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## Companies Should Fear Trump's 'Emergency' Powers

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While many commentators mocked Donald Trump's order to stop producing goods in China, a close reading of the International Emergency Economic Powers Act should worry U.S. companies with investments or trading relationships in China. In short, Congress has ceded far more authority to the president to regulate U.S. companies than American businesses realize.

"You'll see that the president has the power, for all intents and purposes, to severely disrupt or even block financial transactions between people and/or companies in the United States and people and/or companies in a designated foreign country," notes economist Dan Mitchell, co-founder of the Center for Freedom and Prosperity. "And there's no limit on the definition of 'emergency.' One could argue that an emergency declaration and a ban on the movement of money wouldn't necessarily prohibit a company from doing business in a particular jurisdiction, but it surely would have that effect. The economic consequences would be profound. In a negative way."

The text of the law confirms Mitchell's interpretation. Under the International Emergency Economic Powers Act, "At the times and to the extent specified in section 1701 of this title, the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise – (A) investigate, regulate, or prohibit – (i) any transactions in foreign exchange, (ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof."

The law states, in section 1701, "Any authority granted to the President . . . may be exercised to deal with 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, if the President declares a national emergency with respect to such threat."

While the statute notes, "The authorities granted to the President . . . may only be exercised to deal with an unusual and extraordinary threat with respect to which a national emergency has been declared for purposes of this chapter and may not be exercised for any other Purpose," it gives the president discretion to define "a national emergency" and "an unusual and extraordinary threat."

An action could be within the law and still carry significant negative consequences. "Any invocation of the International Emergency Economic Powers Act in these circumstances and for these purposes would be an abuse," Daniel M. Price, managing director of Rock Creek Global Advisors and an official in the White House with responsibility for international trade under President George W. Bush, told the New York Times. "The act is intended to address

extraordinary national security threats and true national emergencies, not fits of presidential pique.”

This latest controversy started when, in response to China retaliating against U.S.-imposed tariffs, Donald Trump tweeted on August 23, 2019: “Our great American companies are hereby ordered to immediately start looking for an alternative to China, including bringing . . . your companies HOME and making your products in the USA.”

In a follow-up tweet, Trump left no doubt from where he believed he derived the authority to order companies to disengage from China: “For all of the Fake News Reporters that don’t have a clue as to what the law is relative to Presidential powers, China, etc., try looking at the Emergency Economic Powers Act of 1977. Case closed!”

Those who believe a president would not take an action economically harmful to many U.S. companies and consumers may not have paid attention to the administration’s increases in tariffs over the past two years – or Trump’s recent statements. The latest example is a comment that at first was interpreted as backing off on the threat to order U.S. companies to leave China. It instead became a reaffirmation of the U.S.-China trade war.

On the morning of August 25, 2019, “[A] reporter asked Trump if he had any ‘second thoughts’ regarding his escalating trade war with China. Trump responded ‘yeah, sure. Why not,’” reported the *Washington Post*. “Might as well,” said Trump. “Might as well. I have second thoughts about everything.”

Shortly after, White House press secretary Stephanie Grisham said, “The president was asked if he had ‘any second thought on escalating the trade war with China.’ His answer has been greatly misinterpreted. President Trump responded in the affirmative — because he regrets not raising the tariffs higher.”

Trade lawyers note the potential scope of a broad use of Trump’s “emergency” powers. “Total US-China trade in goods and services was about \$730 billion last year. And that doesn't really touch cross-border investment (e.g., U.S. cos. operating and selling in China or to other parts of Asia, or Chinese cos. here). Any actual ‘embargo’ would be catastrophic,” according to attorney and Cato Institute adjunct scholar Scott Lincicome.

Attorney Doug McCullough noted multinational companies could try to “put a Chinese Wall between the U.S. and their Chinese” operations. However, as analysts note, sanctions on Iran, Cuba and other countries show such mitigating actions are not easy to accomplish.

One potential limit on the president’s use of this authority is Congress — but only if it is willing to act. According to the law, “The authorities described . . . may not continue to be exercised under this section if the national emergency is terminated by the Congress by concurrent resolution pursuant to section 202 of the National Emergencies Act and if the Congress specifies in such concurrent resolution that such authorities may not continue to be exercised under this section.”

Companies likely never imagined that a president could use “emergency” powers to control transactions around the world totaling hundreds of billions of dollars annually. They do now.