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THE PRESIDENT'S ECONOMY?

*The Law of Tariffs and Democracy*¹

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In the first weeks of his administration, President Trump announced tariffs against Canada, Mexico and China.² On April 2, the administration escalated its trade war with a so-called “reciprocal tariff regime” that imposed new levies on all of America’s trading partners.³ Following backlash from allies and unease across financial markets, a series of moratoria left the fate of these pronouncements in limbo for some time thereafter. In the interim, the administration threatened steeper tariffs and offered bilateral deals to countries seeking to keep relatively favorable access to U.S. markets. During this time, the administration also imposed or threatened further tariffs on imports from various sectors—like steel, pharmaceuticals, and semiconductors.⁴

After a period of substantial uncertainty, the reciprocal tariffs went into effect at the start of August.⁵ Some trading partners struck bilateral deals to face lower than expected tariff rates on goods exported from their country into the U.S. market, while others now face levies that are higher than those that were first announced.⁶ Even if the administration’s approach to remaking the international trading system through broad coercion and bilateral dealmaking is now clearer, substantial uncertainty remains.⁷ This is not least because the Constitution grants

¹ The author wishes to thank Chris Nardi for invaluable research and analysis of the existing statutory scheme governing the President’s tariff authority, as well as Dan Farber, Jonathan Gould and Bertrall Ross for helpful comments. Catherine Lhamon deserves special appreciation for her careful review of multiple drafts.

² See, e.g., Exec. Order No. 14193, 90 FR 11423 (2025).

³ Exec. Order No. 14257, 90 FR 15041 (2025).

⁴ See Michael Lowell et al., “Trump 2.0 tariff tracker” ReedSmith LLP, <https://www.tradecomplianceresourcehub.com/2025/08/06/trump-2-0-tariff-tracker/>.

⁵ Exec. Order No. 14326, 90 FR 37963 (2025).

⁶ See, e.g., Mercedes Ruehl, *Switzerland in ‘shock’ at 39% US tariff blow*, FINANCIAL TIMES, Aug. 1, 2025, <https://www.ft.com/content/e64f4ef0-0f98-4a8b-8840-459fd6f2dc28>.

⁷ In fact, continued uncertainty seems inherent in this approach: the pattern of threatened escalation and temporary truces continue—particularly vis-à-vis China and Canada.

Congress the exclusive Article I power to regulate foreign commerce and levy tariffs, meaning the President's legal authority to enact such an expansive tariff regime remains in question ahead of the Supreme Court's consideration of the issue in early November.⁸

These tariffs—and the broader effort to remake the international trading order—are justified with reference to various goals. Sometimes they are explained as a way to address problems associated with the trading system itself, such as the uneven enforcement of the existing treaty regime or the imbalances that work to the disadvantage of American manufacturing.⁹ At other times, these tariffs are justified as a way to push nations to act on various other issues, like managing the flow of illicit drugs across borders, cost-sharing for defense expenditure, or even to extract favorable treatment for the President's political allies in foreign courts.¹⁰ While the focus on restructuring international trade is not new to the second Trump administration, the approach taken over these last months has little parallel. These actions represent a major rupture in the exercise of presidential power with respect to the international trading system.¹¹

In light of this drastic shift, the following develops a framework for understanding and evaluating the role of the executive in the governance of international trade. Rather than focusing on the dispute over the International Emergency Economic Powers Act (IEEPA)-based tariffs that is presently before the Court, this analysis situates the current tariffs alongside other authorities that Congress has delegated to the executive. It suggests that these powers could allow the administration to pursue many of its trade-related aims even if the current tariffs are

⁸ U.S. CONST. art. 1, §8; *see, generally*, Kathleen Claussen and Timothy Meyer, *Economic Security and the Separation of Powers*, 172 U. PA. L. REV. 1955. *See also* V.O.S. Selections, Inc. v. United States, 1:25-cv-00066 (Ct. Intl. Trade); Learning Resources, Inc. v. Trump, 2025 WL 1525376 (D.D.C. May 29, 2025); V.O.S. Selections, INC. v. Trump, No. 25-1812 (Fed. Cir.) (striking down the IEEPA tariffs as unconstitutional).

⁹ Jameison Greer, *Why We Remade The Global Order*, N.Y. TIMES Aug. 7, 2025, <https://www.nytimes.com/2025/08/07/opinion/trump-trade-tariffs.html>.

¹⁰ *Compare* Exec. Order No. 14257 90 FR 15041 (2025) (imposing worldwide 'reciprocal' tariffs in the name of addressing America's trade deficit) *with* Exec. Order No. 14194 90 FR 9117 (2025) (imposing tariffs on bordering countries to address the "sustained influx of illegal aliens and illicit opioids and other drugs.") *and* Exec. Order No. 14323 90 FR 37739 (2025) (justifying additional tariffs on Brazil due to its "treatment of former President Bolsonaro" and its purported contribution to the "deliberate breakdown in the rule of law in Brazil").

