

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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LEARNING RESOURCES, INC., ET AL.,)
Petitioners,)
v.) No. 24-1287

DONALD J. TRUMP, PRESIDENT)
OF THE UNITED STATES, ET AL.,)
Respondents.)

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DONALD J. TRUMP, PRESIDENT)
OF THE UNITED STATES, ET AL.,)
Petitioners,)
v.) No. 25-250

V.O.S. SELECTIONS, INC., ET AL.,)
Respondents.)

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7 OF THE UNITED STATES, ET AL.,)

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11 OF THE UNITED STATES, ET AL.,)

12 Petitioners,)

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14 V.O.S. SELECTIONS, INC., ET AL.,)

15 Respondents.)

16 -

18 Washington, D.C.

19

21

22 Oral argument before the Supreme Court of the
23 United States at 10:04 a.m.

24

25

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1 PROCEEDINGS

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument this morning in Case 24-1287, Learning
5 Resources versus Trump, and the consolidated
6 case.

7 General Sauer.

8 ORAL ARGUMENT OF GEN. D. JOHN SAUER

9 ON BEHALF OF THE FEDERAL PARTIES

10 GENERAL SAUER: Mr. Chief Justice, and
11 may it please the Court:

12 On April 2, President Trump determined
13 that our exploding trade deficits had brought
14 us to the brink of an economic and national
15 security catastrophe. He further pronounced
16 that the traffic of fentanyl and other opioids
17 into our country has created a public health
18 crisis, taking hundreds of thousands of
19 American lives.

20 President Trump has declared that
21 these emergencies are country-killing and not
22 sustainable, that they threaten the bedrock of
23 our national and economic security, and that
24 fixing them will make America strong,
25 financially viable, and a respected country

1 again.

2 Due to IEEPA tariffs, President Trump
3 has negotiated agreements worth trillions of
4 dollars with major trading partners, including
5 most recently China. Unwinding those
6 agreements, he warns, would expose us to
7 ruthless trade retaliation by far more
8 aggressive countries and drive America from
9 strength to failure, with ruinous economic and
10 national security consequences.

11 In Dames & Moore against Regan, this
12 Court held that IEEPA's sweeping and
13 unqualified language grants the President's
14 actions the strongest presumption of validity
15 and the widest latitude of judicial
16 interpretation. Yet plaintiffs argue that
17 tariffs, IEEPA's least blunt and most nimble
18 tool, are virtually the only tool that Congress
19 did not grant the President to deal with
20 foreign emergencies.

21 That is wrong. The phrase "regulate
22 importation" plainly embraces tariffs, which
23 are among the most traditional and direct
24 methods of regulating importation. And
25 plaintiffs concede that IEEPA authorizes quotas

1 and other tariff equivalents.

2 The major questions doctrine does not
3 apply here. IEEPA confers major powers to
4 address major problems on the President, who is
5 perhaps the most major actor in the realm of
6 foreign affairs. And the nondelegation
7 doctrine casts no doubt on IEEPA because
8 Congress may assign the President broad
9 authority regarding the conduct of foreign
10 affairs, where he enjoys his own inherent
11 Article II powers.

12 I welcome the Court's questions.

13 JUSTICE THOMAS: Would you spend a few
14 minutes on why exactly the major question
15 doctrine doesn't apply to the President in this
16 case?

17 GENERAL SAUER: Yes, Justice Thomas.

18 And I may make two or three points on that
19 front.

20 First of all, though the major
21 questions doctrine may apply to the President
22 in other contexts, specifically in the foreign
23 affairs context, where he has his own inherent
24 Article II authority, it's a particularly poor
25 fit to apply the major questions doctrine, and

1 that's for at least two reasons.

2 First of all, just as a matter of kind
3 of common-sense interpretation, one would
4 expect Congress to confer major powers on the
5 President to address major, you know, sort of
6 foreign -- international crises, so to speak,
7 in foreign-arising emergencies, that that's
8 just sort of a natural, common-sense thing you
9 expect Congress to do.

10 And, in fact, you know, Justice
11 Jackson in his Youngstown opinion addressed
12 this very situation at pages 652 and 653 when
13 he says this is the system within our -- or
14 this is the procedure within our constitutional
15 system that we have developed to strike the
16 balance, you know, what Dames & Moore described
17 as the never-ending tension between the need
18 for the executive to address -- have robust
19 powers to address emergencies and to subject it
20 to checks and balances.

21 What our constitutional system has
22 devised to address that particular problem,
23 that never-ending tension, is the system where
24 Congress confers broad and necessary powers in
25 advance and subjects them to ongoing political

1 oversight, which is exactly what you see in
2 IEEPA.

3 So that's one reason, one reason just
4 as a matter of common-sense interpretation you
5 would expect Congress to grant major powers to
6 the President, who has his own broad range of
7 major authority, Article -- inherent Article II
8 authority in this context.

9 And that is by just my second point,
10 which is --

11 JUSTICE KAGAN: Can I interrupt you,
12 General, there? And I know that you have a
13 second question, and I -- I want to let you get
14 to that. But just on that first reason, it
15 seemed to depend a lot on the President's
16 inherent Article II powers. And I'm wondering
17 what exactly -- which -- which powers you're
18 speaking of there, because tariffs, one would
19 naturally think, is -- are -- are the power to
20 impose taxes, the power to regulate foreign
21 commerce. These are not things that are
22 thought of as Article II powers. They are
23 quintessential Article I powers.

24 So what kind of Article II powers are
25 you relying on when you gave the answer about

1 major questions to Justice Thomas?

2 GENERAL SAUER: I would refer to what
3 the Court said, for example, in Egan,
4 Department of Navy against Egan. That's a
5 generally accepted view that the President has
6 broad authority in the foreign affairs realm.
7 Now there's been debates about exactly how far
8 it goes and how to draw the boundary between
9 the President and Congress, but Egan,
10 Garamendi, other cases, Curtiss-Wright, the
11 Court has recognized the President has broad
12 inherent authority to address foreign
13 situations, foreign affairs, foreign policy,
14 including foreign-arising emergencies.

15 Now we don't contend that he has -- he
16 has at least in peacetime inherent tariffing
17 authority. What we have here is two layers.
18 There's the layer, the bedrock, of the
19 President's, you know, inherent Article II
20 powers, and layered on top of that is a
21 sweeping delegation of -- of authority from
22 Congress. When you put those two things
23 together, Congress has said you have inherent
24 powers to address international emergencies,
25 and we're conferring you -- on you the tools,

1 including Article I tools, like, for example,
2 the power to regulate foreign commerce.

3 And I want to make a very important
4 distinction here. We don't contend that what's
5 being exercised here is the power to tax. It's
6 the power to regulate foreign commerce. These
7 are regulatory tariffs. They are not
8 revenue-raising tariffs. The fact that they
9 raise revenue is only incidental. The tariffs
10 would be most effective, so to speak, if no --
11 no -- no person ever paid them. They -- they
12 achieve their goals if they -- and so forth.

13 CHIEF JUSTICE ROBERTS: Counsel,
14 you -- you've already mentioned Dames & Moore
15 three -- three times, which surprises me a
16 little because the Court in Dames & Moore went
17 out of its way to say that it was issuing a
18 very narrow decision that it pretty much
19 expected to apply only in this case. Just a
20 few quotes. It said: "Decisions in this area
21 have been rare, episodic, and afford little
22 precedential value for subsequent cases."
23 Again: "We lay down no general guidelines
24 covering other situations not involved here and
25 confine the opinion only to the very questions

1 necessary to a decision of this case." And, at
2 the end of the opinion, it said: "Finally, we
3 re-emphasize the narrowness of our decision."

4 Now this -- at issue in Dames & Moore
5 was a different provision of IEEPA, not at
6 issue here, and certainly did not concern
7 tariffs. So I don't quite understand how you
8 can get as much out of Dames as -- Dames &
9 Moore as you're trying to get.

10 GENERAL SAUER: Maybe I can put it
11 this way. We don't dispute that Dames & Moore
12 is, as you state, a narrow opinion. However,
13 it -- it -- it addressed certain principles
14 that we think are equally applicable here, for
15 example, the interpretive principle.

16 Dames & Moore held -- and, again, it
17 was -- it was the power to nullify and void,
18 not the power to regulate, but it's in the very
19 same sentence in the very same statute, and the
20 Court quoted the First Circuit opinion and
21 said, look, this is sweeping and unqualified
22 language, which it didn't disagree with.

23 And then it said this particular
24 provision, where Congress has given these broad
25 verbs, I mean, "regulate" is a capacious verb,

1 admittedly, so are "nullify," so are "void," so
2 are, frankly, all the other verbs there in
3 the -- the language in IEEPA.

12 JUSTICE SOTOMAYOR: Counsel --

13 GENERAL SAUER: -- the strongest
14 presumption of validity.

15 JUSTICE SOTOMAYOR: -- I just don't
16 understand this argument. It's not an article.
17 It's a congressional power, not a presidential
18 power, to tax. And you want to say tariffs are
19 not taxes, but that's exactly what they are.
20 They're generating money from American
21 citizens, revenue.

22 And you say it's incidental to the
23 regulatory purpose. But I don't see how a
24 quota is equivalent to revenue-raising. A
25 quota sets a limit to what you can import in,

1 but it doesn't generate revenue.

2 I -- I -- I don't understand this
3 argument that it's equivalent or that foreign
4 powers or even an emergency can do away with
5 the major questions doctrine.

6 Didn't we in the Biden case recently
7 say an emergency can't make clear what's
8 ambiguous?

9 GENERAL SAUER: As to that point, I
10 believe the Court has never applied the major
11 questions doctrine in the foreign policy
12 context.

13 JUSTICE SOTOMAYOR: But we have --

14 GENERAL SAUER: But that's the
15 emergency context, not the foreign policy
16 context.

17 JUSTICE SOTOMAYOR: Counsel, we have
18 never applied it to foreign affairs, but this
19 is a tariff, this is a tax.

20 GENERAL SAUER: It is a -- it is a --
21 if I may, it's a foreign-facing regulation of
22 foreign commerce. That's a regulatory
23 tariff --

24 JUSTICE SOTOMAYOR: Commerce --
25 everything --

1 GENERAL SAUER: -- distinct from a
2 tax.

3 JUSTICE SOTOMAYOR: So Biden could
4 have declared a national emergency in global
5 warming and then gotten his student forgiveness
6 to not be a major questions doctrine?

7 GENERAL SAUER: I don't think he could
8 have gotten student loan forgiveness.

9 JUSTICE SOTOMAYOR: Why? It's
10 global --

11 GENERAL SAUER: But perhaps he could
12 have -- he could have said --

13 JUSTICE SOTOMAYOR: It's foreign --
14 it's foreign-facing. We need -- we need all of
15 these things to -- to face -- to tax fossil
16 fuel or to do something else. That's all Biden
17 would have had to do with any of his programs?

18 GENERAL SAUER: Let me put it this way
19 if I may.

20 JUSTICE SOTOMAYOR: Is just declare
21 some foreign-facing purpose?

22 GENERAL SAUER: If I may, maybe I can
23 articulate it this way. The power to impose
24 tariffs is a core application of the power to
25 regulate foreign commerce, which is what the

1 phrase "regulate importation" in IEEPA

2 naturally evokes --

3 JUSTICE SOTOMAYOR: Why is it --

4 GENERAL SAUER: -- not the power to

5 tax. What's --

6 JUSTICE SOTOMAYOR: Why -- could you

7 tell me why it is that when Congress intended

8 to permit a president to regulate by imposing

9 tariffs, it's always used "tariff" and

10 "regulate"?

11 I have about 16 laws in the past that

12 when Congress intended "regulate" to mean

13 taxing, that it used taxes simultaneously.

14 GENERAL SAUER: This Court --

15 JUSTICE SOTOMAYOR: But it didn't

16 here.

17 GENERAL SAUER: Respectfully, this

18 Court came to the opposite conclusion, if I

19 may, in Algonquin, where the phrase was not

20 impose duties from the --

21 JUSTICE SOTOMAYOR: Well, but that

22 was -- we did something in Algonquin. It was

23 in the duties section, unlike here. It was

24 paired with questions about decreasing tariffs

25 and increasing tariffs. So it's a very

1 different statute than the one at -- at issue
2 here.

3 GENERAL SAUER: But the governing
4 language -- admittedly, the reference is to
5 duties in Section 232(a). 232(c) does not
6 refer to them. And the Court didn't refer to
7 232(a) at all or the phrases "duties" or
8 "tariffs" in its analysis.

9 What it held was the phrase "adjust
10 imports," which includes a verb that's
11 narrower --

12 JUSTICE SOTOMAYOR: But it was in the
13 context --

14 GENERAL SAUER: -- the word "regulate"
15 here naturally encompasses --

16 JUSTICE SOTOMAYOR: -- it was in
17 context of activities that had to do with
18 raising and lowering duties.

19 Here, the noun -- the verbs that
20 accompany "regulate" have nothing to do with
21 raising revenues in the form of taxes.

22 JUSTICE JACKSON: And, counsel,
23 Algonquin wasn't a textualist opinion. Do you
24 agree with that?

25 In other words, the analysis that the

1 Court was using there was really keyed to the
2 legislative history of that statute, and it
3 wasn't as though we were doing an
4 interpretation of the word "adjust."

5 GENERAL SAUER: I disagree with that.
6 I think you read the opinion, first, it talks
7 about plain meaning, then it talks about
8 statutory context, and then it goes on to
9 legislative history. So it was all three of
10 those.

11 And the conclusion it came to, it --
12 it directly addressed and rejected the argument
13 that the D.C. Circuit had accepted in that
14 case, which is that when Congress wants to
15 delegate the authority to tariff, it uses a
16 consistently explicit and well-defined
17 approach, which is to use these magic words,
18 tariff, tax, impose, and so forth.

19 JUSTICE JACKSON: All right. Let
20 me -- let me --

21 GENERAL SAUER: And the Court said,
22 no, we -- Congress is not bound to use that
23 particular formulation when it wants to confer
24 this power.

25 JUSTICE JACKSON: Let me ask you about

1 the premise of your argument, which you -- you
2 sort of started at the beginning saying that
3 one would expect for Congress to give the
4 President broad leeway in this kind of foreign
5 affairs context.

6 And I guess I'm wondering whether you
7 also don't have to contend with the actual
8 purpose of IEEPA in making this argument
9 because, as I understand it, that the -- IEEPA
10 was designed and intended to limit presidential
11 authority, that Congress was concerned about
12 how presidents had been using the authority
13 under the predecessor statute, TWEA, and it's
14 pretty clear that Congress was trying to
15 constrain the emergency powers of the President
16 in IEEPA.

17 So it seems a little inconsistent to
18 say that we have to interpret a statute that
19 was designed to constrain presidential
20 authority consistent with an understanding that
21 Congress wanted the President to have
22 essentially unlimited authority.

23 GENERAL SAUER: I disagree with that
24 because what Congress actually did as --

25 JUSTICE JACKSON: What part do you

1 disagree with? I'm sorry.

2 GENERAL SAUER: Well, I disagree with
3 the notion that they were trying to constrain
4 the breadth of the actions the President may
5 take when it comes to this particularly narrow
6 domain, which is, you know, various regulations
7 of transactions over how many of which
8 foreigners have interest.

9 JUSTICE JACKSON: But how can you
10 disagree with that? I mean --

11 GENERAL SAUER: Because --

12 JUSTICE JACKSON: -- the history is
13 what it is, and --

14 GENERAL SAUER: Because they made a
15 series of changes to IEEPA --

16 JUSTICE JACKSON: Yes.

17 GENERAL SAUER: -- that relate to
18 the -- the triggering conditions, so to speak,
19 and the procedures that apply, but they did not
20 change the language in I -- in TWEA --

21 JUSTICE JACKSON: Right, but what was
22 the --

23 GENERAL SAUER: -- at all. So --

24 JUSTICE JACKSON: -- what was the
25 intent of -- of Congress in changing the

1 language? Wasn't it to constrain presidential
2 authority in this area?

3 GENERAL SAUER: To constrain it in the
4 triggering conditions and the procedures that
5 apply in this --

6 JUSTICE JACKSON: No, those --

7 GENERAL SAUER: -- context, but --
8 but --

9 JUSTICE JACKSON: The triggering
10 conditions and procedures that apply are a
11 means to constrain. That is how they went
12 around -- about constraining.

13 But my point is that Congress enacted
14 this legislation with the intent of preventing
15 the President from having unlimited powers in
16 this area, and you're asking us to now
17 interpret that statute consistent with an
18 understanding that Congress wanted to allow the
19 President to do pretty much whatever he wanted
20 in this area.

21 GENERAL SAUER: Congress took the
22 language from TWEA and enacted the very same
23 language and, most importantly here, the very
24 same phrase, "regulate importation," in IEEPA,
25 and, therefore, the natural inference is

1 Congress did not intend to change the scope of
2 authority, the powers, the tools the President
3 can exercise to --

4 JUSTICE JACKSON: Did any President
5 under TWEA --

6 GENERAL SAUER: -- address foreign
7 emergencies.

8 JUSTICE JACKSON: -- did any President
9 under TWEA use that language to impose tariffs?

10 GENERAL SAUER: Well, yes, President
11 Nixon's 1971 tariffs --

12 JUSTICE JACKSON: Not a tariff.

13 GENERAL SAUER: -- were visibly --

14 JUSTICE JACKSON: That wasn't a
15 tariff. It was a licensing agreement during
16 wartime. It was a specific thing. A tariff
17 I'm -- I'm talking about.

18 GENERAL SAUER: I'm referring to
19 President Nixon's 1971 tariffs --

20 JUSTICE JACKSON: Oh, President -- I'm
21 sorry. Excuse me, yes. I thought you meant
22 Lincoln.

23 GENERAL SAUER: That was -- not only
24 that, but then it was upheld by the court of
25 appeals with exclusive jurisdiction under this

1 very phrase, "regulate" --

2 JUSTICE JACKSON: But can I --

3 GENERAL SAUER: -- "importation."

4 JUSTICE JACKSON: -- back you up just

5 a second? I'm sorry. You're talking so

6 quickly.

7 GENERAL SAUER: Sorry.

8 JUSTICE JACKSON: President Nixon did
9 not rely on TWEA initially to impose the
10 tariffs. Is that correct?

11 GENERAL SAUER: I don't think
12 that's --

13 JUSTICE JACKSON: I understood that
14 was just a litigating position that he took
15 once it was challenged. That was not his
16 initial --

17 GENERAL SAUER: I wouldn't put it that
18 way because he has a broad invocation, you
19 know, I'm invoking a whole range of statutes,
20 something like that, in Proclamation 4074, and
21 I think the understanding is he didn't want to
22 kind of spook our allies by invoking the
23 Trading With the Enemies Act by specifically
24 invoking it. But, in litigation, it was
25 defended on that ground. So the Department of

1 Justice defended it as an exercise of TWEA and
2 did so successfully.

3 JUSTICE KAVANAUGH: What's the
4 significance of the Nixon example and precedent
5 here? Because I think figuring that out is
6 real important to deciding this case correctly.

7 So --

8 GENERAL SAUER: Well, there's one
9 obvious very powerful takeaway from it, which
10 is that this very two-word phrase, "regulate
11 importation," that we say it carries with it
12 the authority to tariff, impose regulatory
13 tariffs at the border, forward-facing tariffs
14 at the border -- border, and we say that's a
15 core application of -- of the phrase "regulate
16 importation," had been interpreted two years
17 before Congress re-enacted that language in
18 IEEPA, had been interpreted to carry with it
19 the authority to -- authority to impose
20 tariffs.

21 So this Court said in Algonquin, for
22 example, with respect to President Nixon's --

23 JUSTICE KAVANAUGH: Well, what --
24 what -- just back on the Nixon, what was the
25 scope of the Nixon tariffs?

1 GENERAL SAUER: Ten per -- he imposed
2 a 10 percent tariff kind of across the board to
3 all our major trading partners to address a
4 balance-of-payments deficit, where he was
5 trying to bring all the major industrial
6 nations to the -- to the -- to the negotiating
7 table, which he successfully did, for the
8 imposition of the tariffs, and they negotiated
9 the Smithsonian agreement in about five months,
10 after which he lifted the tariff.

11 So the tariff there was used as here,
12 in part as leverage to get our trading partners
13 to the negotiating table, and it was
14 subsequently upheld by the Federal Circuit, the
15 CCPA, the Federal Circuit's predecessor that
16 had exclusive jurisdiction over that question,
17 to include the power to tariff. And then, two
18 years later, Congress took that same phrase and
19 re-enacted it in IEEPA after carefully studying
20 the problem of presidential emergency powers
21 and being deeply concerned about, you know,
22 excessive or abusive exercise of that power.

23 So that whole -- that whole sort of
24 process gives sort of strong sort of
25 confirmation that this phrase "regulate

1 importation" carries with it the power to
2 tariff.

3 Now, of course, that's not our leading
4 argument. Our lead argument on interpretation
5 is there's a -- a -- a pedigree, historical
6 pedigree, of regulating imports specifically
7 where the power to tariff is just the -- sort
8 of a core application of that, a quintessential
9 exercise of that power. And that goes back to
10 Gibbons against Ogden and Justice Story's
11 treatise and runs all the way through cases
12 like McGoldrick and Board of Trustees and Gulf
13 Oil.

14 JUSTICE BARRETT: General Sauer, can I
15 just ask you a question? Can you point to any
16 other place in the Code or any other time in
17 history where that phrase together, "regulate
18 importation," has been used to confer
19 tariff-imposing authority?

20 GENERAL SAUER: Well, as to "regulate
21 importation"? That was held in TWEA. So,
22 obviously -- and that's --

23 JUSTICE BARRETT: Okay. Okay. So an
24 intermediate appellate court held it in TWEA,
25 but you just told Justice Kavanaugh that wasn't

1 your lead argument, that your lead argument was
2 this long history of the phrase "regulate
3 importation" being understood to include tariff
4 authority.

5 So my question is, has there ever been
6 another instance in which a statute has
7 conferred -- used that language to confer the
8 power?

9 GENERAL SAUER: Well -- yes. Yeah.

10 JUSTICE BARRETT: Putting aside
11 Yoshida.

12 GENERAL SAUER: I mean, obviously, the
13 other statutory example is just imports. The
14 cases we rely on are cases where, for example,
15 in Gibbons against Ogden and Justice Story's
16 treatise there --

17 JUSTICE BARRETT: But that just shows
18 the word can be used that way. None of those
19 cases talked about it as conferring tariff
20 authority. I understood you to be citing
21 McGoldrick and Gibbons and those cases just to
22 show that it's possible to say that "regulating
23 commerce" includes the power to tariff.

