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Presidential Authority to Impose Tariffs

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INTRODUCTION

Over the last half century, power constitutionally vested in Congress has been ceded to the president. This devolution has been chronicled extensively in the context of the tension between the president's commander-in-chief authority and Congress's responsibility to declare war without a serious attempt at correction. This cession of power has also happened in the area of tariffs—traditionally in the purview of the legislative branch but arrogated in recent years by the executive. Congress has recently demonstrated its willingness to allow this shift to happen in the context of Russia's invasion of Ukraine. This Article advances the argument that in the area of tariffs, presidential claims to authority in the absence of a specific grant from Congress are illegitimate, and even with an explicit grant of authority from Congress, such a grant is ill advised. With the courts' reluctance to rule on war powers, it may be in the area of tariffs that the judicial branch may set right the principles of separation of powers between executive and legislative branches.

I. ASSERTION OF PRESIDENTIAL TARIFF AUTHORITY TARGETED AGAINST A SINGLE COUNTRY UNDER THE INTERNATIONAL ECONOMIC EMERGENCY POWERS ACT IS ILLEGITIMATE

The most striking assertion of presidential authority over tariffs without congressional permission occurred in 2019. Purporting to act under the authority of the International Economic Emergency Powers Act (IEEPA), President Trump threatened heightened tariffs in an attempt to intimidate Mexico into doing more to stop immigrants from illegally entering the United States. President Trump stated:

To address the emergency at the southern border, I am invoking

> the authorities granted to me by the International Emergency Economic Powers Act [(IEEPA)]. Accordingly, starting on June 10, 2019, the United States will impose a 5-percent tariff on all goods imported from Mexico. If the illegal migration crisis is alleviated through effective actions taken by Mexico, to be determined in our sole discretion and judgment, the tariffs will be removed. If the crisis persists, however, the tariffs will be raised to 10 percent on July 1, 2019. Similarly, if Mexico still has not taken action to dramatically reduce or eliminate the number of illegal aliens crossing its territory into the United States, tariffs will be increased to 15 percent on August 1, 2019, to 20 percent on September 1, 2019, and to 25 percent on October 1, 2019. Tariffs will permanently remain at the 25-percent level unless and until Mexico substantially stops the illegal inflow of aliens coming through its territory.[1]

Mexico's government conceded to this threat by adopting the "Remain-in-Mexico" policy, which kept asylum seekers on the Mexican side of the border and strengthened its own border with Guatemala. President Trump's assertion of tariff authority under the IEEPA accordingly was withdrawn and never subjected to judicial challenge. President Trump's spokesperson asserted there was legal authority for his position,[2] and the highly regarded Congressional Research Service has agreed:

> No President has used IEEPA to place tariffs on imported products from a specific country or on products imported to the United States in general. However, IEEPA's similarity to TWEA [Trading With the Enemy Act], coupled with its relatively frequent use to ban imports and exports, suggests that such an action could happen. . . . IEEPA may be a source of authority for

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1. Statement on Emergency Measures To Address Illegal Migration at the Mexico-United States Border, 2019 DAILY COMP. PRES. DOC. 354 (May 30, 2019); *see also* Scott R. Anderson & Kathleen Claussen, *The Legal Authority Behind Trump's New Tariffs on Mexico*, LAWFARE: TRADE AND SEC. (June 3, 2019, 4:19 PM), https://www.lawfareblog.com/legal-authority-behind-trumps-new-tariffs-mexico [https://perma.cc/F2JS-2TDP].

2. Anderson & Claussen, *supra* note 1 ("'[The IEEPA] gives [the president] much broader authority than he's even taking on this front,' White House Press Secretary Sarah Huckabee Sanders said when asked about the law. 'There's case law that supports it.' In fact, the legal basis for this latest Mexico policy is far from clear. Instead, like many of the Trump administration's recent policies, the Mexico tariffs test the outer limits of the president's legal authority—terrain that Congress and the courts may yet choose to reclaim." (alterations in original)).

> the President to quickly impose a tariff. On May 30, 2019, President Trump announced his intention to use IEEPA to impose on and gradually increase a five percent tariff on all goods imported from Mexico until "the illegal migration crisis is alleviated through effective actions taken by Mexico." The tariffs were scheduled to be implemented on June 10, 2019, with five percent increases to take effect at the beginning of each subsequent month. On June 7, 2019, President Trump announced that that [sic] "[t]he Tariffs scheduled to be implemented by the U.S. [on June 10], against Mexico, are hereby indefinitely suspended."[3]

President Biden initially reversed the Remain-in-Mexico policy, but this action was successfully challenged under the Administrative Procedure Act.[4] The Biden Administration has restarted the policy, with Mexico's agreement.[5] Whether a renewed threat of tariffs figured in Mexico's decision is not clear.

However, successful in the context of Remain in Mexico, present and future presidents may well threaten use of tariffs—claiming to have authority under the IEEPA or some other statute—for virtually any American foreign policy objective against any one or handful of countries. The IEEPA does not confer tariff authority upon the president for the following reasons:

> (a) tariffs are economically different from quantitative import restraints,
> (b) this interpretation of IEEPA violates rules of statutory construction,
> (c) this assertion of power violates separation of powers principles that accord Congress primacy over tariffs,
> (d) and to do so violates the scheme of the international trading order.

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3. CHRISTOPHER A. CASEY ET AL., THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT: ORIGINS, EVOLUTION, AND USE 27 (CONG. RSCH. SERV., R45618, 2020) (footnotes omitted) (fourth alteration in original). *See also* Anderson & Claussen, *supra* note 1.

4. Texas v. Biden, 554 F. Supp. 3d 818 (N. D. Tex. 2021).

5. Kevin Sieff & Arelis R. Hernández, *'Remain in Mexico' program begins in El Paso amid skepticism from advocates*, WASH. POST (Dec. 8, 2021, 7:44 PM EST), https://www.washingtonpost.com/immigration/remain-in-mexico-restarts-biden/2021/12/08/33184c3c-570f-11ec-929e-95502bf8cdd5_story.html [https://perma.cc/Y3VE-WLV9].

A. Tariffs are Economically Different from Quantitative Import Restraints

The following differences between a quota—or outright ban on imports—and a tariff are economically salient. No court has recognized what microeconomics teaches on this point. Each of these distinctions has relevance to the separation-of-powers issue regarding tariffs and quantitative restraints.

