

# THE GLOBE AND MAIL

## THE BEST HOPE FOR CANADA IN FIGHTING A TRADE WAR WITH TRUMP MAY LIE IN U.S. COURTS

*This story was published online in [The Globe and Mail](#) on Feb. 2*

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With the stroke of a pen, U.S. President Donald Trump summarily halted free trade in North America, wielding executive power to impose new tariffs on his country's biggest trading partners and creating upheaval for countless companies and workers.

For Canada and others seeking to challenge the legality of Mr. Trump's actions, the best hope may lie in U.S. courts – and the conservative justices that the President himself nominated in his first term. Those judges have shown a new willingness to circumscribe federal powers, opening potential avenues to challenge his actions.

In his determination to forcibly remake the U.S. economy, Mr. Trump has acted under a broad suite of authorities entrusted to him by generations of federal legislators. But the presidential powers he is deploying were never envisioned by the founders of the country.

Those who signed the U.S. Constitution in 1789 made their intentions clear. Under Section 8 of the document, the power to tax and collect duties, imposts and excises lies with Congress alone.

Canada releases list of U.S. goods targeted for retaliatory tariffs, including food, appliances and military gear

More than two centuries later, it is the country's President who is brandishing the promise of stiff taxes on foreign goods to extract concessions and revenue from friends and foes alike.

His use of emergency powers to enact tariffs forms part of a much broader evolution in the U.S., in which Republicans and Democrats alike have delegated new authorities to the presidency – some in hopes the White House would prove a more sober source of decision-making than the legislative branch, others as a workaround to a deadlocked partisan Congress.

In 1977, Congress passed the International Emergency Economic Powers Act, or IEEPA, which allows the president broad latitude to respond to an “unusual and extraordinary threat” from outside the U.S. that places at risk the country’s “national security, foreign policy, or economy.”

IEEPA has been wielded by numerous administrations to assert international power through the use of American economic strength. During the Iranian hostage crisis, Jimmy Carter used powers under the act to freeze Iranian government assets and largely sever its commercial contact with the U.S. After the Sept. 11 attacks, George W. Bush used IEEPA to freeze assets belonging to terrorist groups.

The long duration of the law, and its basis in legislation, give it considerable strength, said Michael McConnell, a former Republican-nominated U.S. Court of Appeals circuit judge who is now director of the Constitutional Law Center at Stanford Law School.

“Congress has delegated extremely broad discretion to the president in IEEPA, and I doubt that there is going to be much of a basis for a legal challenge to that,” he said.

But IEEPA has never before been used to impose tariffs. That opens one potential avenue for legal attack, on what are known as “nondelegation” grounds.

In other words, can Mr. Trump exercise a power under IEEPA that Congress has not specifically delegated to the presidency?

In recent years, the U.S. Supreme Court and its Trump-appointed cohort of conservative justices has been willing to apply new scrutiny to that question.

That has given rise to what is known as a “major questions doctrine,” which holds that “if the executive branch is taking an action that it claims is authorized by a statute – that involves a matter of economic or political significance – then Congress has to

have clearly authorized that action,” said Timothy Meyer, a scholar of international business law at Duke University who clerked for Neil Gorsuch, one of the three Supreme Court justices nominated by Mr. Trump.

The court used that doctrine to defeat actions taken by the Joe Biden administration, including student loan relief and a pandemic-era moratorium on rental evictions.

And, Prof. Meyer said, “in my mind, an across-the-board 25-per-cent tariff on a major trading partner is clearly a question of major economic significance. I don’t see how you could argue it’s not.”

At the same time, considerable legal obstacles stand in the way of anyone seeking to defeat the new tariffs in court. One is whether tariffs are considered an economic issue or whether they fall under a broader “foreign affairs exceptionalism,” which give the president greater powers to act in international matters. If the court sees the tariffs as a question of foreign affairs, Mr. Trump is likely to win a more favourable reception.

Another question is whether, in fact, Mr. Trump is exercising a new power. In 1971, Richard Nixon imposed blanket 10-per-cent tariffs on imported goods, under the authority of the Trading with the Enemy Act, a predecessor to IEEPA – although it’s not clear that precedent will matter, since IEEPA employs different language.

”Using IEEPA to impose tariffs has not been done before, so there has never been a court ruling on this question,” said Julian Ku, who studies the interaction of international law and U.S. constitutional law at Hofstra University.

President Donald Trump’s favorite economic tool is the tariff. In his first day in office, he said he planned to slap a 25% tariff on imports from Canada and Mexico -- and more are probably coming.

Mr. Trump has, however, argued that he is responding to external threats, citing the movement of fentanyl and illegal migrants to the U.S. from Canada, Mexico and China. That is likely to prove a potent defence, Prof. Ku said.

“The court has also been deferential to the President on national-security matters, and the language of the statute is very

broad, so it is far from clear which way the court would come down on this issue,” he said.

Other legal scholars believe it will prove difficult for the U.S. to argue a legal case that tariffs are a tool of national security.

“Although import bans may have some valid national-security use, tariffs never do except to protect an uncompetitive domestic industry,” said Steve Charnovitz, who specializes in international law at the George Washington University.

For countries struck by U.S. tariffs, there are avenues for response outside of U.S. courts. China has pledged to file a lawsuit with the World Trade Organization, saying Mr. Trump’s action “seriously violates WTO rules.”

Canada has grounds to do the same. In a WTO complaint, “quite frankly, hands down, Canada wins. This is an open-shut case,” said Petros Mavroidis, a legal adviser to the WTO who is a professor at Columbia Law School.

It would almost certainly be a hollow victory.

Mr. Trump’s hand has been strengthened in part by the actions of Mr. Biden, whose administration refused to fill seats on a World Trade Organization appellate body, the highest adjudicator of world trade. Mr. Trump had initially blocked appointments to the body after a string of U.S. defeats on softwood lumber matters.

Those actions effectively remove a guardrail in the defence of international trade.

“Without a fully functioning WTO legal system, the U.S. has effective immunity from legal challenges against its improper actions at the WTO,” Mr. Charnovitz said.

In the U.S., meanwhile, the free hand enjoyed by Mr. Trump is largely a function of decisions made by federal legislators. There are good reasons for that, said Geoffrey Manne, founder of the International Center for Law and Economics, a non-partisan research group.

“There’s certainly a valid argument that says, in the case of the kind of real emergency that was contemplated by IEEPA, you want to give that power to the president. You want to have an entity that can

act decisively and quickly.”

But it also amounts to “a kind of fecklessness on the part of Congress,” he said. “It likes not have to be responsible for things.”

Even critics of that expansion of U.S. presidential power say it has proven difficult to challenge. Congress has spent nearly a century delegating powers to the White House, said Clark Packard, a research fellow at the Cato Institute, a libertarian think tank.

“It is kind of frightening that the president largely has carte blanche authority to restrict international trade like this and basically engage in fiscal policy,” Mr. Packard said.