

## ARTICLE

# TRADE, TARIFFS, SANCTIONS AND SECURITY: A FRAMEWORK FOR JUDICIAL REVIEW

C. Alexander Evans\*

*National security and international trade, and their intersections, have become critical focuses for recent administrative action. It was once rare to invoke national security as a justification for tariffs and restriction on foreign investment, but it has now become increasingly common. Courts reviewing these measures have largely defaulted to deferential approaches developed in an earlier era—one in which such actions were infrequent and rarely litigated. But in an era where assertions of national security are more common, this dogmatic jurisprudential approach lacks coherence. A new framework is needed to better guide judicial review.*

*This Article proposes that new framework. It identifies a distinction between two categories of justifications: Category I restraints, which seek to prevent adversaries from acquiring strategic advantages; and Category II restraints, which aim to shore up perceived weaknesses in the domestic industrial base. Category I restraints are more likely to involve classified information and fall within the President's core foreign affairs authority, thus warranting substantial judicial deference. Category II restraints, by contrast, often resemble conventional economic regulation and rely on publicly available information, thereby falling more squarely within the judiciary's competence to assess under established administrative law principles.*

*The framework introduced in this Article provides a doctrinally grounded and judicially administrable approach that allows courts to calibrate deference in*

---

\*Assistant Professor of Law, University of Florida Levin College of Law. I am grateful to Ben Johnson and Wentong Zheng at the University of Florida for their help in developing the argument in this Article. I am also grateful to Garrett Snedeker, Andrew Morris, John Vecchione, Eugene Meyer and Mark Chenoweth for their work with NCLA on litigation related to this Article and for their comments on earlier drafts. Steven Shepard at Susman Godfrey, Aviel Menter at Irell & Manella and Joshua Livingston all provided helpful suggestions that have improved the quality of this Article. Finally, I am grateful to my research assistant Isaac Shore and to the outstanding editorial team at the *Stanford Law & Policy Review* for numerous suggestions that significantly strengthened this Article.

*national security cases. This Article thus helps to clarify the proper legal structure of this rapidly evolving area of law and provides guidance for the growing number of cases that are now making their way through the courts.*

## TABLE OF CONTENTS

INTRODUCTION.....	41
I. NATIONAL SECURITY RESTRAINTS ON INTERNATIONAL COMMERCE.....	44
A. The Committee on Foreign Investment in the United States ....	46
B. Tariffs & Related Restraints .....	48
II. THE CURRENT DOCTRINAL FRAMEWORK .....	52
A. Dames & Moore v. Regan .....	53
B. United States v. Yoshida International .....	55
C. Recent Cases .....	59
III. A NEW FRAMEWORK.....	64
A. Category I Restraints .....	65
B. Category II Restraints .....	68
C. How Much Deference? .....	70
D. A Scale not a Switch.....	72
E. Applying the Framework.....	74
F. Reflective Equilibrium.....	79
CONCLUSION .....	81

## INTRODUCTION

*“What protection teaches us, is to do to ourselves in times of peace what enemies seek to do in times of war.”<sup>1</sup>*

Henry George

Over the last ten years, the use of national security justifications to justify restraints on international commerce has surged.<sup>2</sup> The two primary national security restraints—merger or foreign investment controls, and tariffs—were used

---

1. HENRY GEORGE, PROTECTION OR FREE TRADE 51 (1886).

2. For an analysis of the Committee on Foreign Investment in the United States (CFIUS), see Paul Connell & Tian Huang, Note, *An Empirical Analysis of CFIUS: Examining Foreign Investment Regulation in the United States*, 39 YALE J. INT’L L. 131, 135-38 (2014) (describing the relatively rare use of CFIUS between 1975-1995); Amy D. Westbrook, *Securing the Nation or Entrenching the Board? The Evolution of CFIUS Review of Corporate Acquisitions*, 102 MARQ. L. REV. 643, 662-65 (2018) (same).

infrequently, and as recently as fifteen years ago, the Committee on Foreign Investment in the United States (“CFIUS”) almost never actually blocked transactions.<sup>3</sup> Meanwhile tariffs, which had once been the primary source of government revenue, were lowered dramatically in the Long Peace following the Second World War. Raising tariffs was controversial, generally signaled far in advance, and subjected to a lengthy formal policy process.<sup>4</sup>

Times have changed.<sup>5</sup> When CFIUS was used to partially block a merger between U.S. Steel and Nippon Steel, it made the headlines<sup>6</sup>—but it was part of a much broader trend of heightened CFIUS scrutiny.<sup>7</sup> Meanwhile, the TikTok ban saga has continued, with new twists and turns each month. Now the newest wrinkle is a forced sale that, like the “golden share” required for the Nippon Steel merger, is largely unprecedented in the American policy experience.<sup>8</sup> And the Trump Administration has invoked another national security statute—the International Emergency Economic Powers Act (IEEPA)—to rapidly impose sweeping tariffs for the first time since IEEPA was enacted.<sup>9</sup>

With these acts, national security restrictions have leapt into the headlines of major American newspapers. The Trump Administration’s assertion of

3. See Farhad Jalinous & Timothy Sensenig, *Keeping Up with CFIUS: A Practitioner’s Report on National Security Trends in the United States*, 15 ERASMUS L. REV. 266, 266 (2022) (describing CFIUS as, until recently, “a small advisory body shrouded in obscurity”).

4. See George S. Georgiev, Comment, *The Reformed CFIUS Regulatory Framework: Mediating Between Continued Openness to Foreign Investment and National Security*, 25 YALE J. ON REG. 125, 126-28 (2008); see also Peter H. Lindert, *U.S. Foreign Trade and Trade Policy in the Twentieth Century*, in 3 THE CAMBRIDGE ECONOMIC HISTORY OF THE UNITED STATES 408, 454-55 (Stanley Engerman & Robert Gallman eds., 1996); PHILLIP W. MAGNESS, CATO INST., THE PROBLEM OF THE TARIFF IN AMERICAN ECONOMIC HISTORY, 1787-1934, (Sept. 2023), <https://perma.cc/GFT4-CB9D> (“By the end of World War II, the average U.S. tariff rate on dutiable goods dropped from almost 60 percent under Smoot[-]Hawley to less than 30 percent, without formally changing the tariff schedule.”).

5. See Patrick Griffin, Note, *CFIUS in the Age of Chinese Investment*, 85 FORDHAM L. REV. 1757, 1777-87 (2017) (describing increasing use of CFIUS).

6. Ken Moriyasu, *Biden to Block Nippon Steel’s Acquisition of U.S. Steel: Report*, NIKKEI (Jan. 3, 2025), <https://perma.cc/7WY7-2CB8>.

7. *Id.*

8. Sapna Maheshwari, Amanda Holpuch & Emmett Lindner, *What to Know About Trump’s Deal to Prevent a TikTok Ban*, N. Y. TIMES (Jan. 17, 2025), <https://perma.cc/R8FK-9HYV> (“Concerns that the Chinese government could manipulate content and gain access to sensitive user data through the app, which is owned by the Chinese company ByteDance, prompted Congress to pass legislation to ban the social media platform unless it was sold to a government-approved buyer.”).

9. See Madeline Ngo, *What to Know About the Emergency Law Trump Used to Impose Tariffs*, N. Y. TIMES (Feb. 2, 2025), <https://perma.cc/L2SR-LSRM> (“No president has previously used IEEPA to put tariffs on imported goods . . . .”); see also E. Maddy Berg, Note, *A Tale of Two Statutes: Using IEEPA’s Accountability Safeguards to Inspire CFIUS Reform*, 118 COLUM. L. REV. 1763, 1765 (2018) (describing the role of IEEPA in a different context to swiftly reform other aspects of U.S. policy). These tariffs have had a major effect on overall trade policy; cf. Ben Chu, *The Impact of Trump Tariffs Ruling-In Numbers*, BBC (May 29, 2025), <https://perma.cc/SKC5-ZM4D> (illustrating mathematically how significantly the new tariffs have departed from historical policy and changed U.S. tariff policy).

expansive, unilateral power to regulate global trade through national security tools demands a more rigorous theoretical framework to delineate the limits of that authority.<sup>10</sup> But while the visibility of trade law and national security practice has exploded, the legal academy has not yet caught up, and as a result, courts and scholars lack a comprehensive theoretical framework from which to evaluate cases.<sup>11</sup>

This Article provides that framework by distinguishing between two justifications for national security restraints.<sup>12</sup> The first category of justification focuses on preventing strategic enemies from becoming stronger, typically by acquiring dangerous information that they could use in a strategic conflict. The second category of justification focuses on preventing structural weaknesses in our own national security—by, for instance, protecting domestic capacity, or by otherwise safeguarding an important strategic or military asset.

When the Executive justifies national security restraints by asserting that a challenged commercial act would make America's strategic enemies stronger—as when, for example, CFIUS forced a China-controlled parent company to divest an investment because of fears that the Chinese military would siphon jet-engine manufacturing technology<sup>13</sup>—courts should continue to approach the challenged action with deference, mindful that the President is acting squarely within his role as Commander-in-Chief and that the Executive Branch may have access to secret information justifying the policy.<sup>14</sup> However, when the Executive justifies national security restraints by asserting that the restraint will prevent America from becoming strategically weaker—as when, for example, the government sought to prevent Nippon Steel from acquiring U.S. Steel<sup>15</sup>—courts should approach the decision with much less deference. In such cases, courts should be mindful that the Executive is more likely to be using national security as a pretext for economic policy and that the Executive is comparatively much

---

10. See Christopher M. Tipler, Note, *Defining 'National Security': Resolving Ambiguity in the CFIUS Regulations*, 35 U. PA. J. INT'L L. 1223, 1225 (2013) (discussing the need for further theoretical clarity even before the current expansive use of CFIUS); Jonathan W. Ellison, Note, *Trust the Process? Rethinking Procedural Due Process and the President's Emergency Powers over the Digital Economy*, 71 DUKE L.J. 499, 504-05 (2021) (highlighting the importance of further theoretical work to help better balance constitutional requirements with emergency policymaking).

11. See Christopher M. Fitzpatrick, Note, *Where Ralls Went Wrong: CFIUS, the Courts, and the Balance of Liberty and Security*, 101 CORN. L. REV. 1087, 1092 (2016) (exploring struggles that impacted the Court's decision-making in *Ralls*); cf. Arthur S. Miller, *Dames & Moore v. Regan: A Political Decision by a Political Court*, 29 UCLA L. REV. 1104, 1109-10 (1981) (discussing *Dames & Moore* and the absence of other precedential cases in this area).

12. See *infra* Part III.

13. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-T-NSIAD-90-21, *The President's Decision to Order a Chinese Company's Divestiture of a Recently Acquired U.S. Aircraft Parts Manufacturer*, at 1 (1990).

14. See *infra* Part III(A).

15. *Nippon Steel Calls Biden out for 'Illegally' Blocking Deal*, ASAHI SHIMBUN (Jan. 7, 2025), <https://perma.cc/ZGG6-VTPK>.

less likely to have secret information justifying its decisions.<sup>16</sup>

The Article proceeds as follows. Part I first describes national security restraints on trade, a subcategory of regulatory acts. Second, Part I explores the history of national security restraints, with an emphasis on CFIUS<sup>17</sup> and on U.S. tariff policy. Next, Part II explores the doctrinal framework courts currently often employ to review national security restraints. As this Part shows, the current muddled approach often results in strained interpretations and inconsistent decision-making. Finally, Part III introduces the distinction at the heart of this Article, between constraints that seek to prevent enemies from becoming stronger and constraints that seek to prevent the United States from becoming weaker. Part III explores how these constraints are imposed, how they differ, and how they overlap. After exploring these issues, Part III applies this new framework to current and hypothetical national security restraints, showing how this new framework captures intuitive ideas about how these restraints should be reviewed.<sup>18</sup>

#### I. NATIONAL SECURITY RESTRAINTS ON INTERNATIONAL COMMERCE

*“National security is a chessboard created by diplomacy.”*<sup>19</sup>

Nobukatsu Kanehara, Assistant Chief Cabinet Secretary of Japan, 2013-19

Nearly all restraints on commerce require policy tradeoffs.<sup>20</sup> If the government prevents a merger, some shareholders will be harmed.<sup>21</sup> Similarly, if a company is forced to spin off a subsidiary, that company is harmed.<sup>22</sup> These costs are justified, ostensibly, by the gain that comes from implementing the restraint.<sup>23</sup> And it is normally justified through domestic policy arguments that explain why the tradeoff is worth it.<sup>24</sup> In many cases, these domestic policy arguments seem

---

16. See *infra* Part III(B). See also Lee R. Marks & John C. Grabow, *President’s Foreign Economic Powers After Dames & Moore v. Regan: Legislation by Acquiescence*, 68 CORN. L. REV. 68, 103 (1982).

17. See *infra* Part I.

18. See *infra* Part III(C); see also Joseph Raz, *The Claims of Reflective Equilibrium*, 25 INQUIRY 307, 308-09 (1982).

19. Nobukatsu Kanehara, *Japan’s Grand Strategy—State, National Interests and Values*, Japan Inst. of Int’l Affs. (2001), <https://perma.cc/63RU-DLTG>.

20. See Joel P. Tratchman, *Trade and . . . Problems, Cost-Benefit Analysis and Subsidiarity*, 9 EURO. J. INT’L L. 32, 33 (1998).

21. See Gaurav Sud, Note, *From Fretting Takeovers to Vetting CFIUS: Finding a Balance in US Policy Regarding Foreign Acquisitions of Domestic Assets*, 39 VAND. J. TRANSNAT’L L. 1303, 1320-26 (2006).

22. Cf. David Godsell, Ugur Lel & Darius Miller, *Financial Protectionism, M&A Activity, and Shareholder Wealth*, 2 (SMU Cox Sch. of Bus. Rsch. Paper 2018) (analyzing impact of CFIUS review on share prices and shareholder wealth).

23. See Georgiev, *supra* note 4, at 129-130.

24. See, e.g., Mission Statement, FTC, <https://perma.cc/US4M-77RK> (“The FTC’s mission is protecting the public from deceptive or unfair business practices and from unfair

to have worked—some domestic restraints, like regulations against monopolies or laws seeking to protect workers rights, are quite popular.<sup>25</sup> Other restraints, though, are justified not by domestic policy but rather by an asserted risk to national security.<sup>26</sup> Because the President has a central constitutional role in protecting national security, invoking national security as a justification is often very effective politically.<sup>27</sup>

Historically, the most prominent of these restraints on international commerce justified by national security have been restrictions on corporate acquisitions, business investment decisions, and tariffs.<sup>28</sup> The Constitutional authority to take these actions rests with Congress, so where the Executive has been involved, it has been pursuant to Congressional statutes that grant broad powers to regulate.<sup>29</sup>

The most prominent Executive policymaking tool for merger control is CFIUS. CFIUS has historically used its powers sparingly—but that has changed recently.<sup>30</sup> These tools have evolved since the early 20th century when alternative restrictions like tariffs and other tax-based restraints were in force. But these were lowered over many decades following the Second World War.<sup>31</sup> Because

---

methods of competition through law enforcement, advocacy, research, and education.”); *see also* Mancur Olson, *THE RISE AND DECLINE OF NATIONS* 44, 142 (1982).

25. *See* Leah Nysten, *It’s the Antitrust Era for 2024 Voters Suspicious of Big Companies*, BLOOMBERG (Oct. 21, 2024), <https://perma.cc/WV48-SZYZ> (“More than 65% of voters recently polled in the seven crucial presidential battleground states and Ohio support the government suing to break up monopolies and economically powerful companies.”); Maryann Cousens, *Creating a Nationwide Paid Leave Program and Bolstering Medicare’s Negotiating Power are Overwhelmingly Popular*, NAVIGATOR RESEARCH (Sept. 6, 2024), <https://perma.cc/A7ZS-C3MD> (“Three in four Americans say it is important that a national paid family and medical leave plan is passed.”).

