

As the Supreme Court Hears Arguments on Trump's "Emergency" Tariffs, Few Good Outcomes Await

By Todd N. Tucker

On Wednesday, November 5, the [Supreme Court](#) will hear [extended arguments](#) about the legality of the Trump administration's tariffs under the International Emergencies Economic Powers Act, or IEEPA. Brought by a suite of importers represented by libertarian law firms and blue state attorneys general, the legal battle could culminate in a wide range of outcomes as outlined in this brief. The complexity of these challenges illustrates an example of a much broader problem in trade policy and beyond: A functioning and effective government requires all three branches to check each other. Congress cannot shirk its constitutional duties and leave them to the courts.

The Supreme Court consolidated three of the [eight challenges](#) Trump's tariffs have faced in federal court: [V.O.S. Selections Inc. v. Trump](#), [Oregon v. US Department of Homeland Security](#), and [Learning Resources v. Trump](#). The first two had been jointly ruled on by the Court of International Trade (CIT) in May, which found unanimously against the government. This ruling was appealed to the US Court of Appeals for the Federal Circuit, where an 11-judge panel ruled the following:

- Four judges (appointed by George H.W. Bush, Barack Obama, and two by Joe Biden) said the IEEPA doesn't allow tariffs.
- Four judges (two appointed by George W. Bush II and Obama each, and including the current and former chief judges) said the IEEPA does allow tariffs.
- Three judges (one appointed by Clinton and two by Obama) said the IEEPA doesn't allow *these* tariffs.

This latter bloc constituted the majority ruling. The *Learning Resources* case was ruled on separately in the US District Court for the District of Columbia in May by the Obama-appointed Judge Rudolph Contreras, who found that IEEPA doesn't allow tariffs.

The long-awaited Supreme Court argument and eventual ruling could determine that Trump's trade war is totally legal, totally illegal, or something in between. Indeed, while some cases have somewhat predictable outcomes in which informed observers can guess the likely ideological breakdown on the bench, this one could plausibly produce a 9–0 decision for or against Trump. This brief offers a guide to the options before the Court and assesses some of the strengths and weaknesses of each.

Option 1: IEEPA Doesn't Allow Tariffs

Tariffs are a widely used tool of industrial policy, as I wrote in a February issue [brief](#) entitled “How Should Progressives Respond to Trump’s Tariff Threats?” Used strategically, they can help onshore or reshore critical industries like clean energy, protect workers’ rights, and restore balance to off-kilter trading relationships. At the same time, tariffs are also a form of taxation, and they are not costless. Indeed, the economic reporting (if not economists’ projections themselves) [predicted](#) very steep [costs](#) and few benefits to Trump’s IEEPA tariffs—which, broadly speaking, encompass three categories:

- “Trafficking tariffs” on Canada, Mexico, and China (supposedly to address their contribution to the fentanyl crisis)
- “Reciprocal tariffs” tackling imbalances between the US and other trading partners
- A universal baseline tariff of 10 percent on other countries

The worst-case scenarios [have not come true](#), leading [one analyst](#) to liken economists to political pollsters that underestimated Trump. Why has a recession (or worse) not occurred? In part, it’s because economic commentators overlooked how already uncompetitive markets give firms market power to shield consumers from the full costs. Roosevelt Institute Senior Fellow Paul Krugman has a [good rundown](#) of these debates.

That’s the economics. What about the law? The [US constitution](#) gives Congress, not the president, the power “to lay and collect Taxes, Duties, Imposts and Excises” and “to regulate Commerce with foreign Nations.” Yet it is difficult for foreign dignitaries to negotiate with 535 different members of Congress, so the constitution assigns the power to negotiate trade deals to the executive branch. Congress has also delegated its trade and tariff powers to the executive branch through various pieces of legislation over the last century, including through Fast Track/Trade Promotion Authority (international trade agreements), Section 232 (product-specific national/economic security tariffs and trade agreements), Section 301 (country-specific tariffs aimed at unfair behavior), and Section 122 (balance-of-payments tariffs). Courts have [long held](#) such delegation to be [valid](#).

The plaintiffs in the Trump tariff cases argue that, while Congress may have delegated tariff powers dozens of times, IEEPA is not one of those times. The relevant [part of the statute](#) reads that, upon his declaration of emergency,

the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise . . . investigate, block during the pendency of an investigation, *regulate*, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, *importation* or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States. [emphasis added]

The plaintiffs' argument is straightforward: While IEEPA allows the regulation of importation, it does not allow the taxation of imports. As their [brief](#) reads, "Regulations command conduct and make violations illegal; taxation raises the cost of lawful activities."¹ They note that most of the other delegations of trade authority explicitly used the word "tariff" while IEEPA does not.

The government, in contrast, maintains that taxation can be seen as a subset of regulation. It notes that [Section 232](#) (referenced above) has been used to impose tariffs even though it doesn't include the word "tariff"; in fact, the only explicit power is to allow the president to "adjust the imports." Moreover, IEEPA has been used to embargo all of the imports of a given country, not just tax them.² In the government's reading, it would be absurd to allow presidents to ban trade, but not to take the less extreme step of merely taxing it. I see a further reason to think it inappropriate that the verb "regulate" must necessarily constitute command-and-control methods, instead of taxation: The production that results in overseas goods showing up on US shores necessarily happens outside of US jurisdiction. The US government cannot typically regulate production in Malawi in the same way it might in Michigan. Taxing through tariffs is thus the lever that is most readily available to the US government seeking to regulate overseas production.

The no-tariff reading has found support among commentators and some judges. Peter Harrell, a Biden administration official who coauthored the amicus brief members of Congress filed against the tariffs, has [argued](#) that "across the many uses of IEEPA since its passage 48 years ago, not once has a president used IEEPA to impose a tariff."³ Political scientist Marc Busch [writes](#) that "The statute was meant to address unforeseen crises such as hostage-taking or asset freezes, not longstanding grievances about trade deficits." Judge Rudolph Contreras of the DC Circuit found for the plaintiffs and wrote that, "If Congress had intended to delegate to the President the power of taxing ordinary commerce from any country at any rate for virtually any reason, it would have had to say so."⁴ And the four-judge concurring opinion on the US Court of Appeals for the Federal Circuit stated that "if the Government's reading of 'regulate' to include adjusting quantity through taxation is adopted, then the President would have the power to unilaterally tax bank withdrawals or to implement a wealth tax on any foreign property holdings."⁵

¹ *Donald J. Trump v. V.O.S. Selections* ([Brief for Private Respondents](#)), No. 25-250 (US Supreme Court October 2025), at 15.

² For example, IEEPA was used to embargo the trade of Nicaragua in the 1980s. See Christopher A Casey et al., *The International Emergency Economic Powers Act: Origins, Evolution, and Use*, no. R45618 (Congressional Research Service, 2025), <https://www.congress.gov/crs-product/R45618>, at 22.

³ Elsewhere, [Harrell added](#) a practical observation: "SCOTUS is relatively less likely to take a split-the-difference approach that authorizes some IEEPA tariffs but not others—Court will recognize the challenge it would face drawing judicially-enforceable lines between lawful and unlawful IEEPA tariffs."

⁴ *Learning Resources, Inc. v. Donald J. Trump* ([Memorandum Opinion](#)) (US District Court for the District of Columbia May 29, 2025), at 17.

⁵ *V.O.S. Selections, Inc. v. Donald J. Trump* (Concurring [Opinion](#)), No. 25-1812 (US Court of Appeals for the Federal Circuit August 29, 2025), at 4.