1. Tariffs Raise Revenue. Quotas Do Not.

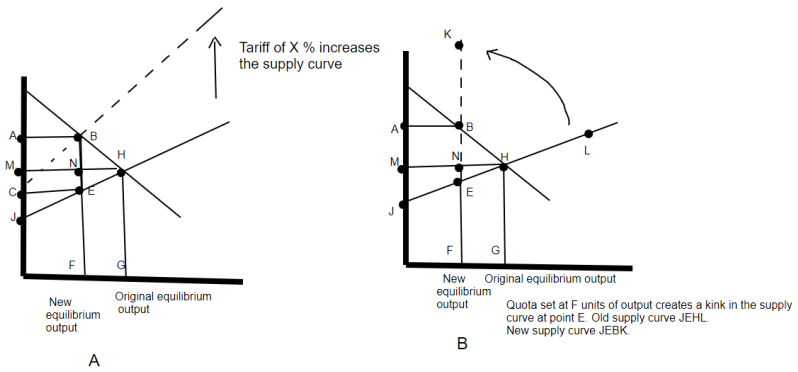

Figure 1

In Panel A of Figure 1, a tariff is imposed of X%. The effect is to lift the supply curve by X% vertically at any given level of output. Original output is G, original price is M, and original equilibrium is H.

When the tariff is imposed, price rises to A, and the amount exported by the country upon which the tariff is imposed drops to F. The importing country's government receives ABEC of revenue.

In Panel B of Figure 1, a quota is imposed at output level F. The effect is to lift price to A. There is no revenue to the government imposing the quota.

Raising revenue is the quintessential congressional prerogative: the power of the purse. Quantitative import restraints like quotas, by contrast, do not raise revenue. This difference has implications for Congress's role in enacting the nation's budget. Up until 1914, tariffs were the principal source of revenue for the United States.[6] From the point of view of the

6. Chad P. Brown & Douglas A. Irwin, *Even Now, Tariffs Are a Tiny Portion of US Government Revenue*, PETERSON INST. FOR INT'L ECON. (July 16, 2019), https://www.piie.com/research/piie-charts/even-now-tariffs-are-tiny-portion-us-government-

authors of the Constitution, and its separation of powers, changing tariff rates would directly impact Congress's most critical function.

Without disagreeing that Congress could, under appropriate "intelligible principles,"[7] delegate some authority over setting tariffs to the president, the centrality of tariffs to the revenue of the United States from its founding until the adoption of the income tax[8] strongly argues against inferring that a president has tariff authority in the absence of such an explicit delegation from Congress. Practically, if the president can adjust tariff levels on his or her own under generic authority as provided for in the International Economic Emergency Powers Act, then he or she could lower them as well as increase them. At the very least, having raised tariffs, the president could decide when to lower them again. Lowering tariffs could have a devastating effect on the revenues on which the federal budget was based for most of the history of our country.

2. Tariffs Allow Domestic Consumers to Benefit from Responses Within the Exporting Country. Quotas Do Not.

Because a quota sets an absolute maximum to the level of exports from the targeted country, even if the manufacturers subject to the quota are able to lower their costs of production, the benefit of the lower cost is not passed along to the consumers in the country imposing the quota. A tariff, by contrast, while increasing the cost of delivering goods to the country imposing the tariff, could lead the exporting country to lower its general business taxes to ameliorate that effect. (Lowering of taxes just on exports would violate the principles of the World Trade Organization (WTO).) Additionally, a foreign country's industry engaged in export might be tempted to lower its export prices on their own in response to the tariff to preserve its market share. Either step is more likely if the tariffs were perceived to be short-lived.

The reason this difference between quotas and tariffs matters from an American separation-of-powers vantage point is that a tariff could induce steps on the exporters' side, preventing American consumers' prices from

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revenue#:~:text=Tariff%20revenue%20has%20not%20been,insurance%20and%20retirement%20payroll%20taxes [https://perma.cc/XJE6-HFF9].

7. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.").

8. It is no coincidence that tariffs began to decline as the dominant source of federal revenue with the adoption of the Sixteenth Amendment allowing a federal income tax in February of 1913.

rising as much, if at all. This would be important to the congressional legislators who imposed the tariff, as the impact on domestic consumers could be ameliorated. A president might not be as sensitive to the impact on domestic consumer prices.[9] If an exporting country was contemplating lowering its business taxes to offset a small tariff, it might choose not to act if the size of the tax cut necessary to offset the tariff grows so large as to be unobtainable. This risk would not be present with a quota since nothing the exporting country could do in the nature of a general tax cut could increase the level of exports.

9. *See generally* William A. Galston & Elaine Kamarck, *Inflation politics is clearer than inflation economics*, BROOKINGS INST. (Jan. 14, 2022), https://www.brookings.edu/blog/fixgov/2022/01/14/inflation-politics-is-clearer-than-inflation-economics/ [https://perma.cc/Y29B-A5S8]. In the current context of tariffs on Chinese goods, lowering the tariffs would help with inflation but lessen U.S. diplomatic leverage.

> [US Special Trade Representative Katherine] Tai earlier this month said that while relief from U.S. tariffs on China is one option under consideration to confront the fastest inflation in four decades, the duties should be studied in the context of broader economic policy. She dismissed March research from the Peterson Institute for International Economics, which estimated that eliminating a wide array of tariffs, including those on Chinese goods, could reduce inflation by 1.3 percentage points.

Eric Martin & Matt Shirley, *US Must Be 'Strategic' on China Tariffs, Trade Chief Says*, BLOOMBERG (May 24, 2022, 3:33 AM CDT), https://www.bloomberg.com/news/articles/2022-05-24/us-must-be-strategic-on-china-tariffs-trade-chief-says [https://perma.cc/R9A6-VHAK].

