

Do the Trump Tariffs Violate the Constitution?

Thursday, April 10, 2025

Visit our media library at constitutioncenter.org/media-library to see a list of resources mentioned throughout this program, listen to the episode, and more.

[00:00:00.9] Jeffrey Rosen: In March, the President imposed sweeping tariffs on Mexico, Canada and China. At the beginning of April, he imposed and then mostly reversed across the board tariffs on all foreign countries. The tariffs against China, which remain in place, are now being challenged in federal court. 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 I am honored to welcome two thoughtful legal scholars to explore whether or not the tariffs are lawful. Steven Calabresi is the Clayton J. And Henry R. Barber professor of Law at Northwestern Pritzker School of Law. He is co-founder of the Federalist Society and author of the great new book the *Mies Revolution*, which we recently discussed on We the People. Steve, it's wonderful to welcome you back.

[00:01:05.7] Steven Calabresi: Thank you. It's wonderful to be back.

[00:01:08.2] Jeffrey Rosen: And Samuel Estreicher is the Dwight D. Opperman professor of Public Law at New York University School of Law. He's the director of NYU's Center for Labor and Employment Law and NYU's Institute of Judicial Administration. He's the author of two dozen books, including *Beyond Elite Law*, *Access to Civil Justice in America*. Samuel, it's wonderful to welcome you to the People.

[00:01:31.1] Samuel Estreicher: Great to be here. Thank you very much.

[00:01:33.5] Jeffrey Rosen: Let's begin with the case that was filed in Florida. It's Emily Lee paper versus Trump and it challenges the tariffs that were imposed by executive order on March 3. They covered three trading partners, China, Canada and Mexico. The lawsuit focuses on tariffs against China. It raises four claims that we'll discuss in detail, including that the China tariffs are not authorized by statute, that they violate the major questions doctrine, that they violate the non delegation doctrine, and that they violate the Administrative Procedure Act. We're going to take up all of those claims, but I'd like to begin, Steve Calabresi, by asking you to sum up for we the People listeners, why you believe that the tariffs are unconstitutional.

[00:02:29.9] Steven Calabresi: Yes. Well, let me first say listeners may know that President Trump backed down on some of the tariffs yesterday and reduced the tariffs on other foreign

countries to a 10% tariff and announced a 90 day pause. But he escalated tariffs on China and tariffs remain on Canada and Mexico and also on imports of steel and aluminum. And my position is that President Trump does not have the statutory authority to impose these tariffs. The constitution in Article 1, Section 8, Clause 1, gives Congress the power to impose taxes, duties, imposts and excises which is what tariffs are. And it gives Congress the power to regulate commerce with foreign nations. So it's only if a statute authorizes President Trump to impose tariffs that he can do so. President Trump, citing the National Emergencies act and the International Economic Emergency Prevention act, claims that there is an emergency that justifies these 10% across the board tariffs. The tariffs on steel and aluminum, the tariffs against Canada and Mexico, and the 125% tariff that he's announced against Canada. Let me say a word about the National Emergencies act and the International Economic Emergencies Prevention Act. These were statutes passed in the 1970s after Watergate to rein in the president's power to declare emergencies.

[00:04:24.8] Steven Calabresi: Some prior presidents had declared emergencies unilaterally, and Congress wanted to rein that power in and confine it. And the statutes need to be interpreted with that in mind. An emergency, according to Webster's Dictionary, is an unforeseen event for which there is an urgent need to act. A classic emergency would be if China or Russia were to launch nuclear missiles against the United States and we had only 20 minutes to respond. That would be an emergency. That the president would be justified in taking action over the situation with China and steel and aluminum and Canada and Mexico is not an emergency. President Trump thinks it is because he thinks that the fact we run big trade deficits with countries is a huge problem, and he thinks the growth of Chinese power is a huge problem. But huge problems are not emergencies. Emergencies are, as I said, things that are unforeseen and urgent and require urgent action. And we have known about China and its economy and its threat to the United States for decades now. It was more than 15 years ago that President Obama pivoted US economic policy towards addressing the threat from China. And people have been aware of the threat from China for that whole period of time.

[00:06:07.4] Steven Calabresi: People have also been aware of the hollowing out of our manufacturing base, something that President Trump complains about. People have been aware of the fact that the Chinese government manipulates the value of its currency. All of these things are things that Congress is well aware of, has been aware of for decades, and, and could legislate on if it wanted to do so. And what I think is that President Trump has to ask Congress to legislate a 10% across the board tariff or tariffs on China or tariffs on Canada or Mexico, or tariffs on steel and aluminum, because I don't think there is an emergency within the meaning of the statute. In construing the word emergency in these various statutes, it's important to note that the Constitution, as I said, gives Congress the power to impose tariffs and raise taxes and to regulate commerce with foreign nations. There would be a serious non delegation doctrine problem if one construed emergency to mean any big problem the way Trump construes it. And so I think the Supreme Court would construe the word emergency more narrowly than that and would construe it to apply to unforeseen things that require really urgent action.

