Whose Constitutional Authority Is It Anyway? Nondelegation, the National Emergencies Act, and the International Emergency Economic Powers Act

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I. INTRODUCTION

In June of 2019, the Supreme Court decided *Gundy v. United States* and upheld as constitutional Congress's delegation of legislative authority to the United

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States Attorney General to determine how to apply the Sex Offender Registration and Notification Act's registration requirements to offenders convicted before the statute was enacted.[1] In a dissenting opinion, Justice Gorsuch suggested the Court replace its current "intelligible principle" test for nondelegation issues.[2] Instead, he argued, the Court should only uphold delegations in three instances: when an agency is merely authorized to "fill up the details," when the application of a statutory rule depends on executive fact-finding, or when the matter is already within the executive's constitutional purview.[3]

Three months later, in October of 2019, President Donald J. Trump imposed sanctions on individuals associated with the Government of Turkey and its operations in Syria following his declaration of a national emergency to address the national-security threat of Turkey's military offensive into northeast Syria.[4] These sanctions prohibited United States financial institutions from lending money, transferring credit, and transacting with these individuals; blocked their property in the United States; and prohibited United States persons from investing in and importing goods and services from the sanctioned individuals.[5]

Though at first glance the two events appear entirely disconnected—the first, a judicial decision addressing an aspect of domestic law; the second, the President's imposition of sanctions to address a foreign threat—they have a deep tie with broad-reaching implications. Congress delegated the President's powers to assess and declare national emergencies and to take international economic actions to address those emergencies through the National Emergencies Act[6] and the International Emergency Economic Powers Act.[7] If that delegation of power were unconstitutional, the President's actions taken under those authorities would be invalid. A finding that these two acts unconstitutionally delegated powers to the President would have enormous implications for U.S. sanctions policy, which is based heavily on those authorities.

This paper applies the NEA and IEEPA to Justice Gorsuch's test in his *Gundy* dissent to determine whether they may be constitutional under that framework. His framework provides that the legislature can only delegate its authority in three circumstances: first, to "fill up the details" of a statute; second, to make application of a rule by Congress dependent on executive fact-finding; or third, when it assigns responsibilities to another branch that are overlapping with powers already possessed by that branch.[8] Given the change in the composition of the Supreme Court since *Gundy*, it is certainly within the realm of possibilities that the Court adopts this test going forward.

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1. Gundy v. United States, 139 S. Ct. 2116 (2019).
2. *Id*. at 2131 (Gorsuch, J., dissenting).
3. *Id*.
4. Exec. Order. No. 13,894, 84 Fed. Reg. 55851 (Oct. 14, 2019).
5. *Id*.
6. National Emergencies Act, 50 U.S.C. §§ 1601–1651.
7. International Emergency Economic Powers Act, 50 U.S.C. §§ 1701–1707.
8. *Gundy*, 139 S. Ct. at 2136–42 (Gorsuch, J., dissenting).

This paper first addresses (II) the nondelegation doctrine and its principles, history, and the test proposed in the *Gundy* dissent; then (III) reviews the history of the NEA and IEEPA from their predecessor, the Trading With the Enemy Act, through today, including post-enactment changes; then (IV) analyzes the NEA and IEEPA under the modern nondelegation doctrine as well as under the new test proposed by Justice Gorsuch; and (V) ultimately concludes that although the NEA and IEEPA will still likely pass constitutional muster under the new proposed test, the Court may still find ways to limit broad use of these authorities under other doctrines.

II. NONDELEGATION DOCTRINE

A. Principle of Nondelegation

Article One, Section One of the United States Constitution states that "all legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."[9] Some scholars, critical of the idea that Congress cannot delegate its powers, have suggested that the first Congress understood the structure of the newly formed federal government to allow Congress to delegate some of its vested legislative capabilities to the Executive Branch by passing laws tasking the Executive Branch with federal rulemaking in a particular area.[10] Others, more in favor of a nondelegation doctrine, have argued that there is significant evidence to support the idea that the founding generation believed Congress could *not* delegate its legislative power.[11] The question, for adherents to the nondelegation doctrine, is when an act of Congress tasking the Executive Branch with some responsibility becomes an unconstitutional delegation of authority.