3. Quotas Encourage Cartel-Like Behavior by the Exporting Countries Not Subject to the Quota. Tariffs Do Not.

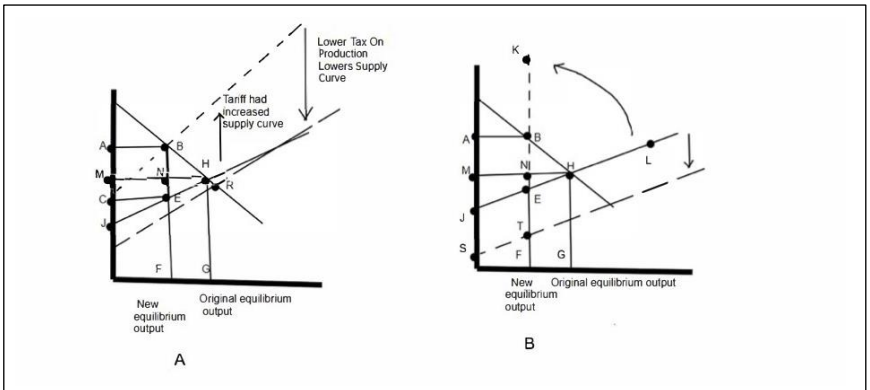

Figure 2

After the tariff is imposed in Panel A, a lowering of taxes on the company producing the export by the exporting country moves the supply curve down from the closely hashed line to the widely hashed line. The new equilibrium is at point R, reflecting a lower price than A, the price after the tariff had been imposed, and a greater amount exported than F, the exports after the tariff had been imposed. Hence, consumers benefit from the lowering of taxes on exporters by the exporting country.

After the quota is imposed in Panel B, the lowering of taxes on the exporting company moves the supply curve down in similar fashion to Panel A. However, the new equilibrium remains at point B. Price remains at A; exports remain at F. Consumers do not benefit. The exporting firm, however, does make more profit in the amount JETS.

Many exporting industries are characterized by a small number of competitors who observe each other's pricing behavior, even if they do not actually agree to set prices.[10] The members of such industrial structures that show interdependent action would benefit from a quota over a tariff regime. A quota guarantees that the industry from that exporting country will not increase its participation in the U.S. market in response to a price increase. The greatest threat to firms acting in a consciously parallel way, or an outright cartel, is the temptation for each participant to expand its own sales while all the other industry participants restrict theirs. With a

10. This was the rationale behind the Webb Pomerene Act, adopted at a time when America was almost unique in having antitrust laws in a world where other countries permitted or even fostered cartels. The proliferation of competition laws in other jurisdictions in recent years has likely diminished the incidence of explicit cartels but not the behavior of conscious parallelism.

quota, the government of the importing country acts as the cartel's police against such cheating.

At a high enough level, a tariff will act as a quota. Doubling the cost to bring an import to market, for instance, would likely have the same effect as outright banning the import.[11] The president and the United States Trade Representative (USTR) might never have contemplated so draconian a measure as an import ban, but increasing tariffs might seem a more palatable step. Thus, while a tariff increase would be preferable to a quantitative restriction from the consumers' viewpoint, the comparative advantage disappears if the quantitative restriction was never going to happen. In that circumstance, any increase in the tariff above the level the USTR originally decided upon while working with Congress and taking account of the cartel-like structure of the industry is a move in the wrong direction.

4. Tariffs Unequivocally Harm Exporters on Whom They are Imposed. Quotas Might Actually Benefit Them.

A tariff increases the cost of an exporter bringing a good to market. The market price rises, but the exporter's cost per unit rises more than the increase in price.[12] The result is less profit for the exporter. By contrast, an import quota restricts the total supply to a market, but the exporter participates in the higher market price. It is possible, if demand is relatively inelastic, for the effect of the higher price to swamp the drop in the exporter's quantity sold. This is the same mechanism whereby a monopolist can increase profits by selling less, but at a higher price, where the percentage rise in price is higher than the percentage drop in goods sold.

The consequence is that a quantitative restriction gives the president something to use to bargain with an exporting country. If the goal is to achieve a higher price for domestic manufacturers in an industry, a quota on imports will lead to that result without the domestic manufacturers having to cut back at all. It is as though Saudi Arabia restricted its export of petroleum, but none of the other Organization of the Petroleum Exporting Countries (OPEC) member countries did. Those other countries

11. The precise effect would depend on the elasticities of demand and supply for the product being imported. If demand elasticity is negative one, and supply curves are highly elastic, a doubling of the marginal cost of bringing a good to market will result in a complete end to imports of the good.

12. The only situation where this would not be true is if demand is perfectly inelastic. Then the market price will rise by the amount of the tariff since consumers have nowhere else to go.

would benefit more, percentagewise, than Saudi Arabia would, but it is possible all would benefit. Accordingly, the quantitative restriction fits more comfortably within the president's diplomatic role—working out a give and take with other countries—than a tariff does. The tariff offers nothing but hurt to the foreign exporter. The quota offers the possibility of gain to the exporter. Both would benefit the domestic producer competing with the foreign exporter.

A good illustration of this reality is that U.S. presidents have often persuaded exporting countries to abide by voluntary quotas. Presidents Johnson, Nixon, Ford, and Carter each reached such restraints on steel imports.[13] President Carter began and President Reagan finished negotiations with Japan on voluntary automobile restrictions.[14] Having no force of law but put into place by a foreign country as a way of resolving trade tensions, voluntary export restraints involve the presidential prerogative in international diplomacy more directly than the imposition of a tariff.

5. Quotas Require Government Selection of Which Importers Can Import How Much; A Tariff Lets the Market Allocate Imports

When a quota on imports is imposed, the government of the importing country must develop a way to decide which importers will be allowed to ship goods into the country. The result requires an allocation scheme to be initiated and supervised by the government. Whether by lottery, first-come first-served, or previous market shares, the practical administration of a quota is entirely the business of the executive branch.[15]

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13. CHARAN DEVEREAUX ET AL., 2 CASE STUDIES IN US TRADE NEGOTIATIONS: RESOLVING DISPUTES 195 (2006); Clyde H. Farnsworth & Daniel F. Cuff, *'Voluntary' Import Restraint*, N.Y. TIMES, Sept. 20, 1984, at D19 ("The steel industry has had protection over 13 of the last 16 years. In 1968 the State Department negotiated 'voluntary' restraints with all the leading foreign steel suppliers. They lasted until 1974, cracking as a result of a world steel shortage.").

14. EXECUTIVE OFFICE OF THE PRESIDENT, 25 ANNUAL REPORTS ON THE TRADE AGREEMENTS PROGRAM 52 (1980).

15. "Trade quotas require active management. Government bureaucrats, often working under rigid rules and with very little data, are expected to level out supply and demand. When a product can only be imported in limited amounts, for example, companies rush to fill the quota before their competitors can do so." Chad Brown, *The False Allure of Managed Trade*, WALL ST. J., Dec. 18–19, 2021, at C5. "Governments often allocate the quota tickets to domestic importing companies based on past market shares. *Section 7.11: Administration of an Import Quota*, INT'L TRADE THEORY & POL'Y, https://saylordotorg.github.io/text_international-trade-theory-and-policy/s10-11-administration-of-an-import-qu.html

By contrast, a tariff is paid by each importer, increasing each importer's cost. If the tariff pushes the marginal cost of an additional unit imported above its market price, then that importer will no longer import. Allocating imports after a tariff, therefore, is an entirely market-driven system. No supervision by the executive branch is required—outside from the already established customs mechanisms for collecting any tariff. This distinction reinforces the association of the executive branch with a quota, where detailed executive branch administration is needed, as opposed to a tariff, which the legislative branch can impose without adding any administrative structure.