¹¹ These measures drastically escalate—and transfigure—an effort to reform the rules of international trade that took place during the Biden administration through its heightened use of industrial policy, export controls and the creation of new trading partnerships like the Indo-Pacific Economic Framework. Instead of trying to reform the international trading system to help build a new geopolitical order, the Trump approach seeks to realign the trading order to new global realities. *See, e.g.*, Matthew Hamilton, *Reform or Realignment: The Geopolitical Lessons of Bretton Woods*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (2025).

struck down. This highlights the need to engage in a more systematic overview of the President's role in international trade.

To this end, the analysis first summarizes the recent development of international trade to situate the Trump administration's novel exercise of power in its broader historical and geopolitical context. Second, it charts the purported legal basis for the expansive assertions of presidential authority that are now being made. Third, the paper identifies how contestation over the tariff power raises questions about the structure of democratic governance in a globalized economy. This contextualizes the administration's approach to tariffs with shifts in executive power since the start of the second Trump presidency.¹² It also highlights the need to prioritize redesigning the international trading system to support a democratic constitutional order.

I. SITUATING THE ADMINISTRATION'S TARIFFS

The Trump administration's tariffs represent an effort to recreate the global economy—which has been substantially shaped by a set of rules, institutions and norms pioneered by the United States since the end of the Second World War.¹³ The trading system formed a foundational part of this broader postwar international economic order, and is the focus of the following analysis.¹⁴

Between the First and Second World War, high levels of economic protection broke out between countries across the globe, which served to insulate domestic firms from international

¹² See, generally, Matthew Hamilton, *Continuity, Change and Contestation: Executive Power at the Start of the Second Trump Administration*, EDLEY CENTER ON LAW & DEMOCRACY (August 2025).

¹³ This set of rules, institutions, and norms include the International Monetary Fund, World Bank and General Agreement on Trade and Tariffs (which eventually provided the basis for the World Trade Organization), as well as the central role of the U.S. dollar in the global economy. For discussion of the history of the postwar system, see Matthew Hamilton, *What is Bretton Woods? The Contested Pasts and Potential Futures of International Economic Order*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (2024).

¹⁴ While the following focuses on the President's role in the trading system, the exercise of this authority must be considered alongside other related efforts to transform the international economic order—especially with respect to changes in geopolitical relations and the governance of international financial flows. See, e.g., David Singh Grewal, *What Role for Global Finance in a Course on International Trade Law*, LPE BLOG (February 2018).

competition and weaponize preexisting forms of economic interdependence.¹⁵ By the end of the Second World War, many viewed this development as a barrier to resolving the Great Depression and an accelerant of the aggression that led to global conflict.¹⁶ The reduction of high tariff levels thus became a postwar priority facilitated under the framework established by the General Agreement on Tariffs and Trade (GATT).¹⁷ This treaty centered on two goals: non-discrimination between domestic and foreign producers of goods subject to the treaty, as well as most-favored nation status that required the extension of the same tariff treatment to all countries participating in the treaty arrangement.¹⁸

After the substantial reduction of tariffs among GATT signatories in the initial postwar decades, the international trading system sought to extend these twin goals by reducing non-tariff barriers to trade—such as subsidies, regulations and legal privileges afforded to domestic firms that compete on international markets.¹⁹ By the end of the Cold War, new treaties extended the rules of international trade to cover additional parts of the economy, like intellectual property and trade in services, while also extending membership to fold almost every nation into the trading regime. Upon the GATT's transformation into the World Trade Organization (WTO) and the subsequent accession of China, these rules organized an essentially global trading system. China's rapid development deepened preexisting problems with this arrangement, which had long served some member-states better than others.²⁰ Since then, the so-called "China shock" arising from the country's rapid integration into the global trading order

¹⁵ See, generally, HENRY FARRELL & ABRAHAM L. NEWMAN, UNDERGROUND EMPIRE: HOW AMERICA WEAPONIZED THE WORLD ECONOMY (2023) (offering the canonical account of 'weaponized interdependence' and its recent history).

¹⁶ For an account of the relationship between protectionism and world war, see NICHOLAS MULDER, THE ECONOMIC WEAPON: THE RISE OF SANCTIONS AS A TOOL OF MODERN WAR (2022) (notwithstanding much historical dispute over the causes of both the Depression and Second World War, there is less dispute over the importance of this perceived cause in shaping the postwar system).

¹⁷ WORLD TRADE ORGANIZATION, *The GATT years: from Havana to Marrakesh*, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (showcasing that postwar trade was initially built around industrialized western economies).

¹⁸ GATT 1947: General Agreement on Tariffs and Trade 1947 (Article I and III). The Trump administration's tariffs pose a frontal challenge to both goals, which were first developed to effectuate trade liberalization between America and its allies after the Second World War.