The idea that powers vested in the legislature cannot be delegated to another branch of government traces its roots to before the Founding. John Locke wrote:

> The Legislative cannot transfer the Power of Making Laws to any other hands . . . . The power of the Legislative, being derived from the People by a positive voluntary Grant and Institution, can be no other than what the positive Grant conveyed, which being only to make Laws, and not to make Legislators, the

9. U.S. CONST. art. I, § 1.

10. In a critique of Justice Gorsuch's *Gundy* dissent and of other skeptics of executive rulemaking authority, Professor Parrillo argues that the original meaning of the Constitution was understood to support broad and vague grants of authority to the executive branch, citing the Valuation and Enumeration Act. That Act, he urges, granted rulemaking power under the "direct tax" of 1798, establishing "in each state a board of federal tax commissioners, appointed by the President and confirmed by the Senate . . . to raise or lower all assessments within any district by a percentage amount '*as shall appear to be just and equitable*'—a phrase the statute did not define." Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288, 1304 (2021) (citing Valuation and Enumeration Act, ch. 70, § 22, 1 Stat. 580, 589 (1798)).

11. Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490, 1493 (2021).

> Legislative can have no power to transfer their Authority of making laws, and place it in other hands.[12]

Chief Justice John Marshall further shaped the scope of the doctrine in finding unconstitutional an act of Congress delegating to the courts the power to set forth judicial procedure; he distinguished "important" subjects from those of lesser importance, for which "a general provision may be made, and power given to those who are to act under such general provisions *to fill up the details*."[13]

B. History of Nondelegation: "Intelligible Principle"

Judicial decisions throughout U.S. history addressing nondelegation doctrine also give light to the role of nondelegation in domestic and foreign affairs and where these responsibilities fall within Chief Justice Marshall's conception of "general provisions" versus "filling up the details." In *Field v. Clark*, the Court addressed the McKinley Act, which delegated tariff-setting authority to the Executive Branch.[14] The Court found that the granted authority was not legislative in nature.[15] Instead, the Executive was acting as an "agent" of Congress, merely carrying out Congress's instructions.[16]

As Congress continued delegating authority to the Executive into the 1900s, the Court began to shape a standard for addressing constitutional delegation issues. Most notably, the Court set forth the current test for nondelegation in *J.W. Hampton, Jr. & Co. v. United States* in 1928, finding that delegation is a constitutionally implied power, but that Congress must lay down an "intelligible principle" to guide the body given the delegated authority.[17] Several years later, provisions of the National Industrial Recovery Act (NIRA) were challenged on nondelegation grounds, allowing the Court to continue carving out the intelligible principle standard by finding examples that fell outside the scope of the test. In *Panama Refining Co. v. Ryan*, the Court struck down a provision of NIRA that granted the President authority to prohibit interstate shipment of petroleum above certain quotas, finding that Congress had set "no creterion" for the President to follow.[18] *Schechter Poultry Corp. v. United States* also found that a provision allowing the President to approve trade codes drafted by businesses was unconstitutional for lacking guidelines and granting the President authority to approve or disapprove proposals as he saw fit.[19]

Since 1935 and the notable switch in the Court's doctrine, the Court has not struck down a single law on nondelegation grounds. With the Court noting in

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12. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (Dave Gowan ed., 2003) (1689).
13. Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 46 (1825) (emphasis added).
14. Field v. Clark, 143 U.S. 649 (1892).
15. *Id.*
16. *Id.* at 693.
17. J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928).
18. Panama Refining Co. v. Ryan, 293 U.S. 388, 415 (1935).
19. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541–42 (1935).

1983 that "some agency action—rulemaking, for example—may resemble 'lawmaking,'"[20] it seemed relatively assured that nondelegation was a largely dormant doctrine. Expanding the Executive Branch and its powers was so engrained into the constitutional structure of the country that nondelegation challenges were seen as unserious. Reviving nondelegation doctrine under a more stringent standard might mean that "most of Government is unconstitutional—dependent as Congress is on the need to give discretion to executive officials to implement its programs."[21]

However, a growing legal movement concerned with separation of powers and the growth of the administrative state helped revive interest in the nondelegation doctrine. Dissenting in a case upholding a delegation of authority to the United States Sentencing Commission allowing the commission to issue sentencing rules, Justice Scalia argued that the "guidelines" set forth by the Commission had the force and effect of laws.[22] He noted that "[t]he delegation of lawmaking authority to the Commission is, in short, unsupported by any legitimating theory to explain why it is not a delegation of legislative power."[23] In a 2001 case, the Court upheld the Environmental Protection Agency's rulemaking authority to issue national air quality standards under the Clean Air Act.[24] Justice Thomas filed a concurring opinion in which he urged the Court to revisit its test for nondelegation challenges, writing that:

> Although this Court since 1928 has treated the "intelligible principle" requirement as the only constitutional limit on congressional grants of power to administrative agencies, the Constitution does not speak of "intelligible principles." Rather, it speaks in much simpler terms: "*All* legislative Powers herein granted shall be vested in a Congress." I am not convinced that the intelligible principle doctrine serves to prevent all cessions of legislative power. I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than "legislative."[25]

Although Justice Thomas did not propose an alternative test to the "intelligible principles" test, he rejected it, finding that it fails to prevent constitutionally impermissible delegations.

In 2018, the Supreme Court heard arguments in *Gundy v. United States*, regarding whether the Sex Offender and Registration and Notification Act (SORNA) violated the nondelegation doctrine. SORNA expressly delegated to the United States Attorney General the authority to decide how to apply SORNA

20. INS v. Chadha, 462 U.S. 919, 953 n.16 (1983).
21. Gundy v. United States, 139 S. Ct. 2116, 2130 (2019).
22. Mistretta v. United States, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting).
23. *Id.*
24. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001).
25. *Id.* at 486 (Thomas, J., concurring) (citations omitted).

to preexisting cases.[26] In a 5–3 vote, the Court upheld the provision of SORNA granting the Attorney General authority to decide how the law would apply to sex offenders convicted before passage of the law.[27] This provision—allowing the Attorney General to determine *how* to apply it—became the crux of the nondelegation issue. Petitioner argued that it granted "unconstrained 'authority to specify' whether and how SORNA applies" by failing to provide an intelligible principle.[28] The Government argued that the intelligible principle test is easily satisfied because Congress sufficiently identified the "general policy" the Attorney General should pursue: "SORNA's text and context make clear that Congress's general policy was to require sex offenders (including pre-Act offenders) to register to the maximum extent feasible."[29]

Writing the plurality opinion, with which Justices Ginsburg, Breyer, and Sotomayor joined, Justice Kagan announced that the delegation provision satisfied the intelligible principle test and noted that previous decisions approved even broader grants of authority with less guidance.[30] She highlighted that SORNA put limits on the delegated authority because it required the Attorney General to register "pre-Act offenders as soon as feasible."[31] Congress left it to the Attorney General to determine "how" to apply SORNA to address the practical problem of applying registration requirements to pre-Act offenders—a "stopgap" for possible implementation delay,[32] she reasoned, not a grant of "unguided" and "unchecked" authority.[33] Notably, she added that "if SORNA's delegation is unconstitutional, *then most of Government is unconstitutional*—dependent as Congress is on the need to give discretion to executive officials to implement its programs."[34]

C. Gundy *Dissent & Gorsuch's Test*

Justice Gorsuch, in a dissenting opinion joined by Chief Justice Roberts and Justice Thomas, took a different approach, expressing concern that the Court's intelligible principle test harmed the principle of separation of powers.[35] Noting that the "Constitution promises that *only* the people's elected representatives may adopt new federal laws restricting liberty," Justice Gorsuch argued that the plurality opinion applies an "understanding of the Constitution at war with its text and

26. Sex Offender Registration and Notification Act, 34 U.S.C. § 20913(d) (2006).
27. Gundy v. United States, 139 S. Ct. 2116 (2019).
28. Reply Brief for Petitioner at 1–3, Gundy v. United States, 139 S. Ct. 2116 (2019) (No. 17-6086), 2018 WL 4215780.
29. Brief for the United States at 12–13, Gundy v. United States, 139 S. Ct. 2116 (2019) (No. 17-6086), 2018 WL 3727086.
30. *Gundy*, 139 S. Ct. at 2129.
31. *Id.* at 2125–26.
32. *Id.*
33. *Id.* at 2123 (citing Brief for Petitioner at 37, 45, Gundy v. United States, 139 S. Ct. 2116 (2019) (No. 17-6086), 2018 WL 2441585).
34. *Id.* at 2130 (Alito, J., concurring) (emphasis added).
35. *Id.* at 2131–48 (Gorsuch, J., dissenting).

