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A N A L Y T I C S

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Trade

Unique Court Rules On The Trump Tariffs

Issue

Last week, the U.S. Court of Appeals for the Federal Circuit ruled against President Trump's tariffs issued under *The International Emergency Economic Powers Act* (IEEPA), in an opinion by an *en banc* panel of its 11 active judges. The court of appeals has ruled that IEEPA's grant of Presidential authority to "*regulate*" imports does not authorize the tariffs pursuant to the President's Executive Orders (EOs). The case is *In V.O.S. Selections, Inc. v. Trump*.

Impact

Unlike other Federal U.S. Courts of Appeal, the U.S. Court of Appeals for the Federal Circuit is a specialized type of Federal appeals court based in Washington, D.C., limited to certain types of cases, including trade, patents, and government contracts.

In reviewing the tariff case, the Federal Circuit upheld the lower Court of International Trade (CIT) ruling holding against the President's tariff authority.

In essence, the legal question is if the text of the Congressional statute does not explicitly state "*tariff*," is it a legitimate interpretation to include tariffs as an extension of trade "*regulation*"?

The court explains that IEEPA statute authorizes the President to:

investigate, block during the pendency of an investigation, **regulate,** direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States.

50 U.S.C. § 1702(a)(1)(B) (Emphases Added).

The court as a whole said that the statute does not.

Next Steps

President Trump was unable to make any judicial nominations to the Federal Circuit during his 1st term. In contrast, President Biden was able to make 2 judicial nominations, and President Obama 5. While this is a court with 11 actively serving judges, only 3 active judges are Republican appointees (including the Chief Judge) while the rest are Democrat appointees. The decision was split along highly partisan lines which may not be upheld.

Notwithstanding the Federal Circuit ruling against the President's statutory tariff authority, it has issued a legal order allowing the tariffs to stay in place pending appeal until mid-October. The legal uncertainty around the President's tariff authority (as well as whether any tariffs must be refunded) will continue at least through the Fall.

Yesterday, President Trump threatened an appeal to the Supreme Court today, while Treasury Secretary Scott Bessent argued that the Trump Administration

would pursue alternative means to effectuating the Administration's tariffs regime to the same ends.

More Information Below

This is a strange opinion given the various factions that arose in authoring the opinion of the court. The majority of the court ruled that the tariffs are not permissible under President Trump's cited circumstances. Notably, however, 4 judges provided additional views arguing essentially that the President simply **can never** use IEEPA to impose tariffs: "*In particular, we conclude that (1) the Government's expansive interpretation of* "regulate" *is not supported by the plain text of IEEPA...*")

The Chief Judge and 3 of her colleagues wrote a dissenting opinion stating that the President has latitude to impose tariffs.

Again, these opinions were almost solely correlated with the real or perceived partisanship of the judges. The Supreme Court is a proverbially different beast.

Without analyzing the Federal Circuit's opinion further, ACG Analytics notes that legal scholars observe that the Federal Circuit is among the most frequent courts of appeal reversed by the Supreme Court.

The legal standard to review a statutory construction issue is quite low: *de novo* review, in other words, a fresh look.

To the extent that the U.S. Court of Appeals for the Federal Circuit is often reversed, we also wish to highlight the political dimension of these developments. This arcane, perhaps "*nerdy*" Federal Circuit court suddenly has a newly heightened importance in Washington policy making. President Trump will not want to have this court impede his agenda for the rest of the term. Just as President Trump has sought to change the ideological balance of power on certain Federal panels—think the Federal Trade Commission (FTC), Federal Communications Commission (FCC), and the Federal Reserve—he will likely try and reshape the ideological bent of the Court.

While the Federal Circuit Court may stymie the Trump Administration going forwards, it is worth noting that the current Court has amongst the oldest jurists actively on the Federal bench:

- Judge Pauline Newman (98) (currently suspended from the bench and who did not participate in this case);
- Judge Alan Lourie (90, George H.W. Bush appointee);
- Judge Timothy Dyk (88, Clinton appointee);
- Judge Sharon Prost (74, George H.W. Bush appointee).

Statistically speaking, it is very likely President Trump could have 2-4 judicial nominations to the Court during this term. That could tip the ideological balance for future trade cases. Here, the White House basically lost 7-4. The replacement of 2 judges could be extremely meaningful for the President's trade agenda in future cases before the Court.

The current judges of the U.S. Court of Appeals for the Federal Circuit have given the President's tariff authority a setback, but President Trump has called the court "*highly partisan*," and the background of the Court arguably bears this out.

Trump may just win in the end.

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