There are pros and cons to a no-tariff reading. Under the sometimes controversial doctrine of [constitutional avoidance](#), if a statute is ambiguous, it is better for courts to adopt an interpretation that sidesteps the need to find as unconstitutional a duly passed law. In the Trump tariff cases, constitutional avoidance would suggest that, if there are two equally plausible interpretations—one that would find IEEPA unconstitutional, and another that would salvage its constitutionality—courts should pick the latter. Reinterpreting “regulate” to not include Congress’ tariff powers could be one way of doing that.

The problem is that this understanding of IEEPA is ahistorical. In 1971, the Richard Nixon administration imposed a 10 percent universal baseline tariff using IEEPA’s predecessor authority, the Trading With The Enemy Act (TWEA)—a move that was upheld by an appellate court in *US v. Yoshida*.⁶ This policy was seen as effective and popular at the time, and progressives and labor groups wanted Nixon to go further and include caps on corporate profits.⁷ Indeed, Nixon was continuing in a 20th-century tradition of using emergency powers to right economies that had become fundamentally imbalanced—including when TWEA was used by the Franklin D. Roosevelt administration to end the gold standard and get out of the Great Depression, and by the Lyndon B. Johnson administration to curb offshoring by US-headquartered multinational companies.⁸

There were many controversies over executive power in the mid 1970s, in the wake of the abuses of the Vietnam War and Watergate. Indeed, the Nixon administration’s actions were so controversial that the whole cohort of legislators elected in the wake of his vacating office were called “Watergate Babies,” and took significant steps to reempower Congress vis-à-vis the executive branch.⁹ It is thus notable that Nixon’s import surcharge was not controversial. Congress’ relatively tepid response consisted solely of the 1976 [National Emergencies Act](#) (NEA) and the 1977 [IEEPA](#), which inherited TWEA’s non-wartime powers and made a limited set of procedural changes (as amended):

⁶ *United States v. Yoshida International Inc.*, 526 F.2d 560 (United States Court of Customs and Patent Appeals 1975).

⁷ Hugh Rockoff, *Drastic Measures: A History of Wage and Price Controls in the United States* (Cambridge University Press, 1984); Douglas A. Irwin, “The Nixon Shock after Forty Years: The Import Surcharge Revisited,” *World Trade Review* 12, no. 1 (2013): 29–56. For more on the history of price measures in the U.S., see Todd N. Tucker, “Price Controls: How the US Has Used Them and How They Can Help Shape Industries” (Roosevelt Institute, 2021), <https://rooseveltinstitute.org/publications/price-controls-how-the-us-has-used-them-and-how-they-can-help-shape-industries>.

⁸ Sebastian Edwards, *American Default: The Untold Story of FDR, the Supreme Court, and the Battle over Gold* (Princeton University Press, 2018); Eric Rauchway, *The Money Makers: How Roosevelt and Keynes Ended the Depression, Defeated Fascism, and Secured a Prosperous Peace* (Basic Books, 2015); Benjamin A. Coates, “The Secret Life of Statutes: A Century of the Trading with the Enemy Act,” *Modern American History* 1, no. 2 (2018): 151–72, <https://doi.org/10.1017/mah.2018.12>.

⁹ John A. Lawrence, *The Class of ’74: Congress after Watergate and the Roots of Partisanship* (Johns Hopkins University Press, 2018).

1. The president must transmit his emergency proclamation to Congress and publish it in the Federal Register (50 U.S. Code § 1621(a)).
2. Emergency powers can only be exercised during emergencies (50 U.S. Code § 1621(b)).
3. Emergencies can be terminated by a joint resolution of Congress or upon a new presidential proclamation (50 U.S. Code § 1622(a)).
4. Within six months, Congress votes on whether to continue the emergency—under specific expedited rules (50 U.S. Code § 1622(b-c)).
5. The emergency terminates within a year unless the president extends it (50 U.S. Code § 1622(d)).
6. The authorities used “may only be exercised to deal with an unusual and extraordinary threat with respect to which a national emergency has been declared for purposes of this chapter and may not be exercised for any other purpose. Any exercise of such authorities to deal with any new threat shall be based on a new declaration of national emergency which must be with respect to such threat.” (50 U.S. Code § 1701(b)).
7. The authorities cannot be used to block private mail, humanitarian donations, media, or personal baggage (50 U.S. Code § 1702(b)).
8. The president must consult with and give reports to Congress during the emergency (50 U.S. Code § 1703).

A careful review of the legislative history from the 1970s produces two conclusions: First, Congress was well aware that the emergency powers could be and had recently been used by Nixon for trade policy purposes. Second, they chose to make no substantive change to guard against this situation repeating itself. The appendix substantiates these points in detail.

Ahistoricity is not necessarily a legal hurdle. But in a context where plaintiffs are asking SCOTUS to effectively overturn almost the entirety of a duly elected president’s foreign economic policy, it could pose a legitimacy problem, pitting the courts against the other two branches of government. In just the last week, the administration has announced a [trade truce](#) with China and released [official texts](#) of trade agreements with Cambodia and Malaysia. This comes after a spate of [earlier announcements](#) this year with the UK, EU, Japan, South Korea, Indonesia, Vietnam, Thailand, Pakistan, and the Philippines. Meanwhile, a majority of the House of Representatives has explicitly or implicitly endorsed these initiatives, while a majority of the Senate has only voted to [overturn](#) the emergencies with respect to Canada and Brazil. Moreover, a bipartisan majority of both chambers [declined to join](#) an amicus brief opposing Trump’s tariffs, and the leaders of the [Senate](#) and [House](#) are on the record expressing their support for his actions.

There is a further problem to a no-tariff ruling: There are logistical hurdles to unwinding and refunding tariffs collected to date. One does not have to adopt the obnoxious apocalyptic tone of Trump’s Department of Justice¹⁰ to see the practical hurdles to

¹⁰ “The President, in his exercise of power over the military and foreign affairs, has determined are necessary to rectify America’s country-killing trade deficits and to stem the flood of fentanyl and

processing refunds to thousands of importers—with little chance it will reach any consumers who ultimately paid higher prices. Indeed, there is some reporting that the tariff refund space has already become a site of financial gaming by none other than the [business](#) formerly run by Commerce Secretary Howard Lutnick and currently run by his children.

Finally, Option 1 has the added disadvantage of the administration already [broadcasting](#) how it would get around it—including [through expedited action](#) under Section 232 and other trade statutes. Thus, any economic relief for the plaintiffs will be ephemeral.

Option 2: IEEPA Doesn't Allow *These* Tariffs

Perhaps sensing that the statutory language and legislative history was not as cut-and-dry as plaintiffs made them out to be, the unanimous opinion at the CIT and majority upon appeal struck a more modest posture: While IEEPA may allow some tariffs, it doesn't allow *these* tariffs.

For transparency, this was more or less the take I had in April in an issue [brief](#) entitled “Trump’s Tariff Tantrum: How Sweeping Tariffs Came to Be and Why It Matters.” I argued that courts could and should scrutinize more

- whether the emergency Trump declared around international economic imbalances was legitimate;
- whether the fact that US policymakers had contributed to the imbalance (which Trump repeatedly conceded) should weigh against the legitimacy of the emergency; and
- whether the instrument Trump had announced (willy-nilly tariffs on countries we had trade deficits *and* surpluses with) was likely to address the imbalance.

