

Are Trump's Tariffs Lawful?

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[0:00:00.4] Jeffrey Rosen: On November 5, the Supreme Court heard oral arguments in *Learning Resources vs Trump* and *Trump vs VOS Selections*, a pair of challenges to President Trump's tariffs. Hello friends. I'm Jeffrey Rosen, president and CEO of the National Constitution Center, and welcome to We the People, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan nonprofit chartered by Congress to increase awareness and understanding of the constitution among the American people. This week we'll recap oral arguments in the tariffs cases and explore the arguments on all sides. And to help us we have two of America's leading scholars on foreign relations law and executive power.

Samuel Estreicher is the Dwight D. Opperman professor of Public Law, the director of the Center for Labor and Employment Law, and the director of the Institute of Judicial Administration at the NYU School of Law. He's author of more than a dozen books, including *Beyond Elite Law*, *Access to Civil Justice in America*, and he joined us for our preview of the tariffs case a few months ago. Sam, it's wonderful to welcome you back to We the People.

[0:01:09.4] Samuel Estreicher: Thank you, Jeff. Great to be here.

[0:01:11.6] Jeffrey Rosen: And John Yoo is the Emanuel Heller Chair in Law at the UC Berkeley School of Law and the Distinguished Visiting Scholar in the School of Civic Leadership at the University of Texas at Austin. His most recent book, *The Politically Incorrect Guide to the Supreme Court*, was published in 2023. John, it's always wonderful to welcome you to We the People.

[0:01:30.5] John Yoo: Jeff, great to be with you. And as always I'll do anything for the Constitution Center because it's in the best city in the world, Philadelphia.

[0:01:38.8] Jeffrey Rosen: And it is always sunny in Philadelphia. Well, let's jump right in. We heard the oral arguments yesterday. Sam, what was your reaction to the oral arguments and how did you see the Justices evaluating the three major legal issues in the case, the statutory question, the major questions doctrine, and the non delegation doctrine?

[0:02:03.3] Samuel Estreicher: Well, first, on the quality of the argument, I didn't think the Solicitor General did a very good job. He introduced the notion of inherent power, which I think is a red herring, that the president has inherent power to impose tariffs. That's completely inconsistent with the legal tradition and it wasn't necessary to his argument. So it was a red herring. And I don't think he did a good job of counteracting the assumption of all of the Justices, apparently all of them, that

what's going on here is really a tax. That's debatable as an economic matter. He did say that the tariff might not be necessary. People might change their underlying behavior, but he should have pushed harder against that tax point 'cause from my sense of the argument, many of the Justices, maybe all of them enough to create a court, were buying this notion that what's going on here is a tax and if it's a tax there's a sort of special history that we have of Congress. Well, Congress does have the say in imposing taxes, but I assume you can also delegate it. But I'm not sure so I'm not sure about that point about the delegation of the tax power.

[0:03:15.8] Samuel Estreicher: But he should have fought back on the fact that it's not a tax. Whether or not US consumers are affected really depends. For example, I'm not a trade lawyer, but it depends on what the economists call elasticity of demand and on whether there are alternatives for the tariff product. So I mean it should have been pushed back by this guy. My sense overall of the argument, and I don't know what John's position is on this, I think the... I've been writing about the reliance on the IEEPA, the International Economic Emergency Powers Act. I think the statute is very problematic because I think it raises very serious non delegation problems and we can see in the way in which the Justices are struggling to come up with some statutory argument for withholding the authorization for reading IEEPA as not authorizing the tariffs. So my sense is... Again, I don't usually like to make short term predictions. I'm very good at predicting what's going to happen 30 years from now. But my sense is there is a court for doing something to block these tariffs. We're not sure what it is. One possibility is they're going to say IEEPA doesn't apply but there may be other tariff authorizations that do apply.

[0:04:42.0] Samuel Estreicher: And the Section 338 of the Smoot-Hawley Act, it's not called that but the 1930 Trade Act and also section I think it's 222, I may have the number wrong. There may be other authorizations. So they may say Mr. President, you don't have authority under IEEPA but you may have authority under these other tariffs. Now, theoretically, I'd like to know what John's view is on this. But theoretically, just because the president cites only to IEEPA doesn't mean that the court can't evaluate the tariffs under these other sources of authority. Sometimes we do hold that if you didn't make an argument then you can't make it now and so that's a possibility. I think we'd warrant a remand. It's a pretty important decision. So I think the court might be interested in that. They're going to find some way, I think, of blocking the tariffs in large part because... I mean, for a bunch of reasons. One is that president Trump has been very erratic with respect to these tariffs, raising them in some places, lowering them in other places, and talking about the revenue output he's getting, which is... There's a saying From World War I, loose lips sink ships.