6. Conclusion

The economic difference between tariffs and quantitative restrictions unequivocally points to the former fitting better within the legislative domain and the latter within the executive domain. Congress could delegate its tariff authority to the president, but in the absence of it having done so, economic logic supports the conclusion that tariffs reside in the legislative area since they affect revenue, induce pro-consumer responses from the exporting country, do not facilitate cartels, and present no offsetting advantage to an exporting country that can be used to bargain to "voluntary" controls. Conversely, quantitative restrictions, and their mere threat, are the product of negotiations between countries, and that is the realm of the executive.

[https://perma.cc/8AQB-K38P] (last visited Feb. 5, 2023). A similar situation results from the government's allocation of H1B immigrant visas in high tech industries, where the limited number made available are snapped up almost immediately, and many applicants are denied. This eventually led to a H1B lottery administered by the federal government. The

> H1B visa is one of the most sought visas to work in the US. In recent years, there are more H1B applications received by USCIS than the required number of 85,000 per year. To address situations of high demand, USCIS introduced the concept of random selection, aka as H1B Visa Lottery.

Kumar, *GUIDE to H1B Visa 2023 – Lottery, Registration, Predictions, News, FAQs*, RED BUS (Nov. 13, 2022), https://redbus2us.com/h1b-visa-season/#H1B-2023-Registration-Process-for-Lottery [https://perma.cc/2RJV-L749].

B. Statutory Construction of the IEEPA Disfavors Assuming the President Has Tariff Authority

The IEEPA[16] has never been used to impose a tariff. Its predecessor, the Trading With the Enemy Act (TWEA), imposed tariffs only once—with jurisprudence that did not go above the level of the Court of Customs and Patent Appeals.[17] The claim that the IEEPA gives the president authority to impose tariffs is based on a faulty syllogism that, since the powers the IEEPA gives the president are broad, tariff authority is likely included. A more careful delineation of the difference between tariffs and other trade regulations supports the conclusion that Congress did not hand over tariff authority, one of its explicit constitutionally defined powers (over "duties" and "imposts"), to the president in the IEEPA.

The language of the IEEPA does not refer to tariffs.[18] The powers given to the president under the IEEPA strongly suggest quantitative restrictions instead. For instance, in stating when a president may not use the IEEPA, the statute points to personal communications, donations to relieve human suffering, the transfer of informational materials like publications, and baggage and living expenses incident to personal travel.[19] None of these activities are logically amenable to a tariff.

The way the IEEPA fits in with other trade statutes also undermines the assertion of a tariff authority in the president. If the IEEPA gives the president the authority to impose tariffs without any of the procedural requirements of these specific trade laws that deal with tariffs, there seems no reason for the president to go through the steps those other statutes prescribe.

In pari materia is a canon of statutory construction that compels an interpretation of an ambiguous phrase in such a way as not to render other

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16. For a legislative history of the IEEPA, see Patrick A. Thronson, *Toward Comprehensive Reform of America's Emergency Law Regime*, 46 U. MICH. J.L. REFORM 737, 743–53 (2013).

17. United States v. Yoshida Int'l, Inc., 526 F.2d. 560, 572–73 (C.C.P.A. 1975) ("We are presented, in this case, with the first reliance upon the TWEA as authority for a Presidential imposition of a temporary surcharge on imports. There being nothing in the TWEA or in its history which specifically either authorizes or prohibits the imposition of a surcharge, and no judicial precedent involving the same, we tread new ground.").

18. The closest the IEEPA comes to granting the president the authority to impose a tariff would be to construe that power out of 50 U.S.C. § 1702(a)(1)(B): "[T]he President may . . . by means of instructions, licenses, or otherwise . . . regulate . . . any . . . transfer . . . [of] any property in which any foreign country or a national thereof has any interest."

19. 50 U.S.C. § 1702(b)(1)–(4).

statutes on the same subject superfluous,[20] let alone make a complex system of statutes as the trade laws entirely unnecessary. This is a powerful argument against stretching the words "regulate . . . any . . . transfer . . . of any property in which any foreign country or a national thereof has any interest"[21] to mean "impose a tariff." This was precisely the logic of the lower courts in the two most important cases interpreting claims of broad presidential tariff authority: *United States v. Yoshida International, Inc.*[22] and *Federal Energy Agency v. Algonquin SNG, Inc*.[23]

In *Yoshida*, President Nixon relied on the TWEA to impose across-the-board tariffs on all imports to redress a balance-of-payments crisis.[24] The operative language of the TWEA is identical to that found in the IEEPA,[25] and it does not include the word "tariff." While the case was pending, Congress passed specific legislation dealing with actions the President could take responsive to such monetary problems.[26] Had the regulations implementing the new law been in place by the time the U.S. Court of Customs and Patent Appeals ruled, that court might well have construed much more narrowly the President's TWEA authority.

There is another reason to believe the Federal Circuit, the successor to the Court of Customs and Patent Appeals, might not rule as the *Yoshida* court did if the issue was newly presented today. The predicate for using the TWEA—and now IEEPA—powers was a presidential proclamation of an emergency, which Congress could repeal by a concurrent resolution. Hence, in reading the words "such other action" to include tariffs, despite

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20. Anuj C. Desai, *The Dilemma of Interstatutory Interpretation*, 77 WASH. & LEE L. REV. 177, 182 (2020) ("The *in pari materia* doctrine is one of numerous ways to engage in interstatutory cross-referencing, to use one statute to help understand another. When a court concludes that two statutes are *in pari materia*, or (translating the Latin) 'on the same subject,' the court then treats the two statutes as though they were one. Provisions within the two statutes must thus be harmonized." (internal footnotes omitted)).

21. 50 U.S.C. § 1702(a)(1)(B).

22. *Yoshida*, 526 F.2d 560.

23. Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548 (1976).

