

Tariffs and Swampbuster - Constitutional Questions Galore

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June 2025

Agricultural Law and Taxation Blog, by Roger McEowen: <https://lawprofessors.typepad.com/agriculturallaw/>
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Overview

Last week there was court action involving constitutional issues that are of importance to agriculture producer and the ag economy. On May 28, the Court of international Trade, a federal trial court, blocked enforcement of Executive Branch tariffs. *V.O.S. Selections, Inc, et al. v. United States*, No. 25-00066, 2025 Ct. Intl. Trade LEXIS 67(U.S. Ct. Intl. Trade May 28, 2025). The decision didn't last long. The very next day the appellate court, the U.S. Court of Appeals for the Federal Circuit, stayed the lower's court opinion while the legal challenges wind through the court system. Also on May 29, a federal district court judge upheld the Swampbuster regulations against a constitutional challenge.

Both cases raise some serious constitutional questions with significant implications that will need to be dealt with either by higher courts or the Congress.

The Tariff Case

The economy is very important to all citizens in general and agriculture in particular. Many agricultural goods are subject to tariffs by other countries when imported into those countries, and the imposition of tariffs on ag products coming into the country is likewise important. This makes the tariff case critical. Since being inaugurated the second time, President Trump has attempted to remove the U.S. from a situation of asymmetrical tariffs of the last 50 years to protect the nation's national security on several fronts – a severe trade imbalance, the fentanyl crises and illegal entries into the U.S. (the last two of which are related, in part). Other than for some of those imposed on China, the tariffs are not retaliatory (the trial court mischaracterized them as such). They are not punitive. They are reactionary. And they will be removed when a country removes tariffs on U.S. goods.

Key issue. The primary issue in the tariff matter is who gets to decide the issue – is it the courts or the Congress? The Court of International Trade is a court comprised of nine judges. It was a three-judge panel that ruled on tariffs (and there's evidence that the panel was not a random draw). The judges are appointed for life. The court is a creation of Congress. There is some good commentary in the opinion. For instance, the court properly framed the issue as a separation of powers issue – separation of powers between the Executive Branch and the Legislative Branch. The court cited The Federalist Papers, No. 48. That's good. Rarely do I read court opinions involving the Constitution where an attempt is made to reference what the Founders actually said. Federalist Paper No. 48, primarily authored by James Madison, addresses the concept of the separation of powers and argues that while the legislative, executive, and judicial branches of government should be distinct, they must also have some constitutional control over each other. That is very true. But, from there the court got off the rails.



Article I, Section 8, Clause 1 of the U.S. Constitution outlines the fundamental power of Congress regarding taxation and spending. It states:

"The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;"

It's the Congress that has the power to impose various forms of taxes, including "Duties" which are tariffs – not the Executive Branch and not the Judicial Branch. This is why tax legislation comes through Congress. The President (as well as the courts) cannot announce a tax on anything or the removal of a tax on anything. Doing so requires congressional action. However, when it comes to tariffs, it's different. In 1977, the Congress ceded its power to levy tariffs to the Executive Branch – the President. The International Emergency Economic Powers Act of 1977 (IEEPA) was enacted to provide the President with broad authority to regulate international commerce during a declared national emergency. IEEPA authorizes the President to declare a national emergency in response to "any unusual and extraordinary threat to the national security, foreign policy, or economy of the United States which has its source in whole or substantial part outside the United States." The delegated power is limited to the President's declaration of an emergency. Once such an emergency is declared, the President can regulate various economic transactions, including the "importation or exportation" of property.

Note: Besides the IEEPA, Congress has enacted several specific laws that empower the President to impose tariffs under certain circumstances, including Section 232 of the Trade Expansion Act of 1962 that allows the President to adjust tariffs if imports threaten national security; Section 301 of the Trade Act of 1974 that addresses unfair trade practices by foreign countries; and Section 122 of the Trade Act of 1974 which allows for temporary tariffs to address balance-of-payments deficits.

Section 1702 of IEEPA (50 U.S.C. §1702) grants the President significant powers to act during a declared national emergency. Subsection B grants the President broad authority over "property" in which a foreign country or national has an interest. Included in the Presidential power is the ability to regulate the importation or exportation of property of a foreign country with some exceptions to protect the free flow of information and humanitarian aid, unless specific conditions related to national emergency, U.S. law, or foreign policy are met. Thus, Section 1702 grants the authority to the President to deal with any unusual and extraordinary threat which has its source in whole or substantial part outside the United States involving trade (commerce) involving national security, foreign policy or the U.S. economy for which the President has declared a national emergency.