[0:06:03.6] Samuel Estreicher: And my sense is the president by being candid here about the revenue he's getting for the US people supposedly, is making stronger the argument that this is really a tax. So for a variety of different reasons, as I heard the argument, he may have some votes with Justice Thomas. And I don't think he has Justice Gorsuch, but Justice Alito and Justice Thomas I think he has. But in order for the president to win, he has to have the chief and Kavanaugh or Barrett or Gorsuch. I think Gorsuch is concerned about delegation. He's made that clear in prior decisions. So he's I think going to have trouble with this statute because to my mind and to our study, it is the broadest delegation Congress has ever provided the president, whether wartime or peacetime. It has virtually no limits, except that you have to make a declaration that it's an unusual threat, but it's not clear that that's justiciable, that's judicially reviewable. So it has no limits, which is why I think I'm working on a paper with another, my co author, Andrew Babbitt, that there is a problem with IEEPA generally, not just in the tariff area, but also in the economic sanctions area. There are just no bounds

to the discretion the president has. Historically, I think Congress was comforted by the fact that in the National Emergencies Act, which was enacted the year before IEEPA, that there was a legislative veto. So if they wanted to they could correct what the president's doing by one or two house veto. Right now that veto provision is unconstitutional. It's not in the statute anymore. Congress amended the statute to say that a joint resolution works, but a joint resolution also can be vetoed by the president.

[0:08:06.0] Samuel Estreicher: So right now we're in a situation where the president has authority under this, I think unbounded statute. And it would take a veto proof majority of both houses to overturn the president. I say this as an executive power fan advocates. I believe in strong executive power but this statute basically says that the president can do essentially whatever he wants. He just has to clothe it in the language of an unusual threat to national welfare whose source is in part from outside the United States. So I think the delegation concerns is one strand that goes against the president. Another strand is this tax argument, which has been abetted by the president's brandishing of the revenue enhancement effects of what he's doing, even though I don't think it's a tax. I don't think it should be viewed as a tax. But I think the fact that a lot of people in the court think it is a tax, they're going to be willing to require some very clear evidence in the statute authorizing the president to impose tariffs. The third strand is the major questions doctrine. I think the chief is open to it, and even though in theory the major question doctrine has been invoked only in the context of administrative agencies, I did a piece on this in Texas, I think it can be invoked against the president as well. Now the major question doctrine up until now requires that it be a novel use of the president's power. An unheralded I think is the language, use of the president's power. So this goes back to how do we treat the Nixon precedent? Those are the three strands. The president's statements, the delegation concern, the major question doctrine.

[0:10:06.4] Jeffrey Rosen: Thank you so much for that introduction. John, Sam has identified these three areas, the statutory argument and the question of whether or not this is a tax, the non delegation doctrine, where he says that there is no foreign affairs exception to the non delegation doctrine, and you've argued that there may be such an exception in the major questions doctrine. Walk us through each of those arguments and how you think the court was inclined to rule.

[0:10:39.0] John Yoo: Thanks, Jeff. It's great to be with you. Thanks. It's great to be with Sam, my friend for many years. And first on the statutory question, I think it breaks down into two straightforward issues. One is, is there in fact an unusual and extraordinary threat to the national security and foreign policy and the economy of the United States? The only one that exists. Do you then get to the second question, which is what can the president do under the IEEPA statute? All this is, of course, about power granted to the president by Congress. The president doesn't have any inherent constitutional authority as Sam has observed, to impose tariffs or taxes or regulate international commerce at all. That's all explicitly given by the Constitution to Congress. So on the first question, I heard some Justices, I think, most notably Justice Gorsuch, question whether this is in fact a national emergency. I too have raised doubts about that because the trade deficit has been with us for 50 years now. And if you look at its size as a percentage of GDP, it's the same size now as it was 20 years ago. So it doesn't seem to be something that's happened all of a sudden.

[0:12:01.2] John Yoo: It doesn't seem to be something whose magnitude as a threat to the country has suddenly increased. It doesn't seem to be driven by any specific event that's occurred. And Justice

Gorsuch, you might recall from oral argument, said, well, if we say this is a national emergency, then what's to say climate change isn't a national emergency and then the President can go ahead and put carbon taxes on all exports and imports. I'm not sure whether President Trump will win on that question, but I didn't hear a lot of Justices defending the idea that this was a national emergency. But Sam's quite right. There is this issue embedded in that. How much deference will the courts give to a president in his findings of the facts of an emergency? The Supreme Court has never, as far as I know, overturned a president's finding of a national emergency. But if they were ever going to, I think it would be this case. So then that leads to the second question is if there is a national emergency, what can the president do? I did hear a lot of Justices questioning the idea that you could impose a tax. They called it a tax or a tariff on imports under the statute.

[0:13:13.6] John Yoo: I don't think it's that hard in the sense that the statute gives the president the authority to completely block all exports and imports with a country and it gives the president the power to regulate all exports and imports with a country. If that's true, how can it be the case that the statute doesn't give the lesser power to just impose a financial penalty? If you can just completely block imports, then you could certainly, I would think under the statute, say you can have the imports, but you have to pay 5% of their value or 15% of their value. I think that's consistent, though the Supreme Court's only case interpreting IEEPA, which is a case from 1981 called *Dames and Moore vs Reagan*, which was about the Iranian hostage crisis. And there Justice Rehnquist, for whom Chief Justice Roberts was clerking that very term and worked on this very case, said, well, the powers the president needs to execute the Iranian hostages case agreement, it doesn't fully capture it, but we're going to assume Congress would acquiesce in it 'cause it used such broad terms in IEEPA. That leads us to the second question you asked about Jeff and that Sam raised, which is the non delegation doctrine.