26. *See, e.g.*, Exec. Order No. 14,193, 90 Fed. Reg. 9113 (Feb. 7, 2025) (“By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) . . .”); *cf.* Kathleen Claussen, *Trade’s Security Exceptionalism*, 72 STAN. L. REV. 1097, 1115-26 (2020) (exploring the role of national security in justifying some restraints on international commerce). For more on the role that emergency declarations play in these justifications, *see* Aditya Bamzai, *Sanctions and the Emergency Constitution*, 172 U. PA. L. REV. 1917, 1946-54 (2024).

27. *Cf.* William C. Banks & M. E. Bowman, *Executive Authority for National Security Surveillance*, 50 AM. UNIV. L. REV. 1, 68-74 (2000) (exploring the broad constitutional authority granted to the Executive for national security actions).

28. *See id.*

29. *See* Kathleen Claussen & Timothy Meyer, *Economic Security and the Separation Of Powers*, 172 U. PA. L. REV. 1955, 1956-57, 1959-60, 1980 (2024).

30. *See* Jalinous & Sensenig, *supra* note 3, at 266-69; *see also* Daniel Meagher, *Caught in the Economic Crosshairs: Secondary Sanctions, Blocking Regulations, and the American Sanctions Regime*, 89 FORDHAM L. REV. 999, 1003-04 (2020) (describing the history of economic sanctions and the increasing use of secondary sanctions over time).

31. *Cf.* MAGNESS, *supra* note 4 (“Almost overnight, the [Smoot-Hawley Tariffs] raised average tariff rates to nearly 60 percent [in 1929], a level unseen since . . . a century prior.”); Tyler Halloran, *A Brief History of Tariffs in the United States and the Dangers of their Use Today*, FORDHAM J. OF CORP. AND FIN. L. (Mar. 17, 2019), <https://perma.cc/MLZ4-DCYY>

the use of CFIUS's powers has recently expanded and historically been used sparingly, this area of law has been undertheorized.<sup>32</sup>

#### A. The Committee on Foreign Investment in the United States

CFIUS is one of the primary tools for imposing national security constraints on international commerce. CFIUS derives its primary authority from Section 721 of the Defense Production Act and from related implementing regulations.<sup>33</sup> These regulations have been modified over time as Congress has responded to political forces.<sup>34</sup> For example, in 2007, concerned by a proposed purchase of the commercial operations of six U.S. ports by a firm based in the United Arab Emirates, Congress passed the Foreign Investment and National Security Act of 2007, giving CFIUS additional statutory authority.<sup>35</sup> Later, in 2018, Congress passed the Foreign Investment Risk Review Modernization Act, expanding CFIUS's jurisdiction and review process.<sup>36</sup> CFIUS currently consists of nine members: the Secretaries of Treasury, State, Defense, Homeland Security, Commerce, and Energy; the Attorney General; the U.S. Trade Representative; and the Director of the Office of Science and Technology Policy.<sup>37</sup> The President can appoint other officials to serve on a case-by-case basis.<sup>38</sup>

---

(“At the end of World War II, tariffs were decreased substantially . . .”).

32. Cf. Claussen, *supra* note 26, at 1131 (noting that trade law in the national security context is understudied and “undertheorized”).

33. Pub. L. No. 81-932, § 721, 64 Stat. 798, 822 (1950) (codified at 50 U.S.C. § 4565). These regulations include, for example, 31 C.F.R. Chapter VIII. CFIUS was initially created and operated through a series of executive orders. *See, e.g.*, Exec. Order No. 11,858, 3 C.F.R. 990 (1971-1975), (“There is hereby established the Committee on Foreign Investment in the United States (hereinafter referred to as the Committee).”)

34. In 1988, Congress became concerned by several high-profile recent acquisitions of U.S. firms (especially defense-related firms) by Japanese companies. With these concerns in mind, Congress passed the “Exon-Florio” amendment to the DPA, which codified the process. *See Omnibus Trade and Competitiveness Act of 1988*, Pub. L. No. 100-418, § 5021, 102 Stat. 1425 (codified at 50 U.S.C. § 4565).

35. *See Paul Rose, The Foreign Investment and National Security Act of 2007: An Assessment of its Impact on Sovereign Wealth Funds and State-Owned Enterprises* in RESEARCH HANDBOOK ON SOVEREIGN WEALTH FUNDS AND INTERNATIONAL INVESTMENT LAW 145, 152 (Fabio Bassan ed., 2015).

36. Foreign Investment Risk Review Modernization Act of 2018, Pub. L. No. 115-232, tit. XVII, 132 Stat. 2174, 2174-2238 (codified as amended in scattered sections of the U.S. Code.)

37. *See* THEODORE MORAN, THREE THREATS: AN ANALYTICAL FRAMEWORK FOR THE CFIUS PROCESS 2 (2009) (also noting that the Secretary of Labor and Director of National Intelligence (DNI) are nonvoting, ex officio members of CFIUS, in addition to five other White House offices that also participate in CFIUS, including the Council of Economic Advisers and the National Security Council); *see also* Madison Cash, Note, *Reversing CFIUS: Analyzing the International and Constitutional Implications of the Revised National Critical Capabilities Defense Act*, 33 DUKE J. COMP. & INT'L L. 289, 291-93 (2022).

38. *See* 50 U.S.C. § 4565 (k)(2)(J). The CFIUS authorizing statute states, “The President may exercise the authority [to suspend or prohibit any covered transaction that threatens to

Between 1975, when CFIUS was created, and 2018, CFIUS blocked just five transactions.<sup>39</sup> All five of these cases implicated bona fide national security interests.<sup>40</sup> However, the number of transactions blocked and the likelihood of CFIUS blocking a transaction under review are not only expanding, but there is every reason to think that will continue.<sup>41</sup> Presidents from both parties have found that CFIUS presents an attractive regulatory tool because it operates in secret and can act without a public economic justification.<sup>42</sup> This independence—and a tradition of judicial deference in national security—makes CFIUS hard to fight.<sup>43</sup> And because CFIUS has only recently become an active part of cross-border mergers and acquisitions, there are surprisingly few doctrinal authorities.<sup>44</sup>

Until recently, there was just one federal challenge to CFIUS to go to judgment: the 2014 case of *Ralls v. CFIUS*.<sup>45</sup> In *Ralls*, a corporation with Chinese owners purchased four plots of land near an American military base.<sup>46</sup> The company filed a notice with CFIUS, initiating a review.<sup>47</sup> CFIUS recommended that President Obama block the acquisition and demand that the company divest.<sup>48</sup> President Obama accepted that recommendation and correspondingly ordered the company to sell the land near the base.<sup>49</sup> The company refused and sued, alleging that the Takings Clause barred President Obama's order.<sup>50</sup> A federal district court initially ruled in favor of the government, holding that federal courts

---

impair the national security of the United States], only if the President finds that—(A) there is credible evidence that leads the President to believe that a foreign person that would acquire an interest in a United States business or its assets as a result of the covered transaction might take action that threatens to impair the national security; and (B) provisions of law, other than this section and the International Emergency Economic Powers Act [50 U.S.C. § 1701 *et seq.*], do not, in the judgment of the President, provide adequate and appropriate authority for the President to protect the national security in the matter before the President.” See 50 U.S.C. § 4565 (d)(4).

39. Noah Berman, *Why Biden Wants to Block the Nippon-U.S. Steel Deal*, COUNCIL ON FOREIGN RELS. (Sept. 6, 2024), <https://perma.cc/MQ8G-UKJF> (“Between the creation of CFIUS in 1975 and 2018, presidents blocked foreign-investment transactions just five times.”).

40. *Cf. Berg, supra* note 9, at 1768 (noting the five foreign investments blocked by CFIUS but not specifying their national security backgrounds).

41. Heath P. Tarbert, *Modernizing CFIUS*, 88 GEO. WASH. L. REV. 1477, 1511-24 (2020).

42. See Tipler, *supra* note 10, at 1226-31.

43. *Cf. Vania Wang, Essay, A New CFIUS: Refining the Committee’s Multimember Structure with for-Cause Protections*, 90 GEO. WASH. L. REV. 1316, 1339-44 (2022) (describing limits on congressional and judicial review of CFIUS decisions).

44. See Jingli Jiang & Gen Li, *CFIUS: For National Security Investigation or for Political Scrutiny*, 9 TEX. J. OIL GAS & ENERGY L. 67, 93-94 (2013).

45. *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 758 F.3d 296 (D.C. Cir. 2014).

46. *Id.* at 304.

47. *Id.* at 305.

48. *Id.* at 305.

49. *Id.* at 306.

50. *Id.* at 306.

could not review CFIUS decisions—and that, in any case—the company’s due process rights had not been violated (and moreover, that even if they had been, the revenue from the company’s sale of the land was sufficient compensation).<sup>51</sup> Ralls appealed, and the D.C. Circuit reversed.<sup>52</sup> In a narrow opinion, the court held that the process used by CFIUS, which heavily involved classified material and gave Ralls very little opportunity to respond, violated the company’s due process rights.<sup>53</sup> The court remanded for further reconsideration, but the parties settled shortly afterward, and the company was ultimately not required to divest.<sup>54</sup>

Recently, two other high-profile federal challenges were filed in response to CFIUS investigations. In 2020, TikTok sued to block an order barred it from operating in the United States.<sup>55</sup> Then, in 2024, Nippon Steel filed a legal challenge against the U.S. government after President Biden blocked Nippon Steel’s acquisition of U.S. Steel.<sup>56</sup> Although both lawsuits represented robust challenges to a controversial use of CFIUS, both cases have since been largely rendered moot by changing policy decisions from the Trump Administration. Correspondingly, neither case is likely to leave a significant judicial precedent.

## B. Tariffs & Related Restraints

Tariffs are an across-the-board restraint on commerce. Over the past fifty years, nearly all tariffs have been imposed for economic policy reasons.<sup>57</sup> One reason for this is that major international treaties, such as the General Agreement on Tariffs and Trade (GATT), have bound or capped tariff rates except for rates imposed for specific reasons.<sup>58</sup> Tariffs imposed for these reasons generally

---

51. *Id.* at 306-07.

52. *Id.* at 302.

53. *Id.* at 319-20.

54. See Kristen E. Eichensehr & Cathy Hwang, *National Security Creep in Corporate Transactions*, 123 COLUM. L. REV. 549, 592 n.213 (2023).

55. Complaint at 1, *TikTok, Inc. v. Trump*, 507 F. Supp. 3d 92 (D.D.C., Sept. 18, 2020) (No. 20-cv-02658), ECF No. 1. This case was ultimately dismissed after President Biden rescinded the Executive Order. See *TikTok, Inc. v. Biden*, No. 20-cv-5381, 2021 WL 3082803, at \*1 (July 14, 2021), *appeal dismissed per stipulation*. However, litigation surrounding the case led to *TikTok, Inc. v. Garland*, 145 S. Ct. 57 (2025), and other related litigation—and the controversy surrounding TikTok remains ongoing.

56. Alexandra Alper, Aatreyee Dasgupta & Yuka Obayashi, *U.S. Steel, Nippon Sue Biden Administration over Decision to Block Merger*, REUTERS (Jan. 6, 2025), <https://perma.cc/TB5J-BZ2V> (“U.S. President Joe Biden unlawfully blocked Nippon Steel’s \$14.9 billion bid for U.S. Steel through a sham national security review, the companies alleged in a lawsuit filed on Monday.”).

57. See also 19 U.S.C. §§ 2411-2420 (granting the Office of the United States Trade Representative (USTR) a range of responsibilities and authorities to investigate and take action to enforce U.S. rights under trade agreements and respond to certain foreign trade practices that may constitute unfair competition).

58. Cf. Raj Bhala, *National Security and International Trade Law: What the GATT Says, and What the United States Does*, 19 U. PA. J. INT’L ECON. L. 263, 266-280 (1998) (discussing

require approval through complicated and specific administrative processes, and American treaty commitments oblige the United States to extend the benefits of low tariffs to other countries regardless of policymakers' views. These treaties generally mandate an extensive review period before tariffs are imposed.

One example of this process came during the first Trump Administration, when the United States launched a thorough investigation into dumping and other potential violations of trade law in the steel industry. Deploying authorities like Section 301 of the Trade Act of 1974, the Trump Administration imposed significant duties to remedy what the Administration viewed as a violation of U.S. trade interests. While tariffs imposed through this process are common and very important in trade policy more broadly, their justification is rarely based on national security and therefore these sorts of tariffs are not really within the scope of this Article.

Along with these tariffs, however, President Trump this year began imposing broad tariffs based on national security concerns through the International Emergency Economic Powers Act (IEEPA), an emergency law designed to allow the executive to take swift action.<sup>59</sup> IEEPA permits the President to bypass ordinary procedures and regulate broadly during a declared national emergency. Past presidents have frequently invoked IEEPA to impose economic sanctions, such as those against Iran,<sup>60</sup> Russia,<sup>61</sup> North Korea, and Venezuela. But prior to the current administration, IEEPA had not been used to justify tariffs.<sup>62</sup>

Congress initially enacted IEEPA in 1977, and—rather ironically, given the current disputes over its broad use—the original purpose was actually to reduce the frequency of emergency regulation. Following Watergate, Congress was

---

requirements under the GATT that bind or cap the maximum allowable tariff rate under the principle of Most Favored Nation trade status).

59. See, e.g., Exec. Order No. 14,193, 90 Fed. Reg. 9113 (Feb. 7, 2025) (“By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) . . .”).

60. See Exec. Order No. 13,902, 85 Fed. Reg. 2003 (Jan. 14, 2020) (“By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) . . .”); see also MI News Network, *U.S. Sanctions Vessels Funding Iran's Nuclear Program & Terrorist Activities*, MARINE INSIGHT (Dec. 20, 2024), <https://perma.cc/8CVW-KBE9>.

61. See Exec. Order No. 14,024, 86 Fed. Reg. 20249 (Apr. 15, 2021) (“By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) . . .”).

62. *Learning Res., Inc. v. Trump*, 784 F. Supp. 3d 209, 226 (D.D.C. 2025) (“In the five decades since IEEPA was enacted, no President until now has ever invoked the statute—or its predecessor, TWEA—to impose tariffs.”). President Richard Nixon imposed a 10% ad valorem tariff on all imports through the Trading with the Enemy Act of 1917 (TWEA). Additionally, during the first Trump Administration, the United States raised the prospect of using IEEPA to impose new tariffs on Mexican imports in response to concerns about border security. However, after the Mexican government changed policies, the United States dropped the issue. See Tom Campbell, *Presidential Authority to Impose Tariffs*, 83 LA. L. REV. 595, 596-98 (2023).

keen to limit Executive power.<sup>63</sup> By 1977, Congress had become particularly concerned by the broad powers delegated through prior emergency laws, such as the Trading With the Enemy Act (TWEA).<sup>64</sup> Although different in structure than IEEPA, TWEA had been used to impose sanctions on North Korea,<sup>65</sup> China, and other countries.<sup>66</sup> This troubled some members of Congress, but even more troubling was the use of TWEA for purposes less clearly related to national security such as the use, in 1933, to justify President Roosevelt’s bank holiday.<sup>67</sup> With these concerns in mind, Congress structured IEEPA to require that emergency powers would only be available if the Executive could meet additional substantive and procedural limitations.<sup>68</sup>

Correspondingly, while IEEPA’s text carried over many of TWEA’s provisions, it made many amendments, including the new restriction that IEEPA powers could only be invoked after the President declared a national emergency under the National Emergencies Act (NEA).<sup>69</sup> Congress also initially provided for the legislative veto to overturn this through a simple majority not subject to a presidential veto—though the Supreme Court’s 1983 decision in *INS v. Chadha* subsequently held that this provision violates checks and balances.<sup>70</sup>

Congress also clearly intended that IEEPA, like other emergency regulations, would be used sparingly. The House report accompanying IEEPA stated that “emergencies are by their nature rare and brief . . . .”<sup>71</sup> Despite this, as with TWEA, IEEPA has been used widely. For example, IEEPA was used recently to impose trade sanctions on Russia after it invaded Ukraine in February 2022—a

63. James M. West, *The United States Embargo on Trade with North Korea*, 20 KOREAN J. COMP. L. 1, 6-7 (1992). For further discussion, see Brief of New Civil Liberties Alliance as Amicus Curiae in Support of Plaintiffs-Appellees at 2-3, *V.O.S. Selections v. Trump*, 149 F.4th 1312 (Fed. Cir. 2025), (Nos. 25-1812 & 25-1813), ECF No. 99 [hereinafter New Civil Liberties Alliance Brief]. See also Samuel Estreicher & Andrew Babbitt, *Are Tariffs an Emergency Power?* 2-3 (NYU Sch. of L., Pub. L. Rsch. Paper Forthcoming, 2025), <https://perma.cc/5PS2-K4UJ>.

