

The tariff decision is good news in terms of checking arbitrary presidential actions, but the opinions fell short in one important area. A key argument against the tariffs was based on the Major Questions Doctrine (or MQD). That doctrine applies when a government action has “vast political and economic significance” (whatever that means). If the government claims that Congress gave it the power to take such an action, it must point to clear statutory language. The doctrine is controversial in part because no one is quite clear on its basis or when it applies. The tariff decision only made that worse. The Justices took many different positions on the doctrine, deepening the confusion.

Three Justices (Roberts, Gorsuch, and Barrett) applied the doctrine to Trump’s tariffs. But Justice Gorsuch and Justice Barrett completely disagree about the basic nature of the doctrine. Roberts got both their votes by using fuzzy language, so we’re not sure what he thinks. Justice Barrett thinks the MQD merely reflects the commonsense principle that part of the context for understanding a message is our expectations about what kinds of messages are normally expected. Thus, the MQD is based on our expectation of what kind of language Congress would be likely to use to dramatically expand executive power. Barrett doesn’t seem to view the MQD as imposing a special clear statement rule based on the separation of powers. Justice Gorsuch thinks the MQD is completely based on the separation of powers and does impose a special clear statement rule.

Three Justices (Sotomayor, Kagan, and Jackson) reject the MQD as a separate doctrine. But like Barrett, they view the extraordinary nature of an executive action, the vagueness of the statutory language, lack of similar prior use of the language, as all being relevant to the interpretation of the statute. Thus, they view the same factors as relevant to statutory interpretation but don’t think it should be turned into a rigid rule.. The practical difference between their approach and Barrett’s is unclear. [Note: I’ve given this more thought, and I think there is a difference in that in practice Kagan’s approach seems more sensitive to context than Barrett’s.]

Justice Thomas thinks that the MQD applies only to actions that deprive people of property or liberty, and that tariffs don’t fall into this category because they importing goods is a privilege not a right. On this theory, for instance, the MQD would never apply to government spending. So a new President might have broad powers to redesignate funding to fighting climate change. But no one else agreed with Thomas.

Justices Kavanaugh, Thomas, and Alito think that the MQD doesn't apply to foreign affairs. No one else agrees with them. However, because the liberals don't believe in the MQD at all, and Kavanaugh's group don't think it applies to foreign affairs, there would apparently be a majority opposed to using the MQD in foreign affairs cases. That could potentially expand the ability of Presidents and EPA to use foreign affairs authorities to address issues like climate change.

Another takeaway is that the Justices might leave arguments about theory to law professors and just get on with the business of deciding cases, which is after all what they get paid for. Six Justices agreed that Trump was relying on a statute that just didn't apply. They could have saved themselves and everyone else a lot of trouble if they had just stuck with saying that.