¹⁹ *Id.*

²⁰ MICHAEL PETTIS & MATTHEW KLEIN, TRADE WARS ARE CLASS WARS: HOW RISING INEQUALITY DISTORTS THE GLOBAL ECONOMY AND THREATENS INTERNATIONAL PEACE (2020).

has played a non-trivial role in the rise of populism and backlash against globalization that reshaped politics in America and across much of the developed world.²¹

The administration's sweeping tariffs should be considered in this broader context. They are not only a response to problems with the preexisting system, but an attempt to tear down a structure that played an important role in economic success and geopolitical stability across the postwar period. This mixed historical record surfaces many questions to help evaluate today's tariffs. First, do they form a viable response to the challenges produced by the recent development of the international trading system? Second, might they create more substantial risks than the ones they set out to address? Third, to what extent should the President be able to act unilaterally given these potential stakes of upending the basic organizing principles of the decades-long trading order? The next section explores whether the President has authority to act unilaterally to reshape the international trading system and America's place within it. The final section poses questions about whether the President should be able to do so, given principles that are fundamental to both the constitution and to democratic governance.

II. PRESIDENTIAL TARIFF AUTHORITY

Questions about the president's power to use tariffs to reshape the international trading system are now actively playing out in the courts. In large part, these disputes center on the President's ability to use a delegated authority under International Emergency Economic Powers Act (IEEPA) to enact the recent tariffs placed on trading partners across the globe. While the extent of this statutory delegation remains unresolved—because it had never previously been invoked to enact tariffs—this analysis emphasizes the other tariff authorities that Congress has delegated to the President. Considering this full range of authorities helps us to assess not only what power the executive has to reshape America's place in the international trading order, but whether the President should have such power.

IEEPA

On May 28, 2025, the Court of International Trade (CIT) first struck down the Trump administration's use of IEEPA to enact its various tariff measures on America's trading partners.²² At the end of August, the Federal Circuit largely affirmed the CIT's holding that the IEEPA-based tariffs exceeded the statute's delegation of power to the President—although on

²¹ David Autor et. al, *The China Shock: Learning from Labor Market Adjustment to Large Changes in Trade*, NBER WORKING PAPER 21906 (2016).

²² V.O.S. Selections, Inc. v. United States, 1:25-cv-00066 (Ct. Intl. Trade 2025).

somewhat different grounds than the CIT.²³ Another District Court has also issued a preliminary injunction against the administration's tariffs under IEEPA, but subsequently stayed its injunction pending appeal.²⁴

Under IEEPA, the President is delegated the authority to "investigate, regulate or prohibit" a wide range of international economic activities that are "subject to the jurisdiction of the United States."²⁵ While IEEPA does not grant explicit tariff authority to the President, the administration is interpreting its permission to "regulate...importation" to include a power to impose tariffs²⁶—although, as noted, the statute has never previously been used for this purpose, and the permissible breadth of this still uncertain power is therefore entirely unsettled.²⁷ The statute further limits permission to exercise IEEPA authorities to circumstances where there is an "unusual and extraordinary threat" and requires a declaration of national emergency for the explicit purpose of exercising this statutory authority.²⁸

In reviewing the Trump administration's actions, the courts have identified two distinct categories of tariffs that have been imposed under IEEPA. First are "trafficking tariffs" aimed at China, Mexico and Canada.²⁹ They were at least facially imposed by the President to address the flow of illicit drugs into the United States.³⁰ Second are the "worldwide and retaliatory tariffs,"

²³ V.O.S. Selections, Inc. v. Trump, No. 25-1812 (Fed. Cir. 2025), at 26 (choosing not to address the question of whether IEEPA authorizes "any tariffs at all" but only deciding that the trafficking and reciprocal tariffs as imposed by the administration are not within the permissible bounds of any plausible IEEPA delegation).

²⁴ See MEMORANDUM OPINION GRANTING PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION Learning Resources, Inc. v. Trump 2025 WL 1525376 (D.D.C. May 29, 2025) (finding success likely on the merits and issuing a preliminary injunction but for the subsequent stay pending appeal). Additional challenges to the tariffs underscore a jurisdictional conflict, as it is unclear whether the Court for International Trade has jurisdiction or not—its exclusive grant is for actions "that arise out of any law...providing for...tariff(s)," while this case is, in part, about whether IEEPA is such a law. 28 U.S.C. 1581.

²⁵ Codified as amended at 50 U.S.C. 1702 (a)(1)(B).

²⁶ This is not yet entirely clear. The D.C. District Court held that the power to "regulate" is distinct from—and does not include—the power to impose tariffs. See MEMORANDUM OPINION Learning Resources, Inc. v. Trump 2025 WL 1525376 (D.D.C. May 29, 2025). The Federal Circuit, meanwhile, did not arrive at a definitive opinion on this question.

²⁷ But the substantially similar Trading With the Enemy Act of 1917 (TWEA) has been used to advance tariffs on one occasion, *infra* section IV.

²⁸ Codified as amended at 50 U.S.C. 1702 (a)(1)(B) (allowing Congress to repeal the national emergency).

²⁹ Exec. Order No. 14194 90 FR 9117 (2025).