64. West, *supra* note 63, at 8 (“The IEEPA was enacted due to widespread dissatisfaction with the broad powers several presidents had invoked . . . .”).

65. *Id.* at 5-6 (describing how TWEA was applied to Soviet satellite countries like North Korea).

66. Nadine Rabah, *Sanctions: A Tool of Modern Peace or an Economic Weapon of War?*, 26 CURRENTS: J. INT’L ECON. L. 29, 30-31 (2024).

67. See Ayodeji George, *United States: National Bank Holiday, 1933*, 7 J. FIN. CRISES 191, 193 (2025).

68. See *V.O.S. Selections, Inc. v. United States*, 772 F. Supp. 3d 1350, 1374-75 (Ct. Int’l Trade), *aff’d in part, vacated in part, remanded sub nom.*, *V.O.S. Selections, Inc. v. Trump*, 149 F.4th 1312 (Fed. Cir. 2025), *cert. granted*, No. 25-250, 2025 WL 2601020 (U.S. Sept. 9, 2025).

69. International Emergency Economic Powers Act, Pub. L. No. 95-223, § 202, 91 Stat. 1625, 1626 (1977) (codified at 50 U.S.C. § 1701(b)) (“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 . . . .”).

70. *Immigr. & Naturalization Serv. v. Chadha*, 462 U.S. 919, 957-59 (1983).

71. H.R. REP. NO. 95-459, at 10 (1977).

use of IEEPA that continues to enjoy bipartisan support.<sup>72</sup> Far more controversial though is the application of IEEPA through tariffs. The Trump Administration has consistently grounded its most aggressive and sweeping tariffs in IEEPA and, because of that, has made sure to identify a perceived national security threat in each case. Executive Orders 14193 and 14194, for example, cited the domestic U.S. fentanyl crisis, and imposed a blanket across-the-board 10% ad valorem tariff through IEEPA on Canada and a 25% tariff on Mexico.<sup>73</sup> Although Canada and Mexico are both traditional U.S. allies as well as parties to NAFTA and its successor treaty, the USMCA,<sup>74</sup> both Executive Orders identify their role in the fentanyl crisis as a national security threat. Similarly, Executive Order 14195 imposed a 10% ad valorem tariff against China, ostensibly because of China's support for the fentanyl trade and because of other actions taken by China that harm US national security.<sup>75</sup> Unlike Executive Orders 14193 and 14194, Executive Order 14195 took effect,<sup>76</sup> this after negotiations between the Trump Administration and the Chinese government broke down.<sup>77</sup> This has had profound downstream effects on American firms because of the substantial volume of trade between the United States and China.<sup>78</sup> Similarly, the so-called Liberation Day tariffs announced on April 2nd, 2025, through Executive Order 14257, also invoke national security concerns<sup>79</sup> and have also had a profound impact on business. Naturally, this downstream impact has led to extensive litigation.<sup>80</sup> That litigation has resulted in two federal courts holding that the Trump's use of IEEPA is unconstitutional, but those judgments have been stayed.<sup>81</sup>

---

72. Exec. Order No. 14,068, 87 Fed. Reg. 14381 (Mar. 11, 2025).

73. Exec. Order No. 14,193, 90 Fed. Reg. 9113 (Feb. 7, 2025); Exec. Order No. 14,194, 90 Fed. Reg. 9117 (Feb. 7, 2025).

74. See United States-Mexico-Canada Agreement Implementation Act, Pub. L. No. 116-113, 134 Stat. 11 (codified in scattered sections of the U.S. Code).

75. Exec. Order No. 14,195, 90 Fed. Reg. 9121 (Feb. 1, 2025) (“[T]he Chinese Communist Party (CCP), which exerts ultimate control over the government and enterprises of the PRC, has subsidized and otherwise incentivized PRC chemical companies to export fentanyl and related precursor chemicals that are used to produce synthetic opioids sold illicitly in the United States.”).

76. See Exec. Order No. 14,256, 90 Fed. Reg. 14899 (Apr. 7, 2025).

77. See Joe Rennison, Danielle Kaye, River Akira Davis & Eshe Nelson, *Trade War Sets Off 'Max Pessimism' in Global Markets as Stocks Plunge*, N.Y. TIMES (Apr. 2, 2025), <https://perma.cc/RMU8-9645>.

78. See Complaint at 20-29, *Oregon v. United States Dep't of Homeland Sec.*, 772 F. Supp. 3d 1350 (Ct. Int'l Trade 2025) (No. 25-cv-00077) (describing the economic impact of tariffs imposed by the Trump Administration).

79. See Exec. Order No. 14,057, 90 Fed. Reg. 15041 (Apr. 7, 2025) (“By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) . . .”).

80. See, e.g., Complaint at 1, *Emily Ley Paper, Inc. v. Trump*, No. 25-cv-00464, 2025 WL 1482771, (N.D. Fla. May 20, 2025), ECF No. 1 (challenging the tariffs imposed through Executive Order 14195).

81. *V.O.S. Selections, Inc. v. Trump*, No. 2025-1812, 2025 WL 1527040, at \*1 (Fed. Cir. May 29, 2025); *Learning Res., Inc. v. Trump*, 784 F. Supp. 3d 209, 233 (D.D.C. 2025).

The litigation surrounding these tariffs continues. But regardless of the outcome, it is likely that this will not be the last time this administration invokes IEEPA to justify tariffs. Unlike trade statutes authorizing tariffs without a national emergency—such as the Tariff Act of 1930<sup>82</sup> and the Trade Act of 1974<sup>83</sup>—IEEPA does not require formal investigations.<sup>84</sup> Consequently, IEEPA allows the administration to bypass the ordinary APA review process and to impose tariffs almost at a whim. Accordingly, it is highly attractive as a policymaking tool. Indeed, in an affirmation filed as part of *Simplified*, Secretary Rubio asserted that this use of IEEPA was vital for the Administration’s overall foreign policy.<sup>85</sup>

What distinguishes these tariffs for the purposes of this Article is that they are, at least ostensibly, grounded in national security concerns.<sup>86</sup> These tariffs are therefore motivated, at least ostensibly, not by a desire to bolster American companies or to refashion trade policy per se, but rather by a concern that American national security is being harmed by trade. Accordingly, these IEEPA tariffs are more similar in justification to CFIUS restrictions and are less like economic policy tariffs imposed through other statutory mechanisms.

## II. THE CURRENT DOCTRINAL FRAMEWORK

*“The life of the law has not been logic: it has been experience.”*<sup>87</sup>

Oliver Wendell Holmes

The current framework for judicial scrutiny of national security restraints on international commerce is muddled. Reflecting the scarcity with which these restraints have been imposed, there is little doctrinal guidance on how to treat challenges to these sorts of actions. This section analyzes some of the current precedents that inform the way courts examine challenges to national security restraints. No clear doctrinal framework emerges from these cases—and while they can fairly be said, as a general matter, to be deferential, just how to apply that deference is unclear.

---

82. Tariff Act of 1930, ch. 497, 46 Stat. 590 (codified at scattered sections of 19 U.S.C.).

83. Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1975) (codified at scattered sections of U.S. Code).

84. *Cf.* New Civil Liberties Alliance Brief, *supra* note 63, at 6 (explaining that the way that the administration has used IEEPA to impose tariffs does not require investigations or create the ordinary notice-and-comment periods that would allow small businesses to prepare for the impact of the tariffs).

85. *See* Response to Motion for Summary Judgment at attach. 5, *Princess Awesome, LLC v. U.S. Customs and Border Prot.*, No. 25-cv-00078 (Ct. Intl. Trade May 23, 2025).

86. *See* Exec. Order No. 14,257, 90 Fed. Reg. 15041 (Apr. 7, 2025) (“[U]nderlying conditions, including a lack of reciprocity in our bilateral trade relationships . . . constitute an unusual and extraordinary threat to the national security and economy of the United States.”).

87. OLIVER WENDELL HOLMES JR., *THE COMMON LAW* 1 (Sheldon M. Novick ed., Dover Publ’ns 1991).

A. *Dames & Moore v. Regan*

One of the most important cases in national security restraints on trade is *Dames & Moore v. Regan*, 453 U.S. 654 (1981).<sup>88</sup> In 1979, after the revolution in Iran, revolutionary forces seized hostages at the United States Embassy in Tehran, demanding that the United States return the former Shah, Mohammad Reza Pahlavi, to Iran.<sup>89</sup> In response, then-President Jimmy Carter invoked IEEPA and froze Iranian assets in the US.<sup>90</sup> Several plaintiffs in the United States subsequently filed suit against Iran and won judgments in American courts against those frozen assets.<sup>91</sup>

Shortly after Ronald Reagan's inauguration, the Algiers Accords were signed.<sup>92</sup> Pursuant to these Accords, the United States agreed to terminate legal proceedings in U.S. courts involving claims by U.S. nationals against Iran to nullify attachments against Iranian property entered by U.S. courts and transfer claims to a new arbitration tribunal.<sup>93</sup>

The plaintiffs in *Dames & Moore* had secured an outstanding judgment against Iran for \$3,436,694.30.<sup>94</sup> These plaintiffs were annoyed that, even though they had already won their case, the President's new executive order, issued to implement the Algiers Accords, forced them to relitigate the issue before a newly created claims tribunal.<sup>95</sup> The plaintiffs wanted their initial judgment honored and they wanted to be able to attach the already frozen Iranian assets held in the United States.<sup>96</sup>

Accordingly, plaintiffs *Dames & Moore* filed an action for declaratory relief against the government to prevent enforcement of the executive orders.<sup>97</sup> The government objected and defended the lawfulness of its suspension action, relying principally "on § 203 of the IEEPA . . . ."<sup>98</sup>

After the district court dismissed the complaint, the plaintiffs sought review

---

88. See Miller, *supra* note 11, at 1112, 1126.

89. Reuters, *Tehran Students Seize U.S. Embassy and Hold Hostages*, N.Y. TIMES (Nov. 5, 1979), <https://perma.cc/6EGR-CJ22>.

90. Exec. Order No. 12,170, 44 Fed. Reg. 65729 ("Pursuant to the authority vested in me as President by the Constitution and laws of the United States including the International Emergency Economic Powers Act, 50 U.S.C.A. sec. 1701 *et seq.* . . .").

91. See Marks & Grabow, *supra* note 16, at 75, 76.

92. Bernard Gwertzman, *U.S. and Iran Sign Accord on Hostages: 52 Americans Could Be Set Free Today*, N.Y. TIMES (Jan. 19, 1981), <https://perma.cc/U7JV-4A6M>.

93. Arslan Chikhaoui, *40 Years Later: The Role of Algerian Diplomacy During the Iran Hostage Crisis*, CTR. FOR STRATEGIC STUD. (Jan. 26, 2021), <https://perma.cc/MU4K-FNZM>.

94. *Dames & Moore v. Regan*, 453 U.S. 654, 664 (1981).

95. *Id.* at 665.

96. *Id.* at 667.

97. *Id.* at 666-67.

98. *Id.* at 669. Specifically, the government argued that "the acts of 'nullifying' the attachments [against Iran] and ordering the 'transfer' of the frozen assets are specifically authorized by the plain language" of § 203. *Id.* at 670.

by the Supreme Court.<sup>99</sup> On review, in a decision written by Chief Justice Rehnquist, the Supreme Court upheld the actions by the Administration.<sup>100</sup> According to the Court, the “broad authority of the Executive” in foreign policy was sufficient to sustain the action.<sup>101</sup> Central to the Court’s analysis was the seminal 1952 case of *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). As the Court explained, “the parties and the lower courts . . . have all agreed that much relevant analysis is contained in *Youngstown* . . . .”<sup>102</sup> And, following *Youngstown*, because:

Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take, or every possible situation in which he might act . . . [a] failure of Congress [to] specifically [] delegate authority does not, ‘especially . . . in the areas of foreign policy and national security,’ imply ‘congressional disapproval’ of action taken by the Executive.<sup>103</sup>

The Court refused to “ignore the plain language” of IEEPA, mindful that IEEPA permits the President “to nullify [and] void . . . any . . . exercising [of] any right, power, or privilege with respect to . . . any property in which any foreign country . . . has any interest . . . by any person . . . subject to the jurisdiction of the United States . . . .”<sup>104</sup>

Thus, while the Court agreed that “Congress intended [through IEEPA] to limit the President’s emergency power in peacetime,” that limitation was not relevant to the facts and here the President’s actions were “supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.”<sup>105</sup>

Indeed, because there was “no contrary indication of legislative intent[.]” the “history of congressional acquiescence in conduct of the sort” at issue in the case<sup>106</sup> indicated that “Congress has implicitly approved the practice of claim settlement by executive agreement” through, for example, “Congress’s enactment of the International Claims Settlement Act of 1949 . . . .”<sup>107</sup> This evidence of Congressional approval and acquiescence meant that, considering the specific facts at issue in *Dames & Moore*, the Court “conclude[d] that the President was authorized to suspend pending claims pursuant to Executive Order No. 12294.”<sup>108</sup>

---

99. *Id.* at 667-68.

100. *See id.* at 686.

101. *See id.* at 672.

102. *Id.* at 668-69 (specifically, the Court found “Justice Jackson’s classification of executive actions into three general categories analytically useful” and employed it.).

103. *Id.* at 678 (quoting *Haig v. Agee*, 453 U. S. 280, 291 (1981)).

104. *Id.* at 671 (quoting *Am. Int’l Grp., Inc. v. Islamic Republic of Iran*, 657 F.2d 430, 439 (D.C. Cir. 1981)).

105. *Id.* at 673-74 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

106. *Id.* at 678.

107. *Id.* at 680.

108. *Id.* at 686.

The Court also highlighted that “the means chosen by the President to settle the claims of American nationals provided an alternative forum, the Claims Tribunal, which is capable of providing meaningful relief.”<sup>109</sup> “Congress ha[d] not disapproved of the action” to transfer the claims to that tribunal, and, particularly in the absence of disapproval, the Court, while “re-emphasiz[ing] the narrowness of our decision” found that the suspension of claims was not unlawful.<sup>110</sup>

The highly deferential approach employed in *Dames & Moore* is court-created and inferred; it is based on Justice Jackson’s *Youngstown* concurrence and not on any other statutory or constitutional requirement. And it is likely that even the Justices involved in *Dames & Moore* would not have wanted to see the case become a significant precedent. As Justice Rehnquist explained, the Court considered the case under expedited review at the request of the government because of the possibility that the United States could otherwise “be in breach of [an] Executive Agreement” with Iran.<sup>111</sup> This “expeditious treatment”, the court wrote, meant that the decision in *Dames & Moore* had to rest “on the narrowest possible ground capable of deciding the case.”<sup>112</sup>

Indeed, the justices went out of their way several times in *Dames & Moore* to stress that their ruling was limited, that it was very shaped by the specific facts of that specific case and that the decision reached in *Dames & Moore* should not be read to inform more broadly the difficult questions of the relationship between the Legislative and Executive branches when national security is involved. Despite this, *Dames & Moore* continues to be amongst the most cited cases in this area of law.