[0:14:30.3] John Yoo: There is a case, a prominent case called *Curtis Wright vs United States*, where the Supreme Court said here's a law that if it were applied domestically would violate the non delegation doctrine, but because it involves foreign affairs, we're not going to apply the non delegation doctrine to it. The court could change its mind about this. If the Court were going to go down the direction Sam is suggesting I think they'd either have to sharply distinguish or overturn *Curtis Wright* because that's what the court plainly says. I believe it's a unanimous decision. I mean it's 1936 or 1937, so it's about 90 years old.

[0:15:07.3] Samuel Estreicher: Two Justices didn't participate.

[0:15:09.2] John Yoo: Yeah, the case doesn't come up all that often, admittedly. But the reason the court gave was because in foreign affairs, and I think this goes to Sam's constitutional point, Congress often tries to give large amounts of authority to the president to take advantage of the president's ability, superior capabilities in foreign policy, to act with speed and secrecy immediately with dispatch, to use Hamilton's terms. But I think in order for the court to say these are tariffs, these are taxes, they're not included in the Ibid Delegation, they're going to have to cut back on *Curtis Wright* and argue in favor of broader form of non delegation. And I think that brings us to the last point you raised, Jeff and Sam, which is the major questions doctrine. That really to me turns on whether you think the non delegation doctrine applies because the major questions doctrine, and there's some argument about where it came from and what it even does. But the court has suggested it protects the non delegation doctrine, that you use the major questions doctrine to interpret vague statutes that

might give too much power to the president because if you do that then you avoid having to strike something down on the non delegation doctrine.

[0:16:28.3] John Yoo: And so I think whether the major questions doctrine flies here or not, and I agree with Sam. My read of the oral argument is that Chief Justice Roberts is very much in favor of using that doctrine here. He has been the main proponent of it in the COVID cases and the student loan cases. If he's going to do it though, it still requires him to go back to number two, which is does the non delegation doctrine apply in foreign policy in the same way it applies to domestic policy? So before the oral argument I thought Trump's odds were 50/50. I thought he might actually lose on the national emergency question but win on this powers granted question. After listening to oral argument, I think the odds are very high that he's going to lose on one or both of those questions now.

[0:17:14.4] Jeffrey Rosen: Thanks so much for that. Well, let's focus on the statutory argument. John, you argued, as you did in your article, that if Congress has the power to block imports, can impose a 5% tax. And Justice Kavanaugh too, expressed concern about removing tariffs from the resident's suite of tools and wondered if Congress could shut down trade, couldn't it authorize the lesser power of tariffs? He said the inconsistency created a doughnut hole in the statute. The Oregon SG memorably responded, it's not a doughnut hole, it's a different kind of pastry. Sam, sum up the various Justices on the statutory argument Justices Barrett, Jackson, Kagan and others express doubt that IEEPA authorized tariffs. Tell us what their arguments were.

[0:18:04.8] Samuel Estreicher: Well, there, I mean, if you look at the language of the statute, it's pretty broad. I think John and I agree here, but the language is pretty broad. Their argument is that I believe it comes down to the point that a tariff is revenue enhancing, and that's why I addressed earlier, it's not necessarily revenue enhancing, but a tariff is revenue enhancing. And as part of our national tradition, we are very, very guarded against making it easy to tax Americans. And so if it's a tax, it's got to be close to an explicit authorization. And because we're concerned about this background norm of not allowing taxing authority to sort of slip into the system, we're going to read the statute very narrowly. I agree with John, and I think this was Justice Kavanaugh's intuition as well. But if you can block the entire importation of a product, you should be able to sort of do something less or it should go through stages. And so the argument's not persuasive to me, and the statute is very broad here. But the argument is, I think it's based... It's a kind of a clear statement rule they're using because it's really a tax, which is not clear, as I said, that we need to have very clear authorization and we don't have it.

[0:19:33.8] Samuel Estreicher: And to add that, in 1971, president Nixon employed the IEEPA as a basis for a 10% across the border tax to deal with the balance of payments problem that was engendered by our going off the gold standard, but it was still a balance of payments problem. And that action by president Nixon under the identical language, it's under a different statute, it's called the Trading with the Enemies Act, but the identical language, and that was the regulation of importation, that's the language, both in the TWEA and in IEEPA, the regulation of importation, that that language authorized the tariff in that case. That was the opinion of the US Court of Appeals, the predecessor to the US Court of Appeals for the Federal Circuit. They also added other language in that opinion saying here it was a relatively bounded tariff, it conformed with the harmonized tariff schedule. And so you can narrow the decision of the Federal Circuit. The problem is ordinarily the Supreme Court would say, well, if the same language was in the TWEA that is now in IEEPA, ordinarily we'd say that Congress, we assume Congress understood the implications of that. So I think

that's a problem.