24. *Yoshida*, 526 F.2d. at 580–83.

25. *Compare* TWEA, 50 U.S.C. § 4305(b)(1) ("[d]uring the time of war, the President may . . . by means of instructions, licenses, or otherwise . . . , regulate . . . any . . . transfer . . . of . . . any property in which any foreign country or a national thereof has any interest"), *with* IEEPA, 50 U.S.C. § 1702(a)(1)(B) ("the President may, by means of instructions, licenses, or otherwise, regulate . . . any . . . transfer . . . [of] any property in which any foreign country or a national thereof has any interest").

26. 19 U.S.C. § 2312; Trade Act of 1974, Pub. L. 93-618, § 122, 88 Stat. 2001.

the comprehensive scheme Congress had created for tariffs, the *Yoshida* court would have understood that Congress could always repeal the President's declaration of an emergency, by a vote not subject to the President's veto, and thereby end the tariffs. The U.S. Supreme Court rendered that part of the TWEA's—now IEEPA's—scheme ineffective in *INS v. Chadha*.[27] Were the issue to arise anew today, the absence of a congressional check might well convince a court to read the IEEPA more narrowly.[28] "By eliminating the legislative veto, and thereby its availability for exceptional presidential tariff authority, the Court left Congress exposed. *Chadha* stripped the exceptional tariff authorities of their most important congressional constraints and effectively required presidential support for new legislation if Congress wanted to reclaim that control."[29]

The other potential decision on which the claim of supportive case law might be based for President Trump's asserted power is *Federal Energy Agency v. Algonquin SNG, Inc*.[30] In that case, the U.S. Supreme Court interpreted a different statute, the "escape clause," which addresses the circumstance when imports threaten a domestic industry of such national security importance, that the President is empowered to "take such action, and for such time, as he deems necessary to adjust the imports of (the) article and its derivatives so that . . . imports (of the article) will not threaten to impair the national security."[31] The Nixon Administration had adjusted tariffs on all imported oil following a Treasury Department finding that the domestic oil industry, of vital interest to the country's national security, was under threat. The statute does not specifically grant tariff authority under the power to "take such action," but the U.S. Supreme Court held that it could be inferred. The Court rejected the challenge of excessive delegation of legislative authority in light of the careful findings that the Treasury Department had to make before the President could act. Those specific predicates are missing from the IEEPA.

The trial court in *Yoshida* was the U.S. Customs Court. Its panel ruled "to invest the President with the powers contended by the defendant would render the proceedings and guidelines enumerated in other tariff

27. INS v. Chadha, 462 U.S. 919 (1983).

28. *But cf.* United States v. Romero-Fernandez, 983 F.2d 195, 196 (11th Cir. 1993) (noting severability clause in the IEEPA). *See* Tom Campbell, *Severability of Statutes*, 62 HASTINGS L.J. 1495 (2011).

29. Kathleen Claussen, *Trade's Security Exceptionalism*, 72 STAN. L. REV. 1097, 1161 (2020) (footnotes omitted).

30. Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548 (1976).

31. *Id.* at 550 (citing 19 U.S.C. § 1862(b) (1970)).

legislation meaningless."[32] The D.C. Circuit in *Algonquin* expressed similar reasoning: "We must . . . conclude that section 1862(b) does not authorize these fees. We reach this conclusion after studying the consistently explicit, well-defined manner in which Congress has delegated control over foreign trade and tariffs; the Government's construction of section 1862(b) would be an anomalous departure from that approach."[33]

Of course, the author must concede that both lower courts just cited were overruled on appeal—one by the court today known as the U.S. Court of Appeals for the Federal Circuit and the other by the U.S. Supreme Court. That fact undermines the authority of those lower court opinions but not their logic. If the IEEPA has the breadth claimed for it in the Mexican immigration context, presidents could use tariffs for any non-trade related purpose they wished simply by announcing a national emergency.[34]

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32. Yoshida Intern., Inc. v. United States, 378 F. Supp. 1155, 1167 (Cust. Ct. 1974). *See also id.* at 1172 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)) ("In determining whether section 5(b) of the Trading with the Enemy Act serves as authority for the imposition of an additional duty, we must accord the word 'regulate' the sense in which Congress intended it to be used. The meaning of a statute or of the words therein is not to be derived from any single section, but from all of the parts comprising the entirety and, in turn, from their relationship to the ultimate purpose sought to be attained. Nor can the Act be read intelligibly if the eye is closed to the purpose and objectives evidenced in complementary statutes or in the known temper of legislative intent or historical usage. For legislation delegating restrictive regulatory authority cannot operate, merely upon the declaration of an emergency, to the exclusion of other legislative acts providing procedures prescribed by the Congress for the accomplishment of the very purpose sought to be attained by Presidential Proclamation 4074.").

33. Algonquin SNG, Inc. v. Fed. Energy Admin., 518 F.2d 1051, 1055–56 (D.C. Cir. 1975)

> In fact, we may generalize from our examination of the myriad of trade provisions that congressional delegations have been narrow and explicit in order to effectuate well-defined goals. *See, e.g.*, 19 U.S.C. §§ 1901, 1981 (injuries to domestic industries); *id.* §§ 2251, 2253 (import relief for threatened domestic injuries); *id.* § 1351 (modify duties within limitations of 50% of existing tariff rates under reciprocal trade agreements). . . . Fitted against this scheme, the Government interpretation of section 1862(b) would represent an anomalous delegation of almost unbridled discretion and authority in the tariff area.

Id. at 1056.

34. Should Congress attempt to repeal the declaration of a national emergency, it would take 2/3 of both houses:

C. Under Separation of Powers, Congress Has Primary Authority Over Tariffs While the President Has Primary Authority Over Diplomatic Relations

The Constitution makes clear that the purpose of duties (tariffs), similar to the purpose of taxes, is to pay the debts of the United States and finance its expenditures: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . ."[35] Congress may have other motives as well, but the key to the constitutionality of a tariff is its revenue-raising function. "So long as the motive of Congress and the effect of its legislative action are to secure revenue for the benefit of the general government, the existence of other motives in the selection of the subjects of taxes cannot invalidate congressional action."[36]

The president, by contrast, has primacy in foreign affairs.[37] Professor Claussen notes how in the trade area, the foreign affairs and the foreign commerce authority are directed to different branches. "Because the exceptions seek to navigate the fuzzy constitutional line between foreign affairs authority and foreign commerce authority—each ostensibly directed to a different branch—they risk contributing to a bilateral power struggle."[38]

> The present statute thus requires two-thirds of both houses to terminate a national emergency, given the almost absolute certainty of a presidential veto of a joint resolution. The statute now provides for a termination procedure that would ordinarily be available if there were no NEA, a remarkable accomplishment given the energy spent on ensuring that Congress would have a mechanism to 'assert its ultimate authority' over emergency power.

Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1416 (1989) (footnotes omitted).

35. U.S. CONST. art. I, § 8, cl. 1.

36. JOHNNY H. KILLIAN & GEORGE A. COSTELLO, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 152–53 (1996) (citing J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 412 (1928)) ("After being debated for nearly a century and a half, the constitutionality of protective tariffs was finally settled by the unanimous decision of the Supreme Court in *J.W. Hampton & Co. v. United States* . . . .").

37. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319 (1936) ("In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation.").

38. Claussen, *supra* note 29, at 1137.

The president has great power to carry on negotiations with other countries, and he can threaten import restrictions in that process. But no court has upheld a president's inherent right to impose tariffs on another country, outside of the authority explicitly delegated by Congress. That is because under the U.S. Constitution, tariff authority is vested in Congress.[39] The president's constitutional authority to conduct international relations might reach as far as to stop imports from a particular country, but that is not the same thing as imposing a duty upon those imports.

Congress can, of course, choose to give authority to the president to impose tariffs against a specific country. This was done in April of 2022 in the Suspending Normal Trade Relations with Russia and Belarus Act.[40] The statute actually specified the new tariffs within its own terms, reverting to the "Column Two" levels previously enacted by Congress to apply to any nation not benefiting from most-favored-nations treatment,[41] though delegating to the president until 2024 the right to impose even higher tariffs.[42] This approach appears to respect the traditional and appropriate reservation of tariff authority to Congress while granting, subject to a short leash of 20 months, an additional weapon in the president's diplomatic arsenal.[43] Nevertheless, there are no articulated standards to guide the president's discretion of going above the Column Two levels. By contrast, if the president chooses to remove the higher tariffs and reverts to those applicable to the most-favored-nation regime, Congress does require specific findings.[44] The difference between these two provisions might be sufficient to raise a non-delegation challenge to the president's ability to impose tariffs above the Column Two levels, entirely in his own discretion.

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39. U.S. CONST. art. 1, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises . . . .").

40. *See* Suspending Normal Trade Relations with Russia and Belarus Act, Pub. L. No. 117-110, 136 Stat. 1159 (2022).

41. *Id.* § 3(a).

42. *Id.* § 3(b)(1).

43. That the actual tariff rates to be imposed on Russia and Belarus had actually been passed by Congress in the so-called "Column Two" part of the tariff statute, further bolsters the conclusion that this statute did not give away any tariff authority of Congress. That is a point considered salient for over a century in Supreme Court rulings. *Id.* "Congress itself prescribed, in advance, the duties to be levied, . . . while the suspension lasted." Marshall Field & Co. v. Clark, 143 U.S. 649, 692–93 (1892).

44. Suspending Normal Trade Relations with Russia and Belarus Act, Pub. L. No. 117-110, § 4(b)(4)(c), 136 Stat. 1159, 1162 (2022).

This example of this alternative approach to giving a president tariff authority in the context of a specific diplomatic crisis may serve as a contrast useful for a court adjudicating presidential tariff authority in the future. Reading the IEEPA so broadly as to allow a president to impose tariffs without action by Congress has been shown to be unnecessary—at least in the context of Russia and Ukraine where Congress is willing to make an explicit, and limited, delegation of its tariff authority.

D. Presidential Tariff Authority Against a Single Target Undermines the International Trading Order

The perception that America, or any country, could implement tariffs against specific countries casts doubt upon the fundamental value of belonging to the WTO. That understanding was that tariffs would be negotiated in a multilateral setting under most-favored-nation rules, with no country able to change the rules unilaterally. If those promises can be eviscerated unilaterally, what stability does membership in the WTO convey to a country? Uncertainty over such an eventuality bolsters the case of countries that would replace the General Agreement on Tariffs and Trade (GATT) and its successor the WTO with a modern version of mercantilist trading blocs. President Biden, in his first address to Congress, identified that the world is at a crucial decision point between two systems: democracy and autocracy.[45] This duality is reflected in the contrast between a rule-based system and an opportunistic environment where trade becomes just another weapon.

To be consistent with the wording and history of the GATT and the charter of the WTO, presidential tariff authority should be negated. The GATT's fundamental focus was on the harmonization and reduction of tariff barriers. Unilateral action on tariffs by a major economy like America undercuts the essential *quid pro quo* of the GATT—now WTO—that all members would receive the benefit of the same tariff as any single member. Enforcing the most-favored-nation rule for tariffs and setting the developed world on sequential rounds of tariff lowering has been the source of the GATT's early successes. More recent failures of the WTO have stemmed from its inability to address non-tariff barriers—like import quotas, *de facto* or *de jure*—as effectively.[46] For that reason, an American

45. *Remarks of President Joe Biden – State of the Union Address As Prepared for Delivery*, WHITEHOUSE.GOV (Mar. 1, 2022), https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/03/01/remarks-of-president-joe-biden-state-of-the-union-address-as-delivered/ [https://perma.cc/MDK9-7BTF].

46. James Bacchus, *Reviving the WTO: Five Priorities for Liberalization*, CATO INST. (Feb. 23, 2021), https://www.cato.org/policy-analysis/reviving-wto-

assertion of unilateral authority to adjust tariffs on particular countries is far more upsetting than a similar assertion of power to keep imports out of America through negotiating voluntary import restraints.

An exception for national security was written into Article XXI of the original draft of the GATT, at the U.S.'s insistence:[47]

> Nothing in this Agreement shall be construed . . . to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests (i) relating to fissionable materials or the materials from which they are derived; (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; (iii) taken in time of war or other emergency in international relations . . . .[48]

Normal rules of statutory construction would bind the more general national security exception by the specific instances cited so that the kind of emergency contemplated would have to be of a warlike nature.[49] The context further indicates the kind of action contemplated: quantitative restrictions rather than tariffs. Countries can prevent vital information from being sent outside the country's borders and can interdict the shipment of military equipment. It would be incongruous to say the GATT's national security exception envisaged a country putting a tariff on a rival's exports.