#### B. *United States v. Yoshida International*

Specifically in the tariff context, one case that has emerged at the center of the recent IEEPA controversy is *Yoshida*, a decision by the Court of Customs & Patent Appeals (now the United States Court of Appeals for the Federal Circuit). In *Yoshida*, the Court reviewed a decision by the Customs Court (now the United States Court of International Trade) interpreting TWEA.<sup>113</sup> *Yoshida* remains one of the most important precedents in understanding how to interpret IEEPA.<sup>114</sup>

---

109. *Id.* at 686-87.

110. *Id.* at 687-88.

111. *Id.* at 660.

112. *Id.* (citing *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)). The Court continued further in this vein throughout the opinion. *See, e.g., id.* at 662 (“[W]e freely confess that we are obviously deciding only one more episode in the never-ending tension between the President exercising the executive authority in a world that presents each day some new challenge with which he must deal and the Constitution under which we all live and which no one disputes embodies some sort of system of checks and balances.”).

113. *United States v. Yoshida Int’l, Inc.*, 526 F.2d 560, 566 (C.C.P.A. 1975).

114. *Cf. Peter M. Bartfeld, United States Trade Law at the Crossroads: Presidential Power in the Trade Area after Yoshida International, Inc. v. United States and the Trade Act*

The controversy in *Yoshida* began with a Japanese company that exported zippers to the United States in August 1971.<sup>115</sup> The government levied an ordinary tariff in accordance with the then-prevailing tariff policy, and then also levied an additional 10% ad valorem surcharge pursuant to Nixon's Presidential Proclamation 4074.<sup>116</sup> *Yoshida* accepted the validity of the ordinary tariff but challenged the validity of the surcharge, arguing that the surcharge was unauthorized by congressional legislation or by any other statutory delegation of congressional tariff authority.<sup>117</sup>

President Nixon issued Proclamation 4074 in 1971.<sup>118</sup> This Proclamation stated, in relevant part, that:

A. [The President] . . . declares a national emergency during which [he] call[s] upon the public and private sector to make the efforts necessary to strengthen the international economic position of the United States.

B. (1) [The President] . . . terminate[s] in part for such period as may be necessary and modif[ies] prior Presidential Proclamations which carry out trade agreements insofar as such proclamations are inconsistent with, or proclaim duties different from, those made effective pursuant to the terms of this Proclamation.

B. (2) Such proclamations are suspended only insofar as is required to assess a surcharge in the form of a supplemental duty amounting to 10 percent ad valorem. Such supplemental duty shall be imposed on all dutiable articles provided, however, that if the imposition of an additional duty of 10 percent ad valorem would cause the total duty or charge payable to exceed the total duty or charge payable at the rate prescribed in column 2 of the Tariff Schedules of the United States, then the column 2 rate shall apply.<sup>119</sup>

Because *Yoshida's* zippers did not qualify for the exception outlined in subsection B(2) of the proclamation, they were subject to the additional 10% ad valorem tariff.<sup>120</sup>

The President cited, for his statutory authority to issue Proclamation 4074: the authority vested in him by the Constitution and the statutes, including, but not limited to, the Tariff Act of 1930, as amended . . . and the Trade Expansion Act of 1962 . . . [led the] President [to] enter[] into, and proclaim[] tariff rates under[] trade agreements with foreign countries . . . [and] the President may, at any time, modify or terminate, in whole or in part, any proclamation made under his authority.<sup>121</sup>

---

*of 1974*, 8 N.Y.U. J. INT'L L. & POL. 63, 77 (1975) (discussing how *Yoshida* helped broaden the use of emergency presidential power in the tariff context and discussing how it was incorporated into what later became IEEPA).

115. *Yoshida*, 526 F.2d at 566.

116. *Id.* at 567-68.

117. *Id.* at 566-67, 572.

118. Proclamation No. 4074, 36 Fed. Reg. 15724, reprinted in 85 Stat. 926 (Aug. 15, 1971).

119. *Id.* (emphasis added).

120. *Yoshida*, 526 F.2d at 566.

121. Proclamation No. 4074, 36 Fed. Reg. 15724, reprinted in 85 Stat. 926 (Aug. 15,

Within less than five months following imposition of this surcharge, a multilateral agreement (The Smithsonian Agreement of December 18, 1971) was reached. Accordingly, on December 20, 1971, the import duty surcharge was terminated.<sup>122</sup>

Yoshida filed suit at the Customs Court, arguing that Proclamation 4074 exceeded the President's authority. The Customs Court agreed, ruling for Yoshida. According to the Customs Court, the President's power to

'terminate, in whole or in part,' existing proclaimed rates was characterized as twofold: first, the President may 'nullify and bring to an end an entire proclamation' (whereupon the duty rate would revert to one previously established but not terminated), or, second, the President may 'specify the extent to which a prior proclamation is terminated, thereby permitting a portion thereof to remain in effect.'<sup>123</sup>

The Customs Court ruled that the President's emergency power from Section 5(b) of TWEA to "regulate [the] . . . importation . . . of . . . any property in which any foreign country or a national thereof has any interest" simply "conveys to the President an authority consisting only of a specific mode of regulation" otherwise described in the Act.<sup>124</sup> Accordingly, the Customs Court concluded that "the power to 'regulate' could not, per se, be said to include the power to levy duties."<sup>125</sup>

The government appealed the lower court's decision to the Court of Customs and Patent Appeals.<sup>126</sup> The sole issue on appeal was "whether the Customs Court erred, as a matter of law, in holding that Proclamation 4074 was an ultra vires Presidential act."<sup>127</sup> In other words:

Whether the surcharge imposed by Presidential Proclamation 4074 was within the delegated authority to be found in either (1) the termination provisions of § 350(a)(6) of the Tariff Act of 1930, . . . and § 255(b) of the Trade Expansion Act of 1962 . . . , or (2) the emergency powers granted by § 5(b) of the Trading With the Enemy Act . . . , and if so, whether such a delegation of authority was constitutional.<sup>128</sup>

Just as the Supreme Court noted in *Dames & Moore*, the Court of Customs and Patent Appeals began by noting that "few areas of American constitutional law [are] more burdened with conflicting decisions and scholarly disagreement" as questions about the proper authority of the Executive vis-a-vis Congress

---

1971).

122. Proclamation No. 4098, 36 Fed. Reg. 24201, *reprinted in* 86 Stat. 1591 (Dec. 20, 1971).

123. *Yoshida*, 526 F.2d at 569 (quoting *Yoshida Int'l, Inc. v. United States*, 378 F. Supp 1155, 1164-1165 (Cust. Ct. 1974)).

124. *Id.* at 569-570 (quoting *Yoshida Int'l*, 378 F. Supp at 1173).

125. *Id.* at 570.

126. *Id.* at 571. This was the court with exclusive appellate review jurisdiction of this issue at that time; the court has since become the U.S. Court of Appeals for the Federal Circuit.

127. *Id.* at 571.

128. *Id.*

regarding questions of national security.<sup>129</sup> Clearly, the President has some “‘inherent’ power in the conduct of foreign relations and foreign affairs.”<sup>130</sup> But the exact scope of those powers is difficult to determine, and “no undelegated power to regulate commerce, or to set tariffs, inheres in the Presidency.”<sup>131</sup>

The court then stated that it agreed with the Customs Court that there was no express delegation by Congress to impose the surcharge at issue in *Yoshida*.<sup>132</sup> Instead, “there being nothing in the TWEA or in its history which specifically either authorizes or prohibits the imposition of a surcharge,” the task for the court was to “effectuate the intent of Congress” by determining whether the language of the TWEA suggested it was intended to permit actions like the surcharge.<sup>133</sup>

Here, the court noted that the “express delegation in § 5(b) of the TWEA is broad indeed” and also that the “Act authorizes the President to define ‘any or all’ of the terms employed by Congress in § 5(b).”<sup>134</sup> Because the “delegation in § 5(b) is broad and extensive,” the court concluded that it “appears incontestable that § 5(b) does in fact delegate to the President, for use during war or during national emergency only, the power to regulate importation.”<sup>135</sup>

But did this delegation include the power to impose the surcharge? The court agreed “with the Customs Court that the delegation could not constitutionally have been of the full and all-inclusive power to regulate foreign commerce.”<sup>136</sup> The Customs Court held that this meant the delegation did not include the power to impose the surcharge.<sup>137</sup> The Court of Appeals thought otherwise. Whereas the Customs Court construed the words “the President may . . . regulate . . . importation” as constrained by the other portions and rules of TWEA, the Court of Appeals read it as they thought it meant in its plain meaning.<sup>138</sup> The Court of Appeals also wrote that the “narrow interpretation adopted by the Customs Court” of Presidential authority “rests upon disregard of the phrase ‘or otherwise,’ which follows ‘by means of instructions, licenses.’”<sup>139</sup>

As a result, the Court of Appeals concluded that:

Congress, in enacting § 5(b) of the TWEA, authorized the President, during an emergency, to exercise the delegated substantive power, i. e., to ‘regulate importation,’ by imposing an import duty surcharge or by other means appropriately and reasonably related . . . to the particular nature of the emergency

129. *See id.* (quoting *Recent Decisions*, 15 VA. J. INT’L L. 649 (1975)).

130. *Id.* at 572.

131. *Id.* (footnote omitted) (emphasis added).

132. *Id.*

133. *Id.* at 572-73.

134. *Id.* at 573 (quoting 50 U.S.C.A. § 5(b)(3)) (current version at 50 U.S.C. § 4305(b)(3)).

135. *Id.* (internal quotation marks omitted).

136. *Id.* at 574 (internal quotation marks omitted).

137. *See id.*

138. *Id.* at 575 (“We cannot agree [with the interpretation of the Customs Court].”).

139. *Id.* at 576.

declared.<sup>140</sup>

After all, as the Court of Appeals noted, the surcharge was limited to specific products and only modestly changed rates.<sup>141</sup> The Court of Appeals also disagreed that this was an example of the Executive acting against the wishes of Congress.<sup>142</sup> Instead, the Court of Appeals concluded that “the surcharge herein had, as its primary purpose, the curtailment, i.e., the regulation, of imports.”<sup>143</sup> This was reasonably related to the power delegated, the Court of Appeals held—and was reasonably related to the economic emergency that the President had declared.<sup>144</sup> As the Court of Appeals wrote, “[n]o one has a vested right to trade with foreign nations.”<sup>145</sup> Similarly, “no one has a legal right to the maintenance of an existing rate or duty.”<sup>146</sup>

The Court of Appeals emphasized that “[t]he declaration of a national emergency is not a talisman enabling the President to rewrite the tariff schedules,” and stated that it was correspondingly essential to the holding that Proclamation 4074 was limited and related to the emergency.<sup>147</sup> Given these facts, though, the Court of Appeals concluded that the “broad and flexible construction given to § 5(b) by the courts . . . is consistent with the intent of Congress.”<sup>148</sup> Accordingly, the Court of Appeals concluded that the “President’s action under review was within the power constitutionally delegated to him . . . .”<sup>149</sup>

### C. Recent Cases

These two narrow precedents provide limited doctrinal guidance for courts. Both *Dames & Moore* and *Yoshida* are expressly narrow opinions; both opinions openly state that they are considering only the specific factual questions in front of them—and passing a very narrow and limited judgment. Because these cases tell courts so little, interpreting these precedents has proven challenging for courts—and has, predictably, led to confusion and conflicting results.

Nowhere has this been more evident than in the recent challenges to President Trump’s use of IEEPA to impose tariffs. Here, because the courts’ theoretical framework has been muddled, there is not even agreement within the lower

---

140. *Id.*

141. *Id.* at 577-78.

142. *Id.* at 578.

143. *Id.* at 579.

144. *Id.* at 576.

145. *Id.* at 580 (citing *Buttfield v. Stranahan*, 192 U.S. 470 (1904); *The Abby Dodge v. United States*, 223 U.S. 166 (1912); *Brolan v. United States*, 236 U.S. 216 (1915); *Weber v. Freed*, 239 U.S. 325 (1915); and *Bd. of Trs. of Univ. of Ill. v. United States*, 289 U.S. 48 (1933)).

146. *Id.* at 580 (quoting *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 318 (1933)).

147. *Id.* at 583.

148. *Id.*

149. *Id.* at 584.

courts as to which courts should consider these challenges.

The first challenge filed against the IEEPA tariffs was *Simplified v. Trump*.<sup>150</sup> This challenge began on April 3, 2025, when a coalition of companies led by Emily Ley Paper, a Florida-based maker of planners and other paper products doing business under the trade name Simplified, filed suit against the Trump Administration in the Northern District of Florida.<sup>151</sup> The government moved to transfer the case, arguing that the United States Court of International Trade had exclusive jurisdiction because the dispute arose out of a challenge to tariffs.<sup>152</sup> The district court agreed and transferred the case.<sup>153</sup>

Meanwhile, a very similar challenge was filed in the D.C. District Court.<sup>154</sup> In that case, *Learning Resources v. Trump*, the government made the same motion to transfer.<sup>155</sup> But in D.C., the district court rejected the motion to transfer.<sup>156</sup> Agreeing with the plaintiffs (and rejecting the conclusion of the Florida district court), the D.C. District Court concluded that, because IEEPA does not authorize tariffs at all, the case does not arise out of tariffs, but only out of executive actions that purport to impose tariffs but are *ultra vires*.<sup>157</sup> Correspondingly, the district court has jurisdiction, the United States Court of International Trade does not, and the tariffs are unlawful.<sup>158</sup> The government has appealed this decision to the D.C. Circuit<sup>159</sup>—that case remains pending.<sup>160</sup>

Separately, California filed suit, advancing largely the same arguments in the Northern District of California.<sup>161</sup> In that case, *California v. Trump*, the district court agreed with the court in Florida.<sup>162</sup> But rather than transferring the case, the district court dismissed the case outright, at California's request.<sup>163</sup> That dismissal is currently on appeal to the Ninth Circuit.<sup>164</sup>

---

150. See Complaint, *Emily Ley Paper, Inc. v. Trump*, No. 25-cv-00464, 2025 WL 1482771 (N.D. Fla. May 20, 2025), ECF No. 1.

151. See *id.*

152. Defendant's Motion to Transfer at 11, *Emily Ley Paper, Inc.*, 2025 WL 1482771 (No. 25-cv-00464), ECF No. 5.

153. *Emily Ley Paper, Inc.*, 2025 WL 1482771, at \*8.

154. Complaint at 1, *Learning Res., Inc. v. Trump*, 784 F. Supp. 3d 209 (D.D.C. 2025) (No. 25-cv-01248), ECF No. 1.

155. Defendant's Motion to Transfer at 1, *Learning Res., Inc.*, 784 F. Supp. 3d 209 (No. 25-cv-01248), ECF No. 8.

156. *Learning Res., Inc. v. Trump*, 784 F. Supp. 3d 209, 215 (D.D.C. 2025), *cert. granted before judgment*, No. 24-1287, 2025 WL 2601021 (U.S. Sept. 9, 2025).

157. *Id.* at 230.

158. See *id.* at 233.

159. Notice of Appeal at 1, *Learning Res., Inc.*, 784 F. Supp. 3d 209 (No. 25-cv-01248), ECF No. 40.

160. *Learning Res., Inc. v. Trump*, No. 25-5202, slip op. at 1 (D.C. Cir. Sept. 17, 2025).