The court said it did not read these provisions to delegate an unbounded tariff authority to the President, but instead said those provisions should be read in light of legislative history and enactments by the Congress of more narrow non-emergency legislation such that the President cannot impose unbounded tariffs (the Section 232 tariffs on steel, aluminum, automobiles and auto parts stay in place, as do on the tariffs imposed under Section 301). The court's justification was that the President had violated the separation of powers doctrine – which the President has done citing the



fentanyl crisis and the various crises associated with illegal entries into the U.S. as national emergencies.

So, the trial court wiped out the tariffs. But the appellate soon reinstated them while the legal process plays out.

Key point. What's missing in all of this is one major item. While the trial court framed the issue as a separation of powers issue (that's the way the plaintiffs, private parties and some states, framed it), Congress is not a party to the lawsuit. The plaintiffs are private parties and several states. The claim is that the President is "stealing" power from the Congress or, alternatively, that the Congress has delegated too much authority to the President. But Congress is neither a party to the lawsuit nor has it taken any legislative action to claw back its power. The power is in the Congress (the elected representatives of the people) to deal with this matter involving the separation of powers, not the courts. That's the structure of the Constitution. So, it's safe to conclude that Congress either agrees with what the President is doing when it comes to tariffs or simply has acquiesced to it.

Consequently, the trial court should have dismissed the case. As a separation of powers case, the remedy is with the Congress. Private litigants can't stand in the shoes of Congress. Even assuming, for sake of argument, that the President's use of IEEPA for widespread tariffs represents a significant expansion of that delegated power, that issue is for Congress to determine. Not the courts. It will be interesting to see how the appellate court and, eventually, the U.S. Supreme Court come out on the whole matter. If it is ultimately concluded *by the judicial system* that either the Congress has delegated power it shouldn't have or the President exceeded his power, the republic has larger problems than merely the tariff issue.

Swampbuster

The Constitution was also invoked in a case involving the Swampbuster rules last week. In *CTM Holdings, LLC v. USDA*, No. 24-CV-2016-CJW-MAR (N.D. Iowa May 29, 2025), a federal trial court judge in Iowa upheld the Swampbuster regulations against a constitutional challenge. The plaintiff, a farming corporation owned by an Iowa farmer, bought a 71-acre tract as an additional piece to the corporation's total farming operation. 21 acres were forested, of which 9 acres the USDA determined were wetlands subject to the Swampbuster rules even though there is no water on the area at any time of the year and trees could be removed and the ground farmed without the need for drainage tile.

The USDA declined the plaintiff's request for a redetermination. The plaintiff sued on several grounds: Commerce Clause violation; conditioning USDA benefits on surrender of constitutional right; unconstitutional taking; USDA's procedurally improper modification of Swampbuster rules to add in "removal of woody vegetation"; and improper denial of request for reconsideration. The trial court granted summary judgment for the USDA on all claims. The court determined that the plaintiff lacked standing to bring all of the claims for lack of exhaustion of administrative remedies because the plaintiff didn't properly request review of a 2010 wetland determination by merely filing Form AD 1026. The court determined that the plaintiff also lacked constitutional standing for lack of a showing of injury in fact - again tied to failure to exhaust administrative remedies.



However, the court went on to opine on the merits, finding the Swampbuster regulations constitutional under Congress's spending power rather than Commerce Clause power which meant, in turn, that the Congress could condition receipt of funds on meeting Swampbuster requirements. Thus, there was no unconstitutional condition. Also, the court determined that USDA's adding of "woody vegetation" language to the Swampbuster rules was merely an example of what an impermissible manipulation of a wetland could be, even in light of the repeal of the Chevron doctrine. The court similarly rejected the plaintiff's challenge to the USDA regulation governing review of a prior wetland certification for lack of exhaustion of administrative remedies.

The case is appealable to the Eighth Circuit, which raises an interesting question. The Eighth Circuit currently has a case pending before it involving a challenge to Swampbuster regulations. *Foster v. United States Department of Agriculture*, 144 S. Ct. 2707 (2024), vacating and remanding, 68 F.4th 272 (8th Cir. 2023). That case made it all the way to the U.S. Supreme Court with the Court sending the case back to the Eighth Circuit for reconsideration after the U.S. Supreme Court repealed its Chevron decision of the 1980s on the issue of federal government agency discretion. The Eighth Circuit then sent the case back to the federal trial court in South Dakota. No. 22-2729, 2024 U.S. App. LEXIS 28536 (8th Cir. Nov. 7, 2024). The question is why the trial court judge in the Iowa case issued an opinion before the *Foster* case is decided.

Conclusion

Constitutional issues of importance to agriculture. Oh, and then there's significant tax legislation that has passed the House and is in the Senate.

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