history"[36] and urged the Court to overturn its approach to nondelegation immediately.[37] Justice Gorsuch asserted that the Framers understood that the structure of government had to ensure the lawmaking branch of government was the branch most responsive to the people, as lawmaking was the most dangerous power in terms of potential threats to liberty.[38]

Justice Gorsuch, looking to the principle of separation of powers and historical examples of nondelegation, provided three "important guiding principles" for findings of permissible delegations.[39] First, he acknowledged that if Congress makes policy decisions in regulating private conduct, it may authorize another branch to "fill up the details," as Chief Justice Marshall held in *Wayman v. Southard*.[40] Second, Justice Gorsuch found that "once Congress prescribes the rule governing private conduct, it may make the application of that rule depend on executive fact-finding."[41] Here, Justice Gorsuch cited *Cargo of Brig Aurora*, a case from during the Napoleonic Wars upholding a statute instructing that, unless the President found and declared that Great Britain was no longer violating the neutrality of the United States, a trade prohibition against Great Britain was to continue.[42] In such cases, the Executive Branch is only tasked with fact-finding, the conclusion of which triggers legislation passed by Congress. Third, Justice Gorsuch found that "Congress may assign the executive and judicial branches certain non-legislative responsibilities," as "no separation of powers problem may arise if 'the discretion is to be exercised over matters already within the scope of executive power.'"[43] In other words, a delegation to the Executive of something already within its power is not an unconstitutional delegation. Here he cited *Cargo of Brig Aurora* again, noting that although it was decided on different grounds, the foreign-affairs-related statute at issue in that case may be an example of permissible lawmaking, given the extent of foreign affairs powers constitutionally vested in the Executive under Article II.[44]

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36. *Id.* (emphasis added).

37. *Id.* at 2131 (Gorsuch, J., dissenting) ("Respectfully, I would not wait.").

38. *Id.* at 2133–34 (Gorsuch, J., dissenting). Justice Gorsuch also notes that the structure was designed to promote deliberation as laid out in Article I's detailed processes for new laws. This deliberation is absent when the authority is merely delegated to another branch of government.

39. *Id.* at 2136 (Gorsuch, J., dissenting).

40. *Id.* (citing Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825)). Chief Justice Marshall, in upholding a statute instructing federal courts to borrow state-court procedural rules but allowing changes, distinguished between "important subjects, which must be entirely regulated by the legislature itself," and "those of less interest, in which a general provision may be made, and power given to those who are to act . . . to fill up the details." *Wayman*, 23 U.S. (10 Wheat.) at 43.

41. *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting).

42. *Id.* (citing Cargo of Brig Aurora v. United States, 11 U.S. (7 Cranch) 382, 388 (1813) (finding that the Court could "see no sufficient reason, why the legislature should not exercise its discretion either expressly or conditionally, as their judgment should direct")).

43. *Id.* at 2137 (citing David Schoenbrod, *The Delegation Doctrine: Could the Court Give it Substance?*, 83 MICH. L. REV. 1233, 1260 (1985)).

44. *Id.* (discussing *Cargo of Brig Aurora v. United States*, 11 U.S. 382, 388 (1813)).

Though Justice Gorsuch laid out these principles in a dissent, the composition of the Court and its approach to precedent has changed since then. Although neither Justice Kavanaugh nor Justice Barrett were on the bench at the time *Gundy* was heard, both have signaled interest in the doctrine.[45] Justice Alito, in his *Gundy* concurrence, stated his willingness to revisit nondelegation doctrine if a majority of the Court was willing to do so as well.[46] With six members of the Court likely willing to readdress nondelegation, along with Justice Gorsuch's "text and history" approach that seems consistent with the approach the majority has taken in other recent cases,[47] it appears well-within the scope of possibility that Justice Gorsuch's dissenting opinion, and the three principles therein, may become the new doctrine of the Court.