24 GENERAL SAUER: I think -- I think our
25 argument goes a bit further than that as an

1 interpretive matter because, if you look at
2 that history, the history of delegating --

3 JUSTICE SOTOMAYOR: Could you just
4 answer the Justice's question?

5 JUSTICE BARRETT: Can you identify any
6 statute that used that phrase to confer
7 tariffs?

8 GENERAL SAUER: Yeah, the only two
9 statutes I can identify now are TWEA as
10 interpreted in Yoshida and then closely
11 related, not "regulate importation" but "adjust
12 imports," in Section 232 in --

13 JUSTICE BARRETT: Well, I think
14 "adjust imports" is differently. So the answer
15 is the contested application in TWEA and then
16 now in IEEPA?

17 GENERAL SAUER: And, of course, I
18 mean, those are -- there's a sort of direct
19 line there --

20 JUSTICE BARRETT: Yeah, I -- I
21 understand that. But okay.

22 GENERAL SAUER: Yes. And then -- but
23 then, more fundamentally, we rely on historical
24 sources to show there's this long historical
25 pedigree of raw delegations of the foreign

1 commerce power, not the power to tax that we're
2 not asserting here. Delegations of the foreign
3 commerce power to the President going back to
4 Gibbons against Ogden, all the way through
5 McGoldrick and Board of Trustees, where this
6 Court and -- and founding-era sources say the
7 power to -- in other words, the power to tariff
8 is kind of this natural -- you know, as
9 everyone knows, that includes --

10 JUSTICE BARRETT: Let me just ask you
11 one other question --

12 GENERAL SAUER: -- the power to
13 regulate commerce.

14 JUSTICE BARRETT: -- about the -- the
15 plain text, General Sauer. So you've referred
16 to the other verbs in IEEPA as capacious.
17 Would you really describe them as capacious?
18 Because, to me, things like "nullify" and
19 "void" have definite meanings.

20 I agree with you that "regulate" is a
21 broader term. But those words, I think, are
22 powerful. They give -- they pack a punch. But
23 I wouldn't describe them as "capacious" in the
24 sense that they have a wide range of meanings.

25 So can you describe what you mean by

1 "capacious"?

2 GENERAL SAUER: Let me put it this
3 way: You look at all nine verbs together and
4 you're looking at a spectrum of powers from the
5 most sort of negative, "nullify," "block,"
6 "prohibit," "void," to the most affirmative,
7 "direct," "compel," and then also powers in
8 between that are more intermediate, "regulate,"
9 "investigate," and so forth. So the natural
10 common-sense inference from that grammatical
11 structure is the intention of Congress to sort
12 of cover the waterfront, to grant the power
13 all --

14 JUSTICE KAGAN: Well, possible,
15 General, possible, except Congress did take out
16 a whole bunch of verbs. It took out
17 "confiscate," "vest," "hold," "use,"
18 "administer," "liquidate," "sell," which were
19 in the prior statute.

20 And -- and -- and, crucially, what it
21 doesn't have here is anything that refers to
22 raising revenue. So it has a lot of verbs. It
23 has a lot of actions that can be taken under
24 this statute. It just doesn't have the one you
25 want.

1 GENERAL SAUER: Well, I would say
2 the -- the notion that all these other verbs
3 are -- are sort of not revenue-raising, like
4 "block" and "prohibit," I think that that
5 argument is unconvincing for two reasons. One,
6 of course, is that we don't -- we're not saying
7 it confers a revenue-raising power. We're
8 saying it confers a regulatory power. And
9 that's a crucial distinction. But also --

10 JUSTICE KAGAN: Yes, but if I can just
11 stop you there, regulatory power, I mean, yes,
12 it says "regulate," but I'll broaden out
13 Justice Barrett's question: Is there any place
14 that you can find in the entire Code where
15 "regulate" used just as "regulate" includes
16 taxing power?

17 GENERAL SAUER: We don't assert that.
18 We say it includes tariffing power when it's
19 combined with "importation." And that's just
20 the most natural way to --

21 JUSTICE KAGAN: Right. Because the
22 natural understanding of "regulate," even --
23 even though, in fact, we can regulate through
24 taxes, but when the Code uses "regulate," we
25 don't typically understand it to refer to

1 duties or taxes or tariffs or anything of the
2 kind.

3 And then, if you look at the flip side
4 of this and you look at all the tariff statutes
5 that Congress has passed, I mean, they use
6 language about revenue-raising, tariffs and
7 duties and taxes, all the language that does
8 not appear in the statute you rely on.

9 GENERAL SAUER: Start with sort of the
10 grammatical structure of the statute, then
11 refer to the other statutes. "Regulate
12 importation," you put those two words in
13 combination, that's -- the inference from that
14 is, you know, the founders discussed with this
15 sort of, like, you know, "as everyone knows"
16 attitude, "regulate importation" then, one of
17 the most natural applications of that is the
18 power to tariff. So, when Congress confers the
19 power to regulate imports, it is naturally
20 conferring the power to tariff, which it has
21 delegated to the executive branch, you know,
22 again and again and again going back to the
23 country's origins.

24 JUSTICE SOTOMAYOR: I'm sorry,
25 counsel, it doesn't say "regulate tariffs." It

1 says "regulate importations and exportations."
2 You agree that they can't put tariffs -- taxes
3 on exportations constitutionally?

4 GENERAL SAUER: Right. Understand.

5 Yeah, we agree to that, yes.

6 JUSTICE SOTOMAYOR: All right. So why
7 should we think that it's natural then to think
8 that "regulate importation" includes taxing
9 importations?

10 GENERAL SAUER: Because that is how --

11 JUSTICE SOTOMAYOR: It's in the
12 conjunctive, "importations and exportations."
13 If they can't do it with respect to import --
14 exportations, why are we permitting them to do
15 it with respect to importations?

16 GENERAL SAUER: Because, as this Court
17 has recognized going back to Gibbons against
18 Ogden and going through McGoldrick and Board of
19 Trustees --

20 JUSTICE SOTOMAYOR: We're going --

21 GENERAL SAUER: -- the phrase --

22 JUSTICE SOTOMAYOR: Assume --

23 GENERAL SAUER: When you're regulating
24 imports, tariffing is a core application of
25 that. So, in other words, if you're saying go

1 regulate trading in securities --

2 JUSTICE SOTOMAYOR: So why is it that
3 Congress --

4 GENERAL SAUER: -- that wouldn't come
5 with a tariffing connotation.

6 JUSTICE SOTOMAYOR: -- why is it that
7 Congress has always used "regulate" and "tax"
8 together in the Code? Are you telling us that
9 with respect to its use of "regulate" in other
10 statutes, the taxing reference is superfluous?
11 They didn't need to do that?

12 GENERAL SAUER: I'm not sure what
13 other statutes use "regulate" and "tax"
14 together, but this statute has a specific
15 historical pedigree going back to its enactment
16 during World War I in 1917 where the phrase
17 "regulate importation" is evoking an inherent
18 power to tariff that became established in the
19 19th century with -- in cases like, you know,
20 Hamilton against Dillin and so forth. And that
21 history is, I think, set forth in Professor
22 Bamzai's amicus brief.

23 CHIEF JUSTICE ROBERTS: Counsel --

24 JUSTICE KAVANAUGH: What about --

25 CHIEF JUSTICE ROBERTS: -- some time

1 ago you dismissed the applicability of the
2 major questions doctrine, and I -- I want --
3 want you to explain that a little bit more. I
4 mean, it seems that it might be directly
5 applicable. You have a claimed source in IEEPA
6 that had never before been used to justify
7 tariffs. No one has argued that it does until
8 this -- this particular case. Congress uses
9 tariffs in other provisions but -- but not
10 here. And yet -- and correct me on this if I'm
11 not right about it -- the justification is
12 being used for a power to impose tariffs on any
13 product from any country for -- in any amount
14 for any length of time.

15 That seems like -- I'm not suggesting
16 it's not there, but it does seem like that's
17 major authority, and the basis for the claim
18 seems to be a misfit. So why doesn't it apply
19 again?

20 GENERAL SAUER: Well, we agree that
21 it's a major power, but it's in the context of
22 a statute that is explicitly conferring major
23 powers, that the point of the statute is to
24 confer major powers to address major questions,
25 which are emergencies. So it would be unusual

1 to say -- look at the statute and say we're not
2 going to find a major power here.

3 CHIEF JUSTICE ROBERTS: Well, but the
4 exercise of the power is to impose tariffs,
5 right? And the statute doesn't use the word
6 "tariffs."

7 GENERAL SAUER: But it uses the word
8 "regulate importation." And, historically, a
9 core central application of that, a big piece
10 of that, has always been to tariff. If you had
11 asked the founders how do you regulate imports,
12 they would say, of course, we tariff. That's
13 what we do. So it would be very unusual to say
14 we're giving you the power to regulate
15 importation to -- and say but you cannot impose
16 regulatory tariffs. That would be almost a --
17 a contradiction. And all the historical
18 sources we cite in our brief, you know, relate
19 to that particular historical pedigree.

20 And, as I was referring to earlier,
21 there's a specific pedigree of "regulate
22 importation" here in the specific context of
23 the Presidents Polk and Lincoln and President
24 McKinley asserting the authority to impose
25 tariffs in wartime that was then codified in

1 TWEA and then recodified for peacetime in TWEA
2 in 1933 and then carried over into IEEPA. So
3 there's that as well.

4 But, more importantly, if you look at
5 the sort of triggering conditions that members
6 of this Court have identified for the major
7 questions doctrine, there's a series of them
8 and we think they really do -- all of them
9 don't apply here. For example, the notion that
10 the power is unheralded. You refer to the fact
11 that IEEPA's never been asserted to invoke
12 tariffs. But, of course, the immediately
13 predecessor statute that -- that -- the tariffs
14 that President Nixon imposed on that were
15 upheld under this very language. So this -- I
16 would say this is -- and it was recodified in
17 IEEPA two years later.

18 So this is kind of the opposite of
19 unheralded power. It's also heralded because
20 there's this longstanding delegation --
21 tradition of very broad delegations of the
22 foreign commerce power going back to the
23 founding, going back to 1790 --

24 CHIEF JUSTICE ROBERTS: But the
25 foreign commerce part -- but -- but, I mean,

1 and I think this is a question for the other
2 side as well, it's two -- two-facing. Yes, of
3 course, tariffs and dealings with foreign
4 powers, but the vehicle is imposition of taxes
5 on -- on Americans, and that has always been
6 the core power of Congress.

7 So, to have the President's foreign
8 affairs power trump that -- that basic power
9 for Congress seems to me to kind of at least
10 neutralize between the two powers, the
11 executive power and the legislative power.

12 GENERAL SAUER: Let me say two things
13 in response to that. First, the notion that
14 these are -- the taxes are all borne by
15 Americans, they're not borne by foreign --
16 foreign producers who are -- whose goods are
17 imported is -- is empirically -- that's not --
18 there's no basis for that in the record. It's
19 actually a mix what --

20 CHIEF JUSTICE ROBERTS: Well, who pays
21 the tariffs? If a tariff is imposed on --

22 GENERAL SAUER: They're --

23 CHIEF JUSTICE ROBERTS: --
24 automobiles, who pays them?

25 GENERAL SAUER: There's a --

1 typically, there would be a, regardless who the
2 importer of record is, there would be a
3 contract that would go along the sort of line
4 of transfer that would allocate the -- the
5 tariff and there would be different --
6 sometimes the foreign -- the foreign producer
7 would pay them. Sometimes the importer would
8 bear the cost. The importer could be an
9 American, could be a foreign company.

10 A lot of times, it's a wholly-owned
11 American subsidiary of a foreign corporation.
12 So it gets allocated. The empirical estimates
13 range from, like, 30 percent to 80 percent of,
14 like, how much is borne by Americans.

15 CHIEF JUSTICE ROBERTS: I mean, it's
16 been suggested that the tariffs are responsible
17 for significant reduction in our deficit. I
18 would say that's raising revenue domestically.

19 GENERAL SAUER: There -- there
20 certainly is incidental and collateral effect
21 of the tariffs that they do raise revenue, but
22 it's very important that they are regulatory
23 tariffs, not revenue-raising tariffs.

24 And the way you can see this, I think,
25 if you look at this policy, this policy is by

1 far the most effective if nobody ever pays the
2 tariffs. And I cite two policies, right?

3 So, if you look at the trade deficit
4 emergency, if nobody ever pays the tariffs and
5 instead Americans direct their consumption
6 towards American producers and stimulate the
7 rebuilding of our hollowed-out manufacturing
8 base, then the policy is by far the most
9 effective. So a tariff, a regulatory tariff
10 that --

11 JUSTICE SOTOMAYOR: So why not -- why
12 not do what the statute permits, bar
13 importation of products altogether? That would
14 be the most effective way to do it.

15 GENERAL SAUER: The question whether
16 this --

17 JUSTICE SOTOMAYOR: You follow the
18 statute, the statute says the President can do
19 that. What it doesn't say is the President can
20 raise revenue.

21 GENERAL SAUER: What it says, that he
22 can regulate importation, and going back --

23 JUSTICE SOTOMAYOR: Regulate it by --

24 GENERAL SAUER: -- for hundreds of
25 years, the way you regulate imports is through

1 tariffs.

2 JUSTICE SOTOMAYOR: -- quotas, pausing
3 it, subjecting some countries and not others to
4 importation bans. It has a lot of verbs, but
5 none of them include generating revenue as a
6 side effect or directly.

7 GENERAL SAUER: Let me -- let me
8 address that verb point if I may because think
9 about the canonical example, a statute that
10 refers to a list of swords, knives, daggers,
11 dirks, and pikes. There, you look at those --
12 that -- that list of things and you say,
13 uh-huh, those are all weapons, therefore, a
14 pike is a spear, not -- not a fish in that
15 particular context.

16 Now look at this list of verbs,
17 "block," "prohibit," "compel," "direct," and so
18 forth. You don't look at that naturally as an
19 ordinary reader and say, oh, look, they're all
20 not revenue-raising. What you say is they're
21 all very broad, powerful, you know --

22 JUSTICE JACKSON: General --

23 GENERAL SAUER: -- actions that you
24 can take.

25 JUSTICE JACKSON: -- General, the

1 verbs that are in the statute are actually
2 doing something. I mean, they're in the
3 statute for a reason, and, as I understand it,
4 Congress actually explained to us in its Senate
5 report and House report when it enacted the
6 1941 amendments to TWEA what it was doing.

7 It said that what we are doing is
8 authorizing the President, in the Senate
9 report, "to control or freeze property
10 transactions where a foreign interest is
11 involved." There's similar language about
12 controlling, freezing control, in the House
13 report.

14 So I -- I appreciate that generally
15 you can look at these words and you can imagine
16 that they mean certain things, but, here, we
17 have evidence that Congress was actually trying
18 to do a particular thing with respect to the
19 authority that it was presenting to the
20 President, and that thing was not raising
21 revenue.

22 GENERAL SAUER: I think that what
23 Congress -- the powers that Congress was
24 conferring on the President are best understood
25 through the plain text of the statute, which

1 includes "regulate importation."

2 JUSTICE JACKSON: No, I know, but some
3 of us care about the legislative history. And
4 so the plain text of the statute has certain
5 verbs in it. It also has regulate commerce, as
6 you say.

7 And when I look at the legislative
8 history, it appears as though Congress was
9 trying to give the President the authority to
10 "control or freeze property transactions where
11 a foreign interest is involved." And in the
12 TWEA context, that makes perfect sense because
13 we're talking about a wartime dynamic, and --
14 and what is happening is the President needs
15 the authority to prevent trading with the enemy
16 in the midst of a war. And that seems to be
17 the focus of the statute.

18 So I guess I'm concerned about just
19 sort of taking a particular word here and there
20 and saying that the general view of it might
21 include raising revenue when, in fact, it looks
22 as though the aim of this was really to give
23 the President a certain kind of authority, to
24 freeze the assets of -- of the enemy.

25 GENERAL SAUER: And let me say two

1 things in response. First, as the notion that
2 this is a revenue-raising tactic or -- or
3 power, it is not. We are asserting a
4 regulatory power. It's a delegation of the
5 power to regulate foreign commerce.

6 The way to control imports
7 traditionally has been to tariff them. They
8 say, well, you can impose quotas. Well, quotas
9 are essentially economically, you know,
10 economically equivalent to tariffs, so the
11 question is why would you be able to quota
12 under regulate but not tariff under regulate
13 when the tariffs are themselves regulatory.

14 And let me turn back to the question I
15 was give -- the response I was giving to the
16 Chief Justice --

17 JUSTICE JACKSON: Could -- could the
18 answer be --

19 GENERAL SAUER: -- to illustrate that.

20 JUSTICE JACKSON: -- could -- could
21 the answer be that in other places where
22 Congress wants that particular form of
23 regulation to be used, they say impose duties.
24 They say you can tax, Mr. President. Here,
25 they don't say that.

1 GENERAL SAUER: I'd say two things in
2 response to that. That's the very argument
3 that this Court rejected in Algonquin, that the
4 fact that these other specific statutes --

5 JUSTICE JACKSON: If we disagree with
6 you about --

7 GENERAL SAUER: -- do you say in a
8 certain way you have to use it this way.

9 JUSTICE JACKSON: If we disagree with
10 you that Algonquin is a similar context, do you
11 have another statute or another circumstance?

12 GENERAL SAUER: And, again, not to say
13 I will not do it again, but -- but,
14 obviously --

15 JUSTICE JACKSON: Yes.

16 GENERAL SAUER: -- we -- we -- we
17 discussed the phrase "adjust imports." And
18 they said, oh, the natural way to do that is to
19 tariff them. And they -- it specifically said
20 it makes no sense at all to -- to authorize
21 quotas, which was conceded that that statute
22 did authorize but not tariffs because those are
23 equivalent to the -- here.

24 JUSTICE BARRETT: But it said "adjust
25 by any means necessary," which kind of beefs up

1 the "adjust."

2 And also -- and -- and this is
3 actually, I just don't know the answer to this
4 question, so maybe you can help and maybe the
5 other side can help as well -- Algonquin was
6 very careful to always call it a license and a
7 licensing fee.

8 And in the oral argument, that came up
9 too, the distinction between a tariff and a
10 licensing fee, and I can understand how in some
11 contexts it would be very difficult, you would
12 press on it and you would say, well, if this
13 license fee is raising revenue, then it -- it
14 actually functions as a tariff, but what is the
15 significance of that?

16 Because, in IEEPA, it also says -- it
17 refers particularly to licenses and it says you
18 can license. And license would be a way of
19 giving permission. That's actually the -- the
20 language also used in -- in the Civil War one
21 and -- and what is it? Dillin?

22 GENERAL SAUER: Hamilton against
23 Dillin.

24 JUSTICE BARRETT: Yeah.

25 GENERAL SAUER: Exactly. Yes, it

1 does.

2 JUSTICE BARRETT: It was a license.
3 It was a license fee. And that's a way to
4 grant permission that you wouldn't otherwise
5 have to -- to trade and import and let it
6 through. So tell me -- tell me what the
7 distinction is between licenses and fees and if
8 it matters.

9 GENERAL SAUER: It's hard for me to
10 see one because what President Lincoln said is,
11 okay, we're going to allow imports from hostile
12 foreign powers, basically, rebellious
13 confederate states, of cotton subject to a
14 license and -- but you've got to pay 4 cents a
15 pound on cotton. When you do it, that's the
16 condition. And -- and -- and that is -- is --
17 is so nearly equivalent to a tariff that says
18 you can bring these goods into our country, but
19 you've got to pay a ad valorem -- you know, ad
20 valorem assessment on it.

21 And so -- and -- and, of course, they
22 have in their briefs conceded that quotas
23 apply, that licensing may apply. There is the
24 language in the beginning of 1701 that talks
25 about instruments, you know, or other methods.

1 Instruments, licenses, or other methods to
2 do --

3 JUSTICE BARRETT: But, if that were
4 true, why couldn't you just call this a
5 license? And it's also true that in the cotton
6 example, the Court said the exaction itself was
7 not properly a tax but a bonus required as a
8 condition precedent for engaging in the trade.

9 So it seems like it was a little squirrely
10 about how it was proceeding. And if -- if --
11 if there really is no distinction, why couldn't
12 you just call it a license here?

13 GENERAL SAUER: Very briefly, the
14 other two cases, you know, the Polk case and
15 then the President McKinley case, talk about
16 duties, so I -- I -- I see an equivalence
17 there, Mr. Chief Justice.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Justice Thomas, anything further?

21 JUSTICE THOMAS: The other side is
22 going to argue, make and argue on delegation, I
23 believe. Would you anticipate that and give us
24 your understanding of the delegation argument?

25 GENERAL SAUER: Yes, Justice Thomas.

1 I'd say a couple things in response to that.
2 First of all, this Court has stated that the
3 nondelegation doctrine does not apply with
4 anything like the same force in -- in -- as it
5 does in the domestic context in the foreign
6 context. And that again, to cite Dames & Moore
7 again, Dames & Moore cites Youngstown. In
8 Youngstown in Footnote 2 of Justice Jackson's
9 opinion, he goes into detail about this. He
10 addresses Curtiss-Wright. He says there's a
11 lot of broad dicta in Curtiss-Wright. But the
12 holding of Curtiss-Wright, the ratio decidendi,
13 is that the non -- the domestic nondelegation
14 doctrine does not apply with the same force in
15 the -- in the foreign context. And then he --
16 and he used that phrase, "does not apply." He
17 says the strict limitations on delegation that
18 apply, you know, in the internal context
19 does -- do not apply in the external context.

20 And so we rely on that line of cases
21 and for the reason I talked about earlier,
22 where we talk about a situation where the
23 President has his own inherent authority to
24 address foreign-arising emergencies and
25 Congress is conferring tools on him that expand

1 his ability, his capacity to do so, we are in
2 the area of Youngstown Zone 1.

3 JUSTICE THOMAS: A few times you have
4 alluded to the history as being important in
5 interpreting this statute and also that this
6 language comes from the Trading With the
7 Enemies Act and that has its own pedigree.

8 Could you just sketch out this direct
9 line that you were alluding to as a basis for
10 interpreting the current emergency statute as
11 you would like it interpreted?

12 GENERAL SAUER: Yes, Justice Thomas.
13 And turning back to the response I was giving
14 to Justice Barrett earlier, there is -- I think
15 it's very well set out in Professor Bamzai's
16 amicus brief. There is this history of
17 presidents using a tariffing power or a
18 tariff-equivalent power, very, very close to
19 tariffing power, in wartime to tariff trading
20 with enemies. And that -- when the Trading
21 with the Enemy Act was enacted in 1917, it was
22 deliberately evoking that, and when it brings
23 in the power to regulate importation, it's
24 essentially codifying for -- an inherent power
25 the President's already recognized to have.