The courts did not adopt my approach. The appeals court majority opinion wrote, “We are not addressing whether the President’s actions should have been taken as a matter of policy. Nor are we deciding whether IEEPA authorizes any tariffs at all.”¹¹ Instead, they would only be looking at the IEEPA consistency of Trump’s specific tariffs. That said, much of the ruling parallels the no-tariff analysis, with extensive pages of discussion drilling down on the regulation-taxation distinction. In trying to avoid overturning *Yoshida*, the court needed to find a way to distinguish Nixon’s and Trump’s tariffs. Citing *Yoshida*, the appeals court wrote that Nixon’s tariffs were “authorized given its ‘[I]imited [n]ature’ in

other lethal drugs across our borders. To the President, these cases present a stark choice: With tariffs, we are a rich nation; without tariffs, we are a poor nation.” *Donald J. Trump v. V.O.S. Selections, Inc.* (Opening brief for the respondents in no. 24-1287 and the petitioners in no. 25-250), No. 25-250 (US Supreme Court September 2025), https://www.supremecourt.gov/DocketPDF/24/24-1287/375365/20250919182906186_24-1287ts_Govt_IEEPATariffs_final.pdf, at 2.

¹¹ *V.O.S. Selections, Inc. v. Donald J. Trump* (Concurring [Opinion](#)), No. 25-1812 (US Court of Appeals for the Federal Circuit August 29, 2025), at 26.

time, scope, and amount, since it was a temporary measure, 'limited to articles which had been the subject of prior tariff concessions, and, thus, to less than all United States imports, and subject to a maximum rate that had been prescribed by Congress."¹² They also maintained that the Nixon tariffs did not "revise the tariff schedule."¹³ In contrast, Trump's "tariffs apply to nearly all articles imported into the United States (and, in the case of the Reciprocal Tariffs, apply to almost all countries), impose high rates which are ever-changing and exceed those set out in the [tariff system] and are not limited in duration."¹⁴ The CIT adopted a similar argument, citing *Yoshida* as support for the notion that Nixon "imposed a limited surcharge, as a temporary measure calculated to help meet a particular national emergency, which is quite different from imposing whatever tariff rates he deems desirable."¹⁵

This attempt to minimize Nixon's tariffs is misleading. His April 15, 1971, [executive order](#) reads in relevant part:

Whereas, there has been a prolonged decline in the international monetary reserves of the United States, and our trade and international competitive position is seriously threatened and, as a result, our continued ability to assure our security could be impaired;

Whereas, the balance of payments position of the United States requires the imposition of a surcharge on dutiable imports; . . .

A. I hereby declare a national emergency during which I call upon the public and private sector to make the efforts necessary to strengthen the international economic position of the United States.

[The US will] assess a surcharge in the form of a supplemental duty amounting to 10 percent ad valorem . . . 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 . . .

[The US] may from time to time take action to reduce, eliminate or reimpose the rate of additional duty herein or to establish exemption therefrom, either generally or with respect to an article which he may specify either generally or as the product of a particular country, if he determines that such action is consistent with safeguarding the balance of payments position of the United States. [emphasis added]

Translating out of trade legalese, there are a few things to note. First, Nixon's tariffs were not taken in response to an unexpected or unforeseeable event. Rather, it is explicitly

¹² Ibid, at 40.

¹³ Ibid, at 17.

¹⁴ Ibid, at 42.

¹⁵ *V.O.S. Selections, Inc. v. Donald J. Trump* (Opinion), No. 25-00077 (US Court of International Trade May 28, 2025), at 30.

premised as a policy response to a “prolonged” problem—just as Trump framed his actions (see text box at the end of the section). Nowhere in this language is there any indication that it will be temporary. (The word only appears in the legal header boilerplate Nixon required to be appended to the tariff schedule). The act, by its nature, did revise almost the entirety of the tariff schedule for an indefinite period of time, which Nixon notes will require sacrifice of domestic firms and households. He also notes that he could change the tariffs continually at his discretion. The only specified substantive limits were that 1) articles that were charged zero tariffs before April 15 would still be charged zero tariffs; and 2) no tariff would be higher than the so-called “column 2” rate—the generally very high rate charged to communist countries that the US did not have normal trading relations with.

Thus, if Trump were to redo his IEEPA tariffs to meet the “Nixon standard,” he could comply by capping tariffs to what we charge [Cuba and North Korea](#) (which would almost always be more than what he actually announced on “Liberation Day”), if he exempted coffee and other items we don’t tariff because we don’t produce them domestically (which would be smart policy that is supported by a [bipartisan group](#) in Congress), and if he included the word “temporary” somewhere in the order.

Is Option 2 thus a smart approach for SCOTUS? It shares Option 1’s weakness of inserting language that Congress did not put into IEEPA. But it has the added weakness that—if followed to the letter—it could end up offering no meaningful relief to the plaintiffs, and would not even require the separate process and rationalization under Section 232 and other statutes. Its strength is that it preserves tariff policy space in IEEPA for a future, arguably more strategic president to take advantage of.

(A variant of Option 2 would be to find that IEEPA is allowed for uses of tariffs for economic policy reasons, but not social and political ones—such as the fentanyl tariffs or the tariffs Trump has imposed on Brazil for the prosecution of his right-wing ally Jair Bolsonaro. The problem is that the post 1977 IEEPA uses are often more political (fighting the Cold War) than economic. Indeed, some commentators seem to prefer IEEPA be preserved for exactly such geostrategic reasons, and thus want the Court to find IEEPA constitutional but disallowing economic tariffs.)

Further Tariff Distinctions in the Lower Courts

The CIT argued that Section 122 of the Trade Act of 1974 displaced IEEPA as a tool for addressing balance-of-payment imbalances, and that Trump’s “trafficking tariffs” do not “deal with” the fentanyl emergency because they are used as a form of leverage with trading partners rather than directly curbing fentanyl imports. The appellate court’s majority did not follow these lines of reasoning, and instead stopped at seeing all the Trump tariffs as excessive.

But it is worth pausing as a substantive matter to consider whether Trump's reciprocal and baseline tariffs really occupy the same lane as Section 122. They do not. First, IEEPA is an emergency authority, while Section 122 is not. Second, Trump's tariffs are taken for an overlapping but distinct set of reasons to those authorizing action under Section 122. Here are the conditions that [Trump cited](#) upon announcing his major raft of IEEPA tariffs:

Underlying conditions, including a lack of reciprocity in our bilateral trade relationships, disparate tariff rates and non-tariff barriers, and US trading partners' economic policies that suppress domestic wages and consumption, as indicated by large and persistent annual US goods trade deficits, constitute an unusual and extraordinary threat to the national security and economy of the United States. That threat has its source in whole or substantial part outside the United States in the domestic economic policies of key trading partners and structural imbalances in the global trading system . . . Trading partners have repeatedly blocked multilateral and plurilateral solutions, including in the context of new rounds of tariff negotiations and efforts to discipline non-tariff barriers.

In contrast, [Section 122 reads](#), in relevant part:

Presidential proclamations of temporary import surcharges and temporary limitations on imports through quotas in situations of fundamental international payments problems: Whenever fundamental international payments problems require special import measures to restrict imports (1) to deal with large and serious United States balance-of-payments deficits, (2) to prevent an imminent and significant depreciation of the dollar in foreign exchange markets, or (3) to cooperate with other countries in correcting an international balance-of-payments disequilibrium. . . .

While both include the word "deficit," Trump's EO addresses a much larger set of diplomatic and labor market challenges. Whether one agrees or not with Trump's description of the conditions giving rise to the emergency declaration, it is clear he is addressing something broader and less specific to financial systems than the conditions that Section 122 addresses.