III. NEA & IEEPA

A. History

Frustratingly for legal scholars and jurists—and perhaps conveniently for Presidents—the Constitution says nothing about emergency power. Some Presidents, such as President Lincoln, took actions based on their own perceived constitutional authority and sought congressional approval for emergency actions after acting, with subsequent legislative authorizations amounting to little more than Congress's blessing.[48] Others, such as President Wilson, requested a broad grant of emergency authority from Congress, giving the executive branch prospective authority to adopt measures as the President finds necessary.[49]

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45. For a discussion of Justice Kavanaugh's approach to nondelegation, see Brett Shumate and John Cheretis, *Justice Kavanaugh Hints at Future Consideration of Nondelegation Doctrine*, WLF LEGAL PULSE (Feb. 19, 2020), https://www.wlf.org/2020/02/19/wlf-legal-pulse/justice-kavanaugh-hints-at-future-consideration-of-nondelegation-doctrine/ [https://perma.cc/J3GA-MPJW] ("In a recent statement concerning the Supreme Court's denial of certiorari in a case from the Sixth Circuit, *Paul v. United States*, Justice Kavanaugh . . . suggested that the Constitution's 'nondelegation doctrine' may prohibit Congress from delegating its authority to decide 'major policy questions' . . . to federal agencies . . . . He also cited Justice Gorsuch's dissenting opinion in *Gundy v. United States*."). Justice Barrett, as a professor, examined delegation of congressional authority to the executive to suspend *habeas corpus* in a national emergency and noting nondelegation's applicability to executive actions, particularly where fundamental rights are implicated. *See* Amy Coney Barrett, *Suspension and Delegation*, 99 CORNELL L. REV. 251 (2014).

46. *Gundy*, 139 S. Ct. at 2130–31 (Alito, J., concurring).

47. *See, e.g.*, New York State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2161 (2022) (Kavanaugh, J., concurring) (applying a "text, history, and tradition" test to determine the constitutionality of state firearm laws).

48. For example, Lincoln declared a blockade on secessionist states' ports before Congress considered a declaration of war and ordered by proclamation that the military be enlarged, Proclamation No. 4, 12 Stat. App. 1258 (1861), even though Congress is granted specific authorization "to raise and support armies." U.S. CONST. art. I, § 8, cl. 12.

49. CHRISTOPHER A. CASEY, ET AL., CONG. RSCH. SERV., R45618, THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT: ORIGINS, EVOLUTION, AND USE (2020) (citing CLINTON ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 241–243 (1948)).

One of these grants of authority was the Trading with the Enemy Act.[50] Section 5(b) granted the President authority to investigate and regulate transactions between the United States and any foreign country as well as require any person within the United States to furnish, under oath, information related to such transactions.[51] Under TWEA, President Wilson issued an executive order to create the Office of Alien Property Custodian, which would confiscate property from those posing a threat to the war effort, an early precursor to the modern Office of Foreign Assets Control.[52]

In keeping with Lincoln's presidential practice of responding to national emergencies by acting first and seeking congressional approval later,[53] President Franklin D. Roosevelt expanded TWEA significantly in 1933 when he cited it as the source of authority for Proclamation 2039, declaring a national emergency and imposing a bank holiday, despite the lack of a wartime emergency.[54] Congress subsequently approved his actions in passing the Emergency Banking Relief Act three days later, which amended TWEA Section 5(b) to apply during both times of war and "any other period of national emergency declared by the President," adding that the President may work "through any agency that he may designate."[55]

The Second World War provided another opportunity for Congress to grant the President additional powers through TWEA, adding the "vesting" power, which allowed permanent seizure of property.[56] TWEA continued to serve as a useful postwar tool for Presidents, as later Presidents declared additional national emergencies relating to the Cold War, giving them the authority to impose sanctions, regulate foreign exchanges and export controls, limit foreign direct investment by U.S. companies, and oversee monetary policy.[57]

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50. Trading with the Enemy Act of 1917, Pub. L. No. 65-91, 40 Stat. 411 (codified as amended at 50 U.S.C. §§ 4301–4341).

51. *Id.*

52. Exec. Ord. No. 2729–A (Oct. 12, 1917), available at GERHARD PETERS AND JOHN T. WOOLLEY, THE AMERICAN PRESIDENCY PROJECT, U.C. SANTA BARBARA, https://www.presidency.ucsb.edu/documents/executive-order-2729a-vesting-power-and-authority-designated-officers-and-making-rules-and [https://perma.cc/V78D-R9RH].

53. Of course, President Lincoln's choice to respond to an attack at the outset of the Civil War was a very different circumstance than President Franklin D. Roosevelt's proclamation of a bank holiday to stabilize the banking system.

