

TRENDMACRO LIVE!

On the SCOTUS Tariff Oral Arguments

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The three liberals are in the bag to strike down the tariffs. Kavanaugh and Alito are at risk.

[The oral arguments before the Supreme Court](#) in the case against President Donald J. Trump's tariffs under the International Emergency Economic Powers Act have just ended after two-and-a-half grueling hours.

- Solicitor General D. John Sauer, speaking for the government, took many hard hits from all three liberal justices – Elena Kagan, Sonia Sotomayor and Ketanji Brown-Jackson. You have to remember that it is the job of all nine Justices to ask tough questions to attorneys on both sides, so this isn't itself dispositive as to where the three liberals stand.
- But the three asked few questions of Neil Katyal speaking for the private plaintiffs, or Oregon Solicitor General Benjamin Gutman speaking for twelve states attorneys general. And those were all softballs.
- Our strong impression is that all three liberals will vote to strike down the tariffs.
- It's not as obvious to us, but our impression is that Samuel Alito and Brett Kavanaugh are the most likely to vote to uphold the tariffs.
- Our sense is that the remaining four – Clarence Thomas, Neil Gorsuch, Amy Coney Barrett and Chief Justice John Roberts are likely to vote to strike down the tariffs.
- That would make seven-to-two, which is not much different from the six-to-three split we predicted when the Court of Appeals for the Federal Circuit struck down the tariffs (see ["Tariffs: Supreme Court or Bust"](#) August 31, 2025).

Early on, Sotomayor cued up what would prove to be a fulcrum issue throughout the session:

"You say they [the tariffs] are not taxes, but that's exactly what they are. A quota does not raise revenues. I don't understand this argument. This is a tariff. This is a tax."

- Sauer responded to Sotomayor that if tariffs are taxes, they are not taxes on Americans – echoing Trump's repeated claims that the tariffs are "charged" to other countries. We have to say, he sounded embarrassed to say that.

Update to strategic view

US MACRO: We think all three liberals will vote to strike down the tariffs, based on their hard questioning of the government's attorney and their softballs to the respondents' attorneys. Thomas, Gorsuch and Roberts asked deep questions going to the "major questions doctrine" and the "non-delegation doctrine." Kavanaugh was stuck on the use of tariffs as a negotiating tool, and seemed to think their utility was more important than their lawfulness. Alito was stuck on the greater powers under IEEPA, such as total embargo, believing that those necessarily permitted lesser powers such as tariffs. The key is the matter Sotomayor raised at the beginning – tariffs are taxes, and taxes are a unique power of Congress, not the president. This power can only be delegated under narrow circumstances, and the president's interpretation of IEEPA seems too broad. Roberts famously hung his ACA ruling on the technical fact that the mandate was administered as a tax. This will be the fulcrum issue. Refunds were only mentioned once, by Barrett. We think the tariffs will get struck down 7-to-2.

- And though the government's brief to SCOTUS brags that the tariffs will bring in \$4 trillion in revenues, Sauer argued that these are "regulatory tariffs, not revenue-raising tariffs." The distinction is key, because the government's whole argument hinges on the claim that IEEPA's authority for the president to "regulate importation" permits tariffs without mentioning the word. If the government admitted tariffs were taxes, the failure to specifically authorize them would quash the tariffs under the so-called "major questions doctrine," which requires clear legislative intent to justify anything as fundamental and sweeping as the delegation to the president of Congress's first enumerated power under the Constitution – to tax. Moreover, the completely unconstrained tariffs imposed by Trump under IEEPA invokes the "non-delegation doctrine," under which Congress cannot give up its powers or responsibilities to other branches of government without the constraint of "intelligible principles."
- Thomas, Gorsuch and Roberts asked many pointed questions about these principles.
- Roberts didn't mention it, but the elephant in the room is the memory of his majority opinion in [NFIB v. Sibelius](#), the case against the mandates in the Affordable Care Act. The decision hinged on the technicality that the mandate was framed in the law as a tax, and was collected through Americans' tax returns. So, the reasoning goes, the mandate is lawful, because Congress can tax, even though it can't force you to buy health insurance.
- Kavanaugh, though, seemed under the sway of Trump's claims that tariffs give a president a uniquely powerful tool with which to advance America's security interests – even specifically repeating Trump's claim that threatening tariffs against India moved it to support US attempts to economically isolate Russia. It does not seem to have occurred to Kavanaugh that, however noble these claims by Trump – even if they are true – that doesn't mean IEEPA gives him the power to impose taxes on the American people in the form of tariffs.
- Alito seemed to be stuck on the idea that tariffs are interior to other enumerated powers under IEEPA – that is, if IEEPA allows a president to do something as large and drastic as to cut off all trade with, say, India, why can't the president do a smaller thing such as impose tariffs? The answer is that IEEPA doesn't give the president the power to impose taxes on the American people in the form of tariffs, whether or not doing that is smaller than something else it does permit him to do.
- Gutman also pointed out that, if tariffs are taxes on the American people, they are a poor tool of foreign policy, especially in an emergency – which IEEPA requires. After all, people can decide whether to import foreign goods and pay the tariffs, or not. Why cede to each individual the decision of whether to trade with the enemy in an emergency?
- As to whether the court would order refunds if the tariffs are struck down, that matter only came up at the very end of Katyal's time before the justices, when Barrett asked:

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“If you win, how will reimbursement work? Seems to me it might be a mess. If it were quotas, there would be no refunds.”

- The subtle subtext there, indicating her sympathy with the idea that tariffs are taxes, is that she draws an important distinction between them and the other clearly permitted presidential powers under IEEPA, such as quotas.
- Katyal reminded her that the government has promised, in the lower courts, to make refunds to the plaintiffs. As to the millions of other similarly afflicted firms and individuals, he argued there is ample precedent (such as [McKesson v. Florida Alcoholic & Tobacco Division](#) for treating them as a class, regardless of how difficult the process might be.

Bottom line

We think all three liberals will vote to strike down the tariffs, based on their hard questioning of the government's attorney and their softballs to the respondents' attorneys. Thomas, Gorsuch and Roberts asked deep questions going to the “major questions doctrine” and the “non-delegation doctrine.” Kavanaugh was stuck on the use of tariffs as a negotiating tool, and seemed to think their utility was more important than their lawfulness. Alito was stuck on the greater powers under IEEPA, such as total embargo, believing that those necessarily permitted lesser powers such as tariffs. The key is the matter Sotomayor raised at the beginning – tariffs are taxes, and taxes are a unique power of Congress, not the president. This power can only be delegated under narrow circumstances, and the president's interpretation of IEEPA seems too broad. Roberts famously hung his ACA ruling on the technical fact that the mandate was administered as a tax. This will be the fulcrum issue. Refunds were only mentioned once, by Barrett. We think the tariffs will get struck down 7-to-2.