1 And then, in 1933, when that power was
2 expanded to an area where he wouldn't
3 inherently have it, the peacetime context, that
4 codification, the meaning of that remains the
5 same. The "regulate importation" language
6 that's brought in from TWEA and then ultimately
7 to IEEPA in 1977 is carrying with it that
8 connotation. And that's reinforced by all the
9 cases we've cited in our brief where there's
10 been extremely broad delegations of the power
11 to tariff specifically and the power to
12 regulate foreign commerce more generally, going
13 back to the time of the founding, which ties to
14 your question about nondelegation.

15 JUSTICE THOMAS: That's it, Chief.

16 CHIEF JUSTICE ROBERTS: Justice Alito?

17 JUSTICE ALITO: The Court of -- the
18 CCPA said several -- said things in Yoshida
19 that are helpful to your position, but it also
20 said some other things. It said that future
21 surcharges "must, of course, comply with
22 Section 122 of the Trade Act of 1974." And it
23 said that the Trading With the Enemy Act did
24 not authorize the President to "fix rates of
25 duty at will without regard to statutory rates

1 prescribed by Congress."

2 So do you think that Congress -- to
3 the extent Congress had that decision in mind
4 and relied on it, do you think it also relied
5 on those statements in the opinion?

6 GENERAL SAUER: Not in the same way
7 because those statements are read into other
8 provisions of TWEA that Congress did not enact
9 in IEEPA that may still be there in TWEA, but
10 those are limitations that it wouldn't make
11 sense to do.

12 And I think the significance of
13 Yoshida is at a higher level. Keep in mind
14 that their principal position is no tariffs at
15 all. "Regulate importation" just doesn't carry
16 a connotation of the power to tariff. And we
17 say we've got historical sources going back to
18 Gibbons against Ogden that say the opposite.
19 But, more fundamentally, everyone knew that at
20 the time IEEPA was enacted that it regulated
21 importation. It just very visibly and very
22 prominently had been upheld to include a
23 very -- a sweeping global tariff.

24 JUSTICE ALITO: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Sotomayor?

2 JUSTICE SOTOMAYOR: I'd like to go
3 back to Justice Barrett's question on the word
4 "license" as used in IEEPA. It's not used as a
5 verb. It's used as a noun. By -- "The
6 President may under such regulations as he may
7 prescribe by means of instructions, licenses,
8 or otherwise" then do what the verbs permit him
9 to do. By license, he can nullify, void,
10 prevent, or prohibit any acquisition, et
11 cetera.

12 So "license" is not being used as a
13 verb, that through licensing he can raise
14 revenue. He can only use licenses to
15 accomplish the verbs. So I don't understand
16 how we can treat licensing as equivalent to
17 revenue-raising as used in IEEPA. The license
18 is only to accomplish what (b) permits.

19 GENERAL SAUER: In Hamilton against
20 Dillin, licenses -- once you had the license,
21 then you had to pay the fees, the --

22 JUSTICE SOTOMAYOR: But that's --

23 GENERAL SAUER: -- license fees to get
24 it in, and those are economical government
25 tariffs.

1 JUSTICE SOTOMAYOR: -- but that's the
2 point I'm making, which is that the only use of
3 "license" here is a noun. You can license to
4 accomplish the powers that (b) gives the
5 President.

6 GENERAL SAUER: Let me be clear. We
7 rely on the phrase "regulate importation."
8 We're not saying that the Executive Order --

9 JUSTICE SOTOMAYOR: Exactly. You're
10 not relying on "licenses" for that reason,
11 correct?

12 GENERAL SAUER: No. I only cite that
13 language, that introductory language about, you
14 know, instruments, licenses, and otherwise,
15 as --

16 JUSTICE SOTOMAYOR: That you -- you
17 can't rely on it when you --

18 GENERAL SAUER: -- another layer of
19 breadth in this particular statute.

20 JUSTICE SOTOMAYOR: Counsel, would you
21 listen to my question? You're not relying on
22 "license" for the reason I just said, because
23 it is a noun, not the verb. You're relying on
24 "regulate," correct?

25 GENERAL SAUER: Yes, we're relying on

1 "regulate importation" here.

2 JUSTICE SOTOMAYOR: All right. And
3 despite the fact that no other president in the
4 history of IEEPA has ever used -- has ever
5 imported -- used tariffs as a power under
6 IEEPA?

7 GENERAL SAUER: Well, President Nixon
8 did so under TWEA.

9 JUSTICE SOTOMAYOR: Under a
10 predecessor, and we have all the limitations of
11 that. All right.

12 Number two, whenever Congress intends
13 to -- to permit taxing and regulate, it uses
14 the word "tax and regulate" in every other
15 statute, correct?

16 GENERAL SAUER: I don't concede that.
17 I mean, two very visible examples, again, are
18 TWEA and Section 122, as we talked about
19 earlier.

20 JUSTICE SOTOMAYOR: We're -- we're
21 back to the -- the question here. Okay. Thank
22 you, counsel.

23 CHIEF JUSTICE ROBERTS: Justice
24 Sotomayor?

25 JUSTICE KAGAN: No, she's Justice

1 Sotomayor.

2 JUSTICE SOTOMAYOR: Yeah.

3 (Laughter.)

4 JUSTICE KAGAN: She just finished.

5 (Laughter.)

6 CHIEF JUSTICE ROBERTS: Justice Kagan?

7 JUSTICE KAGAN: General Sauer --

8 JUSTICE SOTOMAYOR: And they're

9 friends?

10 JUSTICE KAGAN: -- I want to take you
11 back to Justice Thomas's question about
12 nondelegation, and if I understood your answer
13 correctly, it was really similar to the answer
14 that you started off with when you talked with
15 Justice Thomas about the major questions
16 doctrine, which is sort of everything's
17 different because the President has independent
18 constitutional powers in this area.

19 And so that -- if -- if -- if one does
20 not think that with respect to tariffs, if one
21 thinks that a tariff is a -- is a taxing power,
22 is a regulation of foreign commerce that is
23 really delegated by the Constitution to
24 Congress, that argument does not -- does not
25 sound so well.

1 And, in fact, when you look at J.W.
2 Hampton, which gives rise to the nondelegation
3 test that we usually use, J.W. Hampton is a
4 tariffs case, and the Court did not say, oh, we
5 need some special new principle here, some
6 stricter rule, because we're dealing with
7 tariffs in which presidents are directly
8 concerned as a matter of foreign relations. It
9 enunciated the test we use for all
10 nondelegations. So how does that fit with your
11 theory?

12 GENERAL SAUER: Eight years later in
13 Curtiss-Wright, the Court held the
14 nondelegation doctrine for domestic affairs
15 does not apply with the same force as it does
16 in foreign affairs.

17 JUSTICE KAGAN: But not with respect
18 to tariffs. Not with respect to quintessential
19 taxing powers, which are given by the
20 Constitution to Congress.

21 GENERAL SAUER: I think Justices of
22 this Court have recognized in their opinions
23 that one of the reasons that the nondelegation
24 doctrine -- you know, that intelligible
25 principle test hasn't packed as much punch as

1 Justice Kavanaugh said in one of his opinions
2 as it might otherwise have done is it did arise
3 in the foreign affairs context because there,
4 the Court has historically been very, very
5 comfortable with very broad delegations.

6 Chicago and Southern Air Lines and other cases
7 of the 1930s. Shortly after, J.W. Hampton
8 talked about the very large delegations of the
9 foreign commerce power being very effective.

10 And, of course, this goes back to the
11 very dawn of the Republic. In 1790, for
12 example, Congress conferred on President
13 Washington basically the entire Indian commerce
14 power. He said go, you know, get licenses,
15 right, to do commerce with the Indians, and
16 they'll be subject to whatever rules and
17 regulations President Washington can make.

18 So I do think there is a profound
19 consistency between the announcement of the
20 intelligible principle test in J.W. Hampton and
21 then the subsequent recognition by this Court
22 in Curtiss-Wright that the nondelegation
23 doctrine doesn't apply --

24 JUSTICE KAGAN: In --

25 GENERAL SAUER: -- with the same force

1 in this context.

2 JUSTICE KAGAN: In Consumers' Research
3 just last year, we had a tax before us, and the
4 question was, was this a delegation issue? It
5 was, of course, a much smaller tax which dealt
6 with many fewer taxpayers. Notwithstanding
7 that, we said, if there's no ceiling on this
8 tax, we sort of assumed that if there were no
9 ceiling on this tax, it would raise a
10 delegation problem. And most of the opinion
11 was given over to showing that there, in fact,
12 was a ceiling on the tax, not a quantitative
13 one but a qualitative one.

14 But how does your argument fit with
15 the idea that a tax with no ceiling, a tax that
16 can be anything, that here the President wants,
17 there an agency wants, would raise a pretty
18 deep delegation problem?

19 GENERAL SAUER: First of all, I can't
20 say enough, it is a regulate -- regulatory
21 tariff, not a tax, and that, I think, ties to
22 my response to that, which is that this is a
23 totally different context. This is IEEPA, a
24 statute that Congress carefully crafted to
25 grant the President admittedly broad powers to

1 address foreign-arising emergencies. It's
2 outward-facing to foreign affairs, where
3 there's the broadest level of deference to the
4 political branches that this Court has
5 recognized in many cases.

6 And it imposed not a floor or a limit
7 on the amount of the tariffs that could be
8 imposed, very naturally because, for example,
9 as this Court said in Loving, quoting, you
10 know, Alexander Hamilton and Federalist Number
11 23, it's impossible to foresee either what
12 exigencies may arise or what tools may be
13 needed to address those exigencies, the means
14 that may be required to address those
15 exigencies. Instead, Congress granted very
16 broad powers, but they're confined to a
17 particular domain. This domain is any property
18 in which any foreign government or any national
19 thereof has any interest.

20 So the -- the sort of discipline if
21 one were to apply -- we say you shouldn't --
22 but, if you were to apply the -- the
23 nondelegation doctrine, the domestic-facing
24 nondelegation doctrine in this context, there
25 is a significant limitation there --

1 JUSTICE KAGAN: Yeah. So the last --

2 GENERAL SAUER: -- where you have a
3 lot of powers that some --

4 JUSTICE KAGAN: -- my last question
5 really does have to do with that point, which
6 is how or whether this is confined because, if
7 you look at Title 19, which is loaded with
8 tariffs and duties of various kinds, all of
9 them have real constraints on them. They are,
10 you know, you can't go over X percent or it
11 can't last more than one year.

12 And, of course, the way you interpret
13 this statute, it has none of those constraints.
14 And the question arises why it is that any
15 president ever would look to the tariffs in
16 Title 19 if sub silentio, if you will, this
17 statute gives the president the opportunity to
18 blow past those limits.

19 GENERAL SAUER: This statute has its
20 own constraints. They are constraints that are
21 appropriate for the context, which is
22 internationally arising emergencies. They are
23 carefully crafted by Congress to address that.
24 And they are, admittedly, different. They're
25 in Section 1701.

1 The president has to make a formal
2 declaration of a national emergency, which
3 subjects him to particularly intensive
4 oversight by Congress, repeat -- you know,
5 natural lapsing, repeated review, reports, and
6 so forth. It says you have to consult with
7 Congress to the -- the maximum extent possible.

8 JUSTICE KAGAN: I mean, you yourself
9 think that the declaration of emergency is
10 unreviewable. And even if it's not
11 unreviewable, it's, of course, the kind of
12 determination that this Court would grant
13 considerable deference to the -- to the
14 President on. So that doesn't seem like much
15 of a constraint.

16 GENERAL SAUER: But it is a --

17 JUSTICE KAGAN: And, in fact, you
18 know, we've had cases recently which deals with
19 the President's emergency powers, and it turns
20 out we're in emergencies, everything, all the
21 time about, like, half the world.

22 GENERAL SAUER: Well, this particular
23 emergency is particularly existential, as
24 Executive Order 14257 says, and, of course, no
25 one disputes the existential nature of the

1 fentanyl crisis, which, you know, we had an
2 agreement last week to create progress on,
3 which illustrates the effectiveness of the
4 tariffs tool here.

5 But the point I would make in response
6 to that is those are -- even if there's limited
7 judicial review, which is very natural in the
8 foreign affairs context, this Court has
9 always -- always granted the President the --
10 the presumption that he's acting in good faith.
11 There are real hurdles. They are very
12 significant. It's got to be an unusual,
13 extraordinary threat that arises in whole or
14 substantial part outside the United States, so
15 it's entirely foreign-facing, to the national
16 security, economy, or, you know, foreign policy
17 of the United States. So there -- there are
18 those.

19 Then there's, you know, 1701(b), which
20 talks about how it can be used for this and --
21 and for no other purpose. Then there are
22 limitations in Section 1702(b). Then there is
23 the limitations I referred to earlier about
24 what he can actually do. He can do a heck of a
25 lot but only when he's dealing with property in

1 which foreigners have an interest, and that's a
2 pretty narrow domain. That's -- that's quite a
3 silo, so to speak.

4 And, then, of course, overarching it
5 all, there is congressional oversight. And you
6 may say congressional oversight may not have
7 much bite, but Congress didn't think so.
8 Congress crafted this compromise. It balanced
9 the never-ending tension.

10 When it -- when it drafted IEEPA, it
11 had its eyes open, as -- as the dissent below
12 says, its eyes open looking at the problem of
13 sweeping emergency powers for an executive who
14 may use them in a way that's excessive versus
15 the need to address unforeseeable emergencies.

16 JUSTICE KAGAN: Thank you, General.

17 CHIEF JUSTICE ROBERTS: Justice
18 Gorsuch?

19 JUSTICE GORSUCH: General, just a few
20 questions following up on the major questions
21 discussions you've had.

22 You say that we shouldn't be so
23 concerned in the area of foreign affairs
24 because of the President's inherent powers.
25 That's the gist of it, as I understand it, why

1 we should disregard both major questions and
2 nondellegation.

3 So could Congress delegate to the
4 President the power to regulate commerce with
5 foreign nations as he sees fit --

6 GENERAL SAUER: We don't --

7 JUSTICE GORSUCH: -- to lay and
8 collect duties as he sees fit?

9 GENERAL SAUER: We -- we don't -- we
10 don't assert that here. That would be a much
11 harder case. Now, in 1790 --

12 JUSTICE GORSUCH: Isn't that the logic
13 of your -- of your view, though?

14 GENERAL SAUER: I don't think so,
15 because we're dealing with a statute that was a
16 carefully crafted compromise. It does have all
17 the limitations that I just talked about.

18 JUSTICE GORSUCH: But you're saying we
19 shouldn't look --

20 GENERAL SAUER: He has broad powers in
21 this very narrow silo.

22 JUSTICE GORSUCH: -- we shouldn't be
23 concerned with -- I want you to explain to me
24 how you draw the line, because you say we
25 shouldn't be concerned because this is foreign

1 affairs and the President has inherent
2 authority and so delegation off the books more
3 or less.

4 GENERAL SAUER: Or at least --

5 JUSTICE GORSUCH: And if that's true,
6 what would -- what would prohibit Congress from
7 just abdicating all responsibility to regulate
8 foreign commerce, for that matter, declare war,
9 to the President?

10 GENERAL SAUER: We don't contend that
11 he could do that. If it did --

12 JUSTICE GORSUCH: Why not?

13 GENERAL SAUER: Well, because we're
14 dealing with a statute, again, that has a whole
15 list of limitations.

16 JUSTICE GORSUCH: I'm not asking about
17 the statute. General, I'm not asking about the
18 statute. I'm asking for your theory of the
19 Constitution and why the major questions and
20 nondelegation, what bite it would have in that
21 case.

22 GENERAL SAUER: Yes. I would say, by
23 then, you would move from the area where
24 there's enormous deference to the President in
25 actually both the political branches, where,

1 here, there's inherent authority, and pile on
2 top of that there's a broad delegation of the
3 duty and --

4 JUSTICE GORSUCH: You're saying
5 there's inherent authority in foreign affairs,
6 all foreign affairs, so regulate commerce,
7 duties and -- and -- and -- and tariffs and
8 war. It's inherent authority all the way down,
9 you say. Fine.

10 Congress decides tomorrow, well, we're
11 tired of this legislating business. We're just
12 going to hand it all off to the President.

13 What would stop Congress from doing
14 that?

15 GENERAL SAUER: That would be
16 different than a situation where there are
17 metes and bounds, so to speak. It would be a
18 wholesale abdication.

19 JUSTICE GORSUCH: You say we -- we --
20 we are not here to judge metes and bounds when
21 the foreign affairs. That's what I'm
22 struggling with. You'd have to have some test.
23 And if it isn't the intelligible principle test
24 or something more -- with more bite than that,
25 you're saying it's something less. Well, what

1 is that less?

2 GENERAL SAUER: I think what the Court
3 has said in its opinions is just that it
4 applies with much less force, more limited
5 application in this context.

6 So perhaps the right way to approach
7 it is a very, very deferential application of
8 the intelligible -- intelligible principle
9 test, that -- that sort of wholesale abdication
10 of -- don't like to --

11 JUSTICE GORSUCH: All right. So now
12 you're admitting that there is some
13 nondelegation principle at play here and,
14 therefore, major questions as well, is that
15 right?

16 GENERAL SAUER: If so, very limited,
17 you know, very, very deferential --

18 JUSTICE GORSUCH: Okay.

19 GENERAL SAUER: -- and limited is
20 what -- and, again, the phrase that Justice
21 Jackson used is it just does not apply, at
22 least --

23 JUSTICE GORSUCH: I know, but that's
24 where you started off, and now you've retreated
25 from that as I understand it.

1 GENERAL SAUER: Well, I think we would
2 as our frontline position assert a stronger
3 position, but if the Court doesn't accept it,
4 then, if there is a highly deferential
5 version --

6 JUSTICE GORSUCH: Can you give me a
7 reason to accept it, though? That's what I'm
8 struggling and waiting for. What's the reason
9 to accept the notion that Congress can hand off
10 the power to declare war to the President?

11 GENERAL SAUER: Well, we don't contend
12 that. Again, that would be --

13 JUSTICE GORSUCH: Well, you do. You
14 say it's unreviewable, that there's no
15 manageable standard, nothing to be done. And
16 now you're -- I think you -- tell me if I'm
17 wrong. You've backed off that position.

18 GENERAL SAUER: Maybe that's fair to
19 say.

20 JUSTICE GORSUCH: Okay. All right.
21 Thank you.

22 (Laughter.)

23 GENERAL SAUER: Because that would be,
24 I think, an abdication. That would really be
25 an abdication, not a delegation.

1 JUSTICE GORSUCH: I'm delighted to
2 hear that, you know. Okay. All right.

3 And then I wanted to return to
4 something Justice Sotomayor asked under this
5 statute, okay, so now we're in this statute.
6 It's a major questions question, though.

7 Could the President impose a 50
8 percent tariff on gas-powered cars and auto
9 parts to deal with the unusual and
10 extraordinary threat from abroad of climate
11 change?

12 GENERAL SAUER: It's very likely that
13 that could be done. That would be very likely.

14 JUSTICE GORSUCH: I think that has to
15 be the logic of your view.

16 GENERAL SAUER: I think -- yeah. In
17 other words, I mean, obviously, this
18 Administration would say that's a hoax, it's
19 not a real crisis, but -- but, obviously --

20 JUSTICE GORSUCH: I'm sure you would.

21 GENERAL SAUER: Yes, but that would be
22 a question for Congress under our
23 interpretation, not for the courts.

24 JUSTICE GORSUCH: All right. And
25 then, on this inherent authority idea, does --

1 I -- I take -- I understand the President's
2 inherent authority in wartime and a lot of your
3 examples of regulating commerce and maybe your
4 best one, Hamilton during the Civil War,
5 they -- they occurred during wartime, when the
6 President's commander-in-chief power is clearly
7 in play.

8 Does the President have inherent
9 authority over tariffs in peacetime?

10 GENERAL SAUER: No, we do not contend
11 that.

12 JUSTICE GORSUCH: Okay.

13 GENERAL SAUER: And, in fact, and I'd
14 cite, if I may, I'd point the Court to two
15 cases. They're Loving against United States
16 and then Mazurie that's cited in Loving.

17 Those are situations -- for example,
18 Loving against United States, the President had
19 broad Article II inherent authority. There was
20 the commander-in-chief power. But this Court
21 held he does not have inherent authority to do
22 the power that was delegated to him, right,
23 which was the power to, you know, identify
24 aggravators that make you eligible for the
25 death penalty in court-martial trials.

1 And yet this Court said, well, we're
2 not going to see a delegation problem here,
3 even though it's really a wholesale delegation,
4 which would otherwise be legislative authority.
5 It would be kind of like a small version of
6 what your hypothetical would be, an abdication.

7 But, because you're in a foreign
8 affairs context or there commander-in-chief, a
9 military context, where the President has his
10 own delegation of authority, he doesn't have
11 the power to do this, but, because of his
12 background inherent authority, the Court said
13 this is a situation where we're not going to
14 see a delegation problem when there clearly
15 would have been a delegation problem in the
16 domestic context. And those cases, I think,
17 are powerful here.

18 JUSTICE GORSUCH: General, if I can
19 cut through those words, I think you're saying
20 that, no, the President doesn't have inherent
21 authority over tariffs in peacetime.

22 GENERAL SAUER: Absolutely. That
23 is --

24 JUSTICE GORSUCH: Okay.

25 GENERAL SAUER: We do not assert that.

1 We say that Congress can delegate that to him.
2 And when Congress does so, as it does when it
3 uses the frayed -- phrase "regulate
4 importation" --

5 JUSTICE GORSUCH: I -- I -- I -- I
6 follow all -- all of that.

7 GENERAL SAUER: Yes. I agree with
8 that. I agree.

9 JUSTICE GORSUCH: Okay. You emphasize
10 that Congress can always take back its powers.
11 You mentioned that a couple of times.

12 But don't we have a serious retrieval
13 problem here because, once Congress delegates
14 by a bare majority and the President signs
15 it -- and, of course, every president will sign
16 a law that gives him more authority -- Congress
17 can't take that back without a super majority.

18 And even -- you know, even then, it's going to
19 be veto-proof. What president's ever going to
20 give that power back? A pretty rare president.

21 So how -- how should that inform our
22 view of delegations and major questions?

23 GENERAL SAUER: I would look at the
24 balance that Congress struck because what
25 Congress did, initially, it had a two-House

1 legislative veto that was held unconstitutional
2 in Chadha --

3 JUSTICE GORSUCH: And we struck that
4 down, yeah.

5 GENERAL SAUER: -- and then Congress
6 went back to the statute and amended it.

7 JUSTICE GORSUCH: Yeah.

8 GENERAL SAUER: It took out the
9 legislative veto and left in the joint
10 resolution but still left the president with
11 all those powers.

