

The Opinion Pages | OP-ED CONTRIBUTOR

Is Trump's Tariff Plan Constitutional?

By REBECCA M. KYSAR JAN. 3, 2017

Among the first steps being floated by the incoming Trump administration is a 5 to 10 percent tariff on imports, implemented through an executive order. It's the sort of shoot-first, ask-questions-later action that President-elect Donald J. Trump promised during the campaign. It's also unconstitutional.

That's because the path to imposing tariffs — along with taxes and other revenue-generating measures — clearly begins with Congress, and in particular the House, through the Origination Clause. When presidents have raised (or lowered) tariffs in the past, they have tended to do so using explicit, if sometimes wide-ranging, authority from Congress.

The founders thought about this issue a lot: After all, taxes, as every grade schooler knows, fueled the colonies' push for independence. So they wrote the Constitution, and its Origination Clause, to give the taxing power to the part of government that is closest to the people, thereby protecting against arbitrary and onerous taxation.

Tariffs were a big deal in the early days of the Republic. The framers believed that a tax on imports would be the country's main source of revenue, and for a while, they were right: For much of the 19th century, tariffs dwarfed other revenue measures in contributing to the federal coffers, with income taxes not rising in

importance until the 20th century. Throughout this period and even today, the House has closely guarded its turf over tariffs, and the Senate has uniformly acquiesced in this arrangement.

So strong is the connection between tariffs and the Origination Clause that early treaties involving tariffs were implemented with legislation that began in the House — even though Article II of the Constitution gives the president the power to make treaties (with advice and consent of the Senate).

True, tariffs are no longer used to raise money, but to protect domestic industries, and to punish foreign ones. But they unquestionably still produce revenue. And while tariffs on imports are aimed at foreigners, they affect domestic industries that use or compete with imports; they can also have an enormous impact on the overall economy by raising consumer prices. Allowing the executive to circumvent the House to enact otherwise unfavorable tax policies that affect Americans is what the clause is designed to avoid — that those furthest removed from the people have the ability to tax them.

While there isn't an enormous body of Supreme Court case law on the Origination Clause, what little there is supports the understanding that the clause would cover tariffs. The court's test seems to set a pretty low bar: While paying lip service to an inquiry of the law's purpose, the court has instead looked at whether a measure funds the general treasury rather than a specific program — a hurdle that tariffs, the money from which almost always goes into the general coffers, would easily clear. Whether the tariff exists to raise money or punish bad trade practices is likely irrelevant.

Indeed, in cases where the court has analyzed the Senate's power to amend tariff legislation originating in the House, the court has never questioned that the bills at issue fell within the scope of the clause, thereby implicitly accepting tariffs as "bills for raising revenue."

Executive orders imposing tariffs would also disrupt the framers' careful constitutional structure. The House's origination privilege was meant to appease the large states in exchange for equal, rather than proportionate, representation in the Senate. It also stood as a counterbalance against the special powers over treaties and

appointments given to the Senate. Mr. Trump could upend this grand bargain by wresting control over tariff policy from the House (and, indeed, Congress altogether).

Mr. Trump would not be the first president to suggest raising revenue by executive action. Last year, President Obama, long criticized for his expansive use of executive authority, eyed unilateral actions on tax matters, with Hillary Clinton and Bernie Sanders voicing support. The taxes at issue then, however, were predominantly to close corporate loopholes. These loopholes were either created by the Treasury or implicated regulatory powers delegated to the agency by Congress, and thus were appropriately in the executive's wheelhouse.

Of course, Mr. Trump doesn't have to act unilaterally; he has Republican majorities in both chambers that are eager to work with him. One option would be to push for a border adjustment tax, a proposal already being floated in the House as part of comprehensive tax reform, which would forbid tax deductions for imports and exempt exports from taxes.

A border adjustment tax is a far better option than tariffs. It would eliminate incentives in the current tax system to manufacture abroad, and to shift income abroad. Unlike a tariff, it aims to be trade neutral, with any changes in consumer pricing of imports and exports being offset by a rise in the dollar. And with strong support in the House, it could be enacted in full compliance with the Origination Clause, lending it legitimacy that a unilateral tariff would lack.

Mr. Trump doesn't need to go it alone in strengthening the domestic economy. He just needs to have the patience to do it in accordance with the Constitution.

Rebecca M. Kysar is a professor at Brooklyn Law School.

Follow The New York Times Opinion section on Facebook and Twitter (@NYTopinion), and sign up for the Opinion Today newsletter.

A version of this op-ed appears in print on January 3, 2017, on Page A23 of the New York edition with the headline: Is Trump's Tariff Plan Constitutional?.

