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Washington Legal Foundation
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2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302 wlf.org

The "Truth in Tariffs Act": An Unconstitutional Legislative Show Horse

by Zac Morgan

Fisher Ames, one of the drafters of the First Amendment to the Constitution, once commented on the work of the House of Representatives by caustically observing, "Do not ask what we good we do." Many Americans would find that sentiment, written by the great Federalist from Massachusetts in the 18th Century, to be evergreen. Today, all too often, serious legislation has been tabled for messaging work.

That is the best explanation for a bill recently introduced by Representative Jaime Raskin of Maryland. This three-page legislation, the Truth in Tariffs Act, would reportedly make it illegal to "sell to a consumer in the United States a good without displaying to such consumer, in a clear or conspicuous manner, the portion of the price of such good that is attributable to" any tariff "imposed on an emergency or other discretionary basis by the President" which "entered into force on or after January 20, 2025" unless the seller is "deemed to be one which is independently owned and operated and which is not dominant in its field of operation."

Obviously, nobody—including Mr. Raskin, or Senator Chuck Schumer, who intends to sponsor the Senate version of the bill—expects this proposal to be enacted. This is just cheap messaging against the President's trade policy, designed to piggyback off (early and inaccurate) reporting that Amazon.com was planning to voluntarily note two prices on items it sold: (1) the retail price and (2) what the retail price would be but-for the Trump administration's new tariff regime. Doing something of substance, such as attempting to corral veto-proof majorities to amend the relevant trade and sanctions laws to reassert Article I authority, would be hard and require engaging in persuasion. It is far easier to be sarcastic. Enter this show-horse.

But we should resist the easy temptation to dismiss this proposal as a simple joke. Left as a laugh, perhaps it will be brought up again later, without a semblance of a lark. Consider the power being claimed here: making illegal the operation of every merchant in the country above a (hazily defined) certain size who declines to talk about tariff policy in a manner conducive to the partisan interests of the Congress. This is, as the Supreme Court exclaimed in an admittingly different context, "a proposition so startling as to arrest attention and demand the gravest consideration."

In Senator Schmuer's remarks on the Act, he contended that its strictures are "no different than when your utility bill shows fees or a receipt shows if a service charge is included or not." Well, only if one ignores the distinction between acts taken voluntarily and acts taken under coercion. By forcing entities to list a "pre-tariff" and "post-tariff" price, the Truth in Tariffs Act converts speech that does no more than propose a commercial transaction (purchase X item for Y dollars), into a

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Zac Morgan is a Senior Litigation Counsel at WLF.

political message. Or as Senator Schumer aptly put it, the Act intends to demonstrate that "increases in prices are not [a retailer's] fault. It's Trump's fault, with his tariffs." The secondary goal? Galvanizing American customers to "call their Republican Senators and Congressmembers and [advocate that they]…join the Democrats and pass some of our legislation that would repeal some of these tariffs" once consumers "know how much these tariffs are damaging them."

By its supporters' own admission, then, the Truth in Tariffs Act is about compelling American retailers to engage in state-approved political speech to prop up the one party's political fortunes. If this is legal—and it is not—it would also be constitutional for Congress to require this two-tiered system of prices: (1) the retail price and (2) what the retail price would be but-for an economic expansion unleashed by an earlier tax cut or other economic stimulus. Or, for that matter, Congress could mandate that every advertised-price in the country be accompanied by a fundraising pitch for the party in power.

Thankfully, the Truth in Tariffs Act is—to use a legal term of art—insanely unconstitutional. As the Supreme Court noted in 1988 in *Riley v. Nat'l Fed'n of the Blind*, it:

> [W]ould not immunize a law requiring a speaker favoring a particular government project to state at the outset of every address the average cost overruns in similar projects, or a law requiring a speaker favoring an incumbent candidate to state during every solicitation that candidate's recent travel budget. Although the foregoing factual information might be relevant to the listener, and, in the latter case, could encourage or discourage the listener from making a political donation, a law compelling its disclosure would clearly and substantially burden the protected speech.

The First Amendment's guarantees are the same today.

Unfortunately, one can see why Raskin and Schumer believed that this bill might go viral without attendant concern for the power they are claiming. America is awash with unconstitutional compelled speech regimes that fail the First Amendment's exacting test, from campaign finance mandates that sponsors "stand by their ad" to cancer warnings predicated on unscientific evidence. Advocates of such compelled speech regimes never bother to do the homework to tailor their demands to a real and vital emergency need—and all too often, the courts have let them get away with it.

Until there's a sharp judicial correction, we expect that legislators and the media will continue to treat the Constitution as a useless annoyance that gets in the way of a good story. And the Congress will never understand why so many Americans cannot say what good they do.