12 JUSTICE GORSUCH: I'll spot you --
13 that's what they -- that's Congress did?

14 GENERAL SAUER: Yes.

15 JUSTICE GORSUCH: Fair enough. As a
16 practical matter, in the real world, it can
17 never get that power back.

18 GENERAL SAUER: I disagree because, in
19 January of 2023, Congress voted to terminate
20 one of the biggest IEEPA emergencies ever, the
21 COVID emergency, and the President went along
22 with that.

23 So what the statute reflects is
24 there's going to be the ability for a sort of
25 political consensus against a declared

1 emergency. Nevertheless, that's a political
2 discipline.

3 JUSTICE GORSUCH: But what happens
4 when the President simply vetoes legislation to
5 try to take these powers back?

6 GENERAL SAUER: Well, he has the
7 authority to veto legislation to terminate a
8 national emergency, for example. I mean, he
9 retains the powers in the background because
10 IEEPA is still on the books, but if he declares
11 an emergency and Congress doesn't like it and
12 passes a joint resolution, yes, he can
13 absolutely veto that. Congress was --

14 JUSTICE GORSUCH: Yeah. So Congress,
15 as a practical matter, can't get this power
16 back once it's handed it over to the President.
17 It's a one-way ratchet toward the gradual but
18 continual accretion of power in the executive
19 branch and away from the people's elected
20 representatives.

21 GENERAL SAUER: I disagree with that.
22 And the recent historical counterexample of
23 Congress's termination of the COVID emergency
24 demonstrates that political -- the political
25 oversight that's baked into the statute's --

1 JUSTICE GORSUCH: With the President's
2 assent.

3 GENERAL SAUER: -- meaningful fold.

4 JUSTICE GORSUCH: With the President's
5 assent. In fact, you know --

6 GENERAL SAUER: Once he lost it by a
7 veto-proof majority in the Senate, I think the
8 position is moot.

9 JUSTICE GORSUCH: Yeah. Right?

10 GENERAL SAUER: I think he realized --
11 and that's -- that's the political process
12 working. There was a little consensus against
13 it to coalesce.

14 JUSTICE GORSUCH: Yeah. It takes a
15 super-majority, a veto-proof majority to get it
16 back. Yeah. Okay.

17 One other question. Do you think
18 tariffs are always foreign affairs?

19 GENERAL SAUER: I do think they
20 would -- I can't think of a situation where
21 they're not foreign-facing if you're talking
22 about tariffs on imports. I mean, maybe there
23 are other tariff contexts that I'm not aware
24 of, but, yes, they typically would involve a
25 foreign affairs thing.

1 However, as in Gibbons against Ogden,
2 if they are revenue-raising tariffs, they would
3 not raise the same sort of, like, foreign
4 affairs issues as regulatory tariffs, which are
5 imposed not for the purpose of raising revenue
6 but to induce foreign powers to change their
7 behaviors and --

8 JUSTICE GORSUCH: So revenue-raising
9 tariffs are not foreign affairs, but regulatory
10 tariffs are?

11 GENERAL SAUER: I don't think a
12 revenue-raising tariff would be foreign affairs
13 to the same degree at least. I think it has a
14 foreign application, obviously, but I don't
15 think it would raise the same issues.

16 JUSTICE GORSUCH: Okay. Thank you,
17 General.

18 CHIEF JUSTICE ROBERTS: Justice
19 Kavanaugh?

20 JUSTICE KAVANAUGH: Figuring out what
21 "regulate importation" means is -- is obviously
22 central here, and for major question purposes,
23 I think the way we think about that kind of
24 question is, does the specific authority,
25 power, major power now asserted pursuant to

1 that general statutory authorization, was that
2 the kind of power that would have been
3 understood by people, by Congress at the time
4 the general statute was passed, as distinct
5 from being a novel kind of use of that general
6 authority to do something different?

7 "Unheralded" is the word in our cases. Okay.

8 One problem you have is that
9 presidents since IEEPA have not done this.
10 Your primary answer or one of your many answers
11 to that is the Nixon example, and that's a good
12 example for you because Nixon relied on
13 "regulate importation" to impose a worldwide
14 tariff. Good example.

15 What is our understanding of Congress
16 in 1977 vis-à-vis that Nixon example when
17 Congress re-enacts or enacts the "regulate
18 importation" language into IEEPA?

19 GENERAL SAUER: Congress at that time
20 was fully aware that a court of appeals with
21 exclusive jurisdiction had interpreted that
22 very phrase very visibly, very prominently, to
23 include the power to tariff and then re-enacted
24 it without change. The Court addressed a kind
25 of lesser situation in Algonquin when it came

1 to Section 122, and the Court said President
2 Nixon -- the Court said President Nixon
3 interpreted this to include a -- a tariffing
4 power, a tariffing-like power. And then
5 Congress a few months later re-enacted the
6 language without change, and that's powerful
7 evidence of congressional acquiescence.

8 So that immediately historical
9 background is very powerful. And it's
10 buttressed, of course, by sources going back to
11 the founding, where we say the phrase "regulate
12 importation," a quintessential application of
13 that is the power to tariff. That's how you
14 regulate imports, is from --

15 JUSTICE KAVANAUGH: Why -- this may
16 require some speculation on your part, economic
17 philosophy, et cetera, but I'll ask it. Why do
18 you think Presidents Clinton, Bush, Obama have
19 not used IEEPA to impose tariffs on -- because
20 there have been trade disputes and, certainly,
21 you know, President Bush, steel imports and the
22 like. Why do you think IEEPA has not been
23 used?

24 GENERAL SAUER: If you look at those
25 69 emergencies, in fact, you go through them

1 one at a time, which we had our team do --

2 JUSTICE KAVANAUGH: Mm-hmm.

GENERAL SAUER: -- it's really hard to
find one where you look at that emergency and
you say, oh, tariffs is the natural tool that
you would use to address that emergency. So,
for example, the blood diamond emergency, you
know, tariffing these sort of, you know,
criminal organizations in Africa that are
financing terrorism through the sale of
diamonds, you don't really tariff them. Or you
take, you know, the Iranian hostage crisis,
President Carter didn't say, oh, you seized all
of our, you know, embassy personnel, you're
holding them hostage, we're going to tariff
you. Right? And if you go through those
emergencies, there are two emergencies, though,
where tariffs are the obvious natural tool for
a president to use. One is the Nixon
balance-of-payments deficit problem, and the
other is these -- this particular emergency.

22 And also, there's political reasons.

23 And they weren't just solved.

24 JUSTICE KAVANAUGH: But I think the
25 question --

1 GENERAL SAUER: I think that it's no
2 question that President Trump is by far the
3 most comfortable with the tariffing -- tariffs
4 as a tool both of, you know, economic and
5 foreign policy than many of the others, other
6 presidents may have been. I mean, there are
7 presidents like President Bush who, you know,
8 probably wouldn't have naturally, you know,
9 selected that particular tool or method.

10 But, if you go through all 69 of those
11 intervening emergencies, what they have not
12 done at least is they have not identified where
13 they say, oh, here's one where tariffs would
14 have been the obvious tool, but the president
15 didn't use it.

16 JUSTICE KAVANAUGH: Algonquin, as
17 you've mentioned many times, is obviously very
18 important here for us to understand exactly
19 what's going on in Algonquin. The phrase there
20 is different, "adjust imports." And they --
21 they really, the other side, your friend on the
22 other side, really relies on the difference
23 with language.

24 And I just want you to -- to give your
25 best answer to why "regulate importation"

1 encompasses tariffs when "adjust" -- we -- we
2 held that "adjust imports" would -- would
3 encompass monetary exactions.

4 GENERAL SAUER: Sure. Three answers
5 if I may.

6 JUSTICE KAVANAUGH: Mm-hmm.

7 GENERAL SAUER: "Adjust" is narrower
8 than "regulate." And so, therefore --

9 JUSTICE KAVANAUGH: So --

10 GENERAL SAUER: -- the greater
11 includes the lesser.

12 JUSTICE KAVANAUGH: -- it follows --

13 GENERAL SAUER: Second answer,
14 "adjust" is the -- is the second Black's Law
15 Dictionary definition of "regulate." The
16 Black's Law Dictionary -- the original
17 plain-meaning dictionary definition says adjust
18 by rule, mode, or -- rule, method, or
19 established mode. So there's just a plain
20 meaning link there. "Regulate" -- "adjust" is
21 a form of -- is a kind of regulation.

22 And then I think far more importantly,
23 "regulate importation," I can't emphasize
24 enough, going back to the time of the
25 founding -- going back to the time of the

1 founding has been understood that the manner in
2 which you regulate importation, the natural way
3 to do that is to tariff.

4 So it would be textually astonishing
5 given that historical pedigree going back to
6 Gibbons, going back to, you know, Madison's
7 letter to Cabell, and all the historical
8 sources cited in our briefs, it would be kind
9 of astonishing to say, hey, President, you can
10 regulate imports, but -- we're not saying this
11 explicitly, but you do not have the power to
12 tariff when the -- the tariffing is the -- in
13 many ways, the quintessential way of regulating
14 importation. So -- so that historical
15 pedigree, you know, sort of gives freighted
16 meaning to that two-word phrase.

17 JUSTICE KAVANAUGH: And, last, you had
18 some discussion about license fee versus
19 tariffs, if there's a distinction. I mean, the
20 counsel in -- in the oral argument in Algonquin
21 said they're all moneys exacted on imports, so,
22 in that sense, it certainly is a tariff and
23 hence all the incidents and the economic effect
24 of a tariff.

25 But we can't rely on what the counsel

1 said in Algonquin. You know, isn't there a --
2 a difference of sorts at least between a tariff
3 and a license fee? You answered this, I think,
4 briefly before, but I want to make sure because
5 I think this could be an important point
6 because I want to know Algonquin to decide this
7 case. So --

8 GENERAL SAUER: Yeah. I --

9 JUSTICE KAVANAUGH: -- give your best
10 shot on that.

11 GENERAL SAUER: -- I agree that there
12 is maybe in -- there's a formal distinction.

13 JUSTICE KAVANAUGH: Mm-hmm.

14 GENERAL SAUER: But, as a practical
15 matter, I think what counsel was probably
16 arguing there is that there really isn't much
17 of an important distinction. And I would point
18 to the passage in Algonquin where the Court
19 says, look, they've conceded that this includes
20 the power to quota, and since quotas are a
21 quantitative method, it would make no sense for
22 Congress not to grant the qualitative method.
23 And all the more so here if there's a
24 concession, as they do in some of the red
25 briefs, concede that --

1 JUSTICE KAVANAUGH: You know, at one
2 time, the Court said monetary methods, i.e.,
3 license fees, and the next page said monetary
4 exactions, i.e., license fees and duties.

5 GENERAL SAUER: Yeah. No, and I think
6 the Court bought the argument correctly --

7 JUSTICE KAVANAUGH: It's important to
8 be consistent.

9 GENERAL SAUER: -- that there's --
10 there's really not a lot of daylight between
11 those two. As a practical matter, certainly,
12 almost no daylight. And so then the question,
13 as the Court said --

14 JUSTICE KAVANAUGH: When you say
15 almost no daylight, just --

16 GENERAL SAUER: I mean, I would say
17 that they're -- that they're economic
18 equivalents. Legally, they're pretty much the
19 same. So I really don't see a big distinction
20 there. And, of course, the -- the logic
21 of Algonquin was you have a -- you know,
22 quantitative methods are -- quotas are allowed.
23 Therefore, it would make no sense at all to
24 interpret this not to include the qualitative
25 or the -- the monetary exaction methods.

1 Well, if -- if we're talking about a
2 distinction between "regulate importation"
3 including licenses that could come with fees
4 but not tariffs, that logic applies all the
5 more so --

6 JUSTICE KAVANAUGH: Thank you.

7 GENERAL SAUER: -- which makes no
8 sense.

9 CHIEF JUSTICE ROBERTS: Justice
10 Barrett?

11 JUSTICE BARRETT: Well, I think, in
12 Algonquin, there was a formal distinction that
13 mattered because, at that oral argument,
14 counsel pointed out that the Uniformity Clause
15 would kick in, and the constitutional
16 uniformity requirement would apply to tariffs
17 if it was that way, and speculated that the
18 reason that the government may have set it up
19 as a licensing scheme with licensing fees was
20 to avoid that.

21 So I do think there are some
22 distinctions, but keeping that in mind, if you
23 say that there really is, as a practical
24 matter, no difference, this is kind of what I'm
25 hung up on in "license" that maybe you can

1 help.

2 So, in IEEPA, Justice Sotomayor is
3 right, "license" is used as a noun, but it's
4 one of the means necessary. So, in Algonquin,
5 it was "by any means necessary adjust." Here,
6 the statute says the President may under such
7 regulations as he may prescribe by means of
8 instructions, licenses, or otherwise regulate
9 importation, which is the key part for our
10 purposes.

11 So the means it specifies are
12 instructions, licenses, or otherwise. So I
13 think it would -- I -- I mean, one argument
14 might be that it would have been natural for
15 Congress to put the President may by means of
16 instructions, licenses, tariffs, or otherwise,
17 with an ejusdem generis thing, I think you have
18 to rely on the "or otherwise" picking up more,
19 or, if there really is no practical difference
20 between licenses and tariffs, why aren't you
21 making the argument or why didn't the President
22 structure this as a licensing fee scheme?

23 How do I understand that language,
24 or -- or am I just misunderstanding it and this
25 language is totally irrelevant?

1 GENERAL SAUER: I think that -- here
2 is the way I'd respond to that. I think that
3 language powerfully reinforces our position as
4 the way you've laid it out right there because,
5 first of all, "regulate importation" we say,
6 and based on extensive historical pedigree, the
7 core application of that is tariffing.

8 To -- to list tariffing again would
9 have been essentially redundant and
10 unnecessary, especially if you look at the
11 specific historical background of TWEA, where
12 TWEA was enacting a tariffing power or a
13 licensing-like power, you know, that was
14 described as again duties and tariffs
15 equivalently.

16 JUSTICE BARRETT: Okay. But I -- I --
17 I don't understand because I think you have to
18 put together (a)(1) and then (b). So I think
19 what you would be saying is he may prescribe by
20 means of tariffs tariffs.

21 GENERAL SAUER: I think what you're
22 saying is by means of instruments, licenses, or
23 otherwise.

24 JUSTICE BARRETT: By instructions,
25 licenses, or otherwise?

1 GENERAL SAUER: Yeah, instructions.

2 Sorry. Yeah, instructions, licenses, or
3 otherwise.

4 JUSTICE BARRETT: Impose tariffs?

5 Okay.

6 GENERAL SAUER: That otherwise, I
7 mean, if you say instructions, licenses, or
8 otherwise, and we're asserting a power that's
9 very, very similar to licensing --

10 JUSTICE BARRETT: The licensing?

11 GENERAL SAUER: -- "otherwise"
12 naturally carries that with it. But that's not
13 our principal position. Our principal position
14 is "regulate importation" means that. Right?

15 JUSTICE BARRETT: Okay.

16 GENERAL SAUER: And so you don't need
17 to say it again. However, if -- if -- Congress
18 has authorized them to do it by licenses that
19 could come with fees that are economically
20 equivalent to tariffs and then says
21 otherwise --

22 JUSTICE BARRETT: Then tariffs would
23 be the neighbor.

24 GENERAL SAUER: -- you know, that just
25 reinforces the same conclusion that we get by

1 using the phrase "regulate" --

2 JUSTICE BARRETT: Okay. Then a
3 question just to follow up on Justice Gorsuch's
4 thing about how could Congress ever get this
5 delegation back, you said, well, listen, you
6 point to the -- Congress's ability to terminate
7 emergencies, which it's done.

8 But, if Congress ever wanted to get
9 the tariffing power back, it would have to have
10 a veto-proof majority because, regardless of
11 the emergency, so if Congress wanted to reject
12 the -- let's say that we adopt your
13 interpretation of the statute.

14 If Congress said, whoa, we don't like
15 that, that gives a president too much authority
16 under IEEPA, it's going to have a very hard
17 time pulling the tariff power out of IEEPA,
18 correct?

19 GENERAL SAUER: Well, I don't know if
20 it would be a hard time. Certainly, we'd have
21 to have a statutory amendment --

22 JUSTICE BARRETT: Well, veto-proof --

23 GENERAL SAUER: -- which would be true
24 of any case this Court definitively interprets
25 the statute, yes, I think that the Court --

1 Congress would have to pass a statutory --
2 JUSTICE BARRETT: But -- but
3 definitively interpreting a statute that grants
4 presidential power makes it particularly hard
5 to get the President to not want to veto
6 something, which, as Justice was pointing
7 out -- Justice Gorsuch was pointing out, has
8 him lose power.

9 All right. I want to ask you a
10 question about unusual and extraordinary
11 threat, which we have not talked about yet, and
12 I specifically want to talk about the
13 reciprocal tariffs.

14 These are imposed on -- I mean, these
15 are kind of across the board. And so is it
16 your contention that every country needed to be
17 tariffed because of threats to the defense and
18 industrial base? I mean, Spain, France? I
19 mean, I could see it with some countries, but
20 explain to me why as many countries needed to
21 be subject to the reciprocal tariff policy as
22 are.

23 GENERAL SAUER: Yeah. Executive Order
24 14257 spells out the nature of the emergency
25 and basically says that there's this -- this

1 sort of lack of reciprocity, this asymmetric
2 treatment, you know, our trade with respect to
3 foreign countries, trade that does run across
4 the board is a global problem.

5 I think that puts in context the
6 argument they make that this power to tariff is
7 so broad because you're applying it to every
8 country in the world. That conflates the
9 nature of the tool, tariffing, which they're
10 challenging here, with the nature of the
11 declared emergency, which they haven't
12 disputed.

13 They haven't disputed, for example,
14 that the President has correctly identified
15 that virtually every major trading partner has
16 this longstanding sort of asymmetric unfair
17 treatment of -- of our trade.

18 So the argument this power is so
19 broad, this power is so broad is really based
20 on a conflation of two different things. One
21 is the power, right? Imagine this. Imagine
22 that, for example, President Reagan had wanted
23 to convince South Africa to change its
24 apartheid policies and he imposed tariffs on
25 them.

1 No one would bat an eyelash and say,
2 well, that's too broad, that's too broad, that
3 can't be in IEEPA. The power to tariff is a --
4 sort of fits naturally with all those powers to
5 block, prohibit, and seize and so forth.

6 What they're saying, and this so
7 broad, because the emergency is so broad, but,
8 of course, that's a presidential determination
9 that -- and -- and there's all kinds of basis
10 for it. And also keep in mind that the
11 emergency is not like just the asymmetric
12 treatment. It's the impact of the asymmetric,
13 the underlying conditions, the hollowing out of
14 our manufacturing base, you -- you -- you know,
15 the -- the -- the vulnerability of our supply
16 chains, and, of course, the -- the -- our
17 defense and industrial base's vulnerability of
18 key inputs.

19 CHIEF JUSTICE ROBERTS: Justice
20 Jackson?

21 JUSTICE JACKSON: So, as I understand
22 your response to Justice Barrett in that last
23 question, you're saying that the power to
24 tariff fits naturally with the power to block
25 and seize. That was your example.

1 But I guess I'm trying to understand
2 then your argument from the text of the actual
3 statute because the statute, unlike what you
4 suggested to Justice Kagan, is focused on the
5 actual actions that the President can take. In
6 response to Justice Kagan, I understood you to
7 say that Congress was giving the President
8 broad authority to act and it was within a
9 particular domain, which is the domain of
10 emergencies with respect to foreign power, but
11 the President could basically do a lot of
12 things.

13 But, when I read the statute, it is
14 telling the President exactly what he can do,
15 investigate, block during the pendency of an
16 investigation, regulate, direct, and compel,
17 nullify, void, prevent, or prohibit.

18 And I guess what is a little
19 concerning to me is that your argument suggests
20 that we should see the word "impose" -- the
21 phrase "impose tariffs" in that same series of
22 things that the President could do. We don't
23 see that word, and, instead, you take
24 "regulate" and say that must mean that.

25 So I guess I'm getting back to Justice

1 Barrett's maybe original question, which was
2 where else in the Code has Congress used the
3 word "regulate" to sub in for "impose tariffs"?

4 GENERAL SAUER: TWEA. And then this
5 Court's opinions, of course, have used
6 "regulate" and "import" or have -- point out
7 that duties are the natural way to regulate
8 foreign commerce. But yet the Court's --

9 JUSTICE JACKSON: But you're saying we
10 should not have expected to see the same level
11 of granularity with respect to the President's
12 authority to impose tariffs as we see here,
13 investigate, block, direct and compel, nullify,
14 et cetera.

15 GENERAL SAUER: I think it would be
16 very unusual for Congress to spell out all the
17 ways that you can regulate in that.

18 JUSTICE JACKSON: So "regulate"
19 becomes a big catch-all. The rest of the other
20 things --

21 GENERAL SAUER: It's -- well, I mean,
22 we have a concession of that from the other
23 side that "regulate" at least includes
24 qualitative methods, quantitative methods,
25 quotas, you know, licenses.

1 They concede that "regulate" --
2 there's a lot in "regulate" that's not spelled
3 out there. And our point is you don't need to
4 spell out tariffs because that's like of all of
5 them the most natural, the most quintessential
6 method of regulating imports.

7 JUSTICE JACKSON: And yet -- and --
8 and -- and yet many, many presidents have not
9 used regulate in this way to impose tariffs.

10 I understand you point to President
11 Nixon. We have licenses from Lincoln. But no
12 one else.

13 GENERAL SAUER: As I said to Justice
14 Kavanaugh, presidents who are faced with
15 international crises to which tariffing is the
16 natural response -- that's President Nixon and
17 President Trump -- have invoked this authority.
18 And also, frankly, President Trump invoked this
19 authority in May of 2019 as well.

20 JUSTICE JACKSON: Can I ask you one
21 question --

22 GENERAL SAUER: So it's more
23 historically attested than they -- than they
24 concede.

25 JUSTICE JACKSON: Let me just ask one

1 more question about the unusual threat. So, in
2 your conversation with Justice Gorsuch that we
3 had, the climate change tariff hypo and you
4 indicated that there would be challengers to
5 the notion that that was an unusual and
6 extraordinary threat, and I'm just wondering,
7 under your position, would they be able to make
8 a legal challenge? Are you saying the Court
9 would not be able to review that concern?

10 GENERAL SAUER: On that particular
11 hypothetical, I think I said that would be a
12 question for Congress.

13 JUSTICE JACKSON: So not a court?

14 GENERAL SAUER: Yeah. I don't -- in
15 other words, that wouldn't be the sort of thing
16 the courts are going to weigh into, is this
17 really an emergency. You know, that would not
18 be -- probably very unlikely. That would be a
19 situation where at least there would be very,
20 very, very deferential judicial review of that
21 kind of determination, a legal dispute, but --

22 JUSTICE JACKSON: No, I'm asking
23 you -- right. Those are two different things.
24 Is there no judicial review or is there
25 deferential judicial review?