[00:07:40.6] Steven Calabresi: The Supreme Court in the last four years has developed something called the major questions doctrine. And the major questions doctrine is a doctrine of statutory interpretation where the court construes ambiguous statutory language not to allow the

president or executive and independent agencies to adopt rules as to something that is a major question that should properly be addressed by Congress. So for example, in West Virginia, against EPA, the Supreme Court held that President Biden couldn't define carbon dioxide as a pollutant and impose a trillion dollar climate change plan unilaterally. He had to go through Congress to do that. The court also held that President Biden couldn't declare Covid an emergency and have OSHA require all employers to force their employees to get vaccines against Covid in a world where many people don't want to be vaccinated against Covid. I think incorrectly, the Supreme Court also said that President Biden couldn't use the COVID emergency to prevent landlords from evicting tenants who weren't paying their rent because that was a major question that required congressional action. And the Supreme Court held that President Biden couldn't forgive all student loan debt, which involved billions and billions of dollars, because the statute in question only allowed forgiving student loan debt if there was a terrorist attack and there hadn't been one.

[00:09:34.0] Steven Calabresi: And so the court said President Biden had to go to Congress for that. The same thing applies to Trump's tariffs, including the reduced tariffs that are currently in place. Congress has the power to impose these kinds of tariffs if it wants to. But we fought the American Revolution over the principle of no taxation without representation. And it's representation in the legislature which has the power to tax, which is critically at stake. So my position is that the Trump tariffs are a violation of the major questions doctrine. They're unauthorized by statute. If they were authorized by statute, there would be a non delegation doctrine problem. And these tariffs are completely unlawful. And I think the district judge in the Northern District of Florida should, in my opinion, issue a nationwide injunction against all of President Trump's tariffs.

[00:10:33.1] Jeffrey Rosen: Thank you very much for that thoughtful analysis. We the people listeners can read more about Steve Calabresi's analysis and on the Vola conspiracy and Samuel Estreicher, you wrote with Andrew Babbitt a very thoughtful post in Lawfare are tariffs and emergency power, where you laid out some of the procedural challenges to the tariffs, including the possibility of challenging them under the Administrative Procedure Act. Please give listeners a sense of your legal analysis of the tariffs.

[00:11:08.8] Samuel Estreicher: I just want to say I agree in great measure with what Steve has said. I think there's a general problem with the IEEPA, the International Economic Emergency Powers Act. When Congress passed it, there was in place, under the National Emergencies act, which was passed the year before, there was in place a legislative veto. Let me explain what I mean by that. The act, by the way, is very, very broad. The IEEPA is very, very broad. And other presidents before Trump have used it in lots of different ways. President Nixon used it with respect to, under the NEA, with respect to tariffs, and that was sustained. So what I'm saying is the problem with the IEEPA and Andrew Babbitt and I are working on this, we think it's in general an unconstitutional delegation of authority to the President. I agree with Steve that this is an area where Congress has plenary authority, not the President. Under the Commerce Clause and the Impost Clause, they've delegated power to the President, but at the time they did it, it was cabined in by a one house or two house veto. Let me explain what I mean by that. Ordinarily, when Congress has to pass a statute, it has to get majorities in both houses of Congress and they have to agree on the same text.

[00:12:34.7] Samuel Estreicher: And then that text doesn't become law yet unless it's presented to the President and the President has an opportunity to sign it or veto it. That's the basic, I think, Article 1, Section 8 process. The Supreme Court held in a case called *Chadha C- H -A -D -H -A* versus the Immigration Service, even though they could have issued a much narrower decision in that case, as my former boss Justice Powell pointed out, they wrote a decision that basically struck down the one House veto. The one House veto goes as follows. The President does X and then if one house of Congress says no or two houses of Congress say no, the President's action is nullified. That's what the veto did. The advantage of that is that it can be done by majority of both houses or one house and it's a much more accessible and meaningful check on presidential power. The Supreme Court said, however, in this *Chadha* case that these one house vetoes or two house vetoes, they circumvent the Article 1 Section 8 process and they're unconstitutional. And then I think Congress subsequently amended the National Emergencies act to get rid of it as they had to.

[00:13:51.3] Samuel Estreicher: And they permit the Congress to pass a joint resolution. A joint resolution is simply a resolution both houses agree on, and goes to the President for a veto. So the problem currently is whatever the President does, even if Congress does something, which Congress is going to be reluctant to do anything, but even if Congress does something, in effect, the President will be invulnerable unless 60 members of the House and Senate pass a measure that is veto proof, the President more than 60, the President will nullify whatever they do, knowing full well that there will not be a two thirds vote of both houses to override his veto. So you need veto proof, majorities. So that's the problem we have after *Chadha*. And after *Chadha*, it makes the IEPA highly problematic. And I believe it's problematic also in the context of military sanctions as well. But that's a longer story. But have me on that as well, because I think it is after the chatter, there seems to be no real restrictions. Now, it is true, as Steve points out, there's the word emergency, which is not, unfortunately not defined in this statute. What the statute says, I'm now referring to the IEEPA.