54. Proclamation No. 2039 (Mar. 6, 1933), *reprinted in* GERHARD PETERS & JOHN T. WOOLLEY, THE AMERICAN PRESIDENCY PROJECT, U.C. SANTA BARBARA, https://www.presidency.ucsb.edu/documents/proclamation-2039-bank-holiday-march-6-9-1933-inclusive [https://perma.cc/K9ED-49SM].

55. Emergency Banking Relief Act, Pub. L. No. 73–1, 48 Stat. 1, (1933).

56. First War Powers Act of 1941, "Title III–Trading with the Enemy," Pub. L. No. 77-345, 55 Stat. 838, sec. 301 (1941).

57. For a discussion of specific measures taken by Cold War-era Presidents under TWEA, see CASEY, ET AL., *supra* note 49, at 6.

B. From TWEA to NEA/IEEPA

Amidst the political scandals of the mid-1970s, however, Congress revisited its delegations of power to the executive branch, finding that TWEA was "essentially an unlimited grant of authority for the President to exercise, at his discretion, broad powers in both the domestic and international economic arena, without congressional review."[58] In an attempt to reign in TWEA, Congress enacted the National Emergencies Act in 1976, which terminated all existing emergencies other than those under TWEA Section 5(b).[59] The NEA required the President to notify Congress of declarations of emergency, mandated a biannual review by Congress to determine whether to terminate the emergency, and authorized Congress to terminate the emergency through a concurrent resolution.[60]

Congress then passed the International Emergency Economic Powers Act to grant the President new authorities for national emergencies,[61] noting that it was designed "to confer 'upon the President a new set of authorities for use in time of national emergency which are both more limited in scope than those of section 5(b) and subject to procedural limitations, including those of the [NEA].'"[62] IEEPA allows the President to investigate, regulate, or prohibit various foreign banking transactions[63] and to investigate, regulate, or (in some cases) confiscate foreign property.[64]

IEEPA is self-limiting. Its geographic scope is "any unusual and extraordinary threat, *which has its source in whole or substantial part outside the United States*, to the national security, foreign policy, or economy . . . if the President declares a national emergency with respect to such threat."[65] Section 1702 also identifies what may *not* be regulated under traditional sanctions, including communications not involving a transfer of anything of value, donations in certain circumstances, importation of information, transactions incident to travel, and classified information.[66]

Additionally, the President must consult with Congress "in every possible instance;" to report to Congress the circumstances necessitating the exercise of authority, the reasons why those circumstances constitute a threat, the authorities

58. *Id.* (citing H.R. Rep. No. 95-459, at 4).

59. National Emergencies Act, 50 U.S.C. §§ 1601–1651. Complicating the enactment of the NEA and IEEPA was the fact that the United States was, at the time, sanctioning entities under TWEA 5(b). The exception for Section 5(b) allowed for the United States to continue its sanctions and international monetary policy under Section 5(b) while Congress figured out how to replace Section 5(b) with a new, more limited act without disturbing them. *See* CASEY, ET AL., *supra* note 49, at 8–9.

60. National Emergencies Act, 50 U.S.C. §§ 1601–1651.

61. International Emergency Economic Powers Act, 50 U.S.C. § 1702.

62. CASEY, ET AL., *supra* note 49, at 9 (citing H.R. REP. NO. 95–459, at 2).

63. International Emergency Economic Powers Act, 50 U.S.C. §§ 1702–1706.

64. *Id.*

65. 50 U.S.C. § 1701 (emphasis added).

66. 50 U.S.C. § 1702.

to be exercised, why the actions are necessary, foreign countries with respect to which the actions are taken and why; and to provide follow-up reports.[67]

C. Changes to NEA/IEEPA

Since their enactments, Congress has amended IEEPA and the NEA several times. After *INS v. Chadha*,[68] Congress was forced to amend the NEA to require a joint resolution (which uses a congressional supermajority) rather than a concurrent resolution (which requires only a simple majority) to terminate an emergency.[69] This raised the bar for Congress to check its delegation of authority to the executive branch. Congress also amended IEEPA, to apply to informational materials used to advance terrorism[70] and to give the President authority to vest frozen assets under certain circumstances.[71]

Despite IEEPA's passage as an attempt to reign in the powers granted to the executive under TWEA, its usage over time has afforded the executive