1 GENERAL SAUER: Our front line -- I
2 mean, Trump against Hawaii, our front-line
3 position is that it falls within Dalton against
4 Specter, it's committed at the President's
5 discretion when he makes his determination of a
6 national emergency, but the Court doesn't have
7 to decide that because whatever review is very,
8 very deferential and it's easily satisfied
9 here.

10 JUSTICE JACKSON: Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Mr. Katyal.

14 ORAL ARGUMENT OF NEAL K. KATYAL
15 ON BEHALF OF THE PRIVATE PARTIES

16 MR. KATYAL: Thank you, Mr. Chief
17 Justice, and may it please the Court:

18 Tariffs are taxes. They take dollars
19 from Americans' pockets and deposit them in the
20 U.S. Treasury. Our founders gave that taxing
21 power to Congress alone. Yet, here, the
22 President bypassed Congress and imposed one of
23 the largest tax increases in our lifetimes.

24 Many doctrines explain why this is
25 illegal, like the presumption that Congress

1 speaks clearly when it imposes taxes and duties
2 and the major questions doctrine.

3 But it comes down to common sense.

4 It's simply implausible that in enacting IEEPA
5 Congress handed the President the power to
6 overhaul the entire tariff system and the
7 American economy in the process, allowing him
8 to set and reset tariffs on any and every
9 product from any and every country at any and
10 all times.

11 And, as Justices Gorsuch and Barrett
12 just said, this is a one-way ratchet. We will
13 never get this power back if the government
14 wins this case. What president wouldn't veto
15 legislation to rein this power in and pull out
16 the tariff power?

17 IEEPA is a sanction statute. It's not
18 a tax statute where Congress gave away the
19 store. Congress knows exactly how to delegate
20 its tariff powers. Every time for 238 years,
21 it's done so explicitly, always with real
22 limits. IEEPA looks nothing like those laws.
23 It uses "regulate," which Congress has used
24 hundreds of times, never once to include
25 tariffs. And it lacks the limits of every

1 other tariff statute. And that is why, even
2 though presidents have used IEEPA to impose
3 economic sanctions thousands of times, no
4 president in IEEPA's 50-year lifetime has ever
5 tried to impose tariffs.

6 And the President bypassed statutes
7 that do address tariffs, like Section 122 for
8 large and serious trade deficits, but that
9 imposes a clear guardrail, 15 percent cap,
10 150-day limit.

11 This is Youngstown at its lowest ebb.
12 If the government wins, another president could
13 declare a climate emergency and impose huge
14 tariffs without fines or -- without floors or
15 ceilings, as Justice Gorsuch said. My friend's
16 answer? This administration would declare it a
17 hoax. The next president may not quite say
18 that. This is an open-ended power to junk the
19 tariff laws and is certainly not conveyed by
20 the -- by the word "regulate."

21 I welcome the Court's questions.

22 JUSTICE THOMAS: Wouldn't your
23 argument also apply to embargoes?

24 MR. KATYAL: So -- and this is the
25 argument in the -- in the fine dissent below.

1 And I think there are three answers to that,
2 Justice Thomas.

3 The first is revenue-raising.
4 Embargoes stop the shipment. Tariffs start the
5 tax bill. They are first and foremost ways of
6 regulating revenue, as some of your own
7 opinions said. This is the way we actually
8 chiefly got revenue for the first hundred years
9 of our republic. Tariffs are constitutionally
10 special because our founders feared
11 revenue-raising, unlike embargoes. You know,
12 there was no Boston embargo party, but there
13 was certainly a Boston tea party.

14 The second thing, textually, in the
15 statute, it's different. "Regulate" appears in
16 a cluster of verbs, as was said before,
17 "investigate," "block," "nullify," and the
18 like. They describe embargo-like controls,
19 "prevent" and "prohibit," for example. But
20 they don't describe revenue exactions. That's
21 Justice Kagan's point. The one verb that's
22 missing here is anything about raising revenue
23 whatsoever.

24 Another point, congressional
25 displacement. Today, there's a whole host of

1 statutes in the tariff architecture of Title 19
2 which both expressly confer the power to tariff
3 and always impose clear limits. Embargoes by
4 the President -- embargoes don't have any of
5 that. They don't set aside that whole thing.

6 If you look at the Learning Resources
7 brief at page 5, it goes through these statutes
8 in detail. Section 122 expressly says "duties"
9 and then limits it, 15 percent, 150 days.
10 Section 201, any duty on the imported article,
11 but it requires ITC findings. Section 301,
12 impose duties. That's the language of the
13 statute, but all sorts of procedural
14 restrictions. Section 338, the same.

15 I can go through this and I could
16 start, by the way, Justice Thomas, with the
17 statutes at the founding, all of which
18 expressly said the word "tariff" or an
19 equivalent.

20 JUSTICE THOMAS: Let's go back to your
21 nondelegation point. It would seem that if
22 it's -- if the power, tariff power, cannot be
23 delegated, your argument on nondelegation would
24 also have to apply to embargoes and to quotas.

25 MR. KATYAL: No, Your Honor, because I

1 think tariffs, because they're uniquely
2 revenue-raising, impose special, unique
3 concerns that go back to our founding. And so
4 I don't think that they apply to embargoes.

5 And, indeed, the history of this is
6 very -- very clear, that as you just heard my
7 friend say, in 1790, George Washington was
8 delegated massive embargo power from the
9 Congress. But what did Congress not do? And
10 this is why the example cuts the other way.
11 They never gave the president any sort of
12 delegation of tariff authority at the time.

13 Our point is not you can't delegate
14 tariff authority. It's simply that you've got
15 to do so with intelligible principles. And
16 what you just heard my friend say is every
17 single limit in IEEPA is one that is not
18 judicially enforceable, there's no limit
19 whatsoever, and, indeed, the main limit that
20 was in there -- he calls this some compromise
21 position -- the only compromise in 1977 was the
22 legislative veto. And, as this case comes to
23 the Court, that's no longer in the statute at
24 all. So --

25 CHIEF JUSTICE ROBERTS: Counsel,

1 you -- yes, sure, the tariffs are a tax and
2 that's a core power of Congress. But they're a
3 foreign-facing tax, right, and that -- foreign
4 affairs is a core power of the executive. And
5 I don't think you can dismiss the consequences.
6 I mean, we didn't stay this case. And one
7 thing is quite clear, is that the
8 foreign-facing tariffs -- tariffs have in
9 several situations been quite --

10 MR. KATYAL: Right, and we are --

11 CHIEF JUSTICE ROBERTS: I'm sorry.

12 MR. KATYAL: Oh, sorry. I'm sorry.

13 CHIEF JUSTICE ROBERTS: Were quite
14 effective in achieving a particular objective.
15 So I -- I don't think you can just separate it.
16 When you say, well, this is a tax, Congress's
17 power, it implicates very directly the
18 President's foreign affairs power.

19 MR. KATYAL: Yeah. Mr. Chief Justice,
20 we're not -- we don't disagree with a large
21 part of that. We think, instead of thinking
22 about foreign versus domestic, the better way
23 of thinking about it is Article I versus
24 Article II. And, as my friend finally conceded
25 to Justice Gorsuch, there is no Article II

1 power here at least when we're talking about
2 peacetime. So --

3 CHIEF JUSTICE ROBERTS: Well, you
4 don't agree with a large part. What's the
5 little part that you do agree with?

6 MR. KATYAL: So we -- we -- we
7 agree -- we agree with the idea that tariffs
8 have foreign policy implications, absolutely.
9 Our founders recognized that. That's in the
10 Federalist Papers. But, nonetheless, they
11 exclusively committed that power to the
12 Congress in Article I, Section 8, and gave it
13 as its first power. So, when you hear my
14 friend cite cases like Egan and Garamendi, they
15 just don't apply to this specific unique
16 situation in which Congress is given that
17 power.

18 And if you were tempted by this, I
19 think -- I think the best place to look is
20 Youngstown because what Justice Jackson said --
21 and I was surprised that he quoted pages 652
22 because what Justice Jackson said is,
23 "Emergency powers tend to kindle emergencies,
24 so it's essential the public may know the
25 extent and limitations of the powers that can

1 be asserted and persons affected may be
2 informed from the statute of its rights and
3 duties."

4 And Justice Jackson went on to say
5 there that it's notable our founders didn't
6 give the -- didn't give the president
7 revenue-raising power even in a time of war.

8 JUSTICE KAVANAUGH: Can I just get a
9 clarification of your answer, which is you
10 agree, if the word "tariff" were in the
11 statute, that would be acceptable and
12 constitutionally permissible, correct?

13 MR. KATYAL: No. Well, it -- it would
14 be -- it'd be constitutionally permissible.
15 The question would then be is the open-ended
16 assertion of power here because every other
17 tariff statute has limitations.

18 JUSTICE KAVANAUGH: Right. I -- I get
19 as applied to this case. But the general point
20 is, yes, Congress -- you say it's assigned to
21 Congress. But Congress can grant authority to
22 presidents to impose tariffs --

23 MR. KATYAL: Absolutely.

24 JUSTICE KAVANAUGH: -- as a general
25 proposition.

1 MR. KATYAL: Absolutely.

2 JUSTICE KAVANAUGH: Okay. So we have
3 to figure out then what "regulate importation"
4 means. And you've heard my questions. If this
5 statute came out of nowhere in 1977, I think
6 your case would be, you know, obviously
7 stronger. We have to figure out, at least I
8 want to figure out, what the Nixon precedent
9 stands for and what Algonquin stands for.

10 On the Nixon precedent, the question
11 is, I think, was Congress aware of that?

12 Meaning that when they used "regulate
13 importation" and it's now being used to
14 encompass tariffs, that's not unheralded
15 because Congress was well aware -- you know,
16 President Nixon announced those tariffs in a
17 nationwide prime-time speech, 10 percent across
18 the board in August 1971. It was not some kind
19 of little piece of paper. So it was
20 well-known.

21 The question then is, was Congress --
22 why didn't they change the language? Why
23 didn't they say "regulate" but not "tariffs"?
24 That's kind of the -- the difficult question
25 from the Nixon precedent that I'll give you an

1 opportunity --

2 MR. KATYAL: Thank you, Justice
3 Kavanaugh. So five answers on the Nixon
4 precedent. First, there is no evidence that
5 Congress thought it was ratifying Yoshida. It
6 was a single court of appeals case, not even a
7 circuit --

8 JUSTICE KAVANAUGH: It's -- it's not
9 so -- my question -- I never mentioned Yoshida.
10 It's the use by the president of that power
11 under "regulate import" -- "importation."

12 MR. KATYAL: Oh. If we're just
13 talking about that, President Nixon did not
14 rely on the statute whatsoever. And that's
15 very clear. In fact, we have a Marshall
16 McLuhan moment here because you have before you
17 Alan Wolff, the person who was there in the
18 room with Nixon, saying Nixon totally disagreed
19 that this statute applied.

20 JUSTICE KAVANAUGH: Okay.

21 MR. KATYAL: So, if we're just talking
22 about Nixon, I don't think it can get the
23 government where it wants to go.

24 JUSTICE KAVANAUGH: The example. Go
25 to your other four. Your other four?

1 MR. KATYAL: Yeah. So I think the
2 only way it does any work is if the
3 President -- is through the -- the vehicle of
4 Yoshida. And that's what I take it --

5 JUSTICE KAVANAUGH: Okay.

6 MR. KATYAL: -- the government is
7 arguing. And with respect to that, this
8 cert-denied intermediate court of appeals
9 decision I don't think can come close to
10 overcoming the clear, plain text. The word
11 "regulate" is -- words "regulate
12 importation" -- the word "regulate" has never
13 been used. It's been -- Congress uses the term
14 1499 times. We got about that number of hits
15 when we looked at it, and maybe there's some
16 double-counting. But it is never used even
17 once to impose taxes or revenue-raising. And
18 that was the question that Justice Barrett was
19 asking. And so I don't think that this
20 intermediate court of appeals decision will get
21 you there.

22 And then, even if you thought that
23 Congress knew about Yoshida and even if you
24 thought they liked it, which there's absolutely
25 zero evidence of, I don't think that helps the

1 government for reasons that Justice Alito was
2 pointing to because Yoshida said three things:
3 (a) TWEA doesn't give the unlimited authority
4 that the government is seeking here; (b) they
5 were only upholding the -- the limited specific
6 assertion of authority that President Nixon
7 sought there; and, third, going forward, the
8 solution they said in Footnote 33 was to use
9 Section 122 of the 1974 Trade Act, 15 percent,
10 150 days.

11 So we have no problem with the
12 President doing that. It's just that this
13 President has torn up the entire tariff
14 architecture. You know, for example, he's
15 tariffing Switzerland, one of our allies, which
16 we have a trade surplus, 39 percent. That is
17 just not something that any president has ever
18 had the power to do in our history. And the
19 idea that Congress, by implication, did this in
20 1977 and handed him all this power, I think, is
21 really difficult.

22 JUSTICE KAVANAUGH: Just --

23 JUSTICE ALITO: Mr. --

24 JUSTICE KAVANAUGH: -- to ask the
25 other --

1 JUSTICE ALITO: -- Katyal --

2 JUSTICE KAVANAUGH: Go ahead.

3 JUSTICE SOTOMAYOR: Mr. --

4 CHIEF JUSTICE ROBERTS: Justice Alito?

5 JUSTICE ALITO: Let's start with just
6 the bare statutory language. You have
7 arguments about structure. You have arguments
8 about history. They're strong arguments, but
9 let's just start with the bare statutory
10 language: "regulate importation."

11 If we disregard all of the rest, would
12 you dispute that that would include the
13 imposition of a fee?

14 MR. KATYAL: So, if it's revenue,
15 yeah, we do dispute that, absolutely.

16 JUSTICE ALITO: What if there were a
17 statute that said -- I mean, suppose that
18 there's a particular national park that's very
19 crowded, and Congress passes a statute that
20 says the National Park Service may regulate
21 admission to the park. Would you say, well,
22 that does not allow them to impose a fee?

23 MR. KATYAL: So, you know, Your Honor,
24 sometimes we think of fees as not
25 revenue-raising but rather capturing the cost

1 of government services, in your example, the
2 going to the park. That may -- you know, those
3 kinds of cases, which I think we've struggled
4 with --

5 JUSTICE ALITO: Suppose it goes beyond
6 the -- the -- the cost of -- of running the
7 park. Congress just wants to control admission
8 to the park, regulate admission. Wouldn't that
9 include the imposition of a fee?

10 MR. KATYAL: So, if -- if it doesn't
11 raise revenue, then -- and it's not about that,
12 then I think that's fine. If it does --

13 JUSTICE ALITO: It -- it raises
14 revenue. That's the --

15 MR. KATYAL: -- then I think it's a
16 tougher --

17 JUSTICE ALITO: -- that's the
18 hypothetical. That wouldn't -- that wouldn't
19 apply?

20 MR. KATYAL: So I think -- I think in
21 that circumstance that it wouldn't be a
22 regulation in context and wouldn't be
23 permitted. That is, at least in the context of
24 tariffs and trade, we know, Justice Alito, from
25 the founding on --

1 JUSTICE ALITO: Okay. Well, that --
2 that gets into your other arguments. We start
3 out with the bare statutory language, and
4 that's -- that was what my question was about.

5 Do you think all tariffs are
6 revenue-raising? Suppose that instead of
7 imposing these -- these across-the-board
8 tariffs, suppose that an executive order
9 imposed a tariff on one particular country and
10 provided that this would take effect in 90
11 days. And suppose that within those 90 days an
12 agreement is reached with that country so that
13 no tariff -- no -- no tariff is ever collected.

14 Would that be a revenue-raising
15 tariff?

16 MR. KATYAL: I take it the initial
17 point was and on its face it is
18 revenue-raising, that that's what it's for, and
19 so I think that would.

20 And, look, I don't doubt that there
21 are edge cases. That is what this Court
22 confronted just recently in FCC versus Consumer
23 Research. And you said, look, what is a tax is
24 sometimes very hard, what is revenue-raising.

25 This is obviously revenue-raising.

1 Their own brief to the Court says it's going to
2 raise \$4 trillion.

3 And, Justice Alito, you in your
4 Consumers Research dissent or Justice Gorsuch's
5 dissent that you joined said taxation is
6 special and different and it is the most
7 powerful thing the government does.

8 And the idea that Congress, when they
9 know exactly how to write tariff and tax
10 statutes, gave this power by implication
11 through the word "regulate" I think is very,
12 very hard to --

13 JUSTICE ALITO: Well, you -- you cite
14 many different statutory provisions that impose
15 tariffs, and -- and you have a point if that's
16 the relevant universe.

17 What if the relevant universe is
18 tariffs that are imposed in emergency
19 situations?

20 MR. KATYAL: Yes. So I think it cuts
21 the other way. So, you know, as Justice
22 Jackson said, it's -- when you're in an
23 emergency situation, the statutes actually have
24 to speak with more precision. The public needs
25 to know because emergencies beget emergencies.

1 And I would say the best way of
2 understanding what Congress does in emergencies
3 is to look at their emergency statutes. Not
4 one has ever given the president a taxation
5 power or a tariff power. We've had all sorts
6 of emergencies for 238 years. No president has
7 ever said, oh, the way to deal with that is I
8 need to have a tariff authority.

9 And, as Justice Sotomayor said, IEEPA
10 gives already a quota power. So you can get
11 what the foreign policy piece of it is through
12 that.

13 I'd also say, Justice Alito, Dames &
14 Moore, which the Chief Justice referred to
15 earlier, I think is really important here
16 because the Solicitor General in that case made
17 a similar argument to what you just heard on --
18 on the claims provisions. He said it falls
19 within "regulate." "Regulate" is a capacious
20 term. He said, Justice Alito, what you said,
21 this is an emergency situation. And he said
22 you've got to defer to the President on a major
23 issue of national security about this very
24 statute. And what did the Court do? It
25 rejected those arguments and said IEEPA doesn't

1 cover this --

2 JUSTICE ALITO: You say that this is
3 not -- this case does not -- these executive
4 orders do not address an unusual and
5 extraordinary threat. I understand that
6 argument.

7 Suppose that the facts were that it
8 was in -- suppose that there was an imminent
9 threat of war, not a declared war but an
10 imminent threat of war with a very powerful
11 enemy whose economy was heavily dependent on
12 U.S. trade.

13 Could a president under this provision
14 impose a tariff as a way of trying to stave off
15 that war, or would you say, no, the president
16 lacks that power under this provision?

17 MR. KATYAL: Couldn't do tariff but
18 could do quota, embargo, all of those things.

19 JUSTICE ALITO: Could do all those
20 things, but the president could not impose a
21 tariff.

22 MR. KATYAL: Because there's a cat --

23 JUSTICE ALITO: That's the one thing
24 he couldn't do.

25 MR. KATYAL: There's a category shift

1 between a tariff and the other eight powers in
2 IEEPA because it is revenue-raising. So it's
3 not a difference in degree or something like
4 that.

5 That's why, you know, I don't doubt
6 tomorrow --

7 JUSTICE ALITO: Even if the purpose of
8 this had nothing whatsoever to do with raising
9 one penny. The president didn't want to raise
10 one penny. The president wanted to deter
11 aggression that would bring the United States
12 into war.

13 MR. KATYAL: Just --

14 JUSTICE ALITO: You would say no,
15 can't do that?

16 MR. KATYAL: Yeah, Justice Alito, I
17 think you've said many times the purpose isn't
18 what you look at. You look to actually what
19 the government is doing.

20 And if you disagree, if you think
21 we're -- you know, if you think -- or, excuse
22 me, if -- if -- if you ruled for us and the
23 president says, I need this power, he could go
24 across the street to Congress tomorrow and get
25 it by a simple majority through reconciliation.

1 But, if you vote for them, this power,
2 as Justice Gorsuch said, as Justice Barrett
3 said, is going to be stuck with us forever.
4 The power to --

5 JUSTICE GORSUCH: Mr. Katyal, I
6 want --

7 JUSTICE KAVANAUGH: Can I ask you --
8 go ahead.

9 JUSTICE GORSUCH: Okay. I just wanted
10 to give you a chance to address kind of the
11 other argument that's been submerged here
12 textually, again, just bare text for a moment,
13 okay?

14 We've been focused on "regulate
15 importation," but, actually, the statute says
16 the President may by means of licenses or
17 otherwise regulate importation.

18 And we've had some discussion today
19 about the fact that maybe the President could
20 simply recharacterize these tariffs as licenses
21 or rejigger the -- the -- the scheme so that
22 they are licenses.

23 We've also heard the suggestion that
24 otherwise, you know, licenses and -- and -- and
25 tariffs are very similar, so "otherwise" might

1 encompass tariffs there. Thoughts?

2 MR. KATYAL: Yeah, a few thoughts,
3 Justice Gorsuch.

4 First is the SG is not even making
5 that argument, and I think they're not making
6 it for a number of reasons.

7 One is that there's a strong
8 presumption against reading statutes this way.

9 In the unique tax and duties context, Hartranft
10 is one of those cases which says, if there's
11 doubt, you don't read the statute to confer
12 such powers.

13 Second, if you were to do that, it's
14 open-ended. It allows -- and this is your
15 hypothetical -- it allows under the word
16 "license" them to tariff the world, you know,
17 and -- and --

18 JUSTICE GORSUCH: It seems like you're
19 putting a major questions thumb or an
20 interpretive lens thumb on the plain text
21 there. Is that fair?

22 MR. KATYAL: I think it's -- I think
23 you could call it major questions. I just
24 think it's like Justice Barrett said in
25 Nebraska versus Biden the most natural way of

1 understanding what this statute is about.

2 We're talking about, under the
3 government's reading, a statute that gives the
4 power to the President to junk the entire
5 tariff --

6 JUSTICE GORSUCH: No, I -- I
7 understand that, but you're not disputing
8 "licenses or otherwise" means what it says.
9 You're -- you're -- you're saying that we
10 should interpret that narrowly for particular
11 reasons.

12 MR. KATYAL: So I think -- well, I
13 think I am disputing it as well. I think the
14 licenses is something Justice Sotomayor was
15 saying don't expand the power. They are not
16 verbs. And so it is limited to the nine verbs
17 there.

18 JUSTICE GORSUCH: No, I understand
19 that.

20 MR. KATYAL: And so "regulate," I
21 don't think --

22 JUSTICE GORSUCH: Thank you.

23 MR. KATYAL: Yeah.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Justice Thomas, anything further?

2 JUSTICE THOMAS: I'd like to just
3 revisit the point that Justice Alito was making
4 with a similar question.

5 If one of our major trading partners,
6 for example, China, held a U.S. citizen
7 hostage, could the President, short of
8 embargoing or setting quotas, say the most
9 effective way to gain leverage is to impose a
10 tariff for the purpose of leveraging his
11 position to recover our hostage?