[00:15:12.9] Samuel Estreicher: The statute says the authority is given to the President in connection with, to deal with any unusual and extraordinary threat to the national security, foreign policy or economy of the United States. That's what the statute says. It's a very broad term. Other presidents have used it, including most recently President Biden, to impose sanctions simply because there's a foreign policy disagreement with a particular country or with the nationals of a country. So there's a problem under the IEEPA which goes beyond tariffs in the tariff areas, a special problem because Congress has, as I said, Congress has plenary authority. The President has only delegated authority. And I agree with Steve completely that the President, unlike maybe some other people, the President must honor statutory law unless it infringes upon his exclusive authority. This is what the court held in the famous steel seizure case. And it's got to be the lodestar for all of us. Now on the authority in the IEEPA, again, I read to you the condition. The condition is very broad. It includes the economy, not just national security. President Obama's sanctions, his people admitted that there was not a threat to national security, but he was imposing sanctions anyway.

[00:16:33.8] Samuel Estreicher: So the real problem here now with respect to tariffs, the statute also seems to refer to importation and exportation. I think we can make an argument that

whatever the President does here has to be with respect to property outside the United States. It's an argument I just came up with, and maybe it's an argument that will work, but it does refer to importation, exportation in the provision in a very. I think it's 1703.02b. I'll read it to you. I'll read it to you only in part because the President has the authority to investigate, block during the tendency of an investigation, regulate, direct and compel, nullify, void, blah, blah, blah, any acquisition, importation or exportation. Now you might say maybe this is just an authority to regulate importation or exportation as opposed to nullify an import or export, but it seems to me it reaches facially at least, could reach tariffs. President Nixon used it with respect to tariffs, and that was sustained by the Court of Customs and Patent Appeals, as we point out in our article in Lawfare the decision, it's a case called *Yoshida* involving the Nixon tariffs. The court in *Yoshida*, which was the Court of Customs and Patent Appeals, which is now the US Court of Appeals for the Federal Circuit, went out of the way to limit its holding to say that there was no attempt here to basically derogate completely from the tariff statutory provisions that Congress had put in place.

[00:18:15.2] Samuel Estreicher: So there's a way to narrow that decision. Now with respect to the major questions doctrine, which I've written about in a recent article in Texas, which I'll send to you, Jeffrey, and I'm a fan of the major questions doctrine because I think it's a way of implementing non delegation concerns where the Supreme Court may be reluctant to get involved with a non-delegation doctrine. So I'm in favor of it. I support it. However, I have a couple of questions about it. One is, does it apply to the President as such, all the cases the Supreme Court has had, which generally I support, apply to administrative agencies. Now, it is true that administrative agencies are in some way exercising the executive power, but this is the IEEPA is a direct and I think the tariff authorities as well, a direct delegation to the President. So I think that'll be a new idea whether the major question is doctrine. Now, it's true. I can get there analytically, I can get there logically and say, well, if it applies to these administrative agencies, that's because they were exercising executive power. And we know the Supreme Court is now very much partial to the view that every agency of the Federal Government exercises some modicum of executive power so the argument can be made.

[00:19:39.0] Samuel Estreicher: I'm just saying it's a new context and the court may be reluctant. Secondly, I think the MQD requires a departure from preexisting practice. Now, there's no question that what President Trump is doing now is a departure because it's across the board. That was also true of the Nixon tariff. It was 10% across the board. It's an across the board tariff. He's flipping the way he's doing these various tariffs. He changes his mind, he pauses them. I mean, there is a departure going on. Is it a major departure from previous practice? The court can say that. I would have no hesitation making that argument in court to say it is a departure from previous practice. But there's going to be a kind of reluctance to measure what's major in this context. Now, when they dealt with vaccines in the OSHA context, that was not the courts. The OSHA, which is a division of the Department of Labor, which is within. It's an executive department. It's within the executive authority. OSHA had never done this before. They required respirators and that sort of thing that you left in the workplace. But a vaccine goes with you across everywhere you are.