161. Complaint at 1, *California v. Trump*, No. 25-cv-03372, 2025 WL 1569334 (N.D. Cal. June 2, 2025), ECF No. 1.

162. *California*, 2025 WL 1569334, at \*1.

163. Judgment at 1, *California*, 2025 WL 1569334 (No. 25-cv-03372), ECF No. 63.

164. Plaintiff's Notice of Appeal at 2, *California*, 2025 WL 1569334 (No. 25-cv-03372),

Three different district courts; three different opinions—because no district court has a framework to know how closely they should scrutinize the President’s claim that he has the authority under IEEPA to impose his tariffs.<sup>165</sup> Even with respect to jurisdiction, the courts are split.<sup>166</sup> Suppose maximal deference is due, as the district court in Florida held.<sup>167</sup> In that case, the President’s assertion that the tariffs are connected to IEEPA is enough, and the Court of International Trade should take the case.<sup>168</sup> If less deference is appropriate, then the court should examine IEEPA, see that it doesn’t involve tariffs at all—and correspondingly reject a transfer and simply find the tariffs unconstitutional.<sup>169</sup>

Nor has the answer from the courts been much clearer when the case has been considered on the merits.<sup>170</sup> Two cases so far have reached the merits of the Trump Administration’s arguments.<sup>171</sup> The first was *V.O.S. Selections v. Trump*.<sup>172</sup> In *V.O.S. Selections*, filed on April 14, 2025, a group of plaintiffs challenged the Trump Administration’s broad-based imposition of tariffs through IEEPA at the Court of International Trade (CIT).<sup>173</sup> The CIT held that the Trump Administration, by imposing tariffs that were not plausibly narrowly related to a specific emergency that the President had declared, exceeded the limits placed on presidential action by *Yoshida*.<sup>174</sup> Whereas Proclamation 4074 had been designed to narrowly raise rates solely to address a specific emergency, the Liberation Day tariffs were blunt tools seemingly unrelated to government policy.<sup>175</sup> Accordingly, even though Proclamation 4074 was not *ultra vires*, as *Yoshida* held, the Liberation Day tariffs are.<sup>176</sup> The CIT’s decision left open the

---

ECF No. 64.

165. New Civil Liberties Alliance Brief, *supra* note 63, at 28-29.

166. *Contrast Learning Res., Inc. v. Trump*, 784 F. Supp. 3d 209, 215 (D.D.C. 2025) (holding that jurisdiction is proper for federal district courts), *with* *Emily Ley Paper, Inc. v. Trump*, No. 25-cv-00464, 2025 WL 1482771, at \*8 (N.D. Fla. May 20, 2025) (holding that the case must be heard exclusively by the CIT).

167. *Emily Ley Paper, Inc.*, 2025 WL 1482771, at \*4, 8.

168. *Emily Ley Paper, Inc.*, 2025 WL 1482771, at \*3-4, \*7-8 (holding for this reason that any dispute must be heard exclusively by the U.S. Court of Int’l Trade).

169. *Learning Res., Inc.*, 784 F. Supp. 3d at 223-25, 230 (holding that jurisdiction is proper for federal district courts and holding that tariffs imposed under IEEPA are unlawful).

170. *Contrast V.O.S. Selections, Inc. v. United States*, 772 F. Supp. 3d 1350, 1365 (Ct. Int’l Trade 2025), *aff’d in part, vacated in part, remanded sub nom.*, *V.O.S. Selections, Inc. v. Trump*, 149 F.4th 1312 (Fed. Cir. 2025), *cert. granted*, No. 25-250, 2025 WL 2601020 (U.S. Sept. 9, 2025) (retaining jurisdiction in the CIT), *with Learning Res., Inc.*, 784 F. Supp. 3d at 223-25, 230 (holding that jurisdiction is proper for federal district courts and holding that tariffs imposed under IEEPA are unlawful).

171. *See* New Civil Liberties Alliance Brief, *supra* note 63, at 6-7, 28.

172. *See* Complaint at 1, *V.O.S. Selections, Inc.*, 772 F. Supp. 3d 1350 (Nos. 25-cv-00066 & 25-cv-00077), ECF No. 1.

173. *V.O.S. Selections, Inc.*, 772 F. Supp. 3d at 1364-65.

174. *Id.* at 1371-73.

175. *Id.* at 1373-75.

176. *Id.* at 1376.

possibility that some tariffs could be justified under IEEPA.<sup>177</sup> But it made it very clear that these tariffs weren't.<sup>178</sup>

The other case to reach the merits was *Learning Resources v. Trump*, because, by deciding that the district court had subject-matter jurisdiction to hear the case, the judge in *Learning Resources* held that CIT did not have exclusive jurisdiction—and, correspondingly, that IEEPA did not authorize tariffs.<sup>179</sup> Unlike in *Simplified* and other cases, where the district court transferred the case, in order to not transfer or dismiss, the district court necessarily reached the merits.<sup>180</sup>

In *Learning Resources*, the district court held that no tariffs were authorized under IEEPA, because the statute “does not encompass the power to tariff” and accordingly simply did not delegate any authority to impose tariffs to President Trump—or to any other President.<sup>181</sup> This position is stronger than the position adopted by the CIT in *V.O.S. Selections*, ruling out all tariffs based on IEEPA in all cases.<sup>182</sup>

*V.O.S. Selections* was swiftly appealed to the United States Court of Appeals for the Federal Circuit.<sup>183</sup> The Federal Circuit moved the case immediately to en banc review and set a rapid briefing schedule and oral argument.<sup>184</sup> Following that, the Federal Circuit issued a per curiam decision that reflected the uncertain standards relevant to the dispute.<sup>185</sup> Four judges—Tiffany Cunningham, Alan Lourie, Jimmie Reyna and Leonard Stark—reached an opinion that was between the CIT holding and the opinion by Judge Contreras of the D.C. District Court, determining that IEEPA broadly does not give the President the authority to impose tariffs.<sup>186</sup> Three judges—Timothy Dyk, Todd Hughes and Kara Stoll—agreed with the CIT holding, determining that IEEPA did not justify the

177. *Id.* at 1376-77.

178. *Id.*

179. *Learning Res., Inc. v. Trump*, 784 F. Supp. 3d 209, 215 (D.D.C. 2025), *cert. granted before judgment*, No. 24-1287, 2025 WL 2601021 (U.S. Sept. 9, 2025) (holding that jurisdiction is proper for federal district courts and holding that tariffs imposed under IEEPA are unlawful).

180. *Contrast Learning Res., Inc.*, 784 F. Supp. 3d at 215, 221-230 (holding that jurisdiction is proper for federal district courts and holding that tariffs imposed under IEEPA are unlawful), *with Emily Ley Paper, Inc. v. Trump*, No. 25-cv-00464, 2025 WL 1482771, at \*8 (N.D. Fla. May 20, 2025) (holding that the tariffs are potentially authorized by IEEPA and for this reason that any dispute must be heard exclusively by the CIT).

181. *Learning Res., Inc.*, 784 F. Supp. 3d at 230.

182. *Contrast V.O.S. Selections, Inc.*, 772 F. Supp. 3d at 1358, *with Learning Res., Inc.*, 784 F. Supp. 3d at 215, 223-225 (holding that jurisdiction is proper for federal district courts and holding that tariffs imposed under IEEPA are unlawful).

183. Defendant's Notice of Appeal at 1, *V.O.S. Selections, Inc.*, 772 F. Supp. 3d 1350 (Nos. 25-cv-00066 & 25-cv-00077).

184. *V.O.S. Selections, Inc. v. Trump*, No. 25-01813, slip op. at 1 (Fed. Cir. 2025) (per curiam).

185. *See generally V.O.S. Selections, Inc. v. Trump*, 149 F.4th 1312. (Fed. Cir. 2025).

186. *Id.* at 1340.

Liberation Day tariffs without necessarily committing to the position that IEEPA failed to justify any tariffs.<sup>187</sup> Meanwhile, four judges—Richard Taranto, Chief Judge Kimberly Moore, Sharon Prost and Raymond Chen—dissented, and would have instead held that IEEPA does justify tariffs.<sup>188</sup>

Both Learning Resources and V.O.S. Selections were further appealed to the United States Supreme Court.<sup>189</sup> After an expedited review, the Supreme Court combined the two cases and agreed to hear the government’s appeal. The Supreme Court has scheduled oral arguments for this November.<sup>190</sup> As of this writing, the United States has already filed its initial brief, identifying three fundamental questions about the scope of IEEPA, its constitutionality and the underlying jurisdictional issues as the primary questions presented.<sup>191</sup> The respondents (now the plaintiffs in both V.O.S. Selections and Learning Resources) are due to respond shortly, and there will likely be several major amicus briefs filed soon as well.<sup>192</sup>

The uncertainty about how to resolve these cases on the merits and even how to address the fundamental jurisdiction question further illustrates the urgent need for a clear analytical framework to review this case. A clear framework would explain how the courts should resolve these cases and harmonize the decisions.<sup>193</sup> Without that framework, it’s not clear what the courts should do.<sup>194</sup> Unfortunately, this uncertainty has been economically costly,<sup>195</sup> and it has left

---

187. *Id.* at 1317, 1347.

188. *Id.* at 1317, 1383.

189. See Petition for a Writ of Certiorari Before Judgment at 1, *Learning Res., Inc. v. Donald Trump*, (No. 25-5202) (June 17, 2025); Petition for a Writ of Certiorari at 1, *V.O.S. Selections v. Trump*, (Nos. 25-1812 & 25-1813) (Sept. 2025).

190. See Michael Sainato, *US Supreme Court Sets Date to Hear Arguments on Trump’s Tariffs*, THE GUARDIAN (Sept. 18, 2025), <https://perma.cc/EG2N-MF2G>.

191. Opening Brief for the Respondents in No. 24-1287 and the Petitioners in No. 25-250 at 23-49, *Learning Resources, Inc. v. Trump*, Nos. 24-1287 & 25-250 (Sept. 19, 2025), 2025 WL 2772085.

192. See, e.g., Brief for Private Respondents, *Learning Res., Inc.*, Nos. 24-1287 & 25-250 (Oct. 20, 2025); Brief for the State Respondents in No. 25-250, *Learning Res., Inc.*, Nos. 24-1287 & 25-250 (Oct. 20, 2025); Brief of Scott Lincicome, Colin Grabow, and Clark Packard *Amici Curiae* Supporting Petitioners in 24-1287 and Respondents in 25-250, *Learning Res., Inc.*, Nos. 24-1287 & 25-250 (Oct. 24, 2025).

193. See Petition for a Writ of Certiorari Before Judgment, *supra* note 189, at 1; Petition for a Writ of Certiorari, *supra* note 189, at 4-6.

194. An uncertainty reflected in the conflicting opinions described above. *Contrast V.O.S. Selections, Inc. v. United States*, 772 F. Supp. 3d 1350 (Ct. Int’l Trade), *aff’d in part, vacated in part, remanded sub nom. V.O.S. Selections, Inc. v. Trump*, 149 F.4th 1312 (Fed. Cir. 2025), *cert. granted*, No. 25-250, 2025 WL 2601020 (U.S. Sept. 9, 2025), *with Learning Res., Inc. v. Trump*, 784 F. Supp. 3d 209, 230 (D.D.C. 2025), *cert. granted before judgment*, No. 24-1287, 2025 WL 2601021 (U.S. Sept. 9, 2025) (holding that jurisdiction is proper for federal district courts and holding that tariffs imposed under IEEPA are unlawful); *Emily Ley Paper, Inc. v. Trump*, No. 25-cv-00464, 2025 WL 1482771, at \*7-8 (N.D. Fla. May 20, 2025) (holding that the tariffs are potentially authorized by IEEPA and for this reason that any dispute must be heard exclusively by the CIT).

195. *Cf. Tony Romm & Colby Smith, Rising Inflation Underscores Risks in Trump’s*

tens of thousands of American companies—and governments around the world—puzzled and uncertain what American law says about trade.<sup>196</sup>

### III. A NEW FRAMEWORK

*“Even a bad plan is better than no plan at all.”*

International Master Julio Kaplan, CHESS LIFE MAGAZINE (1978)<sup>197</sup>

The recent proliferation of national security restraints on international commerce has left CFIUS and national security tariffs in a strange place. Understanding the precise rules is extremely important to the economy,<sup>198</sup> and knowing how to evaluate them is crucial for judges,<sup>199</sup> attorneys and business leaders. At the same time, because these tools are so powerful and new, their proper use is heavily undertheorized within the legal literature. In short, a new theoretical framework that helps ground when national security constraints are appropriate (and why) is urgently needed.

This section proposes that this new framework should be based on the fundamental distinction between two different types of national security restraints. The first type of restraint, which this section terms a Category I restraint, focuses on preventing America’s strategic enemies from becoming stronger. The second type of restraint, which this section terms a Category II restraint, focuses on preventing weaknesses in American national security capacity.

Significant scrutiny should be applied to attempts to impose Category II restraints, because for these restraints: (a) require more steps with less certainty to show a genuine threat to national security; (b) the President is less likely to hold special or privileged information unavailable to others regarding the significance of the threat; (c) it is comparatively more likely that Category II restraints are inappropriately based on the narrow specific interest of a particular company or industry; and (d) the harm created by Category II restraints is comparatively more likely to create a political market failure that justifies more aggressive protection by the courts.

By contrast, significant deference should be applied when considering Category I restraints, because with these constraints: (a) there is comparatively less

---

*New Tariff Threats*, N. Y. TIMES (Jul 15, 2025), <https://perma.cc/RMU8-9645> (describing price increases following the first tariffs).

196. See Stephen Kirchner, *State of Confusion: Economic Policy Uncertainty and International Trade and Investment*, 52 AUSTL. ECON. REV. 178, 180-195 (2019); Bernard Horowitz & Terence Check, *TikTok v. Trump and the Uncertain Future of National Security-Based Restrictions on Data Trade*, 13 J. NAT’L SEC. L. & POL’Y 61, 105, 111(2022); Claussen, *supra* note 26, at 1100.

197. Julio Kaplan, *The ABCs of Chess*, 33 CHESS & LIFE REV. 173, 210 (April 1978).

198. See Rennison et al., *supra* note 77 (describing stock market declines following the implementation of the tariffs).

199. Claussen, *supra* note 26, at 1162.

ability to mitigate the harm, so a hard restraint may be the only effective administrative action available; (b) the President is comparatively more likely to hold special information that he cannot reveal which justifies the restraint; (c) the determination of how much risk the country should take in return for potential economic reward is a fundamentally normative policy question, not a legal question; (d) as long as the justification is prima facie plausible, the court can have confidence that the executive is acting more squarely in the realm of national security rather than economic policy—and more deference is due to decisions of national security because they are more related to foreign policy and therefore more closely related to the fundamental constitutional role of the President.

This framework helps explain how courts should address administrative policies challenged under the APA or under constitutional challenges. If the challenged restraint is a Category II restraint, then courts should scrutinize the Executive's actions carefully and take steps to ensure that the action adheres to the limits of law created by the governing legislative authority. By contrast, if the challenged restraint is a Category I restraint, then courts should apply significant deference and should let the decision stand unless the action is flagrantly out of order.