[0:21:01.5] Samuel Estreicher: I think this case is really driven by the non delegation concerns across the board. So I think that's the principle argument. You can block importation, you can have a quota on importation, but what you can't do is use any of these means that would be revenue enhancing because of the special solicitude about easy delegation of taxing authority outside of Congress.

[0:21:29.2] Jeffrey Rosen: John, Justice Kavanaugh was among the Justices who seemed sympathetic to the argument that IEEPA might authorize these tariffs. He noted President Nixon's reliance on the Trading with the Enemies Act as well as President Ford's use of the Trade Expansion Act to impose tariffs on imports. He introduced the delicious pastry analogy. And Justices Alito and Thomas also seemed sympathetic to the statutory argument. Tell us about their position.

[0:22:02.6] John Yoo: Yes, it is again a variation of this greater power, lesser power argument, and maybe this is an easier way to understand it. If President Trump had said instead of worldwide, the trade deficit is a national security threat, it said China is the unusual and extraordinary threat, and then said, I'm putting tariffs on imports from China. I don't think this case even gets to the Supreme Court. IEEPA has been used to trade entire embargoes on trade with other countries. And under the preceding statute, the one that you're referring to, Jeff, and that those Justices are talking about, the Trading with the Enemy Act of 1917, and that's the way IEEPA has traditionally been used. And so I think it's hard to say you can't use financial penalties then to enforce an embargo or enforce trade sanctions against other countries, because what do you actually do if you say we're going to have a trade embargo with Libya or North Korea or Cuba and you violate it? Well, you would usually pay a financial penalty, which is as Sam was pointing, economically it's the same thing as a tariff. Is there a really big difference? So I think that's what they're getting at one.

[0:23:22.4] John Yoo: And then the second thing is this comes more out of this *Dames and Moore* style argument, which is what Congress tried to do in IEEPA was give the president every economic power they could think of to handle national security threats, but they couldn't think of every possible thing. And if there's a gap, and this is what *Dames and Moore* said, and I think this is what Justice Kavanaugh and the other Justices are thinking there that you mentioned, if there's a gap or a lacuna in the statute, we shouldn't read that as rejection. What Congress is trying to do is just provide the laundry list of everything they could think of that a president might need. And if there's a lacuna in the statute, this is what didn't *Dames and Moore*, they read it in favor of the president, the exact opposite of the presumption of the major questions doctrine and the non delegation doctrine. And then lastly, and here's I think what concerns Kavanaugh, Thomas and Alito is not necessarily this case, but the next case. They're really worried about... There is a genuine national security threat that arise. Maybe it's not something like a worldwide trade deficit.

[0:24:30.0] John Yoo: Maybe it is something like a China or a Russia. And are we going to hamstring presidents in the future from taking the measures that are necessary immediately in order to protect the nation's security? How can we time 0 predict in time 1 five years in the future, 10 years in the future with new technologies, new kinds of economic products and relationships? How can we predict all the ways that a president might need to respond to a very serious threat? And this is very common. And this goes back to *Curtis Wright*. This is very common in the way we understand emergency

powers and why Congress makes such broad delegations in the first place. You might say, and I think this is also part of what the court's wondering is, if the president wants more power, go to Congress and just get him to add to IEEPA. But the problem is how does a legislature predict accurately into the future exactly what powers a president is going to need, especially when the national security is at stake?

[0:25:28.9] Jeffrey Rosen: Thanks for flagging the *Dames and Moore* case, which General Sauer did as well. Chief Justice Roberts memorably said, you've mentioned *Dames and Moore* three times, which surprises me 'cause the court went out of its way to say it was issuing a very narrow decision. It was pretty much expected to apply only in that case. He clerked for Chief Justice Rehnquist when the case was decided and clearly felt invested in it. But as you suggest, some of the other Justices seem more sympathetic. Well, let's now turn to the central question of non delegation. Sam, Justice Gorsuch has long championed resurrecting the non delegation doctrine. Here Neal Katyal argued for resurrecting it, leading Justice Alito to say whether he'd be surprised that his legacy was the resurrection of the non delegation doctrine and Neal Katyal responded, in fact, he felt that this case was unique because it was not just a delegation, but a legislative abrogation. So tell us what was going on in that exchange, why Justice Gorsuch thinks this is inclined to violate the non delegation doctrine and whether or not other Justices agreed with him.

[0:26:41.3] Samuel Estreicher: Well, two aspects of the non delegation doctrine. One as a basis for outright invalidation of IEEPA, and the other is, and I agree with John, that it influences how we're reading this statute and whether we're going to adopt the major questions doctrine. And I think both the way that this statute is being read by the Justices that I think that are inclined to rule against the president and the interest in the major questions doctrine stem from the non delegation concern. I have no problem with using these other doctrines to avoid an outright invalidation of IEEPA. Historically, we've not had a very vigorous application of the non delegation doctrine. I'm doing a study right now of national security measures, and they are all much more... In fact, it just came out in Lawfare. All of the statutes that are cited by Justice Sutherland and *Curtis Wright* are much more bounded delegations than IEEPA. There are no bounds to IEEPA. Now, John mentions the fact that it has to be an unusual and extraordinary threat, it's going to be very hard to second guess the president. So when President Biden imposes sanctions on Israeli settlers in the west bank, was that an unusual and extraordinary threat?