³⁰ *Id.*

which the Trump administration explained as a means to mitigate bilateral trade deficits with America's trading partners.³¹

The CIT struck down each category of tariffs on a different basis.³² It found that the trafficking tariffs were not properly tied to a national emergency, which is prerequisite for the exercise of the President's IEEPA authorities.³³ Meanwhile, the CIT held that the worldwide and retaliatory tariffs exceeded the limits of the President's delegated power under IEEPA.³⁴ The Federal Circuit took a different approach in its majority opinion, stressing that both categories of tariffs were too broad to be permissible under IEEPA, notwithstanding the question of whether IEEPA delegates any tariff authority given the ambiguity of the statute. Both findings regarding the limits of IEEPA raised a series of subsidiary legal questions—concerned with the limits of permissible delegations of Congressional power to the executive, and the breadth of presidential discretion to identify a national emergency for the purposes of invoking IEEPA authorities. The Supreme Court has granted certiorari to hear the case in November 2025.

FURTHER TARIFF AUTHORITIES

While the fate of the IEEPA-based measures awaits the Supreme Court, it is worth considering the other tariff authorities that Congress has delegated to the President. These powers provide clearer boundaries on the circumstances and extent of permissible tariffs,³⁵ and generally fall into three categories.³⁶ First, like IEEPA, a set of statutes allow the President to raise tariffs after identifying a threat to “national security” or a national emergency. Second, various authorities permit the President to raise tariffs after identifying either trade discrimination or other threats to the national economy due to economic policies pursued by

³¹ Exec. Order No. 14257 90 FR 15041 (2025) (notwithstanding the question of whether this is a sensible goal or a reasonable means of achieving it).

³² V.O.S. Selections, Inc. v. United States, 1:25-cv-00066 (Ct. Intl. Trade).

³³ *Id.* (noting the need for a closer connection between the declared emergency and the ability of tariffs to address it).

³⁴ *Id.* (drawing on the basic principles surrounding non-delegation and major questions doctrine to inform construction of the outer-limits of the IEEPA authority).

³⁵ A non-exhaustive list of such statutes enacted by Congress can be found in Brandon J. Murrill, Cong. Rsch. Serv., R44707, *Presidential Authority over Trade: Imposing Tariffs and Duties* (2016) 3–7, <https://crsreports.congress.gov/product/pdf/R/R44707>.

³⁶ Kathleen Claussen, *Trade's Security Exceptionalism*, 72 Stan. L. Rev. 1097, 1112–16 (2020)

other countries.³⁷ Finally, Congress provides the President with broad power to adjust tariffs upon entering into a trade agreement with a foreign nation³⁸—although the following analysis does not focus on these fast-track authorities for trade negotiations as they do not relate to the President's attempts to unilaterally upend the basic principles that have governed international trade across recent decades.³⁹

A. NATIONAL SECURITY OR EMERGENCY AUTHORITIES

Until the new administration, Section 232 of the Trade Expansion Act of 1962 was the most frequently invoked national security trade authority.⁴⁰ Under Section 232, if the Secretary of Commerce conducts an investigation and determines that an import “threatens to impair the national security”, then the President may impose any tariff or quota.⁴¹ In so doing, the President must consider, among other factors, “domestic production needed for projected national defense requirements,” and “the close relation of the economic welfare of the Nation to our national security.”⁴² While the executive's factual determinations are not subject to judicial review, a court may evaluate its actions for “clear misconstruction” of the considerations required under the statute.⁴³ Nevertheless, given Section 232's broad view of national security harms, legal challenges to presidential actions under this authorization are rather unlikely to succeed.⁴⁴ As of 2025, thirty-two Section 232 investigations had been conducted, with ten

³⁷ This categorization surfaces a question with no clear answer, and which is at the core of demarcating the difference between Article I and Article II powers: how to tell the difference between a national security related issue and one that impacts the national economy?

³⁸ Most recently, Congress enacted the Bipartisan Congressional Trade Priorities and Accountability Act of 2015, Pub. L. No. 114-26, 129 Stat. 320, which in relevant part expired on July 1, 2021. The law allowed the president to enter into a trade agreement that raised or lowered tariffs without Congressional approval, subject to certain limitations. *Id.* § 103(a) (codified at 19 U.S.C. § 4202(a)). While some scholars question whether these statutes violate the nondelegation doctrine, courts have rejected nondelegation challenges to statutes authorizing executive tariff actions. *Compare* Cameron Silverberg, *Trading Power: Tariffs and the Nondelegation Doctrine*, 73 Stan. L. Rev. 1289, 1327–30 (2021) (arguing Section 232 as broadly interpreted would be unconstitutional), *with* *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 558–60 (1976) (rejecting nondelegation challenge to Section 232).

³⁹ These authorities do implicate the administration's effort to develop an alternative approach to international trade through bilateral dealmaking with trading partners, which merits a separate analysis.

⁴⁰ Codified as amended at 19 U.S.C. § 1862.

⁴¹ *Id.* § 1862(c)(1)(A).

⁴² *Id.* § 1862(d).

⁴³ *Severstal Exp. GMBH v. United States*, 39 ITRD 3084, 2018 WL 1705298, at *7 (Ct. Int'l Trade 2018) (quoting *Corus Grp. PLC. v. Int'l Trade Comm'n.*, 352 F.3d 1351, 1359, 1361 (Fed. Cir. 2003)).