[00:20:52.6] Samuel Estreicher: It's in your body. It was a new thing for the Department of Labor. So there was that departure concept, which I think is critical to the MQD, because if it

isn't critical to the MQD, that everything an agency does will now be subject to the MQD, which the court may do, by the way. I just don't think they're there yet. So there's that problem with majors. The other problem is I think it's hard. It's not impossible, by the way. I agree with Steve a great deal. But it's very hard to argue that there's no delegation here to the President. I think I just read to you the provisions of the IEEPA. Now, you can argue I have for many years, including when I was a student at Columbia, argued that the court has a responsibility to reconcile more general statutes with more specific statutes. So there's specific statutes here on tariffs. They sort of should control and they should inform how we read the IEEPA. The court, generally speaking, has not bought into that proposition. The statutes stand alone. One statute does not implicitly derogate from another. Again, I would be. Even if you didn't pay me, I would be glad to take these cases on a contingency fee because I feel strongly about them.

[00:22:00.8] Samuel Estreicher: But there is a leap here. That's going to have to be done because the IEPA does refer to importation and exportation. Again, I can make statutory arguments for why they mean only with respect to property in a foreign country. Yoshida did not make that argument. And I think there have been other instances as well where tariff authority has been used. So I'm a little unsure about the major questions doctrine. I'd be very, very comfortable making the argument, but it will require a stretch in a number of different ways. So I'm not sure it's going to prevail on non-delegation. I do believe there's a non-delegation problem and I'm working on it. I'm actually doing a survey of all of all of the military measures from the very beginning of the Republic to now to show that actually they were under much more bounded delegations from Congress. And there are cases where the President has inherent authority to repel invasion, no question about that. We're talking about other things in some of these cases, including the authorization to use military force in Vietnam. So I want to show that there's a tradition. Even in the foreign relations area, there is a tradition of bounding the President.

[00:23:19.3] Samuel Estreicher: I do think there's a delegation problem here, especially in light of the specific tariff statutes. The Supreme Court has been reluctant to use the non delegation doctrine since the 1930s, understandably. But I think there is a problem. I think there's an easy case with the IEEPA. That's my point, because there are no real constraints on the IEEPA and it should be struck down. The virtue of striking it down, if the Court has the temerity to do so is it'll force Congress to get more involved. They basically delegated too much, certainly in the tariff area, but also in other areas as well. Now, you asked me about statutory arguments under the Administrative Procedure act, which is a very important statute. It provides for review of agency action. And ordinarily the administrative agencies may not. Their decisions as well as their regulations are not to be sustained if they're arbitrary and capricious or not supported by substantial evidence in the record. If it's an adjudication. The problem with using the APA is that the Supreme Court has held that it doesn't apply to the President. The President is not an administrative agency. So if, if the challenge is to the discretionary act of an agency, there is no discretionary act here.

[00:24:42.5] Samuel Estreicher: The President has made this decision on the IEEPA. It's either valid or not, you know, under the statute or under the Constitution. But it's not likely to be subject to the APA. I think now people say it is, but I don't know how they get around the Supreme Court decision if in fact he was delegating discretionary authority to agencies that

might be subject to the APA, those discretionary actions. Well, the president, as far as I can tell, is pretty upfront about what he's doing here. And there may be as applied challenges under the APA. A particular company says, you know, I shouldn't be part of this tariff for a variety of reasons. There may be those arguments challenging agency officials that make discretionary decisions, but the basic move that we are now complaining about, which is the imposition of the 10% tariff or the other tariffs, may come back into play. I don't see them being subject to the APA. That's not the end of the world because I do think there are statutory challenges and constitutional challenges here.

[00:25:49.5] Jeffrey Rosen: We the People listeners, I think this is a significant agreement between Professor Calabresi and Professor Estreicher. They are among the leading conservative and liberal commentators on administrative law. And the fact that both of you think that there are strong challenges under the major questions and Non Delegation act is significant indeed. Steve, as you respond, I'd like you to give listeners a sense of how likely the courts are to embrace these constitutional challenges. This particular challenge is being brought by the New Civil Liberties Alliance. It's a libertarian think tank founded by Professor Philip Hamburger at Columbia. It's trying to use the non-delegation doctrine and major questions doctrine to reduce the scope of the administrative state. So far, as Professor Estreicher said, the Supreme Court has been reluctant to use the non-delegation act. And he also said that there are questions about whether the major questions doctrine applies to the president. So if you were arguing before the Supreme Court, what would you say about why this is comfortably both within their recent precedents, striking down Biden actions in four cases, as you noted, and basically give our listeners a sense of do you think that these constitutional challenges will ultimately succeed or not?

[00:27:13.5] Steven Calabresi: Yes, I think that this challenge would succeed in the current Supreme Court. And in particular I think that it's quite possible that as many as seven of the nine justices would find this to be a major question. And I would include in that not only the Democratic appointees, but also Chief Justice Roberts, Justices Gorsuch, Kavanaugh and Barrett who were appointed by Trump in his first term. And I think there would be a substantial majority. I'm not even convinced that Justice Clarence Thomas wouldn't join an opinion like this. But just to respond to some of the things that Professor Estreicher said, because he made a number of very good points. Professor Estreicher mentions that IEEPA, the statute which Trump is relying on, had a legislative veto attached to it, which is no longer enforceable. I think the Supreme Court in *Chadha* made a mistake, as Justice Rehnquist argued, by saying that if it struck down the legislative veto, it could still uphold the delegation to the president, rather than severing the legislative veto and leaving the delegation to the president in place. Congress only delegated power to the president subject to a legislative veto because it was aware that it was delegating legislative power or policymaking power.