[0:28:18.4] Samuel Estreicher: I just think it's very hard when the president makes a declaration to second guess that declaration. As a practical matter, I think it was conceded that the court has never actually overturned an emergency declaration. The problem with this statute is has no bounds. I would have no problem with a... I think there'd be no problem if the statute said we will authorize you to do whatever you want under IEEPA, but it has to be for only six months or three months. Then you have to get reauthorization from Congress. The problem here is it can continue indefinitely. In fact, we have national emergencies that were announced during the Korean War and afterwards that are still in existence. And the only way to terminate a national emergency is as I said earlier, by a veto proof a majority of Congress. So I think this is the delegation concern that Justice Gorsuch has identified but I think it underlies how everyone is approaching this statute. If we have another President who is concerned about climate change and calls that a national emergency, this statute as it stands, I think would allow the president to do that.

0:29:36.5] Samuel Estreicher: And that's why I think it's unconstitutional statute. It is less bounded than even the statutes the Supreme Court struck down during the New Deal period *Sick chicken case*, *Schechter vs United States* and the Panama hot oil case. They had more restrictions and this has no standard. It's easy to say that something is unusual unless we're going to create a justiciable controversy into whether something's an extraordinary threat or an unusual threat. The President says, I'm sanctioning the sellers in Israel 'cause it's a continuation of an ongoing threat. And I don't see how that can be a justiciable question. If I'm right about that there are no bounds in this statute. And this should be a bipartisan concern. There are no bounds in the statute and the only way the president can be checked is by a veto proof majority of both houses, which is extremely difficult. That is the only way a national emergency can be terminated. I think it's time for it. Now, as I said, our tradition, even the AUMF, the authorization of military force after 9/11 is more bounded than IEEPA because the president can only... And it is broad. The president can only go against people that planned, authorized, committed or aided in terrorist attacks or harbor these people.

[0:30:55.8] Samuel Estreicher: Now, that is a limitation that's not present in IEEPA. The president go anywhere he wants. There's no time duration, as I pointed out, no durational limit. There's no location limit, there's no goods limit. And this is completely foreign to our tradition. Now, the court's going to be reluctant to embark on the non delegation doctrine but I say they can do this through these other means that don't involve invalidating the statute. But we have to change the dynamic here and actually help in a way, help Congress get back its ability to check the president here. I'm a strong presidential power person. You need to have emergency legislation, but not of this variety. It should be something very time bounded and that it requires the president to get a reenactment of the authorization, not simply make a declaration, consult with Congress. Then Congress has to sit on its hands.

[0:31:52.9] Jeffrey Rosen: John, do you see more than Justice Gorsuch supporting the application of the non delegation doctrine to the president, might the liberal Justices be reluctant to embrace a doctrine that they'd previously resisted? So in other words, how many Justices do you think will go for it and describe the nature of your disagreement with Sam about whether or not there's a foreign affair as exception to the non delegation doctrine under the *Curtis Wright* case? And where did you see the court going on that question?

[0:32:26.1] John Yoo: Jeff, interesting. I have to say I can't really predict what the Justices will do, but I can try to guess based on their past votes and writings about the non delegation doctrine, because this has been an issue that has really been roiling the court over the last five or six years. And this is all in the domestic context. And you can see the major question is doctrine is a way for some Justices to move the ball forward towards a kind of non delegation doctrine of the kind that Sam would like. I don't disagree necessarily with Sam in what would be normatively good. What might we like the non delegation doctrine to be? But when you look at descriptively, what has the court actually done in the non delegation doctrine area? There are Justices who have individually I think led by Justice Gorsuch and Justice Thomas, who have written opinions saying that the court should more rigorously enforce the rule against Congress giving too much power away to the president. But the court has several times now avoided the question. They've granted cert in at least two cases that have raised this question recently and the Justices can't come to a majority view on what to do.

[0:33:43.8] John Yoo: The standing major precedent on this is a case called *Whitman v. American*

Trucking Associations back from 2000. And it's about the environmental laws and it's really broad delegation that's permitted domestically, much broader than the ones back from the '30s. Essentially, the court said when Congress gives the EPA the power to regulate the air in the national interest, in the public interest, that itself is enough of a standard to allow regulation. I can't imagine a broader delegation puzzle. That's much broader than IEEPA. Just regulate the air in the public interest is basically the standard that the Supreme Court said is okay, doesn't violate the non delegation doctrine. If that's still the law, and I think it is, then descriptively we don't right now have a tough non delegation doctrine for domestic affairs. I would say if we apply just the *Whitman* standard to IEEPA, IEEPA would survive, but that's 'cause the *Whitman* standard is just so broad. So if I were to guess in these cases that we've seen that I'm talking about from the last few years, the liberal Justices, and I'm talking about them liberally as a matter of jurisprudence, not politically. And I would say that's Kagan, Sotomayor, Jackson.

[0:35:12.4] John Yoo: And they would say, they have said in their opinions that they like the non delegation doctrine the way it is. They don't think it should be toughened in any way. They don't think that the court should be trying to disrupt the way the administrative state works and that's built on broad delegations of authority. The conservative Justices, again, jurisprudentially conservative. Roberts, Kavanaugh, Barrett, Thomas, Alito have all written individual opinions saying they would like to make the non delegation doctrine tougher, but they can't agree on how to do it. And so that's why the law today is still the non delegation doctrine is relatively toothless. And so if I were to bet, I would say that the liberal Justices still aren't going to go back on their earlier opinions on non delegation and that I don't think the conservative Justices would go this way either in this case. They're much more interested in reviving it to attack, say, the COVID shutdowns or the Biden student loan forgiveness program, the things that are involved in domestic affairs. And that's why I think the easier thing for them to do, the one that makes most sense for me is the court to say, this is not an unusual and extraordinary emergency and then not have to test the delegation doctrine at all.

[0:36:33.3] Jeffrey Rosen: And that brings us finally to the last big question, the major questions doctrine, which the court has expressed sympathy for in striking down President Biden's student loan plan. Justice Sotomayor asked whether if the court accepted General Sauer's suggestion that the president has broad authority in the foreign affairs realm, whether President Biden could have declared a national emergency in global warming and then gotten the student forgiveness to not be a major question. And he replied, the power to impose tariffs is a core application of the power to regulate foreign commerce rather than domestic tax. And then just to finish that exchange, Justice Barrett said, can you point to any other place in history where the phrases regulate importation have been used to confer tariff imposing authority? So, Sam, help us understand the contours of the major questions doctrine. When does it apply and is the court likely to invoke it to strike down the tariffs?

[0:37:33.4] Samuel Estreicher: Well, John is right. It's gotten invoked predominantly in the domestic context to challenge administrative action that's been unheralded and it's been a doctrine that enables the court to say, well, we need to see specific authorization. So I think President Biden was on the student loan forgiveness. He didn't have clear authority to do what he was doing. It was unusual exercise of authority and therefore it was not sustained. I think John is right there's been a reluctance to invoke the non delegation doctrine directly, but it is certainly been used in these major questions cases. The non delegation concern is driving, at least in a domestic context thus far is driving the insistence that there be express authorization for these various administrative actions. And I think

that's a possibility in this case as well, in this Trump tariffs case that they will say even though it wasn't completely unheralded, the ruling of the U.S. Court of Appeals for the Federal Circuit's predecessor, the Court of Customs and Trade Appeals, I think it was called, that that ruling dealt with... An exercise of the tariff authority was much more limited. It conformed to the Harmonized Tariff Schedule. It wasn't quite this wholesale anything goes invocation of the tariff authority so that in fact, if you look at that precedent carefully, it really is now what President Trump is doing is an unheralded invocation. And that we look at the statute now and we want to see whether there is express authorization and we don't see express authorization. We see the regulation of importation language that could mean simply blocking trade with the country, although I think it leaves some of those words in the statute redundant. But they could say we need to see express authorization of a tariff authority, especially since Congress has legislated in the tariff area in many other places and it's too easy for the president to simply ignore all those much more restricted tariff authorization. I know the Chief is interested, but I think this is again, I don't like to make short term predictions, but I think this is a way in which the court can go, they're not going to want to second guess the emergency declaration. It just opens up a Pandora's Box in many areas in the international economic sanctions area, where we've got to second guess whether in fact what the president is doing is unusual, dealing with an unusual threat to national security.

[0:40:36.0] Samuel Estreicher: My instincts tell me that the major questions doctrine is likely to be the doctrinal vehicle that a majority of the court will agree to. I know the liberal Justices are not super happy with the major questions doctrine, but I'm finding here in this particular context, my liberal friends here on the NYU law faculty and related institutions are enamored of the major questions doctrine. So The Brennan Center that is here at NYU Law School, they have advanced. I haven't read their brief in this case, but I assume that they're making that argument. My colleague and co author Ricky Rives, our former dean who runs the Center for Policy Integrity, he also has argued for a robust in his brief, a robust application of major questions doctrine. So I think we're getting late term converts to the major questions doctrine in this case. So it's hard to predict what the Justices will do, but I don't think they're going to overtly second guess the emergency declaration. So if they don't do that, then I think the only... And I think it's very hard to actually argue that this is clearly a tax. And even if it were, Congress can also delegate its taxing authority.

[0:41:57.0] Samuel Estreicher: So I don't think it solves that problem. I don't think it's clearly a tax. As the SG said, Mr. Sauer said, well, no one's going to pay anything if actually the underlying conduct changes. So we're saying don't export fentanyl to us and we won't tariff you. So in many cases it won't be a tax. And also, as I said, it also depends on substitutability of other products for the ones that are tariffs, whether consumers pay. I think it's hard to actually say it's a tax. That route does not hold up, I believe. And so I think you're left with something like the major questions doctrine. I could be wrong about this, of course, but that's my sense.

[0:42:37.5] Jeffrey Rosen: John, do you agree that at least some liberal Justices may invoke the major questions doctrine in striking down the tariffs? And might some conservative Justices refuse to find that the major questions doctrine is at issue because they view IEEPA as the successor to other statutes which do authorize tariffs?

[0:42:59.6] John Yoo: Jeff, I think there's a difference between how advocates use doctrine and Justices treat doctrine. I think there's nothing wrong with advocates like the ones that Sam has

mentioned who have been critical about major questions doctrine applied to environmental cases, for example, turning right around then and saying, oh, but you should use it when it comes to the tariffs by President Trump. That's what advocates do. They use any stick to beat a dog, as they say. I think that's different with the Justices because some of the liberal Justices have been really strident, I think, in attacking the use of the major question doctrine. Really, Justice Kagan, in particular, is really where in some sharp sense questioning where it came from, saying that it was kind of made up, that it's been used in a way just to get political outcomes to express its hostility to administrative state. I think it's hard as a Justice to have attacked the doctrine this way and then turn around and say, ah, but we're going to apply it to the tariffs. I think they want to be more consistent. And also I think again, they're thinking about the cases for the future.

[0:44:06.8] John Yoo: And so I think in general, the liberal Justices are more forgiving to the administrative state and the way it currently operates. And so if they were to sign on an opinion here saying the major questions doctrine requires the tariffs to be shut down, the government will quote that back to them every time they can when they seek their support for limiting the powers of the administrative state or expanding presidential control over. I can see Sam's point. I think Sam is kind of making the argument whether you think the major questions doctrine is right or wrong it provides this kind of middle ground that lots of different Justices with varying ideologies can at least sign on to, even if any number of them would not pick that as the primary reason they're against the tariffs. You've been following the Supreme Court a long time, Jeff. Doesn't this smack to you of a typical Chief Justice Roberts compromise, which is why he's out there selling it? It's because this gives him a chance to use his favorite doctrine, which has very ideologically jurisprudential obscure origins, but it's politically convenient as a compromise. That's what this sounds like to me.

[0:45:21.7] John Yoo: But again, I think if the conservative Justices are not going to apply here, or the liberals justice can change their mind, they really got to explain then where they fall on this question of non delegation and foreign policy and national security. Because if you're applying the major questions doctrine, it's because you think the non delegation principle applies to foreign policy. And then you have to figure out why you don't agree *Curtis Wright* anymore. And I think that's one of the great fundamental questions in constitutional law. I mean, we teach constitutional law, teach foreign affairs law. *Curtis Wright* is a brooding omnipresence in the sky. It sort of organizes the way we think about foreign policy and the Constitution. And so to cut away at it, and Sam's made some arguments about why we might want to, but to cut away at it really pulls at one of the fundamental strands of how we think about the Constitution just in brief, because we're going to the 250th anniversary of the Declaration next year and the revolution. *Curtis Wright* takes the view that Lincoln took that the nation is created in 1776 and the Constitution comes second. And because of that we allow the government to do things in foreign policy that we don't allow to do domestically.

[0:46:35.9] John Yoo: Is the court going to turn its back on that logic? They can. But that's a really important fundamental principle of American constitutional law that feels settled by the Civil War. And so just recognize today the Court and *Curtis Wright*.

[0:46:49.2] Jeffrey Rosen: Well, it is time for closing arguments in this excellent discussion. Sam, the first one to you. Please tell us why you think the court should strike down the tariffs and on what grounds.

[0:47:02.7] Samuel Estreicher: Well, the court should strike down the tariffs because they're an exercise of authority under IEEPA, which is a complete unbounded delegation, not just in the tariffs area but also in the imposition of economic sanctions abroad. I don't think the court is going to second guess the emergency declaration. I think if you really... The statutory arguments are problematic 'cause I think it's been pointed out in our discussion here. If you can block all trade with a country, I don't see why a lesser means of a tariff is not available. A tariff is not inherently revenue enhancing. It can have that effect. President Trump, of course, has sort of given up the... He's given up the ghost in the sense that he says he's very proud of the revenue enhancements. I just don't think the court's going to go down on that route. I think really the only route that makes any sense is that we're worried about the scope of delegation in IEEPA. Put aside *Curtis Wright* for a moment 'cause I don't agree with John about *Curtis Wright*. It doesn't matter at this point. But I think the delegation concerns here, let's limit it to tariffs for a moment.

[0:48:23.7] Samuel Estreicher: It's too much at war with the very specific provisions that Congress has put in place and they will strike down its application to tariffs at the very least. And the background concerns, I think John's conceit of this, the background concerns are the non delegation concerns. Let's limit it to tariffs for a moment. A tariff is a regulation of foreign commerce. I don't think it is an inherent power of the president to impose a tariff, nor is it the inherent power of the president to impose embargo. It may be within the middle of an armed conflict or an incipient armed conflict, then the president can do many things to defend the country. But as an ongoing matter, I think it's problematic. So I don't see any good move by the Supreme Court other than some invocation of the major questions doctrine. They will say it in fact is unheralded. It's never been used in this way. And that is true. It's never been used in this way. Even the 1971 tariff by President Nixon was bounded as the lower court noted in that case. So I think this is something that the chief is interested in this. It may be that this case cannot be given to the liberal Justices to write, but I see five votes for this rationale because of the background delegation concerns. And of course there'll be some concern about whether it applies to foreign affairs.