#### A. Category I Restraints

Category I restraints are grounded in fears that through a particular challenged commercial act a strategic enemy of the United States would become stronger and would be better able to defeat the United States in a strategic conflict. An example of a Category I restraint is CFIUS' block on the acquisition of the dating app Grindr by a Chinese company.<sup>200</sup> Grindr is an app that seems to often be used for casual dating, particularly for men who have sex with men.<sup>201</sup> Inevitably, an app with this focus will contain sensitive information—and some users of the Grindr app are doubtlessly powerful officials in the American defense sector.<sup>202</sup>

---

200. Echo Wang, Alexandra Alper and Chibuike Oguh, *Exclusive: Winning Bidder for Grindr Has Ties to Chinese Owner*, REUTERS (Jun. 2, 2020), <https://perma.cc/D323-THWU>. CFIUS ordered Kunlun to divest Grindr in May 2019, giving the Chinese company until June 30, 2020 for the deal to be completed. The U.S. panel was concerned that personal data of U.S. citizens held by Grindr, such as private messages and HIV status, could be compromised after Kunlun gave access to the app's database to employees in China, sources previously told Reuters. *Id.*

See also Chan Van De Weil & Stephanie Tom Tong, *Breaking Boundaries: The Uses & Gratifications of Grindr*, UBI COMP 619, 620 (2014) (discussing the reasons why users choose to use Grindr and how their use of the app helps them to explore different experiences).

201. Natasha Singer & Aaron Krolik, *Grindr and OkCupid Spread Personal Details, Study Says*, N. Y. TIMES (Jan. 13, 2020), <https://perma.cc/5XDN-L3DY> (“Grindr [is] the world's most popular gay dating app . . .”).

202. See Sarah Bauerle Danzman & Geoffrey Gertz, *Is It a Threat to US Security That China Owns Grindr, a Gay Dating App?*, BROOKINGS (Apr. 8, 2019), <https://perma.cc/2NHT-LDS6>; Sarah Min, *Why Did the U.S. Order a Chinese Company to Sell Grindr?*, CBS NEWS

CFIUS did not choose to block this deal out of concern that American defense would be weakened by the absence of a casual dating tool.<sup>203</sup> Instead, CFIUS worried that—while America would be pretty much unaffected (from a security standpoint) by Grindr’s absence from the market—a potential adversary of the United States (specifically, China) might be able to use the information from the app to harm the United States.<sup>204</sup> In other words, CFIUS was concerned that, by acquiring Grindr, China would become stronger.<sup>205</sup>

There are many reasons why a Category I restraint should be taken very seriously and why courts should be very deferential in assessing Category I restraint. First, in many cases involving a Category I restraint, the harm is done as soon as the deal happens, or the information leaves the American company. When this kind of harm is contemplated by the President or the administration, the only feasible way to mitigate it may be to outright ban the acquisition or deal.<sup>206</sup>

Second, secret information may not be publicly available that explains and justifies the Category I restraint—and even its existence may not be publicly available, as was initially true in the aerospace defense case discussed below.<sup>207</sup> Courts have only limited access to secret information, but sometimes this information fully justifies a restraint, even if courts cannot see it.<sup>208</sup>

Third, Category I restraints involve normative decisions about the fundamental tradeoff between economic growth and security. These decisions are squarely implicated by this sort of restraint, as discussed in the examples below. And this normative policy decision is fundamentally political. Accordingly, the judicial branch is not the best place to second-guess it.

Fourth, Category I restraints often involve actions where the President is squarely acting within his constitutional role as commander-in-chief or is directly advancing stated foreign policy goals that are part of his political platform.<sup>209</sup> Accordingly, Category I restraints place the President on firmer constitutional

---

(Mar. 29, 2019), <https://perma.cc/VWD3-QM3C>.

203. See Conor Ferguson, Andrew W. Lehren, Keir Simmons & Didi Martinez, *Dating Apps Like Grindr Could Pose a National Security Risk, Experts Warn*, NBC NEWS (Jan. 14, 2020), <https://perma.cc/8XRB-UYES>.

204. Carl O’Donnell, Liana B. Baker & Echo Wang, *Exclusive: Told U.S. Security at Risk, Chinese Firm Seeks to Sell Grindr Dating App*, REUTERS (Mar. 27, 2019), <https://perma.cc/GE4S-2PUW>.

205. See Ama Adams, Brendan Hanifin & Emerson Siegle, *Grindr, CFIUS and the National Security Risks of Dating*, LAW360 (Apr. 1, 2019), <https://perma.cc/NR8R-9RH8>.

206. See O’Donnell, *supra* note 204.

207. See U.S. GOV’T ACCOUNTABILITY OFF. *supra* note 13, at 2-3, 5-6.

208. In-camera submission or other forms of national security screening, as used by the FISA Court, could be one way of mitigating this concern—but no current statutory structure exists to facilitate this.

209. See, e.g., Jonathan Lemire & Matt Berg, *Biden Announces More Than 500 New Sanctions on Russia After Navalny’s Death*, POLITICO (Feb. 23, 2024), <https://perma.cc/GXG6-63EG> (“Biden followed through on a promise to further punish Russian President Vladimir Putin one week after opposition leader Alexei Navalny died . . .”).

footing.<sup>210</sup>

A recent example of a Category I restraint is the proposed ban on TikTok. The purpose of the ban on TikTok is squarely to prevent China from becoming stronger by continuing to amass data on the personal preferences and behaviors of millions of Americans.<sup>211</sup> While banning TikTok would lead to market opportunity for rival American apps, no one argues that TikTok must be banned because the American app industry is of national security importance and must be shielded from TikTok's competition.<sup>212</sup> Instead, the argument is that TikTok is making China stronger by giving it inappropriate access to influence American citizens.<sup>213</sup>

Several features make it clear that the TikTok ban is a Category I restraint. First, it was initially difficult to see how TikTok could mitigate the harm short of radical changes to its ownership that TikTok has refused.<sup>214</sup> Second, the President may well hold private or privileged information about TikTok, which would indicate that TikTok is uniquely dangerous.<sup>215</sup> Third, deciding whether the country should be able to benefit from TikTok videos or whether that is too grave a risk to security seems to be a normative decision best made by elected officials; not a question of law naturally suited to the judiciary.<sup>216</sup> Fourth, if the President acted to ban TikTok, he would be doing so primarily out of foreign policy and security concerns, and these fall most squarely within his constitutional authority as commander-in-chief.<sup>217</sup>

Another example of a Category I restraint are the IEEPA tariffs on China.<sup>218</sup> These tariffs appear to have been motivated by concerns that China was engaging in industrial espionage and unfairly benefiting from trade agreements with the U.S.<sup>219</sup> By unfairly taking advantage of divergent laws on privacy and data

---

210. See generally New Civil Liberties Alliance Brief, *supra* note 63.

211. Maheshwari et al., *supra* note 8.

212. See *TikTok Ban: Why Does the US Want to Shut Down This App?*, REUTERS (Jan. 16, 2025), <https://perma.cc/88UZ-K6QQ> (providing a list of explanations for why the United States wants to shut down TikTok and not listing as a reason a desire to shelter the U.S. app industry).

213. See Noah Berman, *The U.S. Government Banned TikTok from Federal Devices. What's Next?*, COUNCIL ON FOREIGN RELS. (Jan. 13, 2023), <https://perma.cc/Z3BB-G2G9>.

214. Maheshwari et al., *supra* note 8. One possibility is a sale of TikTok—and indeed, that is what now appears to be happening. But it was at first unclear whether TikTok would approve a sale that the United States would accept.

215. See Berman, *supra* note 213.

216. See generally Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (Amy Gutmann, ed. 1997).

217. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (Jackson, J., concurring).

218. See, e.g., Exec. Order No. 14,195, 90 Fed. Reg 9121, (Feb. 7, 2025).

219. Michelle Price, *How Trump Justifies His Tariffs—From Budget Balancing to Protecting 'The Soul' of America*, ASSOCIATED PRESS (Mar. 7, 2025), <https://perma.cc/4FF9-E5W9>.

protection, the argument goes, China can become stronger<sup>220</sup>—and China is, in the Trump Administration’s view at least, a leading strategic adversary of the United States.<sup>221</sup>

Here, as in other examples above, there are several features suggesting a Category I restraint. First, China can mitigate the harm only by making fundamental changes to its political structure or by agreeing to protect data more strictly.<sup>222</sup> These are major systemic political changes that involve significant foreign policy decisions, which the Chinese government is unlikely to make soon.<sup>223</sup> Second, the President may again hold private or privileged information about espionage by Chinese firms and could be basing the decision, at least in part, on that. Third, deciding whether China is such a major risk that the United States should slow trade, even at the cost of economic growth, is a fundamentally political decision. Finally, fourth, the President’s action to restrict trade is aimed at general foreign policy goals, not benefits to a specific company, and is foreign policy oriented.

A third example of a Category I restraint came in 1990, when CFIUS compelled a China-controlled parent company to divest MAMCO Manufacturing.<sup>224</sup> Here, the United States had become concerned that China was trying to steal manufacturing secrets about jet engines through MAMCO.<sup>225</sup> Because MAMCO manufactured core parts for jet engines, China would have potentially been able to learn highly classified details about the engines’ specifications. China could have mitigated this concern only by systemic changes in its political structure and foreign policy outlook. Additionally, the President held classified information about the nature of U.S. jet engines and their manufacturing process, as we later discovered.<sup>226</sup> We now also know that here the President’s action was aimed at general foreign policy goals to block espionage and was not designed to benefit any domestic company.

## B. Category II Restraints

Category II restraints are based on a domestic weakness that a challenged commercial act in question might cause. To justify this sort of restraint, it must be shown that: (a) the transaction or trade will diminish American domestic

220. *See id.*

221. German Lopez, *The U.S.-China Trade War*, N. Y. TIMES (Apr. 14, 2025), <https://perma.cc/656W-DG3N> (“China is, after all, an adversary . . .”).

222. *See* Alex He, *State-Centric Data Governance in China*, 232 CIGI PAPERS 1, 1-8 (2023).

223. *See* See Jing Qian & Jennifer Choo, *China 2026: What to Watch*, ASIA SOC’Y POL’Y INST. (Dec. 10, 2025), <https://perma.cc/G3EW-3SFC>. (noting that the CCP is expected to maintain its high degree of centralization, prioritizing control and national security).

224. *See* U.S. GOV’T ACCOUNTABILITY OFF. *supra* note 13, at 1, 2, 5.

225. *See id.* at 1.

226. Stuart Auerbach, *President Tells China to Sell Seattle Firm*, WASH. POST (Feb. 2, 1990), <https://perma.cc/P6DE-XBFT>.

capacity or harm American domestic capabilities in some way; (b) the harm will not be mitigated by market reactions (c) the harm cannot be mitigated in hostile circumstances by emergency government action; (d) the harm is relevant to the capacity for national security production now; and (e) the harm will be relevant in a future national security scenario. All these are difficult to show. Moreover, Category II restraints are always based on public information, so there is no reason to think that the Executive branch has access to relevant secret information.

Moreover, Category II restraints are directly grounded in market realities, and any industry is incentivized to try to limit competition.<sup>227</sup> Correspondingly, it is more likely that lobbying considerations or other political factors are driving the decision. Indeed, Category II restraints often involve concentrated harms to entities that cannot vote or are poorly represented in the political process; or they involve very diffuse harms that are unlikely to lead to much political change but that result in concentrated gains for politically connected groups.<sup>228</sup>

An example of a Category II restraint was the CFIUS block on the Nippon Steel—U.S. Steel acquisition. No one asserted that the deal would enhance the strategic capacity of an American adversary.<sup>229</sup> Japan is not an American adversary,<sup>230</sup> and this is not what the deal will do—even according to its critics.<sup>231</sup> Instead, President Biden and President Trump asserted that the deal: (a) would harm domestic industrial capacity in a key defense industry; (b) would not be

---

227. For example, a CFIUS block on a deal that disadvantages a foreign corporation or foreign shareholders but benefits a domestic potential competitor is likely to be difficult to mitigate politically, because the foreign corporation cannot vote. Similarly, a tariff that targets a foreign exporter is likely to cause diffuse harm through higher prices but concentrated gains to some American firms that will move to supply instead now that the import is less affordable. Voters are unlikely to vote based on the slightly higher prices (and may not notice them or be able to trace them to the tariff); but the benefiting American firm is likely to actively support its political advocate.

228. See ASAHI SHIMBUN, *supra* note 15 (describing a concentrated harm to an entity that cannot vote).

229. *Why Biden Cited National Security Concerns As He Blocked a Japanese Bid to Buy U.S. Steel*, PBS NEWS (Jan. 3, 2025) [hereinafter *Why Biden Cited*], <https://perma.cc/WS6X-GRSC> (“In a statement, the president said that he would block Nippon Steel’s purchase of U.S. Steel because—quote—’a strong domestically owned and operated steel industry represents an essential national security priority and is critical for resilient supply chains.’”).

230. See Abe Shinzo, Prime Minister, Japan, *Toward an Alliance of Hope*, Address by Prime Minister Shinzo Abe to a Joint Meeting of the U.S. Congress (Apr. 29, 2015) (on file with the *Stanford Law & Policy Review*).

[The U.S.-Japan] alliance has lasted more than a quarter of the entire history of the United States . . . [i]t is an alliance that is sturdy, bound in trust and friendship, deep between us. No new concept should ever be necessary for the alliance that connects us, the biggest and the second biggest democratic powers in the free world, in working together. Always, it is an alliance that cherishes our shared values of the rule of law, respect for human rights and freedom. *Id.*

231. See *Why Biden Cited*, *supra* note 229.

After all, the president said that a domestically owned and operated steel industry is important to national security. But what Nippon Steel was saying is, we’re still going to make it in the United States. The owners will just be Japanese, which, last time I checked, was an ally of the United States, not an adversary. *Id.*

mitigated by the market; (c) could not be mitigated in a crisis by nationalization; (d) would limit production of steel needed for strategic purposes for the foreseeable future.<sup>232</sup> All four of these claims are uncertain and dubious.<sup>233</sup>

Moreover, the asserted reasons for blocking the deal rely entirely on public information and have nothing whatsoever to do with any information source the President would have that we do not.<sup>234</sup> There is every reason to think that the decision is politically motivated and is a consequence of inappropriate political influence rather than genuine national security concerns. The harm to U.S. Steel and its shareholders affects only that discrete and insular minority of persons; these individuals are comparatively unlikely to influence the political will because they are so few and easily outnumbered by countervailing political forces.

### C. How Much Deference?

The standard under *Dames & Moore* is not maximally deferential—even in *Dames & Moore*, the Court recognized that actions under IEEPA are subject to review.<sup>235</sup> Instead, *Dames & Moore* seems to suggest that, while courts will be exceptionally deferential when national security is invoked, courts could still step in if the challenged action is unrelated to the stated goals, if the action dramatically exceeds the authority provided by statute, or if the action raises major constitutional issues.<sup>236</sup>

This approach sets a precedent for a high level of deference accorded to national security restraints on international commerce.<sup>237</sup> Accordingly, the framework proposed in this section represents the limit of Category I deference.<sup>238</sup> If the Executive can establish that a particular challenged restraint is Category I, then the courts should adopt the mode of review used in *Dames & Moore*.<sup>239</sup>

---

232. *Id.*

233. Andrew Ross Sorkin, *The Fallout from the End of the U.S. Steel Deal*, N. Y. TIMES (Jan. 3, 2025), <https://perma.cc/J9XY-5W2U>.

234. See Sarah Bauerle Danzman, *Biden's Blocked US Steel Deal Carries Big Risks*, ATL. COUNCIL (Jan. 3, 2025), <https://perma.cc/T6CD-HYKC> (“[The block of the Nippon Steel deal] could open the door for increasingly dubious claims of national security concerns to justify interventions into transactions for broader economic competitiveness reasons or to favor domestic political allies.”).

235. See *Dames & Moore v. Regan*, 453 U.S. 654, 660 (1981) (“We granted certiorari before judgment in this case, and set an expedited briefing and argument schedule, because lower courts had reached conflicting conclusions on the validity of the President’s actions.”).

236. See *id.* at 662.

237. Cf. Miller, *supra* note 11, at 1118-19 (criticizing the decision for being excessively deferential).

238. The idea is that, in the limit, if a case is an archetypal Category I restraint and is dominated by concerns that a regulated commercial action would make a strategic adversary stronger, then the predominance of national security concerns justifying the challenged regulatory action justifies a high level of deference akin to the deference accorded in *Dames & Moore*.