Option 3: IEEPA Is Unconstitutional

Given how clunky the no-tariff and “not-these-tariffs” arguments were, I became concerned by another line of argument advanced by the plaintiffs: that IEEPA itself is unconstitutional. This approach has the advantage of not second-guessing congressional drafting decisions, but it also poses significant collateral risks—as I argued for the Roosevelt Institute in a July [piece](#) entitled “In Constitutional Clash Between Trump and Courts on Tariffs, Risks Ahead for Progressive Policies” and in an August *Financial Times* [op-ed](#), “Opponents of Trump’s Tariffs Should Be Wary of Relying on the Courts.” Among those representing anti-tariff plaintiffs is a [Koch-funded](#) law firm [dedicated to](#) “cutting the Administrative State down to size,” along with another libertarian outfit that has [led attacks](#) on labor unions and gun safety measures.

These groups argue for legal doctrines that require that Congress must prescribe in advance, in exhaustive detail, what specific threats presidents should address in the future and how they should address them. In particular, the plaintiffs argue that Trump’s use of IEEPA violates the “[major questions doctrine](#).” As they wrote, “the Court presumes ‘Congress intends to make major policy decisions itself,’ rather than delegating them. . . . and has repeatedly required a clear statutory basis for major, unprecedented policy changes—even in emergencies.” They go on to note that the Court invalidated Biden’s COVID-era eviction moratorium because it was “unprecedented . . . in size and scope”; his vaccine mandate because the Department of Labor had “never before” used its authority in that way; EPA’s nationwide cap on carbon-dioxide emissions, where it “had always set emissions limits” narrowly and in “an entirely different” way; and his student debt cancellation because (although the law might have been read to authorize loan forgiveness), the plan’s “economic and political significance” was “staggering.”

The plaintiffs argue that Trump’s tariffs have an even more economically significant impact.¹⁶ They also argue that—if Trump’s tariffs are in fact permissible under IEEPA—that the law itself violates the “[nondelegation](#)” doctrine, which forbids Congress from giving away powers the constitution assigns them without an “intelligible principle” to guide agency action. The Court only applied this doctrine during the early-New Deal period, where it was used to invalidate key FDR industrial policy initiatives.¹⁷ As these examples show, these legal doctrines tilt the scales overwhelmingly against progressive priorities.

This vision of how constitutional government should work does not play to Congress’s strengths. Lawmakers ideally set broad objectives, and make sure that highly trained civil servants and those on the front lines of foreign policy and intelligence briefings have the leeway to fit them to specific challenges as these emerge.

Thus, a major downside of Option 3 is that whatever one thinks of Trump or his tariffs, limits on Trump today will bind future presidents tomorrow. This could include centrists,

¹⁶ *Donald J. Trump v. V.O.S. Selections* (Brief for Private Respondents), No. 25-250 (US Supreme Court October 2025), at 40-42.

¹⁷ Peter H. Irons, *The New Deal Lawyers* (Princeton University Press, 1993).

progressives, MAGA types, or traditional conservatives, who will need or want robust executive tools to address ruinous competitiveness or [climate emergencies](#). Constitutional republics have long recognized the [utility](#) of [emergency](#) powers, and the US has used them in conditions ranging from Reconstruction after the Civil War to the Great Depression to help build state capacities and economic development that long outlive the emergencies in question.¹⁸ Ideally, future emergencies would be based on a greater degree of consensus, though this may be unattainable given polarization, corruption, and sluggishness of the legislature.¹⁹ Indeed, it is somewhat ironic that, at a moment when the country is having a long overdue debate about demanding government act more [decisively](#),²⁰ the plaintiffs and courts would have us hew to the ultimate proceduralism. The end result of neutering IEEPA could be disempowering the executive without necessarily going through the reform efforts to make sure that Congress acts to address our fundamental economic challenges.²¹

Finally, this option shares with the foregoing ones that it will not provide plaintiffs with relief, as the administration is committed to simply reapplying tariffs under other statutes.

Option 4: Let Congress Fix It

Yet these are not the only options. The Supreme Court could also decide that the case is nonjusticiable, meaning Congress—not the courts—must do the checking and balancing. Congress has a number of tools provided by NEA and IEEPA outlined in the first section, like voting to end specific emergencies. And the legislature’s options don’t end there: It could refuse to fund or confirm nominees to Trump’s trade agencies, investigate and sanction individual political appointees, and generally bring Trump’s agenda to a [halt](#).

The advantage of Option 4 is that it could ultimately do what the courts can’t: Offer relief to the plaintiffs. If the Court takes this option as part of a long history of strategic judicial restraint,²² it could provide a jolt to the public to get Congress to awake from its complacency.

¹⁸ Harold C. Relyea, *A Brief History of Emergency Powers in the United States* (University Press of the Pacific, 2005); Tyler M. Curley, “Models of Emergency Statebuilding in the United States,” *Perspectives on Politics* 13, no. 3 (2015): 697–713, <https://doi.org/10.1017/S1537592715001255>; Daniel P. Gross and Bhaven N. Sampat, “Crisis Innovation Policy from World War II to COVID-19,” *Entrepreneurship and Innovation Policy and the Economy* 1 (January 2022): 135–81, <https://doi.org/10.1086/719253>.

¹⁹ Elena Chachko and Katerina Linos, “Emergency Powers for Good,” *William & Mary Law Review* 66 (2025 2024): 1; Vicki C. Jackson and Yasmin Dawood, *Constitutionalism and a Right to Effective Government?* (Cambridge University Press, 2022).

²⁰ Ezra Klein and Derek Thompson, *Abundance* (Avid Reader Press / Simon & Schuster, 2025).

²¹ Osita Nwanevu, *The Right of the People: Democracy and the Case for a New American Founding* (Random House, 2025); Todd N. Tucker, *Fixing the Senate: Equitable and Full Representation for the 21st Century* (Roosevelt Institute, 2019), <https://rooseveltinstitute.org/publications/fixing-the-senate-equitable-full-representation-21st-century>.

²² Evan Tsen Lee, *Judicial Restraint in America: How the Ageless Wisdom of the Federal Courts Was Invented* (Oxford University Press, 2010).

Ironically, we are only in this situation because of a previous court decision in 1983, which destroyed the so-called legislative veto that gave Congress tools to [police the IEEPA](#). The *Chadha v. Immigration and Naturalization Service (INS)* decision allowed either the House or Senate to block emergency action by a simple majority vote that could not be vetoed by the president. Joe Biden, then the junior senator from Delaware, [warned that](#) the decision would produce “crises in our foreign policy.” As a result, Congress cannot terminate declared emergencies except with a president’s agreement or a two-thirds vote—nearly impossible in today’s polarized environment. As Rep. John Bingham (D-NY) of the House International Relations Committee put it in IEEPA hearings in 1977,

The administration, of course, takes the position that concurrent resolutions are improper, but I think this is an area where we simply have to agree to disagree. The Congress for years now has been using the concurrent resolution as a legislative device, and some day it may have to be tested in the courts . . . In the past, there have been cases where the power to make definitions was stretched by the President to an inordinate degree. President Roosevelt, for example, under the Trading With the Enemy Act, defined banks to include private nonbanking institutions. And we just think it wise to include this power.²³

Legal scholar [Josh Chafetz](#) makes a compelling case that the loss of the legislative veto in *Chadha v. INS* changed the political economy of congressional oversight of IEEPA, such that it disincentivizes checking and balancing by members of the president’s own party—unless they know they have the two-thirds vote in both chambers to override a presidential veto.

