

[Securities Regulation Daily Wrap Up, SUPREME COURT NEWS—Justices seem skeptical about Trump’s power to tariff under emergency law, \(Nov. 6, 2025\)](#)

Securities Regulation Daily Wrap Up

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By [Thomas Long, J.D.](#)

In oral argument, several members of the Supreme Court—including some of the conservative Justices—appeared to doubt that IEEPA’s grant of power to “regulate” imports included the authority to impose tariffs.

In oral argument held November 5 in the closely watched “Trump tariffs” case, several U.S. Supreme Court Justices seemed ready to side with lower courts that ruled that President Trump does not have the power to impose tariffs under a statute authorizing him to “regulate” imports in response to a national emergency declared by the president. The [argument session](#)—which ran for over two and a half hours—reflected the case’s important ramifications regarding the separation of powers and the Constitution’s system of checks and balances, as well as its potential effects on businesses and consumers. Several Justices—including some of the conservatives—sounded dubious about the Administration’s arguments in favor of the President’s tariffing power under the International Emergency Economic Powers Act (IEEPA), possibly indicating that there could be enough votes to affirm the lower courts’ rulings against the tariffs. Along with the three liberals, Chief Justice Roberts and Justices Barrett and Gorsuch asked particularly tough questions that seemed to indicate skepticism of the government’s arguments.

Trump’s tariffs. The dispute concerns two sets of sweeping tariffs imposed by Trump in response to declarations of national emergencies, for which he claimed to have the power under the IEEPA, [50 U.S.C. §§ 1701-1706](#). Specifically, Trump invoked [Section 1702\(a\)\(1\)\(B\)](#) of IEEPA and concluded that action under other authority to impose tariffs was inadequate. The first set of tariffs stemmed from an emergency declared on Inauguration Day in [Proclamation No. 10886](#), regarding the opiates crisis, specifically the alleged trafficking of fentanyl and other narcotics from Mexico. The scope of this proclamation was later expanded to threats originating in Canada and China. To address these declared emergencies, President Trump announced a series of tariffs referred to as the “trafficking tariffs” in Executive Order Nos. [14194](#) (90 Fed. Reg. 9117), [14193](#) (90 Fed. Reg. 9113), and [14195](#) (90 Fed. Reg. 9121)—imposed duties on Mexico, Canada, and China. Subsequent EOs made various adjustments, changes, pauses, and resumptions of these tariffs. On April 2, Trump, through EO No. [14257](#) (90 Fed. Reg. 15041), imposed tariffs on imports from nearly every country with which the United States conducts significant trade. Trump again claimed authority under IEEPA to impose these duties, which he called “reciprocal tariffs.”

Court challenges. Wednesday’s argument comprised two consolidated cases, *Learning Resources, Inc. v. Trump*, [No. 24-1287](#), and *V.O.S. Selections, Inc. v. Trump*, [No. 25-250](#) (consolidated into No. 24-1287). The first case concerns two manufacturers of educational toys that filed suit in the federal district court in the District of Columbia on April 22, seeking declaratory and injunctive relief with respect to tariffs imposed by Trump in a series of executive orders earlier this year. They asserted that the tariffs would significantly harm their businesses by requiring them to raise prices to offset increased costs, and they contended that IEEPA did not authorize the president to impose tariffs and that doing so violated the constitutional principle of separation of powers. Defendants named in the suit included President Trump and several cabinet officials and their respective departments and offices: Kristi Noem, Secretary of the Department of Homeland Security; Scott Bessent, Secretary of the Treasury; Howard W. Lutnick, Secretary of Commerce; Pete Flores, Acting Commissioner of Customs & Border Protection; and Jamieson Greer, U.S. Trade Representative. The district court [granted](#) the plaintiffs’ motion for a preliminary injunction on May 29. The government parties noticed an

appeal to the U.S. Court of Appeals for the D.C. Circuit on May 30, which was docketed the same day. On June 17, the plaintiffs then filed a [petition](#) for certiorari before judgment of the appellate court. The Court granted review on September 9 and set a relatively quick briefing schedule. The question presented is “whether IEEPA authorizes the President to impose tariffs.”

The second case involves five small businesses and 12 states (led by Oregon), who filed suit in the Court of International Trade (CIT) against the United States and various government officials in their official capacities, challenging the reciprocal tariffs. On May 28, a three-judge panel of the CIT [granted](#) summary judgment to both sets of plaintiffs and held that both the reciprocal tariffs and the trafficking tariffs exceeded the President's authority under IEEPA. The CIT panel permanently enjoined the government from imposing these tariffs. The defendants appealed, and the Federal Circuit, sitting en banc, [held](#) that IEEPA's grant of presidential authority to “regulate” imports did not authorize the tariffs. Trump and the other government defendants filed a [petition](#) for certiorari seeking Supreme Court review, which the Court granted on September 9 and consolidated with the *Learning Resources* case.

Oral argument. Solicitor General D. John Sauer argued on behalf of the federal government parties (referred to below as “the Administration” or “the government”). Milbank LLP partner and former Solicitor General Neal Katyal argued for the private businesses challenging the tariffs, and Oregon Solicitor General Benjamin Gutman represented the state parties.