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five-priorities-liberalization [https://perma.cc/4WY2-56GC] ("[T]he drawn-out failure of the Doha Development Round of trade negotiations begun in 2001 . . . the proliferation of bilateral and regional agreements outside the WTO framework; the historic resurgence of China as a global economic power; the apprehensive U.S. reaction to China's rise; the U.S. retreat from rule-based multilateralism in trade under a unilateralist and protectionist President Trump; and the worldwide surge in managed and manipulated trade have all combined to call into question whether the WTO remains relevant.").

47. Claussen, *supra* note 29, at 1135, 1135 n.177.

48. General Agreement on Tariffs and Trade art. XXI, Oct. 30, 1947, 55 U.N.T.S. 194.

49. *See Ejusdem Generis*, CORNELL LEGAL INFO. INST., https://www.law.cornell.edu/wex/ejusdem_generis#:~:text=Ejusdem%20generis%20is%20latin%20for,to%20clarify%20such%20a%20list [https://perma.cc/57GB-LJ77] (last updated Feb. 2022). Ejusdem generis is the canon of construction whereby specific words, when followed by a more general phrase, are used to limit the reach of the more general phrase. *Id.*

The international trade and monetary structures of the GATT, WTO, and Bretton Woods provide an additional basis for concluding that the *Yoshida* and *Algonquin* cases do not support asserted presidential power to impose tariffs on a single country for diplomatic purposes. For a balance of payments purposes, *all* imports received an additional tariff in *Yoshida*.[50] In *Algonquin*, *all* oil imports received an additional tariff to help the U.S. domestic oil industry.[51] Thus, the most-favored-nations principle was not violated. Imposing tariffs just on Mexico, by contrast, directly undermines this most essential concept of the GATT and the WTO enshrined in American trade laws.[52] The tariffs in *Yoshida* and *Algonquin* were applied to all countries importing into the United States. No one country's exports to America were targeted over others.

The International Monetary Fund (IMF) was created instead to deal with a country's individual need for currency stabilization in the midst of a run on its currency. The IMF would prop up a nation's currency against all other currencies by lending from its pool of capital contributed by all the member states. No other nation was disadvantaged by that kind of support. Similarly, the kind of action in *Yoshida* targeted no other nation's currency. This kind of tariff would not undermine the design of the Bretton Woods Agreements. Imposing tariffs on another nation's exports, by contrast, would exacerbate the balance of payments problem of the targeted country, making an appeal to the IMF for emergency relief more likely.

II. OTHER POTENTIAL STATUTORY AUTHORITY FOR A BROAD PRESIDENTIAL AUTHORITY TO LEVY TARIFFS IS UNAVAILING

A review of America's trade statutes reflects the studious jealousy of Congress over tariffs. Authority has been delegated to the president to negotiate trade agreements—and to promulgate lowered tariffs than the congressionally set level pursuant to such trade agreements—only upon Congress's grant of "fast track" authority for limited periods of time, which are subject to Congress's ultimate approval.[53] Another provision of trade law—the "escape clause"—specifies strict procedural requirements, including findings by an independent agency—the U.S. International Trade Commission—before tariffs can be imposed, only for a limited time,

50. United States v. Yoshida Int'l, Inc., 526 F.2d. 560, 568 (C.C.P.A. 1975).

51. Algonquin SNG, Inc. v. Fed. Energy Admin., 518 F.2d 1051, 1053 (D.C. Cir. 1975).

52. *See, e.g.*, 19 U.S.C. § 2132(d).

53. 19 U.S.C. § 4202(a).

to protect domestic industries from unexpected surges of imports.[54] This remedy was anticipated and permitted by the GATT.[55] Another trade law grants the president authority to take action to protect domestic industries vital to U.S. national security when threatened by imports (section 232[56]). It does not explicitly reach to tariffs; it took a Supreme Court interpretation to do so.[57] Like the "escape clause," invocation of section 232 requires detailed findings under a complex administrative law scheme.[58] In another

54. 19 U.S.C. § 2252 (1975).

55. *GATT 1947: Article XIX*, OXY, https://sites.oxy.edu/whitney/_private/classes/ec311/archive/ec311_2008_01/realwrld/Gatt94/article_xix.htm [https://perma.cc/K56Z-W6UU] (last visited Feb. 5, 2023).

56. 19 U.S.C. § 1862 (1962).

57. *See* Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548 (1976). Professor Claussen observed, "There is no limit in the statute as to what types of tariffs or quotas the President may impose [under 232]." However, there is no specific mention of tariffs in the generic authority granted to the President to "take such action [and for such time] as he deems necessary" "to adjust the imports of [an] article and its derivatives so that [] imports [of such article] will not [so] threaten to impair [] national security." Claussen, *supra* note 29, at 1120, 1143; 19 U.S.C. § 1862(b) (1970). The lower court, the U.S. Court of Appeals for the District of Columbia Circuit, had held that the much more intricate fabric of tariff laws would be undone by allowing section 232 to short circuit it. *See Fed. Energy Admin.*, 426 U.S. at 557.

58. *See* RACHEL F. FEFER ET AL., SECTION 232 INVESTIGATIONS: OVERVIEW AND ISSUES FOR CONGRESS 8–22 (CONG. RSCH. SERV., R45249, Aug. 24, 2020), https://crsreports.congress.gov/product/pdf/R/R45249/32 [https://perma.cc/7ARG-9AEK]. The Commerce Department must make specific findings that imports of a product undermine the US industry in that product. Its design is to consider all imports as a single factor; however, individual countries have negotiated their own quota restrictions that the U.S. then accepted in lieu of a tariff. This process of country-by-county exclusion could threaten to turn section 232 into a mechanism for imposing a tariff on a specific country. President Trump's utilization of section 232 to impose tariffs on steel and aluminium imports in 2018 made many such exceptions—and not always for countries that had adopted quotas instead. Logically, the imposition of across-the-board tariffs, followed by exemptions for all countries but one or two, morphs into a system of imposing tariffs on specific countries. If the rationale for excluding other countries is not that they have negotiated quantitative restrictions instead but, rather, that the U.S. has other diplomatic interests to consider, section 232 comes closer to the IEEPA for purposes of analysis. However, unlike the IEEPA, section 232 still requires the fact findings of threat to national security by the Commerce and Defense Departments. The Congressional Research Service Report, cited above, provides a useful summary of the Trump administration's episode of using section 232 for steel and aluminium imports for specific countries.

example, specific legislation was passed to deal with balance of payments crises, authorizing only across-the-board tariffs for no more than 150 days and without the ability to target one country over another.[59] The last U.S. trade statute that might be construed to give tariff authority to the president,[60] section 301 of the 1974 Trade Act,[61] grants the president authority to impose tariffs but only to offset a specific violation of trade agreement and, once again, with detailed administrative predicates.