239. As a practical matter, this means that the challenged executive action will likely be

But even for Category II restraints, a less deferential approach would still recognize the important and traditional sphere of Presidential authority in foreign affairs and would tread lightly in reviewing the challenged act.<sup>240</sup> Review by the courts would also still focus on whether the action was permitted by the authorizing statute (and whether the statute was unconstitutional).<sup>241</sup> When examining these issues through a critical lens, a court would still likely find many Category II restraints lawful.<sup>242</sup>

For example, it is currently unclear how courts should assess tariffs imposed under IEEPA.<sup>243</sup> But other tariffs—like tariffs justified by Section 301 of the Trade Act of 1974—are reviewed through the Administrative Procedure Act (APA).<sup>244</sup> According to the framework proposed here, while APA review is not currently used for IEEPA-based tariffs, because they are a Category II restraint, the court should here apply that analogous standard.<sup>245</sup> Under APA review, if the purpose pursued by the challenged Executive action is statutorily authorized, supported by substantial evidence, and reasonably connected to that statutory goal—then courts should likely uphold it. The IEEPA tariffs may not meet these standards, but many other regulatory acts will.<sup>246</sup>

---

upheld on review. But this need not always be the case; *see infra* Part III(D) for further discussion and examples of circumstances where an action might be blocked even despite a highly deferential judicial approach.

240. *Cf.* Curtis Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 650-54 (2000) (explaining that in the foreign policy context courts have traditionally been deferential in trying to identify the proper scope of presidential authority).

241. *See generally* KRISTEN HICKMAN & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* (2025) (describing generally the role of judicial review under the APA and how courts review acts taken by the Executive pursuant to delegated authority).

242. *See* Warren Maruyama, Meghan Anand, & William Alan Reinsch, *Are President Trump's Trade Actions Exempt from the Administrative Procedure Act?*, *CTR. STRATEGIC & INT'L STUD.* (Mar. 31, 2025), <https://perma.cc/U22C-YL3H> (describing how ordinary APA review would work for tariffs implemented through other authorizing statutes).

243. *See* *V.O.S. Selections, Inc. v. United States*, 772 F. Supp. 3d 1350, 1383 (Ct. Int'l Trade 2025) (proposing one means of addressing tariffs, striking them down due to a lack of Presidential authority, among other reasons).

244. *See* Maruyama et al., *supra* note 242 (“Unlike actions taken under IEEPA and Section 232, actions taken under Section 301 are subject to the APA because the statute grants ultimate authority to the U.S. Trade Representative . . .”); *see generally* Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447 (1986) (describing APA review).

245. The idea here is that, absent the special national security features claimed by the executive, these regulations would otherwise be reviewed according to this standard. So, now that they have been classified as Category II restraints and therefore less predominantly concerned with national security in a way that would justify greater deference, the appropriate degree of judicial scrutiny reverts in the limit to the background level of scrutiny that would otherwise apply to the action.

246. It is particularly helpful, in this context, if the executive has considered alternate regulatory options and elected to pursue the chosen path despite this. APA review is substantive, but it is not the function of the courts to second-guess the Executive *de novo*—accordingly, here, particularly if the executive has explained the reason for this course of action rather than others, the challenged action should be upheld.

In other contexts, different standards may be the most useful analogs—although often they impose a similar degree of deference.<sup>247</sup> For example, if FTC review is ordinarily applied to cross-border M&A deals, then a cross-border M&A deal blocked by CFIUS for reasons that are best articulated as a Category II restraint should be reviewed with the same standards that a court would ordinarily apply to FTC review.<sup>248</sup> Identifying the review as a Category II restraint helps explain that special considerations particular to national security considerations are not central.<sup>249</sup> Accordingly, applying the same review as in other similar economic activity makes doctrinal sense.<sup>250</sup>

It may seem unusual to use a two-step process to determine how to assess a regulation.<sup>251</sup> But actually, judicial review of regulatory action often proceeds this way.<sup>252</sup> For example, in the antitrust context, courts often first work to define a market—and then, once that is accomplished, assess the Executive action in the context of that definition.<sup>253</sup> So, the process outlined in this section for applying the proposed framework is similar to other existing modes of judicial analysis.<sup>254</sup>

#### D. A Scale not a Switch

While some restraints are archetypal Category II restraints, such as the CFIUS block on Nippon Steel's acquisition of U.S. Steel, the idea behind the framework introduced in this Article is to propose a sliding scale, not a switch. The closer an act is to a pure Category I restraint, the more deferential the courts should be—the closer the courts should get to Dames & Moore deference. Similarly, the closer an act is to a pure Category II restraint, the less deferential the courts should be.

Consider, for example, the Liberation Day IEEPA tariffs.<sup>255</sup> These tariffs are Category II restraints, as discussed above. Should they be upheld, applying

---

247. See Stephen Williams, *The Roots of Deference*, 100 YALE L.J. 1103, 1103-04 (1990).

248. Donald Baker, *Antitrust Merger Review in an Era of Escalating Cross-Border Transactions and Effects*, 18 WIS. INT'L L.J. 577, 581-582 (2000).

249. See *supra* note 245.

250. *Id.*

251. Cf. Alison Young, *In Defence of Due Deference*, 72 MOD. L. REV. 554, 559 (2009) (discussing two step review in the context of the European Convention on Human Rights)

252. Cf. Gary Lawson and Stephen Kam, *Making Law Out of Nothing at All: The Origins of the Chevron Doctrine*, 1 ADMIN. L. REV. 1, 2-3 (2013) (criticizing this kind of two-step decision making).

253. George R. Hall, *Market Definition and Antitrust Policy*, 20 WASH. & LEE L. REV. 46, 47-49 (1963).

254. See Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL'Y 103, 105-107, 115-120 (2018).

255. See, e.g., Exec. Order No. 14,226, 90 Fed. Reg. 11369 (Mar. 6, 2025).

enhanced scrutiny? The closest analogue would probably be the sort of review used under the Administrative Procedure Act, because that is the standard of review for tariffs enacted through Section 301 of the Trade Act of 1974.<sup>256</sup> Applying that analogous mode of review, here the procedural irregularity in passing the Liberation Day tariffs, combined with the irrelevance of the formula apparently used to determine the rates, suggest that these tariffs are not particularly related to their stated regulatory purpose. Correspondingly, substantial evidence likely does not exist to support these tariffs—particularly because there are serious questions about whether IEEPA authorizes tariffs at all.<sup>257</sup> Accordingly, these tariffs should likely be struck down.

Consider, instead, the TikTok ban that has been authorized by Congress.<sup>258</sup> This is a Category I restraint, as discussed above.<sup>259</sup> Accordingly, the courts should be highly deferential.<sup>260</sup> Here, the Congressional statute is clear and specifically authorizes the ban. Employing the highly deferential standard appropriate for Category I restraints suggests that any ban on TikTok should be upheld.

Now consider the restraints imposed by CFIUS on Nippon Steel. These are Category II restraints, as discussed above. There is no legitimate national security justification for these restraints, and Japan is not a strategic enemy of the United States. The courts should treat this issue with less deference—and here the CFIUS decision, while clearly authorized by Congress, is simply unrelated to any relevant national security objective and obviously unsupported by substantial evidence.<sup>261</sup> Accordingly, these restrictions should be thrown out by the court.

Finally, consider the IEEPA tariffs on China. As discussed above, these are Category I restraints. Accordingly, the courts should be highly deferential. However, even adopting a highly deferential approach, IEEPA still fails to authorize tariffs of any kind—on China, or on anyone else.<sup>262</sup> Accordingly, the tariffs should be struck down as exceeding the delegated congressional authority that underlies IEEPA.<sup>263</sup> If the government could put together even a modestly compelling argument for how IEEPA authorizes these tariffs, that might be

---

256. Another close analogue would be the procedural requirements under Section 232 of the Trade Expansion Act, which are robust even though actions under Section 232 are not subject to review under the APA. *See* Trade Expansion Act of 1962, Pub. L. No. 87-794, § 232, 76 Stat. 872, 877 (codified at 19 U.S.C. § 1862); *see also* Maruyama, et al., *supra* note 243.

257. *See* William Alan Reinsch and Thibault Denamiel, *Insights into the Trump Administration's IEEPA Tariffs Setback*, CTR. FOR STRATEGIC AND INT'L STUDS. (May 29, 2025), <https://perma.cc/4XLV-BTVK>; and New Civil Liberties Alliance Brief, *supra* note 63, at 6-7.

258. Madison Clausius, Note, *The Banning of TikTok, And the Ban of Foreign Software for National Security Purposes*, 21 WASH. U. GLOB. STUD. L. REV. 273, 275-277 (2022).

259. *See supra* Part III(A).

260. *Id.*

261. *See Why Biden Cited, supra* note 229 (suggesting that the evidence, if any was limited).

262. *See* New Civil Liberties Alliance Brief, *supra* note 63, at 6-7.

263. *See id.* at 13-15.

persuasive, given how deferentially the courts should approach this issue.<sup>264</sup> But here, no such argument appears to be forthcoming.<sup>265</sup>

#### E. Applying the Framework

Huawei, a Chinese electronics company, has recently come under increased scrutiny for its close ties to the Chinese Communist Party (CCP) and for its role in critical electronics infrastructure.<sup>266</sup> Several different options for regulating Huawei have been proposed.<sup>267</sup> By grounding legal questions about these options in a theoretical framework, the framework discussed in this section permits proactive assessment of the lawfulness of these different proposals.

For example, suppose that CFIUS reviewed Huawei-related transactions and ultimately declared that any company doing business or in partnership with Huawei should be required to divest the Huawei-linked portions of any combined deal.<sup>268</sup> Applying the framework discussed in this section, absent some strong evidence on the record to the contrary, this decision would properly be categorized as a Category I restraint, and an Executive Order imposing CFIUS' divestment recommendation should be upheld on review.

Or CFIUS could order Huawei to divest its investments in the United States or secure independent ownership of Huawei's telecommunications infrastructure. Alternatively, IEEPA or another statute could be used to sanction Huawei and force it to either withdraw from the U.S. market, pay significant fines, or take specific actions to protect against espionage concerns.

Which motivation better describes this action? Is the president primarily concerned with preventing the CCP from becoming stronger by using Huawei to gather information about the United States? If so, these restrictions ought to be considered a Category I restraint and treated with deference. But Huawei is a fierce competitor and charges significantly less than many American companies

---

264. See *Emily Ley Paper, Inc. v. Trump*, No. 25-cv-00464, 2025 WL 1482771, at \*7-8 (N.D. Fla. May 20, 2025) (holding for this reason that any dispute must be heard exclusively by the CIT).

265. See *V.O.S. Selections, Inc. v. United States*, 772 F. Supp. 3d 1350, 1370-83 (Ct. Int'l Trade 2025) (detailing why the court was not persuaded by the Administration's arguments).

266. Steve Stecklow and Marcelo Rochabrun, *Exclusive: Top Huawei Executives had Close Ties to Company at Center of U.S. Criminal Case*, REUTERS (Sept. 16, 2020), <https://perma.cc/3VJL-2KS4> (describing close ties between Huawei and the Chinese government and the use of a closely held company to allegedly avoid U.S. corporate restrictions).

267. Ilan Alon, Wenxian Zhang, & Christoph Lattemann, *The Case for Regulating Huawei*, 10 FIIB BUS. REV. 202, 202-204 (2021); and Jordan Villegas, Note, *Paving a New (Hua)Wei: A Comparative Analysis of International Approaches to Securing Information and Communication Technology Supply Chains*, 71 CATH. U. L. REV. 623, 655-60 (2022).

268. Souvik Saha, Note, *CFIUS Now Made in China: Dueling National Security Review Frameworks as a Countermeasure to Economic Espionage in the Age of Globalization*, 33 NW. J. INT'L L. & BUS. 199, 228-30 (2012).

that compete in the same industry.<sup>269</sup> Is that the president's principal objective—is the president primarily concerned with protecting American industry, from some competition that would weaken its ability to create key telecoms infrastructure? If so, this is a Category II restraint and ought to be treated with much less deference.

Applying the framework discussed in this section, the court's first task would be to try to identify whether the action was a Category I or Category II restraint. Facts matter here, and the details of the Executive process may provide some of the most important evidence.

For example, suppose that sanctions imposed through IEEPA included a potential mitigation option—a lockout that would prevent any American data from being transferred overseas unencrypted. Suppose further that the Executive offered to cover any additional cost from that encryption—and that enforcing that required encryption would cause the sanctions to be lifted. Here, the inclusion of this mitigation language strongly suggests that the underlying IEEPA restraint is principally Category I. If there is little to no cost to Huawei to encrypt the data, then American firms will not benefit from the sanctions package. Huawei can simply encrypt the data and continue (out)competing its American competitors. Correspondingly, the intention of the sanctions package would most reasonably be construed as Category I-based, because the sanctions do not seek to advantage American market players. In other words, this sanction is designed to prevent a strategic enemy (the CCP) from getting stronger by preventing it from accessing American data. Accordingly, it is a Category I restraint, and courts should be deferential.

On the other hand, suppose that CFIUS required, for future transactions involving Huawei, that an American domestic firm be included as a silent equity partner without control. This would most plausibly be a Category II sanction; there is not much to be gained, from a data-security perspective, by including an American third-party without control. By contrast, if Huawei is eating American telecoms' lunch, then forcing Huawei to give equity to its failing competitors would seem primarily designed to help the profit from Huawei's success. Here, the restraint is motivated mainly by strengthening American domestic capacity by giving American firms a cut of Huawei's profit—and by making it harder for Huawei to take their market share.<sup>270</sup> Accordingly, this is a Category II restraint, and courts should be less deferential.

---

269. See NATHANIEL AHRENS, *CTR. FOR STRATEGIC & INT'L STUDS, CHINA'S COMPETITIVENESS: MYTH, REALITY, AND LESSONS FOR THE UNITED STATES AND JAPAN* 10 (“[Huawei] slashed prices well below that of its competitors, purportedly sometimes by as much as 70 percent.”).

270. Of course, these considerations are fact-specific, as is common in the legal decision process of common-law courts. For example, if the evidence on record suggested that the government had sought to make Huawei's business in the United States unprofitable to identify whether it was operating in the U.S. for non-market reasons, that might point more toward an intricate Category I restraint. But there would need to be evidence in the record to support that conclusion.

Of course, deference is not decisive. If evidence emerged during a challenge to a proposed IEEPA Order that the real reason for the Executive's action was that many of Huawei's American employees had actively campaigned for a political opponent of the current President, then that would raise new First Amendment challenges to the sanction that might well lead to it being struck down. Similarly, if it emerged that Huawei's electronics are simply technically unable to store or send information outside the United States anyway, then even approaching the issue with deference, courts might still strike down the restraint. =

Similarly, even in the case of the Category II restraint discussed above, if it emerged that Huawei secretly used CCP resources as part of an express coordinated strategy to undermine domestic capacity as a prelude to potential military action—and if it came out in litigation that CFIUS became aware of this express strategy and responded with a profit-sharing approach—then even under the heightened scrutiny appropriate for Category II transactions, this action may nevertheless pass muster.