Tariffs as tool to address emergencies. Sauer opened the session by describing the national emergencies underlying the tariffs. “President Trump determined that our exploding trade deficits had brought us to the brink of an economic and national security catastrophe,” he said. “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.” He then explained the Administration's views on the effects of the tariffs, and the potential negative impacts of rolling them back. “Due to IEEPA tariffs, President Trump has negotiated agreements worth trillions of dollars with major trading partners, including most recently China,” Sauer told the Court. “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.”

Meaning of “regulate.” Getting to the legal case in favor of the tariffs, Sauer contended that “IEEPA's sweeping and unqualified language grants the President's actions the strongest presumption of validity and the widest latitude of judicial interpretation,” and he characterized the tariffs as “IEEPA's least blunt and most nimble tool.” Taking aim at the challengers' contention that IEEPA does not authorize the President to impose tariffs, Sauer said, “The phrase ‘regulate importation’ plainly embraces tariffs, which are among the most traditional and direct methods of regulating importation.” He also contended that the tariffs were lawful as part of the executive's inherent power to conduct foreign policy, and that they were tools to that end, not revenue-generating mechanisms. Sauer's characterization likely reflects the fact that taxing power generally lies with the legislature, but the Constitution gives the President broad authority over the conduct of international relations.

Some Justices, however, appeared skeptical about Sauer's contention that Trump's tariffs do not have a “revenue-raising” purpose and are instead “regulatory” in nature, with a foreign policy goal. For example, Chief Justice Roberts, in a line of questioning over who pays the tariffs—foreign companies or American consumers—pointed out, “It's been suggested that the tariffs are responsible for significant reduction in our deficit. I would say that's raising revenue domestically.”

“Major questions” concerns. Meanwhile, the liberal Justices, Kagan, Sotomayor, and Jackson, seemed convinced that Trump's tariffs amounted to taxes and were therefore generally outside the scope of presidential power. They invoked the “major questions doctrine,” which requires clear and explicit authorization from Congress to delegate questions of major political or economic importance to executive agencies. The argument here against the tariffs is that IEEPA did not contain this clear and explicit authorization, since it does not mention tariffs or other terms suggesting a taxing power.

Some conservatives also raised “major questions” issues. Chief Justice Roberts suggested that the claim of tariff powers under IEEPA could violate the doctrine. Justice Gorsuch, in his own line of questions about the doctrine,

indicated difficulty with the logic of treating the tariffs as foreign-policy actions and therefore outside the scope of checks on delegation of powers. Gorsuch also asked questions of Sauer that challenged the administration as to the potential scope of the purported delegation, such as whether the President could impose a 50 percent tariff on gas-powered cars to address climate change. Gorsuch also got Sauer to concede that the President does not have inherent authority over tariffs in peacetime.

Other laws providing tariff powers. Representatives for the state and private parties pointed out that Congress had delegated limited tariff powers in other laws but had done so explicitly. In particular, Gutman mentioned Section 232 of the Trade Expansion Act of 1962 and Katyal mentioned Section 301 of the Trade Act of 1974 as laws that permit the President to impose duties. In contrast to IEEPA, which contemplates quick and unilateral action by the President, those laws require investigations to be conducted and reports to be made before tariffs could be imposed, presumably making them less appealing to the Administration.

Expansion of executive power. Gorsuch asked the Solicitor General a series of questions about the lack of practical limitations on presidential powers if IEEPA is interpreted as delegating the power to tariff. Although Solicitor General Bauer asserted that Congress can vote to take back this power, Gorsuch pointed out that it would effectively require a supermajority to do that, since the President would likely veto that legislation. “As a practical matter, in the real world, it can never get that power back,” Gorsuch said. He also said, about the grant of power under the administration’s interpretation of IEEPA, “It’s a one-way ratchet toward the gradual but continual accretion of power in the executive branch and away from the people’s elected representatives.”

IEEPA’s “donut hole.” Justice Barrett asked challenging questions of both sides, querying Sauer as to whether Congress had ever used the key language in IEEPA—“regulate ... importation”—to delegate tariff power to the executive. But she also questioned Gutman about the logic of arguing that IEEPA gave the President the power to take major actions—such as imposing an embargo on trade against another country—but not the much smaller action of imposing a tariff on imports from that country. Kavanaugh—who seemed to likely be on the side of upholding the tariffs—said this interpretation created an “odd donut hole” in IEEPA. Justice Alito also seemed to think that IEEPA gave the President the authority to impose tariffs as a means of dealing with serious foreign policy threats.

Complications if tariffs are rolled back. Another topic of discussion was the potential refunds that would have to be paid if the tariffs are struck, which could create a thorny problem for courts to administer. Katyal pointed out that the Administration, in the lower courts, had opposed a preliminary injunction against the tariffs because the revenues could be refunded later (and therefore did not present a risk of irreparable harm). Katyal mentioned that the government had stipulated that the private plaintiffs could receive refunds as remedies if they prevail in their lawsuit. As for everyone else affected by them, Katyal referenced administrative procedures under existing trade law, which he called “very complicated.” The Justices did not clearly indicate a position on this aspect of the dispute.

What comes next? Given the Court’s rapid movement on this case since granting review, it is plausible that a ruling could come relatively soon, but, as always, it is impossible to know when the Court will issue its decision. It is also impossible to be sure that the Justices’ tough questioning of the Solicitor General will translate into votes against the tariffs. Given these uncertainties, businesses affected by the tariffs will likely have to proceed with caution and not assume that the tariffs will be lifted. Until a decision is handed down, stakeholders will likely have to continue using the strategies and tactics they have already been using to deal with the tariffs’ impacts.

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