Yet, this is more an excuse than a reason. Even if all one wants is to have the courts shelve Trump’s tariffs, the judiciary will have more legitimacy if it is seen as backing up a legislature that is trying to assert its own institutional prerogatives. In the absence of such action, the Court could reasonably conclude that plaintiffs are asking for a resolution of a “political question” that they could not convince the elected branches of government to act on. Just as permanent and unjustified emergencies corrode democracy, so too does judicial supremacy that supplements its judgment for that of the people’s representatives.²⁴

If the Court kicks the matter back to Congress, it is imperative that all members engage in some soul-searching as to how to rightsize emergency powers to better ensure all branches of government have the capacity to deliver fair international trade and sustainable and equitable economies.

²³ *Revision of Trading with the Enemy Act*, nos. 93–149 (House Committee on International Relations, 1977), <https://catalog.hathitrust.org/Record/002939980>, at 6.

²⁴ Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford University Press, 2005); Todd N. Tucker, *Judge Knot: Politics and Development in International Investment Law* (Anthem Press, 2018), <https://www.anthempress.com/judge-knot-pb>.

Appendix:

Nine Things to Know About Congress and IEEPA's Tariff Authority, and What the Courts Have Gotten Wrong

From March 29 to June 23, 1977, the House Committee on International Relations held 12 hearings to develop their IEEPA proposal. The first nine of these hearings were heard by the Subcommittee on International Economic Policy & Trade, led by chairman Rep. Jonathan Bingham (D-NY) and ranking member Rep. Charles Whalen (R-OH). As the name implies, their subcommittee members and staff were experts in trade matters. The final three hearings were before the full committee, under the chairmanship of Rep. Clement Zablocki (D-WI) and ranking member William Broomfield (R-MI). The committee and subcommittee produced a combined 332-page record of markup and testimony from 15 business, legal, and government expert witnesses, as well as a 25-page official summary report. The Senate consideration is sparser, and includes only a bare-bones 21-page hearing transcript and a 13-page report.

An even cursory read of this history produces two takeaways: First, Congress was well aware that the emergency powers could be used for trade and tariff purposes, and had been in the recent past. Second, they chose not to make substantive changes to limit tariff actions in the future.

To break these apart in more detail (since they have been misrepresented in court proceedings over Trump's tariffs to date), here are nine more granular conclusions:

1. **Questions on TWEA's reach into trade policy were frontloaded in debates.** The very first question that Bingham posed on the first day of hearings on March 29 was whether TWEA-like authorities should allow "for the imposition of trade embargoes in time of peace? If not, what should replace it?"²⁵
2. **Congress was aware of Nixon's tariffs and knew of the concerns about the adequacy of court rulings on them.** The first witness's very first point was that "import controls have been imposed since the beginning of our republic" and proceeded to excoriate the Roosevelt, Johnson, and Nixon administrations' uses of TWEA. The witness, legal scholar Andreas Lowenfeld, also bashed the *Yoshida* appellate decision as

a thin one, which should not, and I think will not, go down in history as one of the great efforts to define the scope of congressional delegation or of the powers of the presidency. It may be that the most important factor in that case—though not mentioned in any of the opinions—was that if the decision

²⁵ *Emergency Controls on International Economic Transactions*, nos. 89–711 (House Committee on International Relations, 1977), at 1.

had gone the other way, the government stood to lose \$540 million in duties collected just in the four months the surcharge was in effect.”²⁶

An extensive discussion of the *Yoshida* cases is included in an appendix to the hearing transcript, indicating substantial committee awareness that courts had disagreed on—but ultimately upheld—the tariff actions. There is no indication that the committee accepted the *Yoshida* appellate court’s decision that only some tariffs would be permissible under IEEPA, or that surcharges after 1975 would have to comply with Section 122.²⁷

3. **Congress was aware of and ultimately disregarded international lawyers’ pro-trade political economy preferences.** Asked for the top reform he would recommend, Lowenfeld gave as his first response, “you could say this action or action taken under this authority shall not be used for purposes of economic regulation” or as “a protectionist device.”²⁸ Another witness on the panel, Stanley Metzger, agreed, arguing

that circumstances do not justify that kind of a grant of power in [TWEA], despite my belief in the necessity of having a broad grant of power in [TWEA] and my opinion that on the whole, the present act has been responsibly employed during the past decades.

He later suggested a reform:

I would start with a policy statement that what this country favors is the flow of goods and services across international boundaries and, therefore, there must be an extraordinary situation which calls for controls stopping that. These should be important types of situations of the general character that political or foreign relations crises or national security crises.”²⁹

The biographies of these two witnesses would have been notable to the committee, especially had members been motivated by constraining trade policy abuses. Both Lowenfeld and Metzger were former senior State Department attorneys, and the

²⁶ Ibid, at 4–18.

²⁷ The final Committee report again echoed awareness of and lack of action to address *Yoshida*. The report notes the uses of TWEA by FDR, LBJ, and Nixon, opining on the latter that federal courts in *Yoshida* were torn on whether TWEA “authorized imposition of duties. Although the lower court held that it did not, the Appeals Court reversed on the grounds that the existence of the national emergency made [TWEA powers] available for purposes which would not be contemplated in normal times.” (at 5). Despite recounting in detail the testimony of the various witnesses, it does not record their front-loaded concern with TWEA’s creep into trade policy. The report records no concern with the use of IEEPA for tariffs or trade policy purposes, but rather with the total lack of “any congressional consultation” or role.

²⁸ Ibid, at 43.

²⁹ Ibid, at 45.

latter was the former chairman of what is today called the US International Trade Commission—the preeminent administrative law agency for tariffs. But the committee report does not cite their recommendations on political economy, and instead focuses on their procedural and consultative recommendations.³⁰

4. **Congress was aware of and ultimately disregarded business leaders’ pro-trade political economy preferences.** On March 30, on the second day of hearings, the first witness, business association representative Timothy Stanley, decried that TWEA “was distorted to control capital movements to our friends and allies” by the Johnson administration, and that “there is a tendency to take emergency action to forestall seeking fundamental solutions.”³¹ The first sentence uttered by the second witness, business association representative David Steinberg, pointed to an urgent “need for reform, particularly after . . . the thunderbolt of the import surcharge of August 15, 1971.”³² He went on to urge Congress to “reassess the whole range of presidential authority to impose trade restrictions of an emergency nature.”³³ On the third day of hearings, April 19, farm trade group representative Peter Nelsen lamented that TWEA had been used “in controlling trade during nonemergency periods, actions which appear to be unconstitutional and contrary to our basic principles of free enterprise.” He called for a reform to restrict trade embargoes to times of war, which would expire within 30 days if not approved by a two-thirds majority of Congress.³⁴ Congress did not take up these business groups recommendations to limit tariffs, or limit tariffs to non-allies, or limit embargoes to times of war. None of these witnesses is even cited in the committee report.
5. **Congress was aware of and implicitly embraced the view that the executive branch wanted to retain maximum flexibility.** On the fourth day of hearings, April 26, representatives of the Jimmy Carter administration (including economist Fred Bergsten, who would go on to found the “free-trade” think tank Peterson Institute for International Economics), defended TWEA. Bergsten defended the uses from Roosevelt to Nixon, arguing that

the speed with which the Executive was able to respond to an emergency under section 5 (b) was a distinct advantage in taking effective measures. This speed is particularly necessary where significant advance notice might precipitate a worsening of the emergency which the measures were intended to alleviate.³⁵

³⁰ *Trading with the Enemy Act Reform Legislation*, nos. 95–459 (House Committee on International Relations, 1977), at 7–8.