It is common for commentators, in discussing the national security exception, not to distinguish between tariffs and quotas or other quantitative restrictions because the context does not require it. For instance, Professor Claussen says, "At the domestic level, enabling the President to take tariff measures in case of security concerns could also have the effect of incentivizing him to use economic tools over military options in cases of interstate conflict."[62] Her analysis is, thus, not contrary to the point of this Article; it merely uses the word "tariff" as a surrogate for "trade restriction" without addressing the differences between types of trade restrictions. Similarly, as a law student, Judge Jason Luong wrote: "As significant as these tariffs [imposed under Section 301] on European exports are, under the IEEPA, the president, after declaring a national emergency with regard to Europe, could not only unilaterally impose the same tariffs on imports, but could also prohibit importation of European goods into the United States altogether."[63]

The system of American trade laws reflects consistently narrow circumstances where the president is given tariff authority. The president's authority over quantitative restrictions, by contrast, is much broader. Every one of the relevant trade laws under which the president can impose

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59. 19 U.S.C. § 2132; *id.* §2132(d).

60. Trade laws dealing with subsidies and countervailing duties are remedial, based on specific actions by foreign countries. Following detailed procedures, an independent federal agency, the International Trade Commission, assigns an appropriate tariff to offset the foreign subsidy or the difference in price caused by dumping. *See* 19 U.S.C. §§ 1671(e), 1673(e). Hence, these statutes do not represent authority for the president to set tariffs for the sake of pressuring a foreign nation on a policy matter.

61. 19 U.S.C. § 2411.

62. Claussen, *supra* note 29, at 1135.

63. Jason Luong, *Forcing Constraint: The Case for Amending the International Emergency Economic Powers Act*, 78 TEX. L. REV. 1181, 1190 (2000). Other such inclusive statements include David Opderbeck, *Huawei, Internet Governance, and IEEPA Reform*, 47 OH. N. UNIV. L. REV. 165, 178 (2020) ("TWEA authorized the Executive to impose tariffs on goods and services produced by entities in states designated as enemies of the U.S. or to prohibit transactions with such entities[,]" though TWEA did not use the word "tariffs.").

tariffs also includes his authority to impose quantitative import restraints, and, in addition, the president has virtually unbridled scope of action to negotiate "voluntary" quantitative import restraints. This distinction reflects the primacy Congress has over tariffs, its fundamental base of congressional authority in revenue generation, and the primacy the president has over bilateral foreign policy.

III. CONGRESS'S PATTERN OF YIELDING ITS OWN AUTHORITY TO THE PRESIDENT

The inappropriateness of a presidential tariff authority is particularly evident in the case of a tariff imposed on a single country, thus violating the most-favored-nations premise of the world trading order since the GATT's founding in 1947. If an American president further imposed such tariffs for reasons unrelated to trade, the entire premise of a reliable international agreement on tariffs would be undone. Yet, that is precisely what President Trump proposed to induce Mexico to comply with America's policy objectives on immigration from Central America. There was no effort in Congress to challenge this usurpation.[64]

When President Biden imposed tariffs on Russia and Belarus in response to the invasion of Ukraine, he was also mixing up the realms of regulating international commerce and engaging in diplomatic policy, though Congress gave President Biden explicit authority to do so. The relevant legislation suspended the most-favored-nations tariffs and allowed the president to exceed the tariff levels set by Congress in its default Column Two.[65] For diplomatic purposes, it is difficult to see why a president would set a tariff rather than a quota. Either would reduce the level of imports into the United States. Either would lift prices to American consumers and benefit other exporters to America. As an expression of outrage, a ban on imports packs a more powerful punch than an increase in tariff rates. The IEEPA undoubtedly gives the president the power to reduce a foreign country's exports to the United States, or to ban them entirely, for diplomatic purposes. Congress's willingness nonetheless to grant tariff authority is further evidence of Congress's own supine posture

64. The threat was removed upon Mexico's yielding to President Trump's demands, so a challenge might have developed had the tariffs actually been imposed. As a political matter, however, it is unlikely Congress would have stood up to a president who, while seizing legislative power, accomplished a result popular with the American people.

65. *See* Suspending Normal Trade Relations with Russia and Belarus Act, Pub. L. No. 117-110, §§ 3(a), 3(b)(1), 136 Stat. 1159, 1160 (2022).

regarding the erosion of its comparative spheres of influence vis-à-vis the executive branch.

This willingness to accept the loss of its constitutional prerogative is not unique to the tariff area. The war powers context provides another example of Congress remaining inert while presidents asserted greater and greater authority in an area of shared responsibility between the legislative and executive branches. When some members of Congress attempted to have the attempted extension of presidential power deemed unconstitutional, the courts showed their own reluctance even to consider whether to right the imbalance by denying standing to the members of Congress to present their case.[66] The same is true over the treaty power, where the Constitution's requirement for Senate ratification by two thirds has been undone by the president's use of executive agreements instead[67] or by outright refusal to honor existing treaty obligations.[68] To the natural disinclination of members of Congress who stand for election every two years to appear soft on a matter of national security must, thus, be added the perceived fruitlessness of trying to remedy a presidential overstepping by their attempting to invoke the aid of the judicial branch.[69]

66. *See* Campbell v. Clinton, 203 F.3d 19 (D.C. Cir. 2000); Kucinich v. Obama, 821 F. Supp. 2d 110 (D.D.C. 2011).

67. United States v. Belmont, 301 U.S. 324 (1937); United States v. Pink, 315 U.S. 203 (1942).

68. See *Goldwater v. Carter*, 444 U.S. 996 (1979), where the District Court and the U.S. Court of Appeals for the District of Columbia Circuit were willing to permit a U.S. Senator's challenge to the President's unilateral abrogation of the treaty between the U.S. and the Republic of China, but the Supreme Court vacated the judgment, reversing the opinion without argument or even publishing an opinion.

69. *See* ALISSA M. DOLAN, ARTICLE III STANDING AND CONGRESSIONAL SUITS AGAINST THE EXECUTIVE BRANCH (CONG. RSCH. SERV., R43712, Sept. 4, 2014).