[00:28:50.7] Steven Calabresi: So I think the Court took the wrong tack there. I don't expect the Supreme Court to revisit that severability holding of *Chadha*, but I guess I do think that the Court is going to construe the statute more narrowly, knowing that there was a legislative veto attached to it and that that legislative veto is no longer in place. Second, Professor Estreicher mentions that the four cases so far have applied to agencies exercising executive power, not the president. There's a fifth case the Court has cited from the early 2000s, *Brown and Williamson Tobacco*, against FDA, where the Food and Drug Administration tried to regulate nicotine as a drug. And

the Supreme Court struck that down and said, congress is well aware of the dangers of nicotine and tobacco. It hasn't regulated it. The FDA can't come along and regulate that. Now, if you asked me personally is carbon dioxide a pollutant that causes climate change, I would say yes. If you ask me personally if nicotine is a drug that should be regulated, I would say yes. But the Court said the economic consequences of a yes answer to that question are so huge that Congress should have to be the one to say, yes, carbon dioxide is a pollutant, or yes, nicotine is a drug.

[00:30:28.3] Steven Calabresi: And just to give you a sense of those consequences, I think that as a result of the tariffs on Mexico and China, the price of vegetables and fruit in supermarkets is about to skyrocket because of the Mexican tariffs. And I think the price of television sets is going to skyrocket in response to the tariffs on China. So what was a \$200 television set may become a \$700 television set that is unsalable. So I guess I think the literal language of IEEPA could be read to authorize what Trump did, but the literal language of the Food and Drug act would have allowed the regulation of nicotine, and the literal language of The Clean Air and Water Acts would have allowed designating carbon dioxide as a pollutant. The Court in the major questions doctrine, which is a relatively new doctrine, it's new within the last four years and was not taken into account by the prior Supreme Court cases like in the Nixon era that Professor Estreicher mentioned. The Supreme Court has said, we're simply not going to let the President through agencies read ambiguous terms in ways that cause enormous economic consequences, like climate change rules or treating nicotine as a drug.

[00:32:02.4] Steven Calabresi: And there's no question that even the tariffs in place today after Trump put a 90 day pause on his worst tariffs will have major, major economic consequences. As I said, the price of vegetables and fruit is about to skyrocket. The price of televisions, electronics and iPhones is about to skyrocket. iPhones are constructed using work in 27 different countries. And so tariffs on the construction of iPhones are going to enormously increase the price of iPhones. I do think that if IEEPA is read literally to authorize Trump's tariffs, it's an unconstitutional delegation of power. And I would rely on an article by my friend and colleague Marty Redish in the Loyola University Chicago Law Journal called Pragmatic Formalism Separation of Powers and the need to Revisit the Non-Delegation Doctrine. And Marty in this article argues that Congress should be able to delegate power to deal with unforeseen events or events which require such urgent action that legislation is impossible to deal with them. Well, the problems raised by the threat of China or the problems raised by imports from all the other countries in the world, which are now subject to a 10% tariff, are not urgent threats that need to be dealt with immediately.

[00:33:42.7] Steven Calabresi: Congress is aware of them, Congress can deal with them, and they've been a subject of public debate for a long time. So if the court read IEEPA broadly, I think it would violate the non-delegation doctrine. I would expect John Roberts, who loves to read statutes narrowly to avoid constitutional questions and has done so in cases like *Bond* against the United States. I think he'll read the statute narrowly to avoid the non delegation question, and I think he'll invoke the major questions doctrine, which has only been around for the last four years and which was not available in the Nixon era cases that Professor Estreicher talked about. It's true that this is a case involving the President and foreign policy, and the Court is deferential to the President on foreign policy matters. However, when President Harry Truman seized the steel industry to avert a strike in the middle of the Korean War. The Supreme Court in

Youngstown Sheet and tube company against Sawyer held six to three that that was unconstitutional. And Justice Jackson set out a very compelling test where he said the President's power is at its strongest where Congress is behind him. There is a middle zone where Congress hasn't addressed the subject and the President's power is at its weakest, where Congress is legislated on the subject.