⁴⁴ *See id.* at *10 (noting the economic factors in § 1862(d) are “quite broad and permissive”); *see also* David McConnell, *Slippery Slope? More Like Sliding Scale: Reviving Section 232 Litigation by Adopting*

resulting in presidential action.⁴⁵ By late October, the new Trump administration had announced twelve new Section 232 investigations, and used this authority as the basis for sectoral tariffs on steel, aluminum and automobiles.⁴⁶

Similar to IEEPA, an additional national security-related authority is provided through the Trading with the Enemy Act (TWEA).⁴⁷ TWEA authorizations are available “[d]uring the time of war,” while IEEPA applies when the president declares a national emergency for IEEPA-specific purposes.⁴⁸ Along with other powers, TWEA allows the president to “regulate . . . importation or exportation of . . . any property in which any foreign country or national thereof has any interest.”⁴⁹ Only President Nixon has used TWEA to impose tariffs. He invoked an older version of the statute (one similar to the powers granted through IEEPA) to place an additional 10% tariff on all imported goods in response to the country’s balance of payments deficit, although Congress then amended TWEA to limit the scope of Presidential power that its earlier iterations afforded.⁵⁰

B. TRADE DISCRIMINATION AUTHORITIES

The President enjoys various additional authorities to enact tariffs—and other trade restrictions—in response to certain actions undertaken by trading partners that are deemed to harm the American economy. Under Section 201 of the Trade Act of 1974, the President can impose trade restrictions when an import is a “substantial cause of serious injury, or [causing] the threat thereof, to the domestic industry producing an article like or directly competitive

Sliding Scale Analysis to Meaningfully Constrain Presidential Action, 31 Fed. Circuit B.J. 145, 155–59 (2022) (cataloging the failure of constitutional challenges to actions under Section 232).

⁴⁵ Rachel F. Fefer et al., Cong. Rsch. Serv., R45249, *Section 232 Investigations: Overview and Issues for Congress* (2021) 3, <https://crsreports.congress.gov/product/pdf/R/R45249>; Kyle H. Kitamura, Cong. Rsch. Serv., IF13006, *Section 232 of the Trade Expansion Act of 1962* (2025), <https://www.congress.gov/crs-product/IF13006>.

⁴⁶ Shara Aranoff et. al, *Status of Section 232 Actions by the Trump Administration*, Covington & Burling LLP (July 28, 2025), <https://www.cov.com/news-and-insights/insights/2025/07/status-of-section-232-actions-by-the-trump-administration>.

⁴⁷ Codified as amended at 50 U.S.C. § 4305.

⁴⁸ *Id.* §§ 1701(a), 4305(b)(1).

⁴⁹ *Id.* §§ 1702(a)(1)(B), 4305(b)(1)(B).

⁵⁰ Doug Palmer, *One Law Could Make Trump’s Tariff Threat a Reality*, Politico (Sept. 1, 2024), <https://www.politico.com/news/2024/09/01/trump-universal-tariff-threat-00176746>. The statute was amended in response to President Nixon’s broad assertion of power; Christopher A. Casey et. al, Cong. Rsch. Serv. R45618, *The International Emergency Economic Powers Act: Origins, Evolution, and Use*, (Jan. 30, 2024), <https://sgp.fas.org/crs/natsec/R45618.pdf>, 6-8.

with the import[.]”⁵¹ If an investigation by the International Trade Commission (ITC) makes an affirmative finding of such an injury or the threat of one, then the President must consider numerous factors to decide on an appropriate response, while ensuring that it “make[s] a positive adjustment to import competition and provide[s] greater economic and social benefits than costs.”⁵² This authority is limited, including by virtue of the fact that the President may only increase existing tariff levels on an import by 50%, and can only impose an action for a maximum of eight years.⁵³ As with other trade authorities, courts are permitted to review Section 201 actions for “fundamental statutory compliance and procedural fairness,” rather than “the substance of the President’s and ITC’s actions or lack thereof.”⁵⁴ There have been seventy-five Section 201 investigations by the ITC; nineteen of which resulted in the President imposing tariffs.⁵⁵ The President has not used Section 201 to impose tariffs since the start of this term, although it provided the basis for tariffs on solar imports under both the first Trump and Biden administrations.⁵⁶

Similarly, Section 301 of the Trade Act of 1974 allows the U.S. Trade Representative (USTR) to “impose duties or other import restrictions” when it determines that a foreign nation is engaging in unfair trade practices.⁵⁷ Specifically, Section 301 mandates action when a nation is either (1) violating a trade agreement, or (2) committing an act that is “unjustifiable and burdens or restricts United States commerce.”⁵⁸ This provision also permits, but does not require, action when a trade practice is “unreasonable or discriminatory and burdens or restricts United States commerce.”⁵⁹ Before imposing any such trade restriction, the USTR must perform an investigation and consult with the foreign nation and other interested parties.⁶⁰ Because Section 301 delegates authority to the USTR, courts review these actions for compliance with the Administrative Procedure Act in addition to review for statutory

⁵¹ Codified as amended at 19 U.S.C. § 2251(a).

