Footwear & Politics in Focus: Presidential Powers Over Trade

Overview of the legal mechanisms through which the US president can shape the country's international trade relations

FDRA

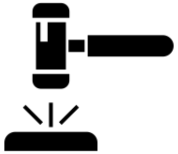
FOOTWEAR DISTRIBUTORS AND RETAILERS OF AMERICA

Trump could limit or revoke the United States' foreign trade agreements if elected president

Overview of presidential powers over foreign trade agreements

Article I, Section 8 of the US Constitution gives Congress the power to regulate commerce with foreign countries. However, Congress has delegated much of this regulatory power to the president through legislation

The United States has free trade agreements (FTAs) with 20 countries, all requiring reciprocal reduction of tariffs and other trade barriers. Under the authority given to the presidency, a Trump administration could terminate FTAs without Congressional approval



Though Trump could unilaterally terminate FTAs if elected president, his administration would face strong legal challenges by both US courts and international trade organizations. Additionally, Congress could propose new bills to revoke the presidency's power over trade

Sources: Justin Wolfers, "Why a President Trump could start a trade war with ease," The New York Times, September 19, 2016; Marcus Noland, Clyde Hufbauer, Sherman Robinson and Tyler Moran, "Assessing trade agendas in the US presidential campaign," Peterson Institute for International Economics, September 19, 2016.

The president can renegotiate or withdraw from NAFTA and similar FTAs without Congressional approval

Exit provisions from the North American Free Trade Agreement

NAFTA Chapter 22

•Chapter 22 of NAFTA allows its parties to withdraw from the agreement after giving six months' notice to the other member countries

•Trump, exercising the presidency's authority over foreign affairs, could unilaterally withdraw the United States from the agreement

NAFTA Implementation Act, Section 201

•Additionally, Section 201 of the NAFTA Implementation Act of 1993 allows the president to proclaim "additional duties" if they are found necessary or appropriate to maintain the balance of reciprocal concessions between the US, Canada and Mexico

•The president would have to consult with Congress before invoking Section 201 to create new tariffs, but would not require Congressional approval

Presidential trade proclamations

•US withdrawal from NAFTA would not automatically raise US tariffs on imports from Canada and Mexico. Trump would have to issue an additional presidential proclamation in order to bring back the pre-NAFTA 'Most Favored Nation' rates on Mexican and Canadian imports – averaging around 3.5%, but with higher rates for specific items like clothing and footwear

Analysis

Trump can also use withdrawal clauses similar to NAFTA's to withdraw the United States from other free trade agreements (FTAs) and the World Trade Organization (WTO)

Sources: Justin Wolfers, "Why a President Trump could start a trade war with ease," The New York Times, September 19, 2016; Marcus Noland, Clyde Hufbauer, Sherman Robinson and Tyler Moran, "Assessing trade agendas in the US presidential campaign," Peterson Institute for International Economics, September 19, 2016.

Continuing US military engagements would allow the president to regulate international commerce

Trading with the Enemy Act of 1917, Section 5(b)

Presidential powers

- Gave the president wartime powers to regulate all forms of international commerce and to freeze and seize foreign assets.
- TWEA does not specifically authorize the president to raise tariffs, but such an interpretation could be made of the mandate to regulate commerce

Implementation

- TWEA is meant to be used only in national emergencies or times of war, though both of these categories can have broad interpretations
- Continuing military engagements in Iraq and Afghanistan, as well as US military activities in Syria and Libya, may be used to satisfy the "wartime" requirement

Precedent

- Presidents Roosevelt, Johnson and Nixon all invoked the TWEA to declare national emergencies and mandate tariffs or other commercial restrictions
- In 1976, Congress amended the TWEA in order to eliminate the 'national emergency' provision and limit the law's use to times of war

Analysis

The meaning of 'times of war' is key to determining whether the president can invoke the TWEA. If the meaning is restricted to wars officially declared by Congress, then current military engagements may not be sufficient justification

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The president can set import restrictions for products that jeopardize national security

Trade Expansion Act of 1962, Section 232(b)

Presidential powers

•Allows the president to raise tariffs or impose import restrictions on products that negatively impact national security

•Places no limit on the nature of restrictions or the size of tariffs that can be imposed

Implementation

•The director of the Office of Emergency Planning must first investigate the impact of certain products or trade relations and approve that the impact merits presidential action

Precedent

•Section 232(b) of the law was cited as one of the legal grounds for President Richard Nixon's 10% steel tariff imposed in 1971

Analysis

Though the United States has signed the General Agreement on Tariffs and Trade (GATT) and is a member of the WTO, **the president retains the power to impose trade restrictions in the name of national security**.

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The president can impose tariffs to balance payment deficits or to retaliate against unfair trade practices

Trade Act of 1974

Section 122

- Grants the president special powers "to deal with large and serious United States balance of-payments deficits"
- Allows the president to impose tariffs of up to 15%, quantitative import restrictions or a combination of the two for 150 days to deal with balance-of-payments deficits; restrictions in place longer than 150 days would need congressional authorization
- The restrictions can be applied on a nondiscriminatory basis or against one or more countries with large balance of payments surpluses with the US
- Can be imposed across the board without the need for a national security impact investigation

Analysis

Breaching international trade agreements could lead to challenges in the WTO and retaliatory tariffs from other countries

Section 301

- In order for Section 301 to be invoked, the US trade representative has to determine that a foreign country is infringing on US trade rights or carrying out discriminatory trade practices against US commerce
- The president can then take various retaliatory actions, including the imposition of duties or other import restrictions
- Section 301 measures do not have a built-in expiration date
- A Trump administration could potentially use allegations of exchange rate manipulation to impose Section 301 sanctions against China

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Under a loosely-defined "national emergency," the president can restrict trade with countries that pose an economic threat

International Emergency Economic Powers Act of 1977

National emergency powers

•Grants the president powers to regulate international commerce and freeze foreign assets if under an "unusual and extraordinary threat"

•Though the IEEPA does not explicitly grant the president to power to impose tariffs, the president may argue that such an action falls under the power to 'regulate' commerce

Implementation

•The standard for what qualifies as an "unusual and extraordinary threat" is loose, as US courts have never questioned presidential declarations of a "national emergency"

Precedents

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•The IEEPA has been used to impose sanctions on countries such as Nicaragua, Panama, Sierra Leone and Somalia

•The previous use of IEEPA sanctions against small countries that were not in direct conflict with the US raises questions about the definition of the "unusual and extraordinary" level of threat required to trigger the law

Analysis

•Trump has proposed tariffs of up to 35% on goods from Mexico 45% for Chinese imports.

•If he invoked the IEEPA, the Supreme Court may find that such high tariffs represent an overreach into Congressional authority

•However, Trump could likely impose quantitative import restrictions instead, which have never been overturned by courts when imposed by past US presidents

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