[00:35:16.6] Steven Calabresi: I think in general, Congress has delegated to the President power to raise tariffs in situations where foreign nations have suddenly imposed a tariff on US Goods and it would be unfair not to impose a retaliatory tariff. So I think that that kind of delegation of tariff imposition power has been made in the past. In the Curtis Wright case, Congress expressed a preference for peace in the Chaco region of Bolivia, but said that if war broke out, the President could impose a tariff on or could stop exports of arms to that area. Those are the kinds of contexts in which Congress has authorized tariffs in the past. President Trump's use of tariffs to deal with problems like the hollowing out of our manufacturing base or Chinese currency manipulation, or the folding into foreign countries prices of value added taxes, or his desire to use tariffs to be a major source of revenue to help replace the income tax going back to the days of William McKinley is an entirely new and entirely different raising of tariffs from anything that we've seen before. And maybe he's right. As a matter of policy, I don't think he is. But something that new and that radical, done for reasons unlike those that any other president has used IIEPA before or the National Emergencies act before, is a major question which should be decided by Congress.

[00:37:06.0] Steven Calabresi: And the Constitution sets up a tough process by which you raise taxes. You have to pass a tax increase. And tariffs are tax increases through two houses of Congress and they get it either signed by the President or passed over the President's veto. And I don't think the court is going to let Trump do an end run around these tariffs. So yes, I think the Supreme Court, the Roberts Court, if faced with this case, will hold that Congress has to address this question and it's not within the President's authority to address it.

[00:37:43.2] Jeffrey Rosen: Fascinating. Thank you very much for that important analysis. Professor Estreicher, same question to you. How do you think the Supreme Court will ultimately analyze this question? And after all, liberals have resisted the application of the non-delegation and major questions doctrine to roll back the regulatory state. Might some of the liberal justices be reluctant to invoke doctrines they previously resisted and give us a sense of how you think it'll come out.

[00:38:14.0] Samuel Estreicher: Well, thank you, Jeffrey. If I can be glib for a moment, I resist making predictions about what the Supreme Court is going to do. I will tell you quite freely what will happen 25, 30 years from now. So I'm going to start with that disclaimer. You know, I agree with almost everything that Steve says. This is an extraordinary use of tariff authority. It conflicts with the very specific procedures that are required in the Tariff Expansions Act. You know, I have hesitation on whether they will use the major questions doctrine here, but you know, they don't have to use that formulation. They can say more simply that the reference to importation and exportation in the statute refers to property outside the United States and the statute requires an unusual and extraordinary threat. We don't see, you know, the president has not made a case for why this is an unusual and extraordinary threat. They can do that without

invoking the MQD. And if the case gets to the court, in other words, if the various obstacles to bringing a case don't materialize, if they take the case, the court, by the way, maybe we'll have the liberals here as well if they can see a way of limiting the invocation of the MQD.

[00:39:41.4] Samuel Estreicher: The major question is the option to the kinds of things they don't like as opposed to the kinds of things they like. It's hard to predict. In general, I'm a big believer in trying to find agreement, especially in a collegial court. So I do think there are moves that can be made with respect to the statute. And again, I do think there's a non-delegation problem here and it would have to be limited to tariffs because I think there'll be a reluctance to if we use MQD or non-delegation, there's going to be a reluctance to say anything that will limit the president's authority to use sanctions in Libya wherever he wants to use them, even though they may not be unusual and extraordinary threats. It's the very same criticism that we might make of the tariffs if they limit it. I think the way the lawyers should do this, I don't know Professor Hamburger's outfit that well, but the way the lawyers should do this is a narrow decision here along the lines that Steve and I have suggested a textual argument, not only looking at the consequences of the tariffs, which I think are real, but bringing to bear some of the historical practice on tariffs and these other statutes.

[00:41:03.5] Samuel Estreicher: I think they should inform how we read the IEEPA. We have very specific statutes. This is an area where the President does not have inherent authority, in my view. He has inherent authority to repel invasion. He has inherent authority to deal with a concrete threat against our allies, that sort of thing. But he doesn't have inherent authority on the economic sphere here, even though it has a foreign relations aspect to it. On non-delegation, by the way, the Supreme Court has never disturbed a case called *Field vs. Clark*, which is a tariff case, by the way, where the Supreme Court required that there be at least an intelligible principle informing what the President is doing. I think it's an important case. There is this case, *Curtis Wright*, which was way overwritten by Justice Sutherland, way overridden. That's one of the things we'll be doing in our article. And we'll show through all the statutes he cites in the foreign affairs area that these were in fact bounded delegations. So there's a degree of, you know, *Curtis Wright* will also need to be modified a little bit. There's a lot of work to be done. I wouldn't raise any of these issues.

[00:42:14.6] Samuel Estreicher: The *Curtis Wright* issues in this litigation might leave it to other folks, but I would make as narrow an argument as possible. I think it can be made. So you have the misfortune of bringing two people on here who basically agree and we are trying to find areas of disagreement to invoke the major questions doctrine against the President is, in my view, not likely because it's going to have consequences for other decisions of the president. Everything is going to be a departure to some extent. I'm doing a little piece on whether President Trump's taking people out of the taking policy making employees out of the protected service into the accepted service. Is that a major question? Well, it's new. It's definitely a departure, but the statute seems to authorize it anyway. There are implications across the board, and some of these implications will be favored by the three liberals on the court. I do agree, by the way, that the center of the court, in my view, is the chief, Brett Kavanaugh and our new justice from Notre Dame. And so that's where the arguments have to be pitched to those three justices, Justice Barrett and I think the arguments can be pitched to the three of them.