³¹ *Emergency Controls*, at 56.

³² *Ibid*, at 63.

³³ *Ibid*, at 64.

³⁴ *Ibid*, at 91.

³⁵ *Ibid*, at 107.

Julius Katz of the State Department argued that “we cannot predict what form of emergency may confront us in the future or what types of emergency action may be required. Therefore, we believe that there are no significant respects in which [TWEA] should be repealed as obsolete.”³⁶ Bingham later bemoaned that

all the President has to do is not to say that there is a new emergency, or that an emergency exists . . . I think that you have to face the facts, which are that the executive branch wants to be free to continue to act with an enormous degree of discretion on the basis that an emergency exists, although by no commonsense application of the term could the situation be called an emergency.³⁷

Yet the final IEEPA did not place major limits on the tools or reasons for declaring emergencies.

6. **Congress considered and decided against a reform that would have made IEEPA more of the foreign-policy-exclusive tool that Trump’s critics now say it is.** On the sixth day of hearings, on June 2, the committee staff began to conduct a markup of the legislation, a process that provides a ground-level view into what issues Congress was or was not thinking about. The first substantive point made by staff director Roger Majak was that they wanted to avoid a repeat of FDR’s use of TWEA to change purely domestic banking transactions. They intended to achieve this by including the following qualification to the remit of the act: “To deal with any extraordinary threat which has its source outside the United States, to the national security policy or economy of the United States.” As the following colloquy indicates, it was nonetheless seen that the new language could accommodate the Nixon tariff precedent:

Mr. BINGHAM: May I make a comment there. I think members of the committee will want to recognize that not only are there good substantive reasons to limit this to threats from outside the United States, but also if we were to stray beyond that, we would be stretching the jurisdiction of the committee, since the jurisdiction of the committee is specifically the Trading With the Enemy Act. In a broader sense, we are dealing with international problems.

³⁶ Ibid, at 99. Katz later makes the passing remark that: “there is specific authority now for balance-of-payment measures of the kind that were taken in 1971. Such measures would not have to be taken pursuant to section 5 (b) in the future. There are specific circumstances for the use of that authority spelled out in the Trade Act of 1974” (Ibid, at 118-119). This is perhaps the clearest support in the record for the notion that Section 122 of the Trade Act occupied the space previously held by TWEA’s trade powers. However, it does not indicate that a president would *have to* do so, just that they could choose to do so. In the context of his overall testimony, it is clear his objective was to maintain administrative flexibility.

³⁷ Ibid, at 113.

Mr. WHALEN: Of course , the term "threat" could be construed to mean some adverse situation created by some friendly nation, could it not?

Mr. MAJAK: Yes; I would certainly think so.

Mr. WHALEN: President Nixon used [TWEA] in connection with part of the economic program back in 1971.

Mr. MAJAK: Yes.

Mr. WHALEN: Could that be utilized again? In such actions as Mr. Nixon took in 1971, could that be utilized again by the President under the provisions of this language?

Mr. MAJAK: Under the staff's description of what would constitute a national emergency, unless the President could make the case that it was from a foreign source, he would not have these authorities available. He would not be able to invoke those authorities.

Mr. WHALEN: As I recall what was happening, money conversions, I think, were draining . . .

Mr. MAJAK: That was our own doing, I think, but nevertheless it came from abroad.³⁸

Thus, the committee staff recognize the Nixon precedent, note that (going forward) presidents should try to articulate some foreign source to the problem they are going to address, and appear to concede that should be pretty easy to do (even in cases where domestic actors are making the problem worse).

A few pages later, the members return to the Nixon precedent:

Mr. WHALEN: Let me take another instance where 5(b) was invoked. Didn't President Nixon in 1971 also use the Trading With the Enemy Act to implement the 10 percent surcharge? This would seem to me to be imposing a tax which only the Congress has the right to impose through legislation initiated in the Ways and Means Committee. I just don't see where there was any national emergency then. It would seem to me that President Carter could do the same thing, couldn't he?

Mr. SANTOS: The Trade Act of 1974 does now authorize that sort of action.

Mr. MAJAK: That illustrates our point. That is, if those authorities are necessary and appropriate, they should be provided for in the appropriate context.

Mr. SANTOS: This was an instance where that action could be authorized.

Mr. WHALEN: I am not sure that there was a national emergency.³⁹

This passage could be read as support for the notion that Section 122 displaces TWEA's trade powers. But again, it is ambiguous whether—despite both including tariff remedies—the former applies to nonemergency and the latter to emergency

³⁸ Ibid, at 147.

³⁹ Ibid, at 162.

settings.⁴⁰ Despite the serious questions raised—as well as one a moment later on whether emergency declarations effectively suspend the Constitution—the committee makes no clear statement or policy recommendation to clarify any of the ambiguity.

Then, on June 8, the seventh day of hearing, Majak noted that, under administration pressure, they softened the “source outside the United States” to the following:

‘extraordinary threat which has its source in whole or in part outside the United States.’ So, a national emergency can only be declared for essentially foreign problems, but we have retained what the administration has requested, namely some flexibility with respect to the remedies that can be used both domestic and foreign.

Majak noted that this would accommodate FDR’s move in 1941 to restrict domestic consumer credit in a response to a “foreign problem,” as well as addressing “a very serious imbalance in trade.”⁴¹ Thus, there is scant support for the view that the nonemergency Section 122 somehow displaced the emergency powers of TWEA/IEEPA.

7. **There was bipartisan agreement among drafters that IEEPA was primarily procedural, not substantive, reform—and would continue to apply to trade matters.** On the 10th day of hearing, June 16, Bingham opened up his presentation to the full House International Relations Committee by noting,

It is our hope, and we feel, that the bill in the form we have presented it is not very controversial. What we are focusing on is a procedural arrangement, and we are avoiding substantive issues of controversy. I think for us to attempt to deal with those controversial substantive issues would be a mistake even though I personally favor [some changes].⁴²

⁴⁰ Ibid, at 267.

⁴¹ Indeed, the committee transcript later quotes from the *Yoshida* decision: “The existence of limited authority under certain trade acts does not preclude the execution of other, broader authority under a national emergency powers act. Though 5 (b) of the TWEA does overlap the traditional framework of trade legislation, it is not controlling that some of the same considerations are involved. That is to be expected. All deal with foreign commerce Congress has said what may be done with respect to foreseeable events in the Tariff Act, the TEA, and in the Trade Act of 1974 (all of which are in force) and has said what may be done with respect to unforeseeable events in the TWEA. In the latter, Congress necessarily intended a grant of power adequate to deal with national emergencies.” (Ibid, at 171.) This passage does, however, provide support for the notion that an event must be “unforeseeable” to merit an emergency declaration. However, unless Congress imposes guardrails to encourage judicial review of foreseeability, then the legislature has left the matter up to executive discretion.

⁴² *Revision of Trading with the Enemy Act*, nos. 93–149 (House Committee on International Relations, 1977), at 2.

Whalen affirmed this view, leading off his comments by stating:

First, this is essentially a bill establishing procedures and not a bill that sets out or judges specific policies . . . This bill will, I hope and expect . . . call the President to produce the policy justifications Congress has the right to expect. This will restore an organic relationship between the two branches and urge my colleagues on the committee to support this legislation which has, in my opinion, been thoroughly aired in the drafting stage.⁴³

The following colloquy indicated how little IEEPA changed relative to TWEA when it came to trade—even after the Committee had explored the open questions presented by Section 122 and the *Yoshida* decision:

Mr. BINGHAM: What this adds up to is, as I have said before, in effect, the same powers that have existed under the Trading With the Enemy Act with the exception of the power to seize property, the power to seize records and I should add, the power to take action with respect to purely domestic transactions. The kind of power that was exercised, for example, with respect to the demonetization of gold would not come within the authority of the more limited powers of [IEEPA].