12 MR. KATYAL: No, Your Honor. So
13 tariffs are different because they're
14 revenue-raising, and they're -- and I think it
15 goes to the point I was saying to you in our
16 very first colloquy, which is quotas,
17 embargoes, and stuff are different for a
18 different reason, which is there's no -- there
19 is a tariff architecture around Title 19, in
20 Title 19, that a tariff would -- like in your
21 hypothetical, would supersede.

22 And, here, the President is seeking
23 the power to set aside all of our trade
24 treaties unilaterally under the word
25 "regulate." I just don't think it can bear

1 that weight.

2 JUSTICE THOMAS: That's it.

3 CHIEF JUSTICE ROBERTS: Justice Alito?

4 JUSTICE ALITO: You mentioned other
5 tariff provisions that you think would be
6 rendered redundant if we adopted the
7 government's interpretation of IEEPA. One that
8 you didn't mention, which is discussed in an
9 amicus brief, is Section 338 of the Tariff Act
10 of 1930.

11 Why doesn't the plain language of that
12 provision, which does speak specifically about
13 duties, provide a basis for all or virtually
14 all of the tariffs that are at issue here?

15 MR. KATYAL: Yeah. The government's
16 never made that argument, Justice Alito, and I
17 think for very good reason, because it only
18 applies to MFN violations, which are not at
19 issue here. You can only tariff if the
20 President "finds as a fact that a country
21 satisfies two conditions, including that it
22 discriminates against the United States."

23 There are all sorts of hosts of other
24 reasons why Section 338 may have lapsed and
25 that's why no President has ever used it. But,

1 look, we are --

2 JUSTICE ALITO: What is the -- what is
3 the argument that it's lapsed? It's -- it's
4 regrettable -- I mean, we put this case on a
5 very expedited schedule and, therefore, there
6 are limitations on what -- and the parties'
7 ability to answer each other's arguments or
8 arguments that are made by amici.

9 The -- the amicus brief says that it
10 hasn't lapsed. There are articles that say it
11 hasn't lapsed. What is your argument -- what
12 is the basis for your argument that it lapsed?

13 MR. KATYAL: So two things, Justice
14 Alito. Sections 252 and 301 have been
15 understood by many to have superseded Section
16 338. And, second, I don't think you have to
17 get into this issue at all. We're not here
18 saying that the government doesn't have a
19 330 -- 338 power. That's something that can be
20 decided by other courts at other times.

21 As these folks come to the Court, as
22 the government comes to the Court today,
23 they're citing one statute and one statute
24 only, IEEPA, and we submit to you it doesn't
25 come even close to authorizing these worldwide

1 tariffs that they're seeking today.

2 JUSTICE ALITO: Well, what if the
3 President tomorrow were to say, I'm reissuing
4 these executives orders and -- and I'm
5 invoking, in addition to other authorities,
6 Section 338 of the Tariff Act of 1930?

7 MR. KATYAL: So I think, at that
8 point, we'd have that case. I mean, I'm not
9 here to say that 338 does or doesn't do one
10 thing. I'm responding to the government's
11 argument, which is the invocation of IEEPA and
12 IEEPA alone.

13 But perhaps that point, Justice Alito,
14 may give them some comfort --

15 JUSTICE ALITO: So then, I -- I -- I
16 mean, I understand party presentation and --
17 and all of that and not being a court of first
18 view, but, in these circumstances, if that were
19 to happen and it might be a realistic
20 possibility, you think, well, okay, then the
21 government would continue to try to collect
22 these tariffs and the plaintiffs here would
23 have to go back to the Court of International
24 Trade or the district court and challenge it
25 again, and it would have to progress through

1 those lower courts and come back to us when, a
2 year from now, six months from now, while the
3 tariffs continue to be collected and the amount
4 that's at stake mounts into the billions? I
5 mean, what are we at now? A hundred billion?
6 We get up to -- up to a trillion? That's what
7 you're suggesting?

8 MR. KATYAL: So, Justice Alito, I
9 think a few things. One is I think it's rich
10 for the government to be making this argument
11 about the refunds undermining us because they
12 opposed a preliminary injunction in this case
13 by saying, oh, don't worry, we'll give the
14 refunds later and they sought a stay in the
15 Federal Circuit on exactly that ground, which
16 was you don't need to do -- you don't need to
17 implement the Federal Circuit's decision
18 because we'll give the refunds later on. And
19 now they're suggesting that the reason it's too
20 late --

21 JUSTICE ALITO: Well, that really
22 wasn't -- that wasn't my question, Mr. Katyal.
23 The question was whether it would make more
24 sense for us to address that if that is a
25 possible justification for these tariffs, for

1 us to address that now --

2 MR. KATYAL: I --

3 JUSTICE ALITO: -- and get it over
4 with rather than having this continue for who
5 knows how long while it goes through the --
6 through the procedures in the lower courts.

7 MR. KATYAL: Justice Alito, I think
8 that is forfeit -- forfeited nine ways to
9 Sunday. This amicus brief has been filed in
10 every single stage of this case. The
11 government's never embraced that argument. For
12 them to be able to do so now, I think, is -- is
13 way, way too late. But I do think, if you
14 ruled, as we're suggesting you do, against the
15 government, they can go and try and seek to use
16 other authorities, whether it's 338, Section
17 122, et cetera. Those are the ways prescribed
18 by the Congress.

19 And, as Justice Kavanaugh was saying
20 earlier, every other president has used all
21 this suite of other authorities, 201 for steel,
22 for -- for autos and things like that; 301 for
23 countries like China. This President has come
24 along and said something different, and with
25 all due respect, we don't think IEEPA allows

1 him to do this juking of the worldwide tariff
2 architecture.

3 JUSTICE ALITO: And what was the
4 view -- what were the views of President
5 Trump's immediate predecessors on the question
6 of imposing tariffs or allowing free trade?
7 What was their policy view on that question?

8 MR. KATYAL: There's been a variety of
9 different views about that, but, you know, the
10 executive or -- my friend said, well, prior
11 presidents had no occasion to use the tariff
12 power, which is belied by the very executive
13 order he's defending here, which says that the
14 trade deficits have been large and persistent
15 every single quarter since 1976. And we've had
16 trade wars. President Reagan initiated, you
17 know, different ones and the use of different
18 authorities. But never once did a president
19 try and seek IEEPA as the basis to rewrite the
20 entire tariff code.

21 JUSTICE ALITO: I found it interesting
22 to hear you make the nondelegation argument,
23 Mr. Katyal. I -- I wonder if you ever thought
24 that your legacy as a constitutional advocate
25 would be the man who revived the nondelegation

1 argument.

2 (Laughter.)

3 MR. KATYAL: Heck, yes, Justice Alito.

4 I think Justice Gorsuch nailed it on the head
5 when saying that when you're dealing with a
6 statute that -- that is this open-ended, unlike
7 anything we've ever seen to give the President
8 this kind of power, yes, this isn't just
9 delegation running riot; this is delegation
10 that's a legislative abdication.

11 JUSTICE ALITO: I mean, wouldn't
12 you -- wouldn't you agree that statutes that
13 confer on the President real emergency powers
14 are often phrased much more broadly than other
15 statutes? Isn't that the very nature of an
16 emergency? I know you dispute the fact that
17 this is a real emergency. Maybe it's not. But
18 isn't it the very nature of an emergency
19 provision that it's going to be more
20 open-ended?

21 MR. KATYAL: So, Justice Alito, we
22 think it actually cuts the other way, as I was
23 saying earlier. That's what Justice Jackson
24 said. And, you know, you already confronted
25 that in Dames & Moore and said it's not that

1 open-ended even though it's an emergency.

2 And, by the way, other emergency
3 statutes have very serious limits. Section 122
4 is literally about President Nixon's
5 proclamation of an emergency. That's what it's
6 about. And it's limited 15 percent, 150 days.

7 JUSTICE ALITO: And what about the
8 authorization for the use of military force in
9 2001, which gave the president the power to use
10 all appropriate force? Now that's pretty
11 open-ended. You -- would you apply the same --
12 the same nondelegation argument there that you
13 do here?

14 MR. KATYAL: Of course not because
15 there, you have shared powers between the
16 President and Article I and Article II powers.
17 That's what I was saying to the Chief Justice.

18 JUSTICE ALITO: Well, it gets into the
19 question of whether it was delegated or not,
20 what was the scope of the delegation.

21 MR. KATYAL: Absolutely. But -- but
22 there, you know, it's military. There's a
23 whole unique history behind that. But, here,
24 you're talking about something that is
25 exclusively committed to Congress in Article I.

1 And there, yes, when you have delegations, I
2 would say, Justice Alito, even when you have
3 delegations in some military cases, in
4 emergency statutes, they have all sorts of
5 limits. So -- so 10 U.S.C. 2808 says that in a
6 declaration of war or a national emergency, the
7 president can "undertake military construction
8 necessary to support emergency use of the armed
9 forces" --

10 JUSTICE ALITO: All right. Thank --
11 thank you very much. Thank you.

12 MR. KATYAL: -- but it has limits.

13 CHIEF JUSTICE ROBERTS: Justice
14 Sotomayor?

15 JUSTICE SOTOMAYOR: I'm fascinated
16 that the two instances where presidents have
17 used their war powers to impose a tariff,
18 Lincoln and Nixon, that Congress found it
19 necessary to ratify their actions and that the
20 court in both those cases, the intermediate
21 court of appeals in Nixon and our own Court,
22 included that as part of their reasoning as
23 justifying the use of war power in that
24 situation.

25 So I'm a little concerned why the fact

1 that this Act, a domestic Act on an emergency,
2 that uses a word, a general word, like
3 "regulate" should take on a war powers meaning
4 when, in every other situation, whenever
5 Congress intended domestic tax -- taxation, it
6 said "tax" and "regulate."

7 MR. KATYAL: Oh, Justice Sotomayor, I
8 wish I had an hour to talk about this with you
9 because this is just -- this argument by the
10 government, advanced in their reply brief, is
11 wrong, you know, every which way. So --

12 JUSTICE SOTOMAYOR: I'm saying that's
13 another -- that's your sixth way of
14 differentiating Yoshida, correct?

15 MR. KATYAL: So --

16 JUSTICE SOTOMAYOR: That was a war
17 powers case, TWEA --

18 MR. KATYAL: So it's a war powers
19 case. It's about conquered territory. It has
20 nothing to do whatsoever with domestic tariffs.
21 And absolutely, you're right in saying that the
22 way that court even in those cases, even at the
23 height of the government's power, war powers,
24 they said Congress had to ratify it. And
25 that's what at page 96 it was --

1 JUSTICE SOTOMAYOR: And that hasn't
2 happened here.

3 MR. KATYAL: And that has not happened
4 here, not even close.

5 JUSTICE SOTOMAYOR: Well, it might not
6 with Congress closed, but -- they can't even
7 think about it right now.

8 (Laughter.)

9 JUSTICE SOTOMAYOR: I -- I'm going to
10 assume, and maybe he can shake his head yes or
11 no, that Justice Kavanaugh will ask you to go
12 to Algonquin, which you didn't answer, and he's
13 shaking his head, so I'll let him do that part,
14 okay?

15 (Laughter.)

16 MR. KATYAL: Excellent. Algonquin,
17 Your Honor, is, you know, under --

18 JUSTICE SOTOMAYOR: No, I'll let him
19 do it.

20 (Laughter.)

21 MR. KATYAL: Oh. Oh, sorry.

22 JUSTICE SOTOMAYOR: He can --

23 CHIEF JUSTICE ROBERTS: We'll --

24 JUSTICE SOTOMAYOR: It was his
25 question, but I want to make sure you get to

1 it.

2 CHIEF JUSTICE ROBERTS: We'll hear
3 from Justice Kagan first.

4 JUSTICE KAGAN: I have one specific
5 question, one more general question. The
6 specific question is, does it matter in the way
7 we think about IEEPA what Congress thought it
8 was doing in IEEPA, what -- what IEEPA, in
9 fact, did, that at the time Congress thought it
10 had available to it a legislative veto?

11 MR. KATYAL: I do think it's relevant
12 at least for delegation purposes because, you
13 know, as this case comes to the Court, the one
14 check that was in there, the so-called
15 compromise, is a legislative veto which now no
16 longer exists. And that's why I said to
17 Justice Alito this statute now looks unlike any
18 other statute with respect to tariffs.

19 JUSTICE KAGAN: I -- I guess I'm
20 wondering whether, though, it cuts against you
21 as well that Congress thought it had a
22 legislative veto, so it didn't put in a variety
23 of checks that it might have put in had it not
24 thought it had a legislative veto, and, you
25 know, that's just tough luck on Congress now.

1 MR. KATYAL: Yeah, I don't think so.
2 I mean, Justice Kagan, I think that's a very
3 tough common-sense argument to make because
4 every single delegation of tariffs -- tariff
5 power statute from Congress to the president
6 always has limits and including, you know,
7 Section 122 passed just right before IEEPA, had
8 in the case of the exact problem that this
9 executive order is dealing with, large and
10 serious trade deficits, it said the way to deal
11 with it is 15 percent, 150 days.

12 The idea that three years later they
13 just said, oh, no, junk the rule book, I think
14 is very difficult, and no Congress, I think,
15 would rely just on the legislative veto for
16 such -- a thing of such momentous importance.

17 As you said to my colleague earlier,
18 why would any president look to -- look to all
19 of the different tariff statutes in Title 19 if
20 you can just IEEPA them all, French Revolution
21 them all.

22 JUSTICE KAGAN: General Sauer rests a
23 lot on the President's inherent authority. And
24 I want to make sure I understand your answer to
25 the Chief Justice and to Justice Alito as to

1 where you think that authority exists in a way
2 that actually would affect our interpretation
3 of a statute and where you think it doesn't and
4 why this falls into the second category given
5 that in General Sauer's view, this is obviously
6 what the Chief Justice called foreign-facing.

7 MR. KATYAL: Yeah. So it may be
8 foreign-facing, but there is still no Article
9 II power whatsoever. There is no citation
10 whatsoever in the government's brief to any
11 notion that the President has Article II tariff
12 authority.

13 Now, look, I will say in wartime,
14 conquered territory, maybe. But this is not
15 a -- this is not a wartime or conquered
16 territory statute. This is -- use of the
17 statute, they are tariffing the entire world in
18 peacetime and they are doing it and asserting a
19 power that no president in our history has ever
20 had. Even Justice Kavanaugh's example of
21 Nixon, really far more limited, didn't blow
22 past Congress's limits, as was said in Yoshida.
23 This is a whole different animal.

24 And maybe Congress has that power, as
25 I agree with Justice Gorsuch. I don't think

1 that it does. But, boy, they've got to say so
2 really clearly. And, here, there's nothing
3 like that in the text of IEEPA.

4 JUSTICE KAGAN: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Gorsuch?

7 JUSTICE GORSUCH: Well, I don't know
8 if I agree with what you say I say, but, at any
9 rate --

10 (Laughter.)

11 JUSTICE GORSUCH: -- back to the plain
12 language. And -- and just stick with me for a
13 moment. You know, with the -- the -- the
14 Constitution says that Congress gets to
15 regulate commerce, and everybody understood
16 that that meant it included the power to
17 tariff. Story, Madison, okay?

18 So that -- that's sort of a -- a
19 problem, right? "Regulate" is a capacious
20 verb. And -- and then you've got the
21 "otherwise" language as well, which we've sort
22 of discussed.

23 And just on the plain language, forget
24 about the backdrop of major, do you need major
25 questions to win? I kind of -- I kind of think

1 you might.

2 MR. KATYAL: No, I don't think so. I
3 mean, if we did, we would -- I think we'd win
4 for reasons expressed. But I don't think so at
5 all. So, Justice Gorsuch, our position is not
6 that "regulate" can never mean tax or tariff.

7 JUSTICE GORSUCH: Okay.

8 MR. KATYAL: Our brief at page 15
9 gives you an example. A president may regulate
10 cars coming into the city and then, if it adds
11 by charging tolls or something like that,
12 absolutely. In context, it does.

13 Here, the context you're referring to,
14 Story and so on, says nothing about this case.
15 That is the constitutional context about
16 Congress's use of power.

17 JUSTICE GORSUCH: But it's part of how
18 we understand language is used, and -- and it's
19 relevant for that purpose. And -- and then,
20 when you've got licenses, which are
21 economically the same thing as -- would you
22 agree they're basically economically the same
23 thing as tariffs?

24 MR. KATYAL: Sometimes they can be
25 revenue-raising in the same way.

1 JUSTICE GORSUCH: Okay. So you've got
2 something that's economically identical to a
3 tariff authorized by this statute.

4 MR. KATYAL: So --

5 JUSTICE GORSUCH: Where does that
6 leave you --

7 MR. KATYAL: So let me --

8 JUSTICE GORSUCH: -- as a matter of
9 plain language?

10 MR. KATYAL: -- let me take the
11 question in two parts. One is about the -- the
12 word "regulate" and the other is about
13 licensing.

14 With respect to the word "regulate,"
15 when it's used in the constitutional sense,
16 it's very different than the sense in IEEPA
17 that my friend is asserting. When we're
18 asserting IEEPA, we're talking about a statute
19 that is granting the President massive powers.
20 And so the relevant context that I think you
21 look at in asking the question what did
22 Congress mean in 1977, the best context, the
23 most natural context is what does Congress say
24 every time they grant the president such power.

25 JUSTICE GORSUCH: I understand that.

1 I understand.

2 MR. KATYAL: And then there's just one
3 other point on this. Constitutions are read
4 totally differently. Story and Madison are
5 talking about the constitutional phrase, and as
6 Chief Justice Marshall said in McCulloch, a
7 constitution we're expounding the prolixity of
8 a legal code is the opposite of the way you
9 read the Constitution.

10 JUSTICE GORSUCH: Yeah. I -- I -- I
11 do follow that argument.

12 MR. KATYAL: Okay.

13 JUSTICE GORSUCH: Okay.

14 MR. KATYAL: And --

15 JUSTICE GORSUCH: What -- what about
16 "otherwise" again? I just really want to make
17 sure I understand, you say that there's --
18 there's a good reason why the Solicitor General
19 didn't make that argument. I'll be curious to
20 see what he has to say about that, but, you
21 know, what's your best reasoning of why
22 other -- the "otherwise" language
23 doesn't capture this?

24 MR. KATYAL: Because it's only a
25 mechanism to implement the nine powers. And

1 that license sometimes can be revenue-raising
2 and sometimes not.

3 JUSTICE GORSUCH: Yeah.

4 MR. KATYAL: And so --

5 JUSTICE GORSUCH: So, if licenses can
6 be revenue-raising and you can do this
7 otherwise through revenue-raising things, why
8 wouldn't that capture tariffs?

9 MR. KATYAL: So because I think,
10 again, our point to you is that -- that
11 Congress -- that license -- that there's two
12 kinds of -- two -- licenses come in two
13 flavors. If the -- if an executive order is
14 asserting a license fee to recoup the cost of
15 government services or something like that, as
16 I was saying to Justice Alito, that doesn't
17 look different than the other verbs. That's
18 not revenue-raising. It doesn't implicate the
19 founders' concern. It doesn't implicate the
20 concerns you wrote about in Consumers' Research
21 about the fear of the government --

22 JUSTICE GORSUCH: Well, you're not
23 answering my question, though, Mr. Katyal. I'm
24 talking about just the plain text here. And
25 you're moving to a major questions or a

1 nondelegation. That's the move you're making,
2 which I think, you know, fine, we can consider
3 that. I'm just talking about on the text,
4 okay? It says by means of licenses or
5 otherwise. You've conceded that licenses are
6 economically equivalent to tariffs. And the
7 statute says by means of licenses or otherwise
8 regulate.

9 MR. KATYAL: Right. It's only a
10 means, and we looked at the history --

11 JUSTICE GORSUCH: Yeah, it's a means.

12 MR. KATYAL: Yeah.

13 JUSTICE GORSUCH: Why isn't tariffs a
14 permissible means on -- on the statute?

15 MR. KATYAL: Because, again, it has to
16 be related to the nine powers that are given
17 there.

18 JUSTICE GORSUCH: Well, a license can
19 be. We all have -- we have to acknowledge
20 that. And you've said a license can raise
21 revenue and you've said a license is equivalent
22 to a tariff economically. So what about
23 otherwise?

24 MR. KATYAL: Justice Gorsuch, if
25 the -- if the license where the otherwise is

1 raising revenue, then it is a difference in
2 kind from the other verbs, and we looked at the
3 history of licenses --

4 JUSTICE GORSUCH: These aren't verbs
5 either.

6 MR. KATYAL: -- under TWEA and we were
7 not able to find any involving licenses or
8 license fees.

9 JUSTICE GORSUCH: Okay. Last
10 question, a little further afield. The parties
11 discuss a little bit the analogy to the Foreign
12 Commerce Clause. Of course, next to it is the
13 Indian Commerce Clause.

14 And delegations there were very broad
15 initially and involved licenses once again.

16 And -- and why -- why shouldn't that inform our
17 understanding of the Foreign Commerce Clause?

18 MR. KATYAL: I don't know that I have
19 a position on that. It maybe is a little too
20 afield for me to --

21 JUSTICE GORSUCH: Well, if the
22 President has broad authority in one part of
23 the Commerce Clause, why wouldn't he in -- in
24 the next-door neighbor?

25 MR. KATYAL: Oh, I see, because, here,

1 Congress has specifically been given the
2 exclusive power over tariffs. And so, if they
3 were to part with it, I think, as this Court
4 has said in J.W. Hampton, which is a tariffs
5 case --

6 JUSTICE GORSUCH: So you'd say --
7 you'd say the same principle would apply with
8 tariffs with the Indian Commerce Clause? It is
9 a tariff-specific argument?

10 MR. KATYAL: I think it's -- at least
11 the intelligible principles is what this Court
12 has used for tariffs specifically, and we think
13 that's the way you should look at this. And
14 then, under intelligible principles, this is
15 miles away from any delegation we have ever
16 seen.

17 JUSTICE GORSUCH: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Kavanaugh?

20 JUSTICE KAVANAUGH: Just on the Nixon
21 point, because you said, I think, that the
22 current tariffs are unprecedented, I mean, that
23 was a 10 percent worldwide tax on every import
24 into the United States, I believe. I mean, we
25 don't need -- I just think that's a fact. You

1 have arguments about that, you made good
2 arguments about that, but I just wanted that
3 point to be -- to be clear.

