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Challenging Executive Actions Under IEEPA

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THE TRUMP ADMINISTRATION IS VIGOROUSLY USING different levers of power to implement its America First trade agenda, commingling laws involving national security, foreign policy and economics to establish new barriers to trade.

In addition to increasing tariffs on a variety of inbound goods, the administration is considering various options to limit the outbound flow of U.S. technology, particularly to China. While Congress contemplates changes to U.S. export controls and rules on foreign investment in the U.S. to address these issues, the Trump administration has suggested another potential tool: the International Emergency Economic Powers Act, 50 U.S.C. Section 1701–1707.

Enacted in 1977, the IEEPA provides the president with authority to undertake a wide range of actions in response to "any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States," but only if the president first declares a national emergency with regard to that threat. Although the authority conferred by the IEEPA is broad, Congress passed the act in an effort to limit the president's authority to declare an indefinite state of national emergency during peacetime. Congress intended presidential use of IEEPA authority to be narrowly tailored, time-limited and subject to congressional oversight.


PRESIDENT DONALD J. TRUMP.

There are legislative and judicial avenues for affected parties to address executive branch overreach that purports to draw on IEEPA's authority. The act, for example, requires the president to consult Congress "in every possible instance" before exercising authority under the IEEPA. The president must also provide Congress with reports explaining, among other things, the reason that the president believes action based on the IEEPA is necessary to deal with an unusual and extraordinary threat. For example, with respect to IEEPA actions on Chinese technology transfers, the president would

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be obligated to explain to Congress why existing laws, such as foreign investment restrictions administered by the Committee on Foreign Investment in the United States and U.S. export control rules enforced by the U.S. Departments of State and Commerce, are insufficient. Once the president takes action, the IEEPA authorizes Congress to terminate the action through a concurrent resolution, i.e., a resolution adopted by the U.S. Senate and House of Representatives that does not require the signature of the president.

The IEEPA neither contains an independent right of judicial review nor imposes limits on such review. Thus, to mount a judicial challenge, a party could seek a declaratory judgment that the IEEPA-based executive action was unconstitutional. Generally, federal courts are very deferential to the executive branch on constitutional questions involving national security and could deem a presidential declaration of a national emergency to be a nonjusticiable political question. Nevertheless, at least two courts (the Ninth Circuit in its 2012 decision in *Al Haramain Foundation v. Treasury* and the U.S. District Court for the Northern District of Ohio in its 2009 decision in *KindHearts v. Geithner*) have held that when the Office of Foreign Assets Control used authority conferred by the IEEPA to freeze the assets of an organization, that asset freeze was subject to meaningful constitutional review under the First, Fourth and Fifth Amendments. These cases indicate that constitutional challenges to IEEPA actions may be viable in certain circumstances.

The Administrative Procedure Act is another source of authority for a party to bring a claim in federal court. The APA entitles a person "adversely affected or aggrieved by agency action" to judicial review of the action. For example, under the APA, an affected party could claim that an IEEPA-based executive action is *ultra vires* (i.e., beyond congressionally delegated authority) or otherwise violates the act. In the case of technology transfers, IEEPA explicitly denies the president authority to regulate imports and exports of "any information" except for certain items subject to U.S. export controls, sanctions, antiterrorism, and aviation safety requirements. Thus, an action that expansively defines "technology" could violate the statute and be overturned by the federal courts. Additional APA claims could state that an IEEPA-based action is not grounded in substantial evidence, is arbitrary and capricious, or was issued without required public notice and comment. Of course, an aggrieved party must meet the basic constitutional and procedural requirements to sue in federal court, including standing, ripeness, and applicable exhaustion requirements.

The use of the IEEPA in an unprecedented and wide-ranging manner opens the door to potential judicial challenges and legislative responses. Indeed, the successful lower court challenges to the "travel ban" executive order may indicate that federal courts are more willing in close cases to review the national security-related executive actions of the Trump administration than those of prior administrations. The Trump administration and Congress should carefully consider the act's intent, requirements and limitations, as well as the possible unintended consequences, of using this broad tool. It is very possible that, in addition to causing drastic economic ramifications for key U.S. employers and their workers, presidential action could establish a new and complex regulatory scheme that overlaps with existing laws, giving rise to inefficiencies within government and the regulated community. This would be a surprising outcome for an administration that has aimed to reduce regulatory burdens for businesses and an unwelcome result for the public.

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