Mr. SOLARZ: What would be an example of a national emergency the President could declare unrelated to war under this bill which would give him these authorities?

Mr. BINGHAM: A *very obvious example* would be a case where the United States was engaged in hostilities where there was no declaration of war, such as the war in Korea, or the war in Vietnam. *I think that it would be logical to conclude that the President could declare an emergency and take certain action if there were a sudden drain on the resources of the United States through such a serious imbalance of trade as to require emergency action.*

Mr. SOLARZ: For argument sake, let us say there was another oil embargo. Would that constitute potentially the kind of nonwar national emergency?

Mr. BINGHAM: I think quite clearly it would.⁴⁴ [emphasis added]

Bingham went on to summarize what he saw as the recommendations he took away from the previous nine hearings:

⁴³ Ibid, at 10-11.

⁴⁴ Ibid, at 4. The Carter administration's Fred Bergsten noted later that it would be difficult to draw a firm line between conditions emerging domestically versus internationally, "it is very hard to speculate, frankly, on any of the possible future uses of any of these authorities. You mentioned some earlier. But it is really very hard to speculate. As an economist, I would have to say that our economy is now so deeply intertwined in the world economy in terms of banking transactions, trade, and most everything else, that, quite frankly, I find it hard to envisage situations where a concern of this magnitude would be of purely domestic origin." (Ibid, at 20.)

- 1) Applying the procedural requirements of the National Emergencies Act of 1976 with regards to congressional consultation, reporting, length and termination of emergencies
- 2) Limiting the scope of emergencies to those “in whole or major part from a source outside the United States,” while letting other statutes deal with non- or different-emergency situations
- 3) Requiring a declaration of a new emergency each time that there is a separate set of issues to address (e.g., the Korean War declaration of 1950 couldn’t be used for unrelated situations years later)
- 4) Grandfathering of certain existing emergencies. He noted that the subcommittee unanimously and on a bipartisan basis approved of this draft, and that the Carter administration agreed with almost all of it.⁴⁵

Note that there is no reference here to limiting the use of IEEPA for tariffs—despite the fact that this concern figured prominently in the hearings and debate.

The June 23 official committee report further confirms the limited nature of the substantive changes IEEPA made to TWEA, describing the former as constituting only “*somewhat* narrower powers subject to congressional review in times of ‘national emergency’ short of war”⁴⁶ [emphasis added], while it later reads that IEEPA “authorities basically parallels” TWEA.⁴⁷ The report describes the new approach that committee members and staff were going for with IEEPA, noting

The committee did not adopt the approach of entirely repealing the President's international emergency economic powers, or making them routine, nonemergency powers. . . . these new authorities should be sufficiently broad and flexible to enable the President to respond as appropriate and necessary to unforeseen contingencies. For that reason, the committee did not adopt, for example, recommendations that it place a definite time limit on the duration of any state of national emergency.⁴⁸

- 8. In its totality, the Committee report’s explanation of IEEPA’s purpose is procedural, not about substantive reform of trade powers.** This section of the report has been cherry-picked by courts, so it is worth printing it in full:

⁴⁵ Ibid, at 9.

⁴⁶ *Trading with the Enemy Act Reform Legislation*, nos. 95–459 (House Committee on International Relations, 1977), at 1.

⁴⁷ Ibid, at 14.

⁴⁸ Ibid, at 10.

H.R. 7738 is an expression of the intent of the committee, based on extensive staff analysis, hearings, and markup sessions, that a new approach to international emergency economic powers should include the following:

First, section 5(b) of the Trading With the Enemy Act should revert to what it originally was: a set of authorities for use by the President in time of war declared by Congress, in conformity with the Trading With the Enemy Act as a whole.

Second, a new set of international economic powers, more restricted than those available during time of war, should be created and conferred upon the President as standby authority for use in time of national emergency declared by the President. *The committee did not adopt the approach of entirely repealing the President's international emergency economic powers, or making them routine, nonemergency powers.*

Third, *these new authorities should be sufficiently broad and flexible to enable the President to respond as appropriate and necessary to unforeseen contingencies. For that reason, the committee did not adopt, for example, recommendations that it place a definite time limit on the duration of any state of national emergency.*

Fourth, given the breadth of the authorities and their availability at the President's discretion upon a declaration of national emergency, their exercise should be subject to various substantive restrictions. The main one stems from a recognition that emergencies are by their nature rare and brief, and are not to be equated with normal, ongoing problems. A national emergency should be declared and emergency authorities employed only with respect to a specific set of circumstances which constitute a real emergency, and for no other purpose. The emergency should be terminated in a timely manner when the factual state of emergency is over and not continued in effect for use in other circumstances. A state of national emergency should not be a normal state of affairs. As a further substantive constraint, the scope of the authorities should be clearly limited to the regulation of international economic transactions. Therefore the bill does not include authorities more appropriately lodged in other legislation, such as authority to regulate purely domestic transactions or to respond to purely domestic circumstances, or authority to control noneconomic aspects of international intercourse such as personal communications or humanitarian contributions.

Fifth, given the history of expansive use of emergency powers, the exercise of the emergency economic authorities should also be subject to strict procedural limitations, including consultation with Congress, periodic reporting requirements, and provision for termination of states of emergency

by Congress and for veto by Congress of regulations promulgated under the international emergency economic powers statute. This should be accomplished at a minimum by conforming the use of the authorities to the procedural requirements of the National Emergencies Act. Where appropriate and necessary, additional procedural safeguards should be written into the new statute.

Sixth, exercises of emergency powers under section 5(b) which are currently in progress should be generally exempted from the provisions of the new statute. Since few if any of the current uses could be justified as responding to an existing emergency situation, but rather are holdovers from emergencies which are long past, to make them subject to this act would be, in effect, automatically to terminate them. The committee feels that this would violate the intent of the National Emergencies Act and would be inappropriate to legislation attempting to legislate for the future not to judge the past. Current uses of section 5(b) should be considered individually, on their merits, in separate legislation. The purpose of the new statute should be to set forth authorities and procedures for future emergency situations.

Seventh, whenever possible, authority for routine, nonemergency regulation of international economic transactions which has heretofore been conducted under section 5(b) should be transferred to other legislation.

Eighth, while it should be the purpose of the legislation to authorize tight controls in time of national emergency, these controls should not extend to the total isolation of the people of the United States from the people of any other country. Such isolation is not only unwise from a foreign policy standpoint, but enforcement of such isolation can also entail violation of First Amendment rights of freedom of expression if it includes, for example, prohibitions on exchange of printed matter, or on humanitarian contributions as an expression of religious convictions.⁴⁹ [emphasis and underline added]

9. **The Senate expressed no trade policy concerns.** On September 9, the Senate Committee on Banking, Housing, and Urban Affairs Subcommittee on International Finance held a hearing on IEEPA. Bergsten opened by noting that substantive changes were not the point. "The bill before you does respond effectively to the principal purpose of the National Emergencies Act: To place procedural restraints on any future exercise of national emergency powers by the President."⁵⁰ Senators' questions to Bergsten focused on whether IEEPA would affect humanitarian transfers or the interest of US nationals whose overseas assets had been expropriated, and did not touch on tariff matters. Steinberg of the trade association

⁴⁹ Ibid, at 10-11.