4 On -- on Algonquin, to pick up on
5 Justice Sotomayor's kind assist --
6 (Laughter.)

7 JUSTICE KAVANAUGH: -- your argument
8 here is that the statute has to use the word
9 "tariffs," I think, basically. And we went
10 through Nixon and Yoshida, but then Algonquin,
11 the statute for 232 does not use the word
12 "tariffs." It uses "adjust imports."

13 And President Ford had imposed, again,
14 a pretty significant tariff on oil imports. It
15 was challenged. It got to this Court. The
16 attorneys standing where you are stood up and
17 said "the license fee now before the Court
18 involves the broadest exercise of the tariff
19 power in the history of the American republic.
20 In fact, we would have to go back to George the
21 III's stamp tax to determine as broad an
22 executive power as claimed in this case. The
23 statute is the simple one. It does not mention
24 the tariff on its face."

25 The argument there was the word

1 "tariff" was not mentioned, it used "adjust
2 imports." The Court, obviously 9-0, rejects
3 that argument, in part because, as others
4 have -- have pointed out, the Court does a lot
5 of questioning, well, what's the difference
6 between a quota and a tariff and what's the
7 difference between an embargo and a tariff?

8 And so, when -- when the Court writes
9 the opinion, it says, "We find no support in
10 the language of the statute," the language,
11 "for respondents' contention that the
12 authorization of the President to 'adjust'
13 imports should be read to encompass only
14 quantitative methods -- i.e., quotas -- as
15 opposed to monetary methods -- i.e., license
16 fees -- if affecting such adjustments."

17 So, on your basic point that you need
18 the word "tariff," Algonquin says you don't
19 need the word "tariff." And that was President
20 Ford's oil imports. It's 9-0. The oral
21 argument goes through this. Your answer?

22 MR. KATYAL: There's a lot there,
23 Justice Kavanaugh, so please bear with me.

24 First, I'd like to just clear --

25 JUSTICE KAVANAUGH: I will.

1 MR. KATYAL: -- clarify what our
2 position is generally and then deal with
3 Algonquin.

4 Our position is not that you have to
5 use the word "tariff" or any other magic word.
6 It's true that Congress has used a specialized
7 vocabulary since the founding, since 1790,
8 using words like "tariffs" or "duties," but as
9 I was saying earlier to Justice Gorsuch, you
10 could even use the word "regulate," as page 15
11 of our brief says, or you could even imagine
12 something that says, "the President may
13 regulate importation by requiring importers to
14 pay 10 percent of the value of goods to the
15 Treasury." So I don't think you have to use
16 any particular word.

17 The question is, in context, is it --
18 does it --

19 JUSTICE KAVANAUGH: But Algonquin
20 didn't have anything like that, but keep going.

21 MR. KATYAL: So Algonquin does have, I
22 think, a context that's miles apart from what
23 the -- what the government is seeking here to
24 do with IEEPA. So, first of all, it is a
25 common-sense statute. I understand there's

1 some rhetoric by -- a common-sense reading of
2 the statute. I know there's some rhetoric by
3 the lawyer who stood here before, which is, of
4 course, forgivable, but it was a statute about
5 one product, 232, article by article. It's one
6 product. This is a billion products or even
7 more than the government is seeking.

8 Algonquin was expressly a trade
9 statute. It was the 1962 Trade Act. It's
10 everything this case isn't. Algonquin had a
11 specific reference to the word "duties" in a
12 separate provision.

13 Algonquin had a legislative history
14 that was clear as day that the President was --
15 the President was given this power. And I
16 understand this Court today doesn't look to the
17 legislative history, but the way Algonquin got
18 to where it was was by saying the legislative
19 history, the chief sponsor of the act --

20 JUSTICE KAVANAUGH: I think I'll
21 disagree with you on that. It does the plain
22 text and then says, is there anything in the
23 legislative history to defeat the plain text?
24 So I disagree pretty strongly with you on that,
25 but it doesn't defeat your point. Keep going.

1 MR. KATYAL: Okay. So I'd also say,
2 and maybe the most important point, 232 -- our
3 point -- our argument is not just that you have
4 to specifically authorize a tariff with some
5 sort of word but also that one way of
6 understanding whether Congress is delegating
7 its awesome tariff power, its awesome taxing
8 power is to ask are there limits to what
9 Congress has put in.

10 And in Algonquin, in Section 232, the
11 Court points to and goes painstakingly through
12 all the limits. The first words of the
13 decision are all about how constrained the
14 statute is. It's a reticulated scheme. The
15 cabinet secretaries have to make certain
16 findings. There are specific statutory factors
17 Congress says the President must look at before
18 acting. There are public hearings. There are
19 limited remedies "to the extent necessary."

20 All of that is in the statute. All of
21 that is in the Algonquin opinion. None of it
22 is in IEEPA. That's the problem.

23 And that's why just like Dames &
24 Moore, the Algonquin case said this is a very
25 limited decision limited just to the facts.

1 JUSTICE KAVANAUGH: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Barrett?

4 JUSTICE BARRETT: So this license
5 thing is important to me. And do you agree
6 that pursuant to IEEPA, the President could
7 impose -- could regulate commerce by imposing a
8 license fee?

9 MR. KATYAL: Sorry. Could you say
10 that again?

11 JUSTICE BARRETT: Could the President
12 regulate commerce under IEEPA by using a
13 licensing fee?

14 MR. KATYAL: Not a fee. So I should
15 have said this earlier, but license is
16 different from a licensing fee. IEEPA and TWEA
17 authorize licenses, not license fees. And no
18 president has ever charged, to my knowledge,
19 fees under those two statutes for the licenses.
20 So fee is impermissible. License is okay.

21 JUSTICE BARRETT: Fee is permissible
22 if they cover the cost of the scheme?

23 MR. KATYAL: Might be. Might be, I
24 mean, but -- but, once they start
25 revenue-raising, you implicate the most serious

1 concerns --

2 JUSTICE BARRETT: But I thought you
3 conceded to Justice Gorsuch there was no
4 difference between a tariff and a licensing fee
5 functionally.

6 MR. KATYAL: If -- if the licensing
7 fee is just to -- I didn't concede that.

8 JUSTICE BARRETT: Okay.

9 MR. KATYAL: So, if the licensing fee
10 is just to recoup the cost to government
11 services, I think that may be okay. I don't
12 think you need to get into it. Here, the
13 government is asserting a power which they say
14 in their briefs to you raises \$4 trillion.

15 JUSTICE BARRETT: So you understand
16 the statute to permit licensing in the sense of
17 permission, like we will not allow you to trade
18 with us, we will not allow your goods to be
19 imported unless we license it?

20 MR. KATYAL: Absolutely. And, Justice
21 Barrett, I think, like, just the natural
22 reading, if you're to look at the word
23 "licenses" and think, wow, Congress smuggled
24 this incredible power to do all of these
25 different things that the government is doing

1 here, 39 percent taxes on some countries and
2 others through the word "license," that's a
3 tough one.

4 JUSTICE BARRETT: Can you license
5 exportation?

6 MR. KATYAL: I don't think so for the
7 reason that, you know, it would be --

8 JUSTICE BARRETT: Well, right now -- I
9 actually looked into this.

10 MR. KATYAL: Well, it depends.

11 JUSTICE BARRETT: I mean, I think
12 you -- maybe not licensing fees.

13 MR. KATYAL: Fees, exactly.

14 JUSTICE BARRETT: But could you
15 license exportation like saying we're not going
16 to allow certain products that have national
17 security implications to be exported?

18 MR. KATYAL: Yes.

19 JUSTICE BARRETT: So licensing could
20 be used in that sense --

21 MR. KATYAL: Correct.

22 JUSTICE BARRETT: -- not as a
23 revenue-raising measure?

24 MR. KATYAL: Yes.

25 JUSTICE BARRETT: Okay. So you went

1 back and forth with Justice Gorsuch about the
2 implications of the President's authority over
3 foreign affairs and whether the major questions
4 doctrine applies. You say that in IEEPA, the
5 President war -- President's war powers are not
6 implicated and that was part of the reason why
7 you say that we should think of this
8 differently than some of the historical
9 examples where the commander-in-chief power,
10 war powers, were implicated.

11 But the same language appears in the
12 Trading With the Enemies Act in which war
13 powers would be implicated. So do you think
14 that language should be -- and, of course, that
15 is what President Nixon relied on.

16 So do you think that the language
17 would be interpreted differently in that
18 context even though the commander-in-chief
19 power and the war power would be implicated?

20 MR. KATYAL: A hundred percent I think
21 it would be interpreted differently. Justice
22 Jackson in the --

23 JUSTICE BARRETT: The same "regulate
24 commerce" language?

25 MR. KATYAL: Yes, because, once you're

1 talking about -- once you're carrying over
2 wartime precedents to peacetime for reasons --

3 JUSTICE BARRETT: Okay. I don't
4 understand that then because everybody agrees
5 the language came -- in IEEPA, came from the
6 Trading With the Enemy Act. So you're saying
7 it has one meaning in the Trading With the
8 Enemy Act and a different meaning in IEEPA,
9 that same "regulate commerce"?

10 MR. KATYAL: No. I think that the
11 conquered territory language and all of that
12 may go to the President's Article II powers,
13 his inherent powers in conquered territory, but
14 I don't think it gets the government where they
15 need to go.

16 The CAC brief and the brief by
17 Professor Paul Steven goes through and explains
18 why, in 1933, when Congress decided to bring
19 these concepts into peacetime, it severed the
20 wartime roots. And there's a extensive
21 legislative history --

22 JUSTICE BARRETT: Okay. I understand
23 that. But I thought that was about -- maybe
24 I'm -- maybe I'm just not tracking. I mean, I
25 think there's been some discussion of whether

1 the President would have inherent Article II
2 authority in wartime to impose tariffs to this
3 end. Is that what you're talking about? Are
4 you actually talking about a statute that said
5 regulate importation in wartime?

6 MR. KATYAL: Right.

7 JUSTICE BARRETT: And you think it
8 could have the tariff power conferred through
9 that language in a war-making statute but not
10 in IEEPA?

11 MR. KATYAL: No, I don't think it
12 confers it in either place. I think the
13 President in the -- it's located, the
14 President's power in conquered territory is not
15 in the Trading With Enemies Act or anything
16 like that but rather in --

17 JUSTICE BARRETT: Okay. So it's
18 inherent constitutional power --

19 MR. KATYAL: Exactly.

20 JUSTICE BARRETT: -- coming from the
21 law of war. Okay.

22 And then, if you win, tell me how the
23 reimbursement process would work. Would it be
24 a complete mess? I mean, you're saying before
25 the government promised reimbursement. And --

1 and now you're saying, you know, well, that's
2 rich. But how would this work? It seems to me
3 like it could be a mess.

4 MR. KATYAL: So the first thing I'd
5 say is that just underscores just how major a
6 question this is, the very fact that you are
7 dealing with this with quotas, there's no
8 refund process to the tunes of billions of
9 dollars or embargoes, but there is here.

10 But, for our case, the way it would
11 work is, in this case, the government's
12 stipulated for the five plaintiffs that they
13 would get their refunds. So, for us, that's
14 how it would work.

15 Your question, I take it, is about
16 everyone else where you don't have a class
17 action or anything like that.

18 With respect to everyone else, there's
19 a whole specialized body of trade law. And 19
20 U.S.C. 1514 outlines all these administrative
21 procedures. It's a very complicated thing.
22 There's got to be an administrative protest.
23 There was a Harbor Management case earlier that
24 this Court was involved with in United States
25 Shoe in which, you know, the refund process

1 took a long time. There were any number of
2 claims and equitable relief and other things.

3 JUSTICE BARRETT: So a mess?

4 MR. KATYAL: So it's difficult,
5 absolutely.

6 JUSTICE BARRETT: Okay.

7 MR. KATYAL: We don't -- we don't deny
8 that it's difficult, but I think what this
9 Court has said in -- in -- in the McKesson case
10 in 1990 is a serious economic dislocation isn't
11 a reason to do something.

12 Northern Pipeline, you guys stayed
13 your decision for a while in order to let the
14 congressional process unfold. There may be a
15 congressional process here as well.

16 You know, your -- you know, it may be
17 able to also be that this Court could limit its
18 decision to prospective relief under the John
19 Q. Hammons case. So there's lots of
20 possibilities.

21 CHIEF JUSTICE ROBERTS: Justice
22 Jackson?

23 JUSTICE JACKSON: So I think I read
24 Algonquin differently than Justice Kavanaugh.
25 When I look at its analysis, it absolutely does

1 a textual review, but then it says, "Turning
2 from Section 232's language to its legislative
3 history, again, there is much to suggest that
4 the President's authority extends to the
5 imposition of monetary exactions."

6 And I appreciate that perhaps that
7 factor is no longer in vogue, but did you look
8 into the legislative history here to determine
9 whether there is anything that supports the
10 conclusion that Congress actually intended for
11 this IEEPA statute to allow or authorize the
12 President to impose these tariffs?

13 MR. KATYAL: I did, and, if I blinked,
14 I would miss it because it was virtually
15 nothing. And, in fact, both page -- page 2 of
16 both the House and Senate report outline all of
17 the powers that are given under IEEPA, and --
18 and -- and none -- and none of them have
19 tariff. There's one brief mention of "tariff"
20 in the legislative history, but nothing else.

21 And, by the way, IEEPA passed by voice
22 vote. It was, you know, there was -- not
23 controversial. We don't deny IEEPA is a big,
24 major statute, but the question is, did it
25 authorize tariffs? One of the most contested

1 things since our founding, we've had battle
2 after battle --

3 JUSTICE JACKSON: And you say there's
4 nothing in the legislative history to suggest
5 it?

6 MR. KATYAL: Zilch.

7 JUSTICE JACKSON: Now, to the extent
8 that Congress did authorize the President to do
9 something, that those verbs are there, that the
10 Congress was giving the President some
11 authority, do you see a theme connecting those
12 verbs? What was Congress trying to do?

13 And let me just say that I see in the
14 Senate report, which I mentioned earlier, that
15 Congress says that it was trying to give the
16 President the authority to "control or freeze
17 property transactions where a foreign interest
18 is involved." And that seems to dovetail with
19 the verbs that are being used in the statute.
20 But -- but what's your view of what Congress
21 was trying to do with this legislation?

22 MR. KATYAL: That's exactly right.

23 They're responding to all sorts of -- of
24 foreign policy emergencies and foreign threats,
25 and they're giving the President economic

1 sanctions power.

2 JUSTICE JACKSON: So what does the
3 word "regulate importation" do in -- under that
4 framework? If we understand that Congress was
5 trying to give this kind of embargo authority
6 in the time of an emergency, when it says
7 "regulate importation," what -- what was it
8 envisioning?

13 So they've used it for quotas, like
14 limitations on the number of goods. They've
15 used it for screening and reporting
16 requirements, like Executive Order 12284 about
17 reporting property of the shah. And they've
18 used it for standards, like domestic safety
19 standards, environmental standards, labor
20 requirements. They've used it for embargoes.

21 So all of those are things that I
22 think Congress had in mind in IEEPA. And I
23 think the proof of this, that it's not this
24 massive statute that allows the government to
25 do anything, is Dames & Moore itself, because

1 this Court rejected the idea that "regulate"
2 includes the claims extinguishment that was at
3 issue in that case. It's a much more limited
4 statute.

5 And, Justice Jackson, there was a
6 predecessor Justice Jackson who said -- who
7 said, you know, that, "For all its defects,
8 delays, and inconveniences, men have discovered
9 no technique for long preserving free
10 government except that the Executive be under
11 the law and that the law be made by
12 parliamentary deliberations. Such institutions
13 may be destined to pass away, but it is the
14 duty of [this] Court to be last, not first, to
15 give [it] up."

16 And I take it my friend's argument on
17 the other side is in deep tension with
18 Youngstown and that canonical principle.

19 JUSTICE JACKSON: Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Mr. Gutman.

23 ORAL ARGUMENT OF BENJAMIN GUTMAN
24 ON BEHALF OF THE STATE PARTIES
25 MR. GUTMAN: Mr. Chief Justice, and

1 may it please the Court:

2 I'd like to begin by picking up with
3 the exchanges with Justice Barrett and Justice
4 Gorsuch about licenses and license fees because
5 I think we ended on the right note, but I just
6 wanted to make sure that our -- that at least
7 my client's position is clear on this.

8 Lenses are different from license
9 fees, and I am not aware of any history in the
10 five decades that IEEPA has been in force of
11 any fees charged for the licenses under this
12 statute.

13 This is a statute that -- licenses can
14 be used, for example, the President might ban
15 certain transactions with a foreign country but
16 then grant licenses to do them for humanitarian
17 reasons, but, as far as I'm aware, there's
18 never been a fee charged for that.

19 And I do welcome the Court's
20 questions, but I think that's -- I just want to
21 make --

22 JUSTICE GORSUCH: Well --

23 MR. GUTMAN: -- absolutely clear --

24 JUSTICE GORSUCH: -- I think the
25 question is what does "or otherwise" do?

1 MR. GUTMAN: Well, "or otherwise"
2 could be things like instructions or licenses,
3 but, again, it's -- it's fundamentally --
4 having something that is a revenue-raising
5 measure or even that is just an exaction of
6 some sort is a fun -- is fundamentally
7 categorically different from what we understand
8 instructions and licenses to be involved, just
9 like we think "regulate" doesn't carry the --
10 the financial connotation given the other verbs
11 there.

12 If -- if I could turn to some of the
13 19th century history that we were discussing as
14 well because I think there may be a little bit
15 more to add there.

16 The -- the 19th century cases about
17 the President's inherent Article II authority
18 to -- with respect to -- in a wartime with
19 respect to importation is -- is not the power
20 to impose tariffs on imports coming into
21 the -- the United States.

22 That is not what any of those cases
23 were about. They were about the President's
24 power, you know, in a wartime as an occupying
25 military force to impose tariffs in occupied

1 territory, in Mexico, in the Philippines, in
2 California.

3 The Civil War case might be the
4 closest case, but even there, what we were
5 talking about were essentially -- there were
6 licensing fees, but they were export fees.
7 They were fees that were being imposed on the
8 exportation of cotton from the occupied South
9 into the North.

10 And so I don't think any of that
11 provides authority for this general notion that
12 there is a background principle that the
13 President, even in wartime, has an Article II
14 authority to impose tariffs, certainly without
15 the consent of Congress.

16 JUSTICE BARRETT: Counsel, you agree,
17 I assume, given all the verbs in this list,
18 that the President could do something like just
19 shut down all trade between us and, say, you
20 know, China, right?

21 MR. GUTMAN: Yes. I mean, there are
22 other limitations in --

23 JUSTICE BARRETT: Okay. So --

24 MR. GUTMAN: -- the statute. Yes.

25 JUSTICE BARRETT: -- doesn't it

1 seem -- and I think this is one of the -- the
2 points that Algonquin makes, and I think it's a
3 point that Justice Kavanaugh was making --
4 doesn't it seem then -- I mean, I don't want to
5 use the phrase "lesser power" or "lesser
6 included measure," but doesn't it seem like it
7 would make sense then that Congress would want
8 the President to use something that was less,
9 you know, weaker medicine than completely
10 shutting down trade as leverage to try to get a
11 foreign nation to do something?

12 MR. GUTMAN: And the President can in
13 the form of, for example, quotas. But what
14 makes an embargo or quotas fundamentally
15 different from tariffs, as my -- as my friend
16 has already explained, is the revenue-raising
17 aspect of that. That makes it a far more
18 significant power. It creates additional
19 danger of -- of overuse.

20 And I think the other point, as
21 Justice Jackson was pointing out, is that it --
22 it cedes control over whether the transaction
23 occurs from the government to the individuals
24 engaging in this transaction.

25 And that is not what IEEPA is

1 intending --

2 JUSTICE BARRETT: Well, what makes
3 something revenue-raising? I mean, fees raise
4 money --

5 MR. GUTMAN: Yes.

6 JUSTICE BARRETT: -- and unless
7 they're going to be kind of one-to-one this is
8 exactly what it costs, I mean, it -- it might
9 raise some surplus. It might raise some extra.

10 So is it the purpose, if the purpose
11 of the fee or the tariff is to raise money --

12 MR. GUTMAN: I don't think --

13 JUSTICE BARRETT: -- is it the purpose
14 that makes it revenue-raising, or is it just
15 the fact of surplus created that goes to the
16 Treasury? Like, how do we decide this?

17 MR. GUTMAN: Yes, I think it's the
18 effect. And, to be clear, I -- I think
19 there's -- there's -- there would be a serious
20 difficulty with interpreting any of these words
21 even to allow revenue-neutral exactions here
22 because none of them involve -- none of them --
23 and, again, as far as I'm aware, IEEPA has
24 never been used in that way.

25 But I don't think there's --

1 JUSTICE BARRETT: Not even a
2 processing fee?

3 MR. GUTMAN: I -- I'm not aware of any
4 use of that sort of -- under IEEPA, but -- but
5 even if -- even if that is permissible, it -- I
6 think that's permissible precisely because it
7 is -- it doesn't have the effect of raising
8 revenue.

9 JUSTICE JACKSON: Can you --

10 JUSTICE KAVANAUGH: Mr. Katyal
11 referred to common sense several times. And I
12 want to pick up on Justice Barrett's question
13 because your interpretation of the statute, as
14 she pointed out, would allow the President to
15 shut down all trade with every other country in
16 the world or to impose some significant quota
17 on imports from every other country in the
18 world but would not allow a 1 percent tariff.
19 And that leaves, in the government's words in
20 its brief, an odd donut hole in the statute.

21 Why would a rational Congress say:
22 Yeah, we're going to give the President the
23 power to shut down trade. I mean, think about
24 the effects. But you're admitting that power's
25 in there.

1 MR. GUTMAN: Yeah.

2 JUSTICE KAVANAUGH: But -- but can't
3 do a 1 percent tariff. That doesn't seem --
4 but I want to get your answer -- to have a lot
5 of common sense behind it.

6 MR. GUTMAN: I think it absolutely
7 does because it's a fundamentally different
8 power. It's -- it's not a donut hole; it's --
9 it's a different kind of pastry.

10 (Laughter.)

11 JUSTICE KAVANAUGH: And on that -- on
12 that power -- that's a good one.

13 On that power, though, and you've said
14 this many times and Mr. Katyal too, and I --
15 and, look, I get this, obviously. But the
16 Court has repeatedly said a tariff on foreign
17 imports is an exercise of the commerce power,
18 not of the taxation power. And I'm repeating
19 some -- but John Marshall said that and Joseph
20 Story and Chief Justice Hughes in the 1933
21 case, and we've said that quite a bit of time,
22 which seems to at least undermine a bit your
23 point that it's an entirely different power
24 because, if it is foreign commerce power, it's
25 the same power that Justice Barrett was talking

1 about of just embagoing trade with the entire
2 world, which you admit is in this statute.