Of course, not all cases are this murky. The primary use of IEEPA, until very recently, was not to impose tariffs but rather to impose sanctions against countries like North Korea and Iran.<sup>271</sup> The use of IEEPA for these purposes also constitutes a national security-based constraint on trade—but it is almost archetypally a Category I restraint—as most direct economic sanctions are.<sup>272</sup> The purpose of sanctions on foreign states is to prevent them from becoming stronger vis-a-vis the United States by preventing them from benefiting from our domestic economy and, perhaps, by correspondingly preventing them from gathering economic and political information that could later be used to harm the United States.<sup>273</sup> Because these targeted economic sanctions are Category I restraints, substantial deference is due to them—and it comes as no surprise that, accordingly, their lawfulness is uncontroversial.<sup>274</sup>

Similarly, as discussed above, the use of IEEPA to impose tariffs on China is a Category I restraint because it seeks to prevent a strategic adversary (China) from becoming stronger.<sup>275</sup> Despite this higher degree of deference, though, because IEEPA does not mention tariffs at all, even on deferential review, the

---

271. See Joshua Stanton, *North Korea: The Myth of Maxed Out Sanctions*, 2 FLETCHER SEC. REV. 20, 20 (2015).

272. Sanctions imposed through IEEPA, unlike tariffs, are usually expressly designed to prevent a strategic adversary from becoming stronger by cutting off their economic markets, regardless of the impact on American business. For example, there are few, if any, North Korean competitors with American companies. The motivation for U.S. sanctions on North Korea is not to help American competitors threatened by North Korean industry; it's to try to prevent North Korea from becoming stronger. See Frank Ruediger, *The Political Economy of Sanctions Against North Korea*, 30 ASIAN PERSP. 6, 12-18 (2006).

273. See *id.*

274. See, e.g., STEPHAN HAGGARD & MARCUS NOLAND, *HARD TARGET: SANCTIONS, INDUCEMENTS AND THE CASE OF NORTH KOREA* 15-21 (2017) (critically evaluating the global sanctions program but implying that there is little dispute as to its lawfulness).

275. See *supra* Part III(A).

IEEPA tariffs against China are ultra vires and should be struck down.<sup>276</sup>

By contrast, as discussed above, the IEEPA tariffs imposed on Canada and Mexico—and most of the Liberation Day tariffs—are Category II restraints, because they aim to prevent the United States from becoming weaker due to a hollowing out of American industry caused by trade. Nevertheless, these tariffs should still be struck down as ultra vires, because IEEPA does not mention tariffs and because these tariffs are not connected to their stated policy.<sup>277</sup>

The framework introduced in this section provides courts with a theoretical grounding for evaluating these challenges and for concluding, with a stronger theoretical grounding, that the tariffs imposed under IEEPA are unlawful. True, courts have a mixed record of checking potential abuses of Executive action, even when there appears to be overwhelming evidence that actions by the Executive are not supported by the law. But there have been exceptions, and there is some reason to think that a clearer framework could help courts act more decisively.

For example, consider the Alien Enemies Act (AEA). The AEA<sup>278</sup> grants the Executive broad authority to “apprehend[], restrain[], secure[], and remove[] alien enemies[]” in situations where there is a “declared war” with “any foreign nation or government,” or when a foreign nation or government has “perpetrated, attempted, or threatened” an “invasion or predatory incursion . . . against the territory of the United States.”<sup>279</sup> Under AEA removal, the Executive has the power to bypass ordinary Immigration and Nationality Act procedures. However, there are significant limitations on the AEA apparent in the statute: AEA powers can only be used during a declared war, an invasion, or during a predatory incursion by a foreign nation or government.<sup>280</sup>

The AEA was originally passed in 1798, but the broad powers granted to the Executive were used only twice until a brief resurgence during World War II.<sup>281</sup> Then, on March 14th, 2025, the Trump Administration revived the long-slumbering Act by issuing a proclamation labeling suspected members of the Venezuelan Tren de Aragua (“TdA”) organization as “alien enemies[,]” invoking AEA powers to authorize the detention and removal of suspected TdA members from the United States.<sup>282</sup> The proclamation announced that the TdA had “infiltrated” the Maduro government and “is perpetrating, attempting, and threatening an invasion or predatory incursion against the territory of the United States,”

---

276. See New Civil Liberties Alliance Brief, *supra* note 63, at 6-15.

277. See *Learning Res., Inc. v. Trump*, 784 F. Supp. 3d 209, 230 (D.D.C. 2025).

278. Alien Enemies Act of 1798, Pub. L. No. 5-74, 1 Stat. 577 (codified at 50 U.S.C. §§ 21-24).

279. *Id.*

280. See 50 U.S.C. § 21.

281. See *J.G.G. v. Trump*, 772 F. Supp. 3d 18, 25 (D.D.C. 2025) (explaining President Roosevelt’s utilization of the AEA to apprehend, intern, and remove Japanese, Germans, and Italians residing within the United States.).

282. Proclamation No. 10903, 90 Fed. Reg. 13033 (Mar. 14, 2025).

including by “undertaking hostile actions and conducting irregular warfare against the territory of the United States.”<sup>283</sup>

Shortly after this declaration, detainees subject to the proclamation filed suit challenging their removal. Due to the significant national security and emergency issues at stake, the Supreme Court quickly granted certiorari and issued orders in two AEA cases. In *Trump v. J.G.G.*,<sup>284</sup> five detainees sued in the D.C. District Court for temporary restraining orders (TROs) preventing the Trump Administration from removing subjected individuals under the proclamation without a hearing.<sup>285</sup> The District Court issued two TROs that blocked (1) any removal of the named plaintiffs from the United States, and (2) any removal under the AEA of a “provisionally certified class consisting of ‘[a]ll noncitizens in U.S. custody who are subject to’ the Proclamation.”<sup>286</sup>

On review, the Supreme Court recognized the detainees’ right to due process notice and hearing procedures, stating that “in [the AEA] context, . . . detainees must receive notice after the date of this order that they are subject to removal under the Act.”<sup>287</sup> However, the Court declined to address the plaintiffs’ arguments challenging the Trump Administration’s interpretation of the AEA and its classification of the plaintiffs as removable alien enemies subject to the Act.<sup>288</sup> Instead, the court held that “[c]hallenges to removal under the AEA . . . largely preclude judicial review,”<sup>289</sup> and therefore plaintiffs’ proper challenges must lie in habeas.<sup>289</sup> As a result, the Court vacated the TROs on procedural grounds, holding that the District of Columbia was an improper venue, and instead, plaintiffs must bring their claims in Texas, where they were confined.

In *A.A.R.P. v. Trump*,<sup>290</sup> the Supreme Court similarly declined to weigh in on the merits of the Administration’s AEA invocation—instead issuing a ruling that only addressed procedural safeguards. In *A.A.R.P.*, two detainees identified as TdA members and a putative class of similarly situated detainees filed an emergency application for a TRO blocking their removal in the United States in the Northern District of Texas.<sup>291</sup> The Court once again acknowledged that the detainees possessed due process rights.<sup>292</sup> It further declared that the Government’s roughly 24-hour notice—without any guidance on how to exercise due

---

283. *Id.* at 13034.

284. 145 S. Ct. 1003 (2025)

285. *J.G.G.*, 772 F. Supp. 3d at 24.

286. 145 S. Ct. at 1005 (quoting Minute Order on Motion To Certify Class in No. 25-cv-00766.); *see id.* (noting the holding of the D.C. Circuit denying the Government’s emergency motion to stay the orders).

287. *Id.* at 1006.

288. *Id.* at 1005.

289. *Id.* at 1006 (quoting *Ludecke v. Watkins*, 335 U. S. 160, 163-164 (1948)).

290. 145 S. Ct. 1364 (2025).

291. *A.A.R.P. v. Trump*, 778 F. Supp. 3d 882, 883 (N.D. Tex.), *appeal dismissed*, No. 25-10534, 2025 WL 1148141 (5th Cir. Apr. 18, 2025), *cert. granted, judgment vacated*, 145 S. Ct. 1364 (2025)

292. *A.A.R.P.*, 145 S. Ct. at 1367.

process rights—”surely does not pass muster.”<sup>293</sup> As a result, the Court granted the TRO and vacated and remanded the case to the Fifth Circuit to determine.<sup>294</sup>

As in many national security cases, this narrow focus reflects the high deference commonly given to the Executive. But even here the Court refused to treat the Executive’s delegated power as immune from review.

#### F. Reflective Equilibrium

A good theoretical model will generally capture at least some of our strong pre-theoretical intuitions.<sup>295</sup> At the same time, a good theoretical model will provide guidance where our intuitions are murky.<sup>296</sup> At times, a good model may prompt us to confront strongly held intuitions and examine their foundations.<sup>297</sup> If the evidence behind the model is very compelling, we may be forced to abandon even a closely held intuition.<sup>298</sup> On the other hand, if the evidence is weak and the intuition very strong, we may instead reasonably decide to abandon the model.<sup>299</sup>

The framework introduced in this section aims to strike the right balance between capturing our intuitions about national security-based restraints on international commerce and providing a solid theoretical framework for courts to approach novel questions about the use of Executive power. The first inquiry into whether it succeeds is to ask whether it captures our firmly held intuitions about

---

293. *Id.*

294. *Id.* at 1370; *See* A.A.R.P. v. Trump, No. 25-10534, 2025 WL 1148141, at \*1 (5th Cir. Apr. 18, 2025), *cert. granted, judgment vacated*, 145 S. Ct. 1364 (2025) (dismissing detainees’ claim for lack of jurisdiction). *But see* W.M.M. v. Trump, No. 25-10534, 154 F.4th 207, 237 (5th Cir. Sept. 2, 2025), *reh’g en banc granted, opinion vacated*, No. 25-10534, 2025 WL 2784957 (5th Cir. Sept. 30, 2025) (granting a preliminary injunction blocking detainees’ removal solely for questions of class action certification, leaving in place the government’s updated one-week notice explaining how the detainees could exercise their due process rights, and remanding to District Court for further proceedings).

295. *See* Yuri Cath, *Reflective Equilibrium*, in *THE OXFORD HANDBOOK OF PHILOSOPHICAL METHODOLOGY* 213 (Herman Cappelen, Tamar S. Gendler, John Hawthorne, eds., 2016).

296. Daniel Little, *Reflective Equilibrium and Justification*, 22 *SOUTH. J. PHIL.* 373, 374 (1984).

297. *See* NORMAN DANIELS, *Introduction: Reflective Equilibrium in Theory and Practice*, in *JUSTICE AND JUSTIFICATION* 1, 1-16 (1996).

298. *See generally* 2 KURT GOTTFRIED & VICTOR WEISSKOPF, *CONCEPTS OF PARTICLE PHYSICS* (1986) (explaining counterintuitively that atoms are primarily composed of empty space and what you feel when you press into a thing is not the displacement of that thing’s physical existence but rather the force of electromagnetic repulsion).

299. Matthew Chalmers, *Physicists Find New Particle, But is it the Higgs?*, *NATURE* (July 2, 2012), <https://perma.cc/8F5H-NRSM> (describing the standards for new discoveries in physics, even if in line with forecasts, and providing examples where new potential discoveries were rejected for further data review because they seemed theoretically contraindicated or otherwise counterintuitive).

this complicated doctrinal area of law.<sup>300</sup>

The framework described above implies that certain uses of Executive authority—like direct economic sanctions under IEEPA, the use of CFIUS to block or force divestment in cases directly linked to military security and the imposition of tariffs aimed to blocking theft of domestic dual-use intellectual property—should be considered Category I restraints and accordingly should be treated by courts with great deference.<sup>301</sup> This seems to capture the widely-held intuition that the President’s broad constitutional authority to act within this area, combined with his specific and often secret information about the risks involved, should be respected by the courts and overturned only in unusual cases, where the statutory language manifestly fails to delegate the relevant authority.<sup>302</sup>

The framework also suggests that certain uses of Executive authority—like the use of CFIUS to block economic transactions to protect favored companies, the use of national security authority to impose broad unfocused tariffs to reshape economic policy and the arbitrary imposition of ostensibly national security based penalties on foreign countries for unrelated diplomatic reasons—should be considered Category II restraints and accordingly should be treated by courts with much less deference. This captures the widely held intuition that these uses of the President’s powers are much more concerning and often serve as run-arounds to achieve unrelated policy goals.

But not everything captured by the framework is intuitive. Predictively, the framework suggests that significant deference is appropriate even in situations where the President’s use of Executive authority is unprecedented and has never previously been attempted—even when the President is applying a decades-old law or venturing into new areas of regulation. There is certainly no consensus that the courts should be deferential in this area<sup>303</sup>—but the framework suggests that this deference is nevertheless appropriate so long as the executive actions are designed to prevent a strategic adversary from becoming stronger.

This framework guides courts in how to approach challenges to executive actions when precedent is unclear and when there is disagreement about how to assess the relevant factors.<sup>304</sup> Understanding the proper level of deference and the scope of review allows judges to better judge—and it allows their opinions to be more informed, comprehensive, consistent, and predictable.

---

300. See Shirin Sinnar, *A Label Covering a “Multitude of Sins”: The Harm of National Security Deference*, 136 HARV. L. REV. F. 59, 69–74 (2022).

301. See *supra* Part III(A).

302. John C. Reitz, *Deference to the Administration in Judicial Review*, 66 AM J. COMP. L. 269, 294 (2018).

303. Cf. Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1366–76, 1403–04 (2009) (describing established elements of national security deference).

304. See *supra* Part II (comparing cases that have left an unclear precedential record).

## CONCLUSION

National security restraints on international commerce are just one subset of commercial regulations. But unlike other restraints, national security restraints are particularly powerful because the importance of security and traditional norms of deference to the Executive in foreign policy permit the Executive to act more swiftly and with less oversight when national security concerns are invoked.<sup>305</sup>

Historically, national security restraints were rare.<sup>306</sup> Emergency national security legislation like IEEPA was not used in the ordinary course of governance to impose tariffs,<sup>307</sup> regulation was generally pursued instead under an economic policy framework, subject to constraints of the guiding statutes and other administrative rules like the APA.<sup>308</sup> Recently, however, administrations have realized that national security restraints offer an end-run around much of this procedural due process and provide an attractive way for administrations to defend broad assertions of executive power.<sup>309</sup> Courts have been tasked with confronting these new executive actions without a theoretical framework in place for how to review these executive actions and when to uphold them.

This Article offers a framework that helps determine when a national security restraint exceeds the constitutional authority of the Executive. If a restraint is aimed at preventing a strategic adversary from becoming stronger, this Article urges that courts continue to apply a highly deferential approach illustrated in cases like *Dames & Moore*.<sup>310</sup> However, when a restraint is aimed at preventing the United States from becoming weaker, this Article argues that courts should subject the restraint to more searching review, using the deference ordinarily employed for the underlying regulatory activity.<sup>311</sup>

But this deference to the Executive can go too far, and courts can err by being too willing to credit dubious national security justifications.<sup>312</sup> Armed with the framework introduced in this Article, courts will know better when to scrutinize national security restraints more carefully, and when, instead, to continue to

---

305. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S., 579 637 (Jackson, J., concurring).

306. See Berman, *supra* note 39 (“Between the creation of CFIUS in 1975 and 2018, presidents blocked foreign-investment transactions just five times.”).

307. Tariffs were instead imposed under other statutory authorities, even during the first Trump Administration. See Craig VanGrasstek, *The Trade Policy of the United States under the Trump Administration*, in *TRADE POLICY IN THE 21ST CENTURY: BACK TO THE PAST?* 99-104 (Bernard M. Hoekman & Ernesto Zedillo eds., 2021).

308. See generally GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW* (2022) (describing APA rules that might apply here).

309. LAURA VON DANIELS, *GERMAN INST. FOR INT’L AND SEC. AFFS., ECONOMY AND NATIONAL SECURITY: US FOREIGN ECONOMIC POLICY UNDER TRUMP AND BIDEN*, 5-11, 15, 17, 20, 30, 37-38 (2024).

310. See *Regan*, 453 U.S. 654, 669 (1981).

311. See *supra* Part III(A).

312. See New Civil Liberties Alliance Brief, *supra* note 63, at 6-7.

deploy a more deferential approach. The hope is that this will help courts safeguard the constitutional balance of powers and will help ensure that Executive action does not violate the Constitution's limits.