[00:43:38.8] Samuel Estreicher: I would again recommend narrow arguments. That's a lot to say on the prediction side.

[00:43:45.2] Jeffrey Rosen: If I could just say, once again, it's not a misfortune but a fortune that We the People listeners are listening to this significant agreement between two guests of very different perspectives. I want to emphasize again that Professor Estreicher and Calabresi are among the leading liberal and conservative administrative law scholars. And their agreement and both of their sense that a majority of the Court may ultimately accept these arguments is significant. Steve, as you sum up for We the People listeners, give us a sense of where this will go. Will the same arguments that you've identified be available to strike down other tariffs as they may arise? Might this be the most significant example of the Supreme Court checking the president that we've seen so far? How might he respond and what can we expect in this litigation over the tariffs over the next year?

[00:44:39.7] Steven Calabresi: Well, I think that to begin with, tariffs, which are taxes and impose a heavy burden, I think that John Roberts and Brett Kavanaugh and Amy Barrett are to some extent Chamber of Commerce Republicans, and the Chamber of Commerce is not wild about tariffs. And so I would expect them not to be wild about tariffs. I think that, I think that if the president uses the power to raise tariffs in a traditional way, that is in retaliation against a country that has imposed a tariff on us or perhaps with respect to a tariff on steel, which President George W. Bush actually imposed during his presidency, if the president used tariffs in a traditional way, I think the court would probably let him do that. But that's not what he's doing here. He's using it in a sweeping way with very high tariffs imposed on all the countries in the world, including countries like Switzerland, which is not a foreign policy threat to us. And he's doing that just because we run a trade imbalance with Switzerland. And the notion you can impose tariffs on any country that we run a trade imbalance with is totally, totally novel.

[00:46:10.4] Steven Calabresi: I think this kind of sweeping, totally novel use of the power to impose tariffs is something that the court is going to say, wait a second, you need Congress's permission before you take this extra step. And as I said, I think these tariffs are hugely, economically disruptive. I mean, the stock market was crashing as a result of Trump's Liberation Day tariffs. And I think his tariffs are quite capable of single handedly causing a depression in the United States. It's worth noting that the Smoot Hawley tariff imposed by President Hoover in the 1930s exported the great Depression to Germany, with the result that Adolf Hitler won the 1933 elections in Germany and became chancellor or prime minister of Germany and came to power through democratic means. So these tariffs could not only devastate the US Economy, including farmers and people who were MAGA voters, but they could also devastate the economies of countries like Germany and France and cause neo Nazi parties to win elections in those countries. So I just think the Supreme Court is going to say before you do something this momentous and this untraditional and this different from what you've done in the past, you need to get Congress's permission.

[00:47:39.1] Jeffrey Rosen: It's fascinating. And Professor Estreicher understands that predictions are hazardous. Just if you're both right, that these arguments are likely to succeed in various forms, will this apply to other tariffs the president might impose? And will this create a

confrontation between the Supreme Court and President Trump, the most significant of his term, and are they prepared to take on this confrontation?

[00:48:07.2] Samuel Estreicher: Well, again, I agree with a great deal of what Steve says in terms of the impact of these tariffs. I don't think they're going to lead to harsh consequences in Europe. There are other reasons why the right wing parties are prevailing in Europe, but economic distress can bring on strange bedfellows. There's a concern there. I don't think that the three justices that I mentioned and that Steve agrees are a key audience are going to do anything very radical here. That's why I recommend narrow arguments. Will they apply to other tariffs? If the president continues to use the IEEPA, he seems to be in a rush in everything he's doing. If he did some of this stuff in a more smart way, it would have more sustainability. But he seems to be in an enormous rush. And so, you know, we have procedures in this country. I think both Steve and I agree that unless it invades upon the president's exclusive authority, the president has a constitutional obligation to execute the law, to do his best to take care that the law is faithfully enforced. So the notion that you just come in with an executive order and undo the country, I mean, not even justice, not even President Jackson thought he could go this far.