⁵² *Id.* § 2253(a)(1)(A), (a)(2).

⁵³ *Id.* § 2253(e)(1), (e)(3).

⁵⁴ Joshua E. Kurland, *Dusting-Off Section 201: Re-Examining A Previously Dormant Trade Remedy*, 49 Geo. J. Int’l L. 609, 626 (2018).

⁵⁵ *Id.* at 610–12; David Ryan, *The Effects of Section 201 Safeguards on U.S. Industries*, 44 Geo. J. Int’l L. 249, 264 (2012).

⁵⁶ Proclamation No. 10339, 87 F.R. 27 (Feb. 4, 2022).

⁵⁷ Codified as amended at 19 U.S.C. § 2411(c)(1)(B).

⁵⁸ *Id.* § 2411(a)(1).

⁵⁹ *Id.* § 2411(b)(1).

⁶⁰ *Id.* §§ 2412–2414.

compliance and procedural fairness.⁶¹ Between 1995 and 2020, the USTR opened 130 investigations under Section 301; thirty-five of those investigations identified ‘burdens or restrictions’ on commerce, and six retaliatory actions followed.⁶² Since the start of the new administration, the USTR has opened one such investigation of Brazil.⁶³

A further section of the Trade Act of 1974, Section 122, allows the President to impose temporary tariffs and quotas to correct for balance-of-payments deficits.⁶⁴ When the President finds “fundamental international payments problems” the President “shall” impose, for up to 150 days, quotas or a temporary import surcharge of no more than 15%.⁶⁵ These import restrictions can be directed toward a single country or group of countries if the President determines that “the purposes of this section will best be served” by targeted measures.⁶⁶ This provision offers a limited means of addressing the very problem that provided the facial justification for the Trump administration’s “worldwide and retaliatory” tariffs under IEEPA.⁶⁷

Finally, Section 338 of the Tariff Act of 1930 allows the President to impose “new or additional duties”—including up to 50% tariffs—after finding that a foreign nation discriminates against U.S. commerce and thereby puts it at a “disadvantage compared with the commerce of any foreign country.”⁶⁸ Section 338 has never been invoked to impose tariffs, although it was used at least once to take other protective actions. It is considered “long forgotten,” but remains an available authorization for the President to hike tariffs.⁶⁹ If the IEEPA-based tariffs are ultimately struck down, many speculate that the administration will turn to this authority—

⁶¹ In re Section 301 Cases, 570 F. Supp. 3d 1306, 1323–26 (Ct. Int’l Trade 2022); *see also id.* at 1335–37 (rejecting that the APA’s procedural requirement exception for “foreign affairs function[s]” applied).

⁶² Andres B. Schwarzenberg, Cong. Rsch. Serv., R46604, *Section 301 of the Trade Act of 1974: Origin, Evolution, and Use* (2020) 26, 53–59, <https://crsreports.congress.gov/product/pdf/R/R46604>.

⁶³ Initiation of Section 301 Investigation: Brazil’s Acts, Policies, and Practices 90 Fed. Reg. 136 (July 18, 2025).

⁶⁴ Codified as amended at 19 U.S.C. § 2132; *supra* section II (seeking to curtail presidential power in response to President Nixon’s broad assertion under TWEA to deal with the balance of payments crisis).

⁶⁵ *Id.* § 2132(a).

⁶⁶ *Id.* § 2132(d)(2).

⁶⁷ It has also been used to explain why IEEPA does not “regulate...import” on the basis of such an emergency, since this statute specifically prescribes a more limited tariff authority for such eventualities.

⁶⁸ Codified as amended at 19 U.S.C. § 1338(a).

⁶⁹ John Veroneau & Catherine Gibson, *The President’s Long-Forgotten Power to Raise Tariffs*, Law360 (Dec. 14, 2016), <https://plus.lexis.com/api/permalink/d55ff5bd-96a6-43d7-a2d2-2d81c772c8f7/?context=1530671>.

not least because there are no clear temporal limits on how long such measures can be kept in place.⁷⁰

III. DEMOCRATIC GOVERNANCE IN A GLOBAL ECONOMY

Tariffs are at the center of President Trump's efforts to project power on the international stage. He associates them with a range of objectives—from offsetting the cost of tax cuts for the wealthy to restoring the working class.⁷¹ While it is possible that the existing tariffs will face further headwinds from the judiciary, this analysis emphasizes the various other tariff authorities available to the President. These are limited delegations in comparison with the power now being asserted under IEEPA, but they can still drastically reshape the global trading order and America's place within it.⁷² In its own right, protracted uncertainty surrounding the tariff regime also invites substantial effects. The possibility that the President can unilaterally transform the international trading system—and abrogate from America's international legal commitments to its foundational principles—is further compounded by the administration's maximal view of its other, non-tariff powers to reshape America's place in the global economy.⁷³ All of this foregrounds the question contemplated in this final section: should the President have such power?⁷⁴ This conclusion pursues this question in relation to core constitutional principles and democratic commitments.

