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Stuart S. Malawer

Separation of powers

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Three trade cases to rein in Trump's tariffs

By Stuart S. Malawer

I predict that three major federal court cases, which might involve the U.S. Supreme Court, will rein in President Trump's abuse of trade legislation by November 2020. They all involve presidential claims of national security to impose tariffs and other trade restrictions. To do so would be in the best national security interests of the United States and American democratic governance.

The most recent trade restrictions — who knows which others will arise — concern national security claims as a basis for new tariffs on Mexican goods to

induce greater immigration control, restrictions on Chinese telecom giant Huawei in the name of national security, and national security claims for imposing tariffs on steel applicable to many of our trading partners and closest allies.

Two significant court actions already are pending against the Trump administration for its trade actions. The first, which is pending at the Supreme Court, concerns steel imports from many U.S. trading partners, including China. The second, which was just filed, concerns investment and trade restrictions on Huawei. A third case concerning the “Mexican immigration tariffs” is imminent and probably will involve the U.S. Chamber of Commerce, among others.

Filed by steel importers, the first case involves the older Supreme Court case *FEA v. Algonquin SNL Inc.* (1976), which concerned tariffs and the national security provision (Section 232) of the Trade Expansion Act of the 1960s. This case is now appealed to the Supreme Court by the steel importers, following an adverse decision by the Court of International Trade. The lower court grudgingly upheld President Trump’s steel tariffs because it hesitated to overrule even questionable precedents.

The second case just filed by Huawei addresses the constitutional prohibition against congressional bills of attainder that single out persons, companies or groups for punishment. Congress seemingly singled out Huawei by imposing restrictions on it for national security reasons under the new National Defense Authorization Act (Section 889).

The third possible case, threatening tariffs on Mexican imports, is based upon President Trump’s claim that Mexican immigration policy is a threat to U.S. national security under the International Emergency Economic Powers Act. Any legal action would certainly raise the threshold issue, if that claim is sufficient to satisfy the national security requirement that allows for a valid emergency declaration.

Federal courts review presidential actions even when they involve foreign policy.

This goes back to *United States v. Curtiss-Wright Export Corp.* (1936), a Supreme Court case involving an arms embargo declared by President Roosevelt during the Chaco War in Latin America, and *Youngstown Sheet & Tube v. Sawyer* (1952), where the Supreme Court addressed President

Truman's seizure of steel mills during the Korean War. In this case, the court clearly stated that the president's powers as commander in chief do not include seizing domestic steel mills. Justice Robert Jackson stated the president is commander in chief of the military, not commander in chief of the nation.

Presidential actions — even when the president argues they are not reviewable by courts — are indeed subject to judicial review. This is what is called the rule of law. Congress makes the laws, and all laws and executive actions must comply with the U.S. Constitution to uphold the structure of the federal government and to preserve individual rights. This is the essence of America's exceptionalism.

Under the U.S. Constitution, Congress has exclusive authority over trade. However, much of this authority has been delegated to the executive branch over the decades. So far, Congress has failed to reclaim its trade authority.

Congress has the sole constitutional authority to enact new taxes. Congress never intended to abrogate its taxing authority by allowing any president to unilaterally impose new tariffs, which are taxes on U.S. imports paid by U.S. firms and consumers. Tariffs and foreign retaliatory tariffs hurt everyone, including farmers, importers, consumers and domestic producers. They are detrimental to state and national economic development.

I predict the federal courts will uphold the separation of powers in face of this unprecedented onslaught of presidential tariff and trade actions by a president relying on dubious claims of nation security. This system has been the foundation of U.S. foreign and national security policy since 1945 and remains so today. The preservation of this system is in the national security interest of the United States, as well as basic American governance.

Stuart S. Malawer is Distinguished Service Professor of Law and International Trade at George Mason University's Schar School of Policy and Government. Contact him at stuartmalawer@msn.com.