress go in delegating their powers to the President. And I don't think Solicitor General Sauer had a very good answer.

In questioning Mr. Katyal, I think Justice Thomas exposed another very serious concern.

JUSTICE THOMAS: Let's go back to your nondelegation point. It would seem that if it's – if the power, tariff power, cannot be delegated, your argument on nondelegation would also have to apply to embargoes and to quotas.

1. KATYAL: No, Your Honor, because I think tariffs, because they're uniquely revenue-raising, impose special, unique concerns that go back to our founding. And so I don't think that they apply to embargoes.

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If Congress can delegate its power to regulate foreign commerce, why not its power to tax? Mr. Katyal seems to think the Clause 1 of Article I, Section 8 has some special power not applied to Clause 3.

Taxing vs Regulating

Now we get to the heart of the argument: Does the power to regulate include the power to tax?

And I want to make a very important distinction here. We don't contend that what's being exercised here is the power to tax. It's the power to regulate foreign commerce. These are regulatory tariffs. They are not revenue-raising tariffs. The fact that they raise revenue is only incidental. The tariffs would be most effective, so to speak, if no – no – no person ever paid them. They – they achieve their goals if they – and so forth.

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Remember when we defined the word tariff? A tariff includes both a list of items and the duties that are imposed on them. A duty is a tax. “With respect to the laws relating to Customs Duties, a tax owed to the government for the import or export of goods.” ([Duty – The Free Legal Dictionary](#)) There is no such thing as a non-revenue-raising-duty, so there's no such thing as a non-revenue-raising tariff. So General Sauer's statement is just plain non-sense. Justice Sotomayor made this exact point.

JUSTICE SOTOMAYOR: – I just don't understand this argument. It's not an article. It's a congressional power, not a presidential power, to tax. And you want to say tariffs are not taxes, but that's exactly what they are. They're generating money from American citizens, revenue.

And you say it's incidental to the regulatory purpose. But I don't see how a quota is equivalent to revenue-raising. A quota sets a limit to what you can import in, but it doesn't generate revenue.

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Then, Justice Barrett asked the very question that is at the cornerstone of this case.

JUSTICE BARRETT: General Sauer, can I just ask you a question? Can you point to any other place in the Code or any other time in history where that phrase together, “regulate importation,” has been used to confer tariff-imposing authority?

GENERAL SAUER: Well, as to “regulate importation”? That was held in TWEA. So, obviously – and that’s –

JUSTICE BARRETT: Okay. Okay. So an intermediate appellate court held it in TWEA, but you just told Justice Kavanaugh that wasn’t your lead argument, that your lead argument was this long history of the phrase “regulate importation” being understood to include tariff authority.

So my question is, has there ever been another instance in which a statute has conferred – used that language to confer the power?

GENERAL SAUER: Well – yes. Yeah.

JUSTICE BARRETT: Putting aside Yoshida.

GENERAL SAUER: I mean, obviously, the other statutory example is just imports. The cases we rely on are cases where, for example, in *Gibbons against Ogden* and Justice Story’s treatise there –

JUSTICE BARRETT: But that just shows the word can be used that way. None of those cases talked about it as conferring tariff authority. I understood you to be citing *McGoldrick* and *Gibbons* and those cases just to show that it’s possible to say that “regulating commerce” includes the power to tariff.

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So apparently no law, no statute, has ever implied that the power to regulate included the power to tariff or tax. Even General Sauer’s attempt to answer shows the weakness of this argument, since the only thing he can point to are court cases that, according to Justice Barrett, do show that “regulating

commerce” includes the power to tax.

JUSTICE KAGAN: Right. Because the natural understanding of “regulate,” even – even though, in fact, we can regulate through taxes, but when the Code uses “regulate,” we don’t typically understand it to refer to duties or taxes or tariffs or anything of the kind.

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If the power to regulate includes the power to create duties, why is the power delegated to Congress to “lay and collect” duties separate from the power to “regulate foreign commerce”? Even the Constitution separates those powers, placing the power to collect duties in clause 1 and the power to regulate foreign commerce in clause 3 of Article I, Section 8.

CHIEF JUSTICE ROBERTS: Counsel, you – yes, sure, the tariffs are a tax and that’s a core power of Congress. But they’re a foreign-facing tax, right, and that – foreign affairs is a core power of the executive. And I don’t think you can dismiss the consequences. I mean, we didn’t stay this case. And one thing is quite clear, is that the foreign-facing tariffs – tariffs have in several situations been quite –

1. KATYAL: Right, and we are –

CHIEF JUSTICE ROBERTS: I’m sorry.

1. KATYAL: Oh, sorry. I’m sorry.

CHIEF JUSTICE ROBERTS: Were quite effective in achieving a particular objective. So I – I don’t think you can just separate it. When you say, well, this is a tax, Congress’s power, it implicates very directly the President’s foreign affairs power.

1. KATYAL: Yeah. Mr. Chief Justice, we’re not – we don’t disagree with a large part of that. We think, instead of thinking about foreign versus domestic, the better way

of thinking about it is Article I versus Article II. And, as my friend finally conceded to Justice Gorsuch, there is no Article II power here at least when we're talking about peacetime.

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Except, as both Justice Kagan and I have already pointed out, there is no foreign affairs powers delegated to the President, not in Article II nor any other clause of the Constitution. The fact that Chief Justice Roberts thinks they are effective doesn't make them legal.

While Chief Justice Roberts doesn't seem to get this, Justice Sotomayor does.

JUSTICE SOTOMAYOR: – I think what we're forgetting here is a very fundamental point, which is the Constitution is structured so that if I'm going to be asked to pay for something as a citizen, that it's through a bill that is generated from Congress and the President has the power to veto it or not.

But I'm not going to be taxed unless both houses, the executive and the legislature, have made that choice, correct?

1. GUTMAN: That's exactly right. So –

JUSTICE SOTOMAYOR: And so there is something – it's not just the taxing power qua taxing power. The question is, do we permit the President to use the taxing power to effect his personal choices of what is good policy for me to pay for?

1. GUTMAN: That's exactly right

The question is who decides.

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Taxes are imposed by the only branch of government elected by the people to represent the people and the states: Congress,

not the President. In fact, the Framers of the Constitution went a step further:

All Bills for raising Revenue shall originate in the House of Representatives;

[U.S. Constitution, Article I, Section 7](#)

Conclusion

After all of that, what can we conclude from these arguments?

First, tariffs, by definition, include duties which are taxes.

Second, the power to lay and collect taxes is vested in Congress, not the Presidency.

Third, when Congress passed a law allowing the President, under certain circumstances, to regulate any transaction in foreign exchange, they did not include the specific power to tax. And claiming that when Congress said “by means of instructions, licenses, or otherwise-” means taxing is a stretch at best.

While I didn't go into detail, there were some arguments about the benefits of the tariffs and the difficulty of overturning them, but that is not a legal argument that they are valid. After all, if someone illegally takes your stuff they can't say, “Sorry, but it was for a good cause,” and keep the stuff. The government made this mess, and the government should be forced to clean it up as soon as possible.

Most importantly to me, the power to collect duties is vested in Congress, not the Presidency. In fact, the power to participate in foreign affairs is mostly vested in Congress, through the Treaty, Commerce, Foreign Coin, Piracy, and War clauses. The only foreign affairs powers vested solely in the Presidency is the power to receive foreign ambassadors and public ministers.

Whether or not you approve of President Trump's tariffs and their goals, it is a power delegated to our representatives in Congress, not the President.

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E-Mail Paul Engel: paul@constitutionstudy.com