3 MR. GUTMAN: Well, there are a couple
4 of points in there, and -- and I'll try to get
5 to all of them, but, I mean, I think all of us
6 agree that context is what matters here --

7 JUSTICE KAVANAUGH: Mm-hmm.

8 MR. GUTMAN: -- and that you certainly
9 could use the word "regulate" to -- to talk
10 about a tariffing power, like you could use it
11 to talk about a taxing power. I mean, we
12 impose taxes for regulatory purposes as well.

13 But the -- the -- the federal
14 government hasn't identified a single other
15 federal statute that uses the term "regulate"
16 to authorize tariffs or taxes. That is just a
17 different kind of power.

18 JUSTICE JACKSON: And I thought your
19 point in response to Justice Kavanaugh, it's a
20 different kind of power because the power
21 that's being authorized by this statute is the
22 power to control or freeze trade.

23 MR. GUTMAN: That's exact --

24 JUSTICE JACKSON: That's what Congress
25 was getting at. And so, if that's true, then

1 we have to read "regulate" in that context.

2 MR. GUTMAN: That's exactly right.

3 And I think the reason, getting back to common
4 sense, as to why a legislature might authorize
5 that is that you might not fear abuse of that
6 power in the same way that you would be
7 concerned about abuse of the power to impose
8 unlimited taxes with no -- with -- with sort of
9 no controlling principle.

10 JUSTICE KAVANAUGH: Well, I'll just
11 press --

12 JUSTICE KAGAN: Well, why is that?

13 JUSTICE KAVANAUGH: Yeah.

14 JUSTICE KAGAN: Because, I mean, there
15 is a sort of commonsensical intuition that one
16 is, in -- in Justice Kavanaugh's example, that
17 one is greater and one is lesser. So why --
18 why is that not right?

19 MR. GUTMAN: Because, to be blunt
20 about it, there's nothing -- one of them
21 there's something in it for the government and
22 one of them there isn't. Actions that bring in
23 revenue from -- from the pockets of taxpayers
24 to the Treasury pose a different set of
25 concerns. Our framers were very concerned

1 about that.

2 JUSTICE KAGAN: A different set of
3 concerns how? Why?

4 MR. GUTMAN: Because they bring in
5 revenue and because that -- that creates a --

6 JUSTICE KAGAN: Well, that seems a
7 little tautological. Like --

8 MR. GUTMAN: Well --

9 JUSTICE KAGAN: -- why is it that the
10 revenue-raisers are in a different category?

11 MR. GUTMAN: Because, if -- look, if
12 there -- if there is some sort of international
13 emergency and the -- the appropriate way
14 to deal with it is to make sure that no more
15 than a thousand of this product comes into this
16 country at -- at a particular time, this
17 statute gives the President the power to ensure
18 that exactly no more than 1,000 come in at this
19 time.

20 Setting a -- setting a tariff doesn't
21 ensure that only 1,000 will come into this
22 country. It -- it cedes control over whether
23 the transaction occurs. And what it does is
24 it -- is it then, you know, adds revenue to the
25 Treasury. And that is -- that is, again,

1 something that our framers thought was
2 extremely important and -- and a core Article
3 I --

4 JUSTICE BARRETT: Except -- but
5 Algonquin -- I mean, this kind of goes back to
6 Justice Kavanaugh's point. Algonquin rejects
7 the idea that it was impermissible to use the
8 fees, and we can call them, you know, license
9 fees that functioned as tariffs or duties in
10 that case, whatever. But Algonquin said that
11 Congress could use the exaction of money to
12 control quantity.

13 And I hear what you're saying is,
14 like, well, you can control quantity by numbers
15 by imposing hard limits but not by money, but
16 that's not what Algonquin said. So I guess --

17 MR. GUTMAN: Well, no --

18 JUSTICE BARRETT: -- why? Why?

19 MR. GUTMAN: Well, and I -- and I
20 don't mean to suggest that you can't use
21 exactions to control quantity. What -- I think
22 Algonquin just shows the importance of context.
23 It might be perfectly natural to read a phrase
24 like "adjust imports" in the context of a
25 statute that talks about tariffs, in the

1 context of the Trade -- of the Trade Expansion
2 Act that has all sorts of provisions about
3 tariffs and about the President adjusting
4 tariff rates. It might be perfectly natural in
5 that context to read a phrase like "adjust the
6 imports" to be referring to changing tariff
7 rates.

8 It's just as unnatural to read a
9 phrase like "regulate importation" to discuss
10 that when the statute has nothing to do with
11 tariffs and doesn't otherwise mention tariffs
12 at all.

13 JUSTICE JACKSON: And Algonquin --
14 JUSTICE BARRETT: Do you think
15 imposing tariffs is a big -- I mean, sorry, do
16 you think that just blocking all trade is a
17 bigger deal than imposing a 1 percent tariff
18 across the board?

19 MR. GUTMAN: I think it would be a
20 huge deal. It is just a different kind of
21 deal.

22 JUSTICE JACKSON: Algonquin --
23 JUSTICE KAVANAUGH: And about the --
24 JUSTICE JACKSON: -- was not a
25 constitutional case, right?

1 MR. GUTMAN: Correct.

2 JUSTICE JACKSON: It was a statutory
3 interpretation case.

4 MR. GUTMAN: Correct.

5 JUSTICE JACKSON: And so the question
6 there was simply was Congress actually trying
7 to give or did Congress in that statute give
8 the President the authority to impose these
9 kinds of exactions. And the Court looked at
10 the text and it looked at the legislative
11 history in which there was a number of clues
12 that Congress had actually intended to do that,
13 right?

14 MR. GUTMAN: Yes, yes. And it looked
15 not just at the text of those specific words,
16 the -- but -- but also the context of what else
17 was in the statute and the fact that some of
18 the factors that the President was supposed to
19 be considering.

20 JUSTICE KAVANAUGH: But -- keep going.
21 Sorry.

22 JUSTICE JACKSON: And it would make
23 perfect sense, I think, in a time of emergency
24 for many of the reasons that General Sauer
25 pointed out that Congress would want the

1 President to have the kind of authority that is
2 imposed when you are embargoing things, when
3 you are stopping the trade, when you are
4 saying, you know, for emergency reasons we're
5 not letting any of this product come in.

6 I mean, sure, that's a big deal, but
7 the nature of it makes sense in terms of an
8 emergency. I think what you're saying is that
9 the idea that the government would use its
10 authority to be raising revenues in this
11 situation is a different kind of power.

12 MR. GUTMAN: Exactly. This is
13 about -- this is a statute about giving the
14 President control over assets, over
15 transactions, over access to banking.

16 JUSTICE JACKSON: And tariffs don't do
17 that.

18 MR. GUTMAN: That's exactly right.

19 JUSTICE JACKSON: You said something
20 about tariffs not -- tariffs, in fact, cede
21 control --

22 MR. GUTMAN: Exactly right.

23 JUSTICE JACKSON: -- over those sorts
24 of things. So they sort of undermine the goals
25 and the purposes of this kind of statute. Is

1 that right?

2 MR. GUTMAN: Yes, that's exactly
3 right.

4 JUSTICE ALITO: From --

5 JUSTICE KAVANAUGH: Can I ask --

6 JUSTICE ALITO: -- from what you've
7 said --

8 JUSTICE KAVANAUGH: Go ahead.

9 JUSTICE ALITO: From what you've said,
10 it seems -- and you said this -- that the
11 reason for drawing a distinction between
12 tariffs and an embargo is the suspicion that
13 tariffs will be used to raise money and,
14 therefore, to circumvent Congress's power to
15 control taxes. So it's a question of the risk
16 that's involved. Am I right?

17 MR. GUTMAN: Yes.

18 JUSTICE ALITO: That's what it boils
19 down to?

20 MR. GUTMAN: Yes. Well, and it's a
21 question of understanding what Congress would
22 have thought it -- what -- what powers Congress
23 would have thought it was conferring. Would
24 Congress have understood the phrase
25 "regulate" --

1 JUSTICE ALITO: Well, the question is
2 why would Congress say you can impose a quota,
3 you can impose a ban, but you can't impose a
4 tariff? And your answer, I gather, is because,
5 when a tariff is imposed, we're -- we're
6 suspect about what's going on. We're
7 suspicious about what's going on. We think
8 that what the government is trying -- what the
9 executive is trying to do is to -- is to raise
10 revenue, and that's our -- that's our business,
11 right? That's what it has to be.

12 MR. GUTMAN: Yes, and every -- we --
13 we know that every other time that Congress has
14 authorized the President --

15 JUSTICE ALITO: No. Well, that's a --
16 you're getting into a different argument. Then
17 would you say the same thing if the measure is
18 really about an emergency?

19 MR. GUTMAN: Yes.

20 JUSTICE ALITO: An undisputed
21 emergency and a really dire emergency.

22 MR. GUTMAN: Yes. I --

23 JUSTICE ALITO: There, would you have
24 the same suspicion?

25 MR. GUTMAN: Yeah, it -- the -- the --

1 yes, absolutely. And, again, I'll -- I'll
2 refer back to Justice Jackson's concurrence in
3 Youngstown that emergency powers tend to breed
4 emergencies. Look, Biden versus Nebraska, I
5 think, is -- you know, says very clearly --

6 JUSTICE ALITO: Well, I -- I really
7 don't think you're answering the question. The
8 question is, would you have the same suspicion
9 when it is perfectly apparent from context that
10 what the President is trying to do is to
11 achieve a goal other than the raising of money?

12 MR. GUTMAN: I think what I'm trying
13 to say is that you -- you have to read the
14 statute the way that Congress would have
15 understood it when it was enacted, not how it
16 is used in any particular case.

17 It may be used for very good reasons
18 in a particular case, but the question is,
19 would Congress have understood itself to be
20 ceding this power with no limits, unlike every
21 other tariffing statute, with no limits --

22 JUSTICE ALITO: All right. I -- I
23 know -- I know that point. Let me ask you an
24 unrelated question. Mr. Katyal listed some of
25 the things that presidents have done under

1 IEEPA, such as screening -- screening imports.

2 Do any of the other verbs in IEEPA
3 talk about screen -- could -- could screening
4 of imports be done under any of the other verbs
5 in IEEPA?

6 MR. GUTMAN: I think maybe, but it
7 would have been --

8 JUSTICE ALITO: Which one?

9 MR. GUTMAN: Prevent. And -- and so I
10 think the question would be could you --

11 JUSTICE ALITO: Screening is
12 preventing?

13 MR. GUTMAN: Well, it -- I think it
14 depends what you're screening for. But, if you
15 were -- if --

16 JUSTICE ALITO: Okay. How about
17 imposing domestic safe -- requirements that
18 promote -- that are needed to safeguard
19 domestic safety? Any -- any reg -- any other
20 provision besides "regulate," any other verb
21 besides "regulate" that would --

22 MR. GUTMAN: Well, again, I think, if
23 we're talking about potentially blocking some
24 property from coming into this country because
25 of safety concern, it might be that prevent

1 would have gotten you there.

2 What I think "regulate" does is it --
3 is it clarifies and amplifies that -- that you
4 don't just -- you know, it -- it can be nuanced
5 in that way. It can say we will let this
6 come -- this come in if it has certain safety
7 requirements, if certain features have been
8 disabled, something like that.

9 And I think -- so I think "regulate"
10 harmonizes with prevent, investigate during the
11 pendency, block during the pendency of an
12 investigation, those sorts of verbs.

13 JUSTICE KAVANAUGH: On the context
14 point, the context of this statute, what
15 Congress would have understood, it's an
16 emergency statute, and, presumably, Congress
17 wants to give the President tools to respond to
18 the emergency in an appropriate way.

19 And it seems odd to imagine a meeting
20 in the Oval Office where the President's told,
21 well, we have a problem with -- I won't name a
22 country -- but Country X and you can stop all
23 trade with that country.

24 I mean, I'm not sure that's a, you
25 know, wise policy to give that much, but it's

1 there, right? You agree it's in this statute.

2 MR. GUTMAN: Yeah.

3 JUSTICE KAVANAUGH: But -- and the
4 President says, well, that's too extreme. I
5 want to calibrate my response to deal with this
6 and maybe a -- a -- you know, a tariff of some
7 kind. Like, well, you can't do that. So
8 you're forcing the President to respond to an
9 emergency, and, you know, Justice Alito has
10 raised the point about, you know, a real
11 emergency. And you're taking away the
12 President's suite of tools when the one is much
13 more extreme than is authorized. That just
14 seems a bit unusual.

15 You know, think about India right now,
16 the tariff on India, right? That's designed to
17 help settle the Russia-Ukraine war as I
18 understand it. Don't pretend to be an expert.
19 But, if that's gone, you know, that's a tool
20 that's designed, talk about foreign-facing, the
21 most serious crisis in the world, and that's --
22 that's out -- out the window.

23 So I just think it's just contextually
24 emergency, it's just a bit unusual to read it
25 that way, but I -- I -- I take your response,

1 taxation's different and you've got to stick
2 with that line.

3 MR. GUTMAN: I -- no, and I don't
4 think it's just that because -- I -- I mean, I
5 do think it's that, but it -- but it's also
6 that there are a -- a range of tools that are
7 more calibrated that the President can do. It
8 doesn't have to be a complete embargo. It
9 could be limits on particular kinds of
10 products. It could be quantity, quality
11 limits.

12 JUSTICE KAVANAUGH: I get it. But, in
13 the history of trade -- trade efforts to
14 respond and push back, you're taking one away.
15 I --

16 MR. GUTMAN: Well, and the
17 President -- and there are many other statutes
18 that might apply depending on --

19 JUSTICE KAVANAUGH: I get that.

20 MR. GUTMAN: -- the exact
21 circumstances --

22 JUSTICE KAVANAUGH: Fair -- that's --

23 MR. GUTMAN: -- 201, 301, 232.

24 JUSTICE SOTOMAYOR: Counsel --

25 JUSTICE KAVANAUGH: -- that's a good

1 point.

2 JUSTICE SOTOMAYOR: -- I think what
3 we're forgetting here is a very fundamental
4 point, which is the Constitution is structured
5 so that if I'm going to be asked to pay for
6 something as a citizen, that it's through a
7 bill that is generated from Congress and the
8 President has the power to veto it or not.

9 But I'm not going to be taxed unless
10 both houses, the executive and the legislature,
11 have made that choice, correct?

12 MR. GUTMAN: That's exactly right.

13 So --

14 JUSTICE SOTOMAYOR: And so there is
15 something -- it's not just the taxing power qua
16 taxing power. The question is, do we permit
17 the President to use the taxing power to effect
18 his personal choices of what is good policy for
19 me to pay for?

20 MR. GUTMAN: That's exactly right.

21 The question is who decides.

22 JUSTICE SOTOMAYOR: It hasn't -- who
23 decides and under what circumstances. Now,
24 with respect to this, I mean, I'm not even
25 going to the pretext argument, okay? But the

1 President threatened to impose a 10 percent tax
2 on Canada for an ad it ran on tariffs during
3 the World Series. He imposed a 40 percent tax
4 on Brazil because its Supreme Court permitted
5 the prosecution of one of its former presidents
6 for criminal activity.

7 The point is those may be good
8 policies, but does a statute that gives,
9 without limit, the power to a president to
10 impose this kind of tax, does it require more
11 than the word "regulate"?

12 MR. GUTMAN: Exactly.

13 JUSTICE SOTOMAYOR: That's your point.

14 MR. GUTMAN: Yes.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Did Mr. Katyal say anything this
18 morning with which you disagree?

19 MR. GUTMAN: No. I think we cleared
20 up any maybe potential disagreement about
21 licensing fees, but I think we all agree on
22 that.

23 CHIEF JUSTICE ROBERTS: Okay. Justice
24 Thomas?

25 JUSTICE THOMAS: No.

1 CHIEF JUSTICE ROBERTS: Justice?

2 Anything further?

3 Justice Kagan?

4 JUSTICE GORSUCH: Briefly.

5 CHIEF JUSTICE ROBERTS: Justice

6 Gorsuch?

7 JUSTICE GORSUCH: Thank you, Chief.

8 So I just want to follow up on Justice
9 Sotomayor's question at the end of a long
10 morning -- afternoon.

11 It does seem to me, tell me if I'm
12 wrong, that a really key part of the context
13 here, if not the dispositive one for you, is
14 the constitutional assignment of the taxing
15 power to Congress. The power to reach into the
16 pockets of the American people is just
17 different and it's been different since the
18 founding and the navigation acts that were part
19 of the spark of the American Revolution, where
20 Parliament asserted the power to tax to
21 regulate commerce. Some of those were
22 revenue-raising. Some of them didn't raise a
23 lot of revenue.

24 We had a lot of pirates in America at
25 the time. And -- and Americans thought even

1 Parliament couldn't do that, that that had to
2 be done locally through our elected
3 representatives.

4 Isn't that really the major questions,
5 nondelegation now, whatever you want to
6 describe it, isn't that what's really animating
7 your argument today?

8 MR. GUTMAN: I think it's a huge piece
9 of what's animating our argument. Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Kavanaugh?

12 Justice Barrett?

13 Justice Jackson?

14 JUSTICE JACKSON: Can I just invite
15 you briefly to address your kind of second-tier
16 arguments?

17 Assuming that the President can impose
18 these sorts of taxes -- or tariffs, why do you
19 think, for example, that the trafficking tariff
20 here does not deal with the drug-trafficking
21 emergency for the purpose of this analysis?

22 MR. GUTMAN: So it doesn't deal with
23 it because it's not a sanction imposed against
24 traffickers. It is a -- say it is -- if you
25 think of it as a sanction, it is a sanction

1 imposed against people importing lawful goods
2 in the hope --

3 JUSTICE JACKSON: But doesn't that
4 indirect -- that happens all the time, right?
5 I mean, all the other authorities indirectly
6 provide leverage on countries in this way.

7 MR. GUTMAN: I don't think so. I
8 think that they are -- that the history of --
9 of IEEPA and even of TWEA is imposing sanctions
10 directly on the wrongdoers. These are statutes
11 about providing sanction authority against --
12 against international actors whose behavior we
13 want to change, and that's not what tariffs do.

14 JUSTICE JACKSON: All right. Thank
15 you.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Rebuttal, General Sauer?

19 REBUTTAL ARGUMENT OF GEN. D. JOHN SAUER
20 ON BEHALF OF THE FEDERAL PARTIES
21 GENERAL SAUER: Thank you, Mr. Chief
22 Justice.

23 Just three points. One an
24 interpretive point. The statutory language
25 here is "regulate importation" and, again, by

1 means of instruments, licenses, or otherwise.
2 Their argument is that that phrase carries with
3 it a whole host of unenumerated forms of
4 regulation, including quotas, licenses,
5 licenses apparently that come with fees as long
6 as they're not -- as long as they're sort of
7 profit-neutral fees, environmental
8 restrictions, qualitative restrictions, reports
9 and so forth.

10 It's just that the one form of
11 regulation that they would not include is
12 tariff regulation, which, of course, is the
13 quintessential most historically tested method
14 of regulating imports. And so that -- that --
15 that -- that additional phrase about, you know,
16 by means of instruments, licenses, or otherwise
17 really sort of reinforces the plain meaning,
18 the ordinary natural meaning of "regulated
19 importation" here.

20 So, when it comes just to the plain
21 text of the statute, their argument is a
22 donut-type argument, and it's not an argument
23 that does justice to the statute's plain text.

24 On the nondelegation point, Justice
25 Gorsuch, you alluded to the founding or

1 delegations of the Indian commerce power, and I
2 just remind the Court that in 1790, in July of
3 1790, Congress passed a statute that
4 essentially delegated to President Washington
5 essentially the entire scope of the Indian
6 commerce power.

7 He said you can do commerce with
8 Indians if you have a license that you had to
9 pay a fee for, but -- and that -- that will be
10 subject to such rules and regulations as the
11 President makes with no further guidance.

12 So, when it comes to this
13 foreign-facing, there, it's obviously analogous
14 because the Indian tribes are not foreign
15 sovereigns, but this foreign-facing situation,
16 we have a very sort of deep and profound
17 historical pedigree through broad delegations
18 of the regulation of commerce, right, the
19 foreign commerce power in that case, the Indian
20 commerce power.

21 And that ties, I think, to what I take
22 to be the main theme of the arguments on the
23 other side. And I think that Mr. Katyal
24 started by saying tariffs are taxes. And I
25 want to complete the answer I think I was

1 giving to the Chief Justice when I got
2 interrupted, is if you look at these, these
3 tariffs, these policies, it is clear that these
4 policies are most effective if nobody ever pays
5 the tariff. If it never raises a dime of
6 revenue, these are the most effective use of
7 these -- of this particular policy.

8 And I said there's two buckets there.

9 One is, first of all, when it comes to the
10 trade deficit emergency, if no one ever pays
11 the tariff, but, instead, they direct their
12 consumption domestically and spur the creation
13 or the rebuilding of our -- of our hollowed-out
14 manufacturing base, that directly addresses the
15 crisis. It's more effective if no one ever
16 pays the tariff. That's the point of it,
17 really. You know, that's a fundamental point
18 of it. And that's one piece of these.

19 And then, as to both of them, as to
20 both of the declared emergencies, the tariffs
21 are an incentive, a pressure point, leverage,
22 bargaining chip, as the Court said in Dames &
23 Moore, to get countries to change their
24 behavior to address the foreign-arising
25 emergencies. So, if you look, for example, to

1 take a historical example, last week's trade
2 deal with China, it unlocked access to rare
3 earth minerals, which, of course, have a
4 critical national security aspect to them, and
5 it got China for the very first time to change
6 its policy with respect to fentanyl precursors,
7 which is a crucial piece of that.

8 That -- those tariffs, if no one ever
9 collects them, but the threat of imposing those
10 tariffs gets China and our other trading
11 partners across the world to change their
12 behaviors in a way that addresses this, then
13 that's the most effective use of the policy.
14 So they're clearly regulatory tariffs, not
15 taxes. They are not -- they're not an exercise
16 of the power to tax. They are the exercise of
17 the power to regulate foreign commerce. And
18 that's why the statute says "regulate." It
19 doesn't say "tax." It says "regulate."

20 And -- and for that reason, we are
21 squarely within the tradition that I was
22 talking about before of very broad,
23 historically very broad, delegations of the
24 power to regulate foreign commerce to the
25 President because he has inherent Article II

1 authority in the area of -- of -- of -- of
2 foreign affairs, although not that. It has to
3 be delegated to him. Otherwise, the
4 delegate -- delegation would be superfluous.

5 And for all those reasons, we ask the
6 Court to reverse both the decisions below.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 The case is submitted.

10 (Whereupon, at 12:44 p.m., the case
11 was submitted.)

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