⁵⁰ *Amending the Trading with the Enemy Act*, nos. 95-757 (Senate Committee on Banking, Housing and Urban Affairs, 1977), at 1.

also testified, but did not raise tariff issues in his Senate (unlike his House) testimony, instead focusing his comments on objecting to Congress's legislative veto. When a senator made a mention of the fact that there's no opposition to IEEPA, Steinberg mentioned obliquely:

Mr. STEINBERG: I am rather surprised, Mr. Chairman, that there has not been more interest in this reform from the business community. Maybe certain marginal areas of the community, but I don't sense any real business interest in this issue. I am rather surprised. Many corporations have been adversely affected in many ways by the use of [TWEA]. I need not elaborate on that.

Senator STEVENSON: I think you are right. I was checking with the staff. We have received very little reaction from the business community. Such interest as has been expressed has been on the behalf of persons with claims for expropriated assets. Beyond that, nothing. I was a member of the committee which recommended the termination of all the emergency powers of the President a couple of years ago. I was trying to remember why we didn't include these powers. It is an interesting sidelight.⁵¹

On October 3, 1977, the Senate published its own shorter report on IEEPA. It does not go into any depth about any aspect of the bill. However, in its short analysis of the purpose of the bill, it notes that IEEPA was motivated to address how TWEA was used “to regulate *both domestic and international economic transactions unrelated to a declared state of emergency*” [emphasis added]. It notes how Nixon's 10 percent tariff was used under TWEA, and expresses concern only that it was based in part on the 1950 Korean War emergency, and not only the 1971 balance of payments emergency.⁵² Thus, it is clear that the concern was more about the bookkeeping around emergency declarations than the substantive use of trade tools.

To date, the courts hearing cases against Trump's tariffs have made unrecognizable interpretations of the foregoing legislative history.

In its unanimous ruling against Trump's tariffs, the Court of International Trade quotes Bingham describing TWEA as conferring “on the president what could have been dictatorial powers that he could have used without any restraint by the Congress”; the committee report calling TWEA “essentially an unlimited grant of authority for the President to exercise, at his discretion, broad powers in both the domestic and international economic arena, without congressional review”; and that the committee report said IEEPA gave “the President a new set of authorities for use in time of national emergency which are both more limited in scope than those of [TWEA] and subject to various procedural limitations,

⁵¹ Ibid, at 10.

⁵² *International Emergency Economic Powers Legislation*, nos. 95–466 (Senate Committee on Banking, Housing and Urban Affairs, 1977), at 2.

including those of the [NEA].”⁵³ There is no discussion of *what* changes in scope the Committee thought it was making, which the above history indicates was limited to matters like humanitarian transfers. Nor is there any indication that Congress thought it was addressing TWEA’s deficiencies through procedural improvements. Instead, the CIT sandwiches the Bingham and report quotes (the actual “legislative history”) with a more amorphous notion of “the legislative history *surrounding* IEEPA”—including the 1974 Trade Act three years prior to conclude that “thus, Congress enacted IEEPA to limit executive authority over international economic transactions, not merely to continue the executive authority granted by TWEA.”⁵⁴

The CIT then goes on to mash together three separate passages from the committee report in a misleading way (numbers have been added to each quote for ease of reference):

The legislative history surrounding IEEPA confirms that Congress cabined any presidential authority to impose tariffs in response to balance-of-payments deficits to a narrower, non-emergency statute. To prevent IEEPA from becoming another (1) “essentially . . . unlimited grant of authority,” the House International Relations Committee suggested that (2) “whenever possible, authority for routine, non[-]emergency regulation of international economic transactions which has heretofore been conducted under [TWEA] should be transferred to other legislation,” and further stated that (3) IEEPA “does not include authorities more appropriately lodged in other legislation. . . .” H.R. Rep. No. 95-459 at 7, 10-11. This reflects that in enacting Section 122, Congress narrowed the President’s emergency authority to impose tariffs in response to balance-of-payments deficits. The words “regulate . . . importation” within IEEPA do not, therefore, permit the President to impose tariffs in response to balance-of-payments deficits”⁵⁵

The first quote (“essentially . . . unlimited grant of authority;”) is from page 7 of the document, and reads in its entirety:

First, through usage and amendment, section 5(b) has become essentially an unlimited grant of authority for the President to exercise, at his discretion, broad powers in both the domestic and international economic arena, without congressional review. These powers may be exercised so long as there is an uninterminated declaration of national emergency on the books, whether or not the

⁵³ The majority opinion on appeal also cited this passage—twice—for the proposition that the absence of the word “tariff” in IEEPA means “regulating imports” can’t include tariffs. See *V.O.S. Selections, Inc. v. Donald J. Trump* ([Opinion](#)), No. 25-1812 (US Court of Appeals for the Federal Circuit August 29, 2025), at 18 and 30. The majority goes on to write in a footnote: “To be clear, we cite legislative history as additional support for the conclusion we reach based on the statutory text alone. Even without this legislative history, we would reach the same conclusion.” (*Ibid*, at 29-30.) The US District Court for the District of Columbia also twice cited this passage, at 3 and 26.

⁵⁴ *V.O.S. Selections, Inc. v. Donald J. Trump* (*Opinion*), No. 25-00077 (US Court of International Trade May 28, 2025), at 31-32.

⁵⁵ *Ibid*, at 35.

situation with respect to which the emergency was declared bears any relationship to the situation with respect to which the President is using the authorities.⁵⁶

In this context, it is clear that Congress's concern is not about the balance between Section 122 and TWEA, but rather relates to procedural concerns like the lack of congressional review.

The second and third quotes are the underlined passages from conclusion 8 above. In context, they present a completely different takeaway. Quote 2 elides the fact that the Committee, in its second recital, makes clear that it has preserved the distinction between emergency, non-routine authorities, and nonemergency, routine authorities. Thus, there is nothing inconsistent about IEEPA addressing the former, and Section 122 the latter.⁵⁷ Quote 3 implies that the Committee thought tariffs were more appropriately vested in Section 122 than IEEPA, when in fact, the Committee was concerned about using IEEPA “to respond to purely domestic circumstances” or interfering with “noneconomic aspects of international intercourse.”⁵⁸ Whatever the wisdom of Trump's tariffs, they easily clear the bar established by the Committee.

The concurring opinion in the appeal of the CIT decision—which maintained that IEEPA authorizes no tariff whatsoever—reached into other parts of the legislative history. To brush aside the point made in conclusion 2 above—that Congress knew of *Yoshida* ruling—they argue that Congress didn't specifically endorse the finding. As support, they point to Lowenfeld's judgment that *Yoshida* was a “thin” opinion and that Congress took on board some of his procedural recommendations⁵⁹—without grappling with the fact that the actual reforms the Committee elevated make no explicit mention of overriding the supposed defects of the ruling.

⁵⁶ *Trading with the Enemy Act Reform Legislation*, at 7.

⁵⁷ The dissenting opinion upon appeal looked to the legislative history and Senate report on the Trade Act of 1974 for further support that Congress was comfortable with bifurcating emergency and nonemergency powers. See *V.O.S. Selections, Inc. v. Donald J. Trump* (Dissent), No. 25-1812 (US Court of Appeals for the Federal Circuit August 29, 2025), at 53.

⁵⁸ This lack of a change to relevant substantive powers is also noted in the dissent, at 14.

⁵⁹ See *V.O.S. Selections, Inc. v. Donald J. Trump* (Concurrence), No. 25-1812 (US Court of Appeals for the Federal Circuit August 29, 2025), at 10-11.