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SCOTUS Justices Question Constitutionality of IEEPA Tariffs

Decision Possible by Year-End, WH Likely to Use Other Tariff Authorities

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Following oral arguments this morning, we continue to believe SCOTUS is more likely to restrict the use of IEEPA tariffs, despite the high court's 6-3 conservative majority. Chief Justice Roberts and swing vote Justices Barrett and Gorsuch appeared skeptical of IEEPA tariffs, suggesting a potential majority vote to restrict White House authority to put in place IEEPA tariffs.

The Trump Administration could utilize another legal authority to implement tariffs (our take [here](#)). We have said that 232 investigations on Pharma and MedTech, particularly the latter, likely serve as a hedge should IEEPA tariffs be struck down by SCOTUS (our take [here](#) and [here](#)). While the SCOTUS session goes through the end of June 2026 ([here](#)), a decision could come before year-end ([here](#)). We note that the White House is also considering other tariff measures to advance their MFN priorities with multiple manufacturers (ABBV, PFE) referencing the potential for Section 301 tariffs that could be weaponized to raise drug prices abroad.

»» Key Points

The Supreme Court (SCOTUS) today heard oral arguments on tariffs imposed under the International Emergency Economic Powers Act (IEEPA). IEEPA tariffs include those targeting Canada, Mexico, and China (fentanyl and illegal immigration), as well as global and reciprocal tariffs (trade imbalances). We note that reciprocal tariffs went into effect on Aug. 7, but IEEPA tariffs on Mexico were recently delayed for "a few more weeks" beyond Oct. 29 ([here](#)) and halved from 20% to 10% for China, effective Nov. 10 ([here](#)).

This legal challenge does not impact potential Sec. 232 tariffs on Pharma or MedTech. Sectoral tariffs are unaffected by the legal challenge as they fall under Section 232 authority rather than IEEPA authority. Additionally, IEEPA tariffs on Canada and Mexico exclude USMCA-compliant goods, including medical technology and pharmaceutical imports. Separately, we note the USMCA (US-Mex-Can) agreement is up for renegotiation in 2026 ([here](#)).

It is a fool's errand to predict a SCOTUS case based on oral arguments (alone). That's because often Justices' questioning isn't always in line with views they support. In contrast, they are typically asking about the

things they question, may not fully understand, or need to be convinced of.

However, Chief Justice Roberts and swing vote Justices Barrett and Gorsuch appeared skeptical of IEEPA tariffs. If all three vote with the three Democratic appointees (Justices Sotomayor, Kagan, and Jackson) against the government, there could be six votes in favor of restricting IEEPA tariffs.

- Chief Justice Roberts linked the tariffs to an imposition of taxes on Americans, which is under the purview of Congress. He also seemed to indicate that the IEEPA tariffs violate the Major Questions doctrine, noting the power to impose tariffs on any product, from any country, for any amount, for any length of time.
- Justice Gorsuch noted that if presidents are given broad tariff authority under IEEPA, it would be difficult to give that power back to Congress.
- Justice Barrett questioned whether emergency authority based on trade imbalances is valid for each and every country subject to global and reciprocal tariffs (and specifically questioned tariffs on France and Germany).

NOW WHAT?

We have said, SCOTUS is more likely to restrict the use of IEEPA authority to impose tariffs. Despite the high court's 6-3 conservative majority, we believe SCOTUS may determine that congressional approval is needed to impose tariffs under IEEPA (see CRS report [here](#) for more background). While there are several potential outcomes following SCOTUS review ([here](#)), we believe the plaintiffs made several compelling arguments, which swayed the lower courts (our take [here](#)).

- **Limits of IEEPA:** This argument contends that IEEPA was never intended to authorize tariffs. It has traditionally been used to freeze assets or regulate financial dealings in response to national emergencies.
- **Major Questions Doctrine:** This argument contends that major economic decisions (such as broad tariffs) need clear approval from Congress.
- **Non-delegation Doctrine:** This argument is that allowing broad tariff powers under IEEPA would unconstitutionally give too much power to the president.
- **Questioning the National Emergency Justification:** This argument questions whether trade imbalances or drug trafficking should count as 'unusual and extraordinary threats' under IEEPA.

Restricting IEEPA tariffs may weaken the administration's negotiating leverage to reach trade agreements with individual countries. While a SCOTUS ruling likely wouldn't immediately unwind existing trade deals, countries may seek to pull out of such deals should the high court rule against IEEPA tariffs.

- A trade deal with the European Union caps tariffs at 15% for most products including pharmaceuticals (our take [here](#)). Generic drugs are excluded, taking into account potential drug shortages.
- Trade deals with Japan and South Korea stipulate that they will not be treated any worse than any other country on pharmaceuticals (currently 15% tariff).
- In a US-UK trade deal, both sides agreed to work toward preferential treatment for UK-made drugs and ingredients, contingent on Sec. 232 results and the UK meeting certain supply chain security rules.

The Trump Administration can utilize other legal authorities to implement tariffs if the SCOTUS rules against IEEPA tariffs.

- **Section 122 of the Trade Act of 1974 ([here](#))**. This provision could be utilized to impose country-specific tariffs, but they would be limited to 15% and last only 150 days under this authority.
- **Section 301 of the Trade Act of 1974 ([here](#))**. This was used during Trump’s first term to implement tariffs on China for unfair trade practices, but this authority requires formal investigations.
- **Section 232 of the Trade Expansion Act of 1962 ([here](#))**. Section 232 tariffs are unaffected by the legal challenge and were used to authorize sectoral tariffs on steel, aluminum, and pharma (delayed). However, new investigations would be required to authorize 232 tariffs on other products.
- **Section 338 of the Trade Act of 1930 ([here](#))**. Although never used, this statute could allow the president to impose tariffs up to 50% on countries that unfairly target U.S. trade.

Section 301 tariffs may be in the works to advance the administration’s international pricing

“equalization” MFN priorities. According to the [Financial Times](#), the administration is planning for a Section 301 investigation on international drug pricing practices and “whether U.S. trading partners are underpaying for drugs.” Section 301 gives the administration relatively broad authority to levy tariffs (particularly against other countries and for sectors of importance for those countries).

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