A. PREEXISTING TRENDS: TRADE IN THE SHIFTING CONSTITUTIONAL ORDER

The administration's maximal claim of its tariff authority feeds on preexisting trends. The IEEPA assertion is another instance of long-running consolidation of presidential control over

⁷⁰ David Lawder, *If trade court ruling stands, Trump seen shifting to other options for tariff assault*, REUTERS (May 29, 2025), <https://www.reuters.com/world/us/if-trade-court-ruling-stands-trump-seen-shifting-other-options-tariff-assault-2025-05-29/>.

⁷¹ Tony Romm, *To Pay for Tax Cuts, Trump Touts Tariff Revenues That May be Fleeting*, N.Y. TIMES (June 5, 2025).

⁷² This is not least because the scope of these other tariff authorities also remains largely untested in courts.

⁷³ See, e.g., Exec. Order. No. 14345 90 FR 43535 (2025).

⁷⁴ This analysis is notwithstanding whether the administration's particular goals are cogent or potentially contradictory with each other. For instance, consider the desire to reassert economic sovereignty while punishing other states with higher tariff rates on the grounds that they have done the same. Can such an approach lead to any stable basis for international economic relations?

foreign affairs.⁷⁵ This trend is stark in various other actions recently taken by the administration, ranging from its unilateral choice to attack vessels on the open seas to its decision to extend significant financial support to political allies abroad. The exercise of international economic and financial power—ranging from tariffs to the imposition of export controls and the regulation of inbound investment—is increasingly viewed as a means of geopolitical competition, which further expands the universe of what the executive might claim as part of its already broad foreign affairs remit.⁷⁶ In addition, this assertion fits with the central role that other forms of executive governance—like the Federal Reserve’s ability to extend dollar liquidity to international partners, or to shape interest rates across the globe—have assumed in structuring the global economy.⁷⁷ Any further attempt to evaluate the administration’s authority to impose sweeping tariffs must be considered in light of these broader trends in the structure of the American state and the distinct role of its executive functions in the global economy.

First, how do today’s assertions of a broad—if not plenary—tariff power for the executive comport with key principles of constitutional governance? At its core, the separation of powers seeks to ensure that no one branch can ascribe to itself the powers enumerated to another.⁷⁸ This constitutional principle seems to conflict with tariff measures that drastically transform the international trading regime without any clear consent being provided by Congress. But recent developments in the separation of powers jurisprudence created the conditions for this assertion to appear at least credible enough to make—even if only to continue shifting the Overton window toward greater presidential control.⁷⁹

Since Congress first delegated most of the extant tariff authorities to the President, deeper international economic integration has also changed the substantive possibilities associated with such delegations. For instance, as America became more integrated into international markets, tariffs assumed a greater potential to impact macroeconomic conditions, like the prices of key goods and services. In addition, as America became more dependent upon imported inputs for production—especially for key technologies that power today’s economy—any prospect of tariffs heightened the risk of retaliatory weaponization by trading partners who

⁷⁵ Curtis Bradley and Martin Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004).

⁷⁶ See, e.g., Andrew Boyle, *Checking the President’s Sanctions Powers*, The Brennan Center for Justice (June 10, 2021).

⁷⁷ See, generally, LEAH DOWNEY, *OUR MONEY: MONETARY POLICY AS IF DEMOCRACY MATTERS* (2024).

⁷⁸ The Federalist No. 47 (James Madison).

⁷⁹ Hamilton, *supra* note 12 (considering these trends in separation of powers, such as the extension of presidential immunity and consolidation of presidential control over government administration).

control these supply chains.⁸⁰ In other words, the potential consequences of the tariff power being asserted by the administration are far greater than could have been anticipated when Congress first delegated the authorities for such purportedly expansive tariffs.

In addition, many of these tariffs are being enacted on the basis of an emergency declaration. As noted, this is the necessary ground for imposing more expansive tariffs through the ambiguous IEEPA, rather than using bounded authorities that are clearly delegated to the President.⁸¹ Meanwhile, deepening presidential control over foreign affairs in recent decades is now permitting the President to couple threats of tariffs with a range of other pressures that aim to restructure America's place in the global economy—all without substantial oversight from the coordinate branches of government. The Court has also generally deferred to determinations of national emergency by the President.⁸² It will likely be even more inclined to do so given the requirement for reporting IEEPA-specific national emergencies to Congress, which provides Congress with at least nominal opportunity to legislate in response to a declaration that it disfavors. But given the ever-greater potential consequences of this determination, should deference remain so broad that the President can unilaterally decide when there is a permissible exception to the constitutional rules that structure America's foreign commercial relations?⁸³

The simultaneity of these developments—the trend toward Presidential monopolization of foreign affairs, the increased potential significance of tariffs in today's globalized economy, and the ability to assert broad Presidential powers under a generally unquestioned declaration of national emergency—raises further questions. Should these various trends—and their mutually reinforcing relationship—inform understanding of whether a potentially expansive tariff authority permissibly delegates the executive branch a power to functionally remake the international trading system? Alternatively, do these trends suggest that any such tariff authority risks creating an extra-constitutional space where the executive enjoys a virtually unfettered capacity and little countervailing pressure to act in a domain that the Constitution enumerates to Congress? Today's discrete legal question about IEEPA cannot be divorced from these broader developments, which show the stakes of this assertion of presidential power in relation to basic constitutional commitments.

⁸⁰ Farrell & Newman, *supra* note 15.

⁸¹ *Id.*

⁸² See Nathaniel Glass, *Partisan Emergencies*, 111 Va. L. Rev. 379 (2025).

⁸³ *Compare with* *Youngstown Sheet & Tube Co. v. Sawyer* 343 U.S. 579 (1952) (Jackson, J., concurring) (stressing that the executive powers are in the 'zone of twilight' when the distribution between branches is uncertain, such as that between the foreign affairs and foreign commerce powers).

B. FUTURE POSSIBILITIES: MAINTAINING A DEMOCRATIC CONSTITUTIONAL ORDER

The interaction of the Trump administration's asserted tariff powers with recent constitutional trends foregrounds questions about who should decide what kind of economy we live in. Irrespective of the outcome of the current litigation, preexisting constitutional trends are converging to enable greater executive control over the structure of the global economy and America's role within it. Is this likely to lead to better outcomes? Or, in fact, could these preexisting trends be part of the reason that Americans have shifted so quickly to reject economic multilateralism and its potential benefits? What would one even need to know to make such a determination? This analysis concludes by suggesting that the laws that shape America's position in the international economy need not only comport with key constitutional principles. Rather, in evaluating whether the President should have such power, it is necessary to recognize that the ongoing transformation of the global economy has crucial implications for maintaining the very possibility of a democratic constitutional order.

America can structure its role in the international economic order to advance many ends. The country might prioritize national security and defense, such as with recent moves to ensure domestic production of key inputs for modern technology. It can seek to maximize efficiency, as has been the case in recent decades, by prioritizing market integration between countries. America can also situate itself in the international economic order to advance certain fundamental policy goals, ranging from combatting climate change to enabling a particular type of domestic political economy built around favored modes of production (such as manufacturing or financialization). Some advocate a paradigm that blends various of these goals—such as a view of resilience that hedges against risks to national security, climate change, and supply shocks that are more likely with globalized production processes. Any attempt to decide how to reshape America's role in the international economic order requires a determination about who gets to decide which of these goals constitutes a good outcome for America's role in the global economy—the President, the courts, Congress, or the American people?

But the question might also be posed in another way—not merely by asking how the democratic process should be organized to chart out America's position in the global economy, but by recognizing that the international economic order has an essential role to play in maintaining the possibility of democratic governance. The above list of potential aims for America's international economic relations—and the constitutional question of who should decide which outcome to prioritize and how to pursue it—overlooks another goal that the international economic order might be organized to deliver. As the history of the postwar order shows, the trading system—and broader structure of the international economy—is significant in creating the enabling conditions for democracy, by ensuring that like-minded states can

effectively pursue their common goals for economic governance.⁸⁴ The laws structuring the international economy must not only be made through democratic processes that comport with the constitution—rather, they must be fashioned in a way that maintains the possibility for democratic governance in a globalized economy.

As the above analysis suggested, the President's sweeping assertion of power to remake the international trading system through tariffs will have great significance for the ongoing reorganization of executive power at a moment when much of the constitutional system is being remade. But it is worth stressing that it will also have a major role in bringing about a far different international economic order than the one that has prevailed since the end of the Second World War. The way the President's assertion of power over trade is managed now will be significant in determining whether this refashioned international economic order can effectively facilitate democratic governance well into the future. For instance, the impending Supreme Court decision regarding the extent of presidential discretion over trade will shape whether certain firms and sectors will be able to disproportionately shape government policy through their proximity to the executive. Already during the second Trump administration, the President has demonstrated a willingness to use tariff policy as a lever to either punish or reward certain firms based on his preferences. Industries and firms now compete for, and sometimes receive, favorable treatment from the United States at the unilateral discretion of the President. This trend offers one foreboding example of how the very legitimacy of democracy will continue to be eroded if the international economic order is not reorganized in a way that underwrites democratically-legitimated modes of economic governance. If democratic practice is going to be meaningfully renewed, any new rules for the international economy must be designed to advance the aims and interests of the broader public, rather than those who are most proximate to power.

Today's consideration of the Presidential tariff power is thus a significant moment in two ways. It will determine whether the country veers from core constitutional principles, and the democratic commitments they entail. Just as important, it will have many consequences for the type of constitutional order that will be possible in the future—by shaping whether states with similar governance commitments can cooperate to effectively govern their economies and meaningfully deliver on democratically-legitimated economic policies. Renewing key constitutional principles today—as this white paper has suggested—is important for ensuring that any new structure of the international economy will support a democratic constitutional order tomorrow.

⁸⁴ Hamilton, *supra* note 11 (highlighting the role of the postwar economic order in facilitating democracy in its early decades, and in eroding it during more recent ones).