[0:50:02.3] Samuel Estreicher: I'll leave that for another day. All of the statutes in *Curtis Wright* is a piece I have right now in Lawfare. They are much more bounded delegations and we're going to run that up all the way through the 1950s even the authorization to use military force in 9/11. We've never had this kind of completely unbounded delegation where the president can basically search the globe and impose sanctions on anyone he wants. So that's the concern on the foreign sanctions part of this, which the court doesn't have to get to. In this case they can simply say in the tariff context this is a problem, it's unheralded, it's having a major impact on the economy and it fits nicely with the various other decisions we've had. I don't know whether liberals, they'll join that opinion. They may write separately saying they think it's some other rationale. But I think the five votes are there for that rationale.

[0:51:02.8] Jeffrey Rosen: Thank you so much for that. John, last word to you. Please tell We the People listeners whether or not you think the court should strike down the tariffs and why.

[0:51:12.6] John Yoo: Well, first I think the Court will strike down the tariffs based on what we saw at oral argument where the defense of the tariffs were very half hearted, I would say, and doubtful. And you had, I think, some very strong criticism of the tariffs. So whether I would do it as a justice is what I think is the right answer is different. Before I get to that, I do think that you could see, as

Sam has suggested, a kind of coalescing around the major questions doctrine as the tool to use it, even though I think that's going to cause tension for some of the Justices with the positions they've taken in the past both for and against the doctrine. But it's a nice compromise. It might work. I think I could easily see Chief Justice Roberts writing the opinion and the case coming out much faster, maybe in the next few weeks or maybe in a month or two than would be normal for a case of this magnitude because of the need to unravel these tariffs quickly and start refunding the money if they have to. Whether what I think the court should do is I would think they should reject the idea that a trade deficit is an emergency.

[0:52:31.4] John Yoo: It's been around for 50 years. It's been the same size for 20 years. Nothing actually new has really happened in our trade policies. In fact, it's not even clear the trade deficit is harmful to the country. I mean, if you talk to economists, they say, well, the trade deficit exactly equals the capital that comes into the country. They actually have to balance as a matter of economics. Maybe it's better for us to give paper to people in exchange for goods and then they bring that paper back here and invest it in American companies. Not even sure whether that's the case then, that the trade deficit is a harm. I think this is all going... But I think the most important thing is the Justices, I think particularly the conservative ones, are going to be wary of saying that an emergency is just completely plastic, that any president can say an emergency is anything. And I think the Justices are worried about climate change and the legal issues that presents. If they disagree, then they'll go on to the second question. I would say I think that tariff is not a form of decision or policy that has to be made by Congress under the Constitution, that the Congress is free to delegate that authority to the president.

[0:53:45.1] John Yoo: And given the broad terms that the statute uses, seems to me that putting a financial penalty on imports is regulate, falls within the word regulate. Just like I forgot to mention just the Supreme Court has clearly said that the Constitution's use of the word regulate when it gives Congress the power to regulate interstate commerce, includes the power to impose taxation, tax penalties on interstate commerce. I think that's also hard to get around if you're the majority. Nevertheless, I think I feel, listening to oral argument, that the court is going to strike down the tariffs. And if I were the Trump administration, I would start working on plan B. There are other trade statutes like section 301, like section 232 of the Trade Acts, which allow the president to use tariffs for an entire industrial sector, entire import sector, or against specific countries unfair trade practices. He may not be able to get this worldwide tariff, but he might be able to get pretty close. And he can use IEEPA against specific countries that pose a national security threat. You stitch those three together, you might get something approaching these IEEPA tariffs, just not the entire worldwide scope of them.

[0:54:57.8] Jeffrey Rosen: Thank you so much, Sam Estreicher and John Yoo for a thoughtful, thorough, and nuanced conversation about the Tariffs case. Sam, John, thank you so much for joining.

[0:55:09.7] Samuel Estreicher: Thank you, Jeff.

[0:55:10.8] John Yoo: Thanks, Jeff. Great to be with you.

[0:55:15.9] Jeffrey Rosen: This episode was produced by Bill Pollock and Griffin Ritchie. It was engineered by Bill Pollock. Research was provided by Griffin Ritchie, Anna Salvatore, Trey Sullivan,

and Tristan Worsham. I'm thrilled that my new book is out. It's called *The Pursuit of Liberty: How Hamilton vs. Jefferson Ignited the Lasting Battle Over Power in America*. Please check it out at a bookstore near you. And if you'd like a signed book plate, please let me know. And always remember that the National Constitution Center is a private nonprofit. We rely on your generosity, passion, and engagement for all our programming. Please consider donating at constitutioncenter.org/donate. On behalf of the National Constitution Center, I'm Jeffrey Rosen.