[00:49:35.6] Samuel Estreicher: Certainly President Lincoln didn't think so, even though he's in the middle of a war. So I mean, this is like a new notion. I mean, whatever the unitary exact, let's say there's one president, right. It's a unitary executive in that case. But you know, Congress has all of these laws out there and this tariff area, it's not in fact, an exclusive authority of the president simply isn't he's exercising delegated authority. So I do think you could limit it to that context and limit it to, as I said, there are ways of reading the statute to curb expansive use of that statute for tariffs for and then remit the president back to the more particular procedures of the Trade Expansion act and the other trade acts. I think that would be the way to go. So I think it can be limited. Who knows? I mean, I don't think the three justices or any of the justices, let's put it this way. I don't think the conservative justices are in a mood to challenge the president more generally now. They may end up being there because the president's been very aggressive here. Steel seizure was a very important case.

[00:50:43.9] Samuel Estreicher: The point about the steel seizure case, the president was using his claimed inherent power to seize a private company's mills because there was a war going on in Korea. And the court said, no, you can't do that. Congress has passed very specific laws dealing with plant seizure as a way of resolving labor disputes. You just can't do that. As Justice Frankfurter agreed. And the majority say that when you have to obey the plan of Congress, even though you may not be violating any specific provision of Congress, Congress has had a plan in these various TAB laws and the IEEPA has to be read narrowly here. I agree with Steve. I don't know if they'll use the MQD because I think it has repercussions. But I do think this is a very strong and legitimate argument to make if made properly. And I think it can be written in a way that does not create a fundamental constitutional clash.

[00:51:47.1] Jeffrey Rosen: Final thoughts. And just because it's such a privilege to have you both just in a tight paragraph from each of you, share with we the People listeners, the most persuasive legal argument for striking down the tariffs. Steve.

[00:52:01.3] Steven Calabresi: So I just wanted to note that since his swearing in on January 20, President Trump has either threatened to impose a tariff or imposed a tariff on virtually every day that he's been in office for the last period of months. So this is something that he is quite, quite fixated on and quite obsessed with. I think one thing that might influence the Supreme Court is that the public, according to recent polls, 62% of the American people disapprove of Trump's handling of the American economy. And the Republican Party in Congress is showing signs of revolt over these tariffs. A Supreme Court opinion reading IEEPA narrowly, maybe not mentioning the major questions doctrine, but reading it narrowly, the way the court in *United States v. Windsor* read the chemical weapons warfare criminal statute narrowly for federalism reasons, is just, I think, a highly likely outcome if the case gets to the Supreme Court. And I think that that's critically important.

[00:53:20.2] Jeffrey Rosen: Thank you so much for that. Professor Hastreicher, last word to you. A tight closing argument about why you believe the tariffs are illegal and unconstitutional?

[00:53:31.9] Samuel Estreicher: Well, I think the Congress has again, this Congress has authority in this area. It has the plenary authority in this area. The President is acting as a delegate of congressional power. The President does not have inherent exclusive authority. There may be circumstances where there needs to be a very quick response to something that's happening. They're taking over mills of ours in another country, that sort of thing, but not for these economic policies, even though the statute itself refers to economic issues as well. So reading the statute narrowly because it will undermine more specific schemes for tariff authorization. So when Congress authorized the imposition of tariffs by the President in these various specific tariff measures, it required certain procedures, in some cases even a hearing, and these procedures are antecedent to the imposition of the tariffs. The President does not have the authority, especially in this area, to simply ignore what statutes require. We go there, we're going to end up in a Latin American democracy. And by the way, what can be done by a Republican President can also be done by a Democratic president. And we will have a kind of policy oscillation between administrations and nothing will count again.

[00:54:55.3] Samuel Estreicher: There are three Justices on the Court that are especially attuned to this concern. I think all of them will be to some extent, and by whatever doctrinal move is made, a check needs to be imposed on the President in this tariff context.

[00:55:12.6] Jeffrey Rosen: Thank you so much, Steve Calabresi and Samuel S. Dreicher for a deep, thoughtful and really important close analysis of the constitutionality and legality of the tariffs. We the People listeners, be sure to read both of their commentaries on this important issue, as well as the complex complaint in the Emily Lay paper case, which we will post on the resource page. Until then, Professor Estreicher, Professor Calabresi, thank you so much for joining us.

[00:55:41.9] Steven Calabresi: Thank you. Thank you very much.

[00:55:43.2] Samuel Estreicher: Thank you very much.

[00:55:46.3] Jeffrey Rosen: This episode was produced by Samson Mostashari and Bill Pollock. It was engineered by Bill Pollock. Research was provided by Samson Mostashari and Gyuha Lee. Please recommend this show to friends, colleagues, or anyone, anyone anywhere who's eager for a weekly dose of constitutional illumination and debate. Check out the new Constitution101 course@constitutioncenter.org Con101 Sign up for the newsletter and always remember in your waking and sleeping moments that the National Constitution center is a private nonprofit. This podcast and all our work is made possible thanks to the generosity of people from across the country who are inspired by our mission of nonpartisan constitutional education and debate. Please consider supporting our efforts by donating today@constitutioncenter.org Donate on behalf of the National Constitution Center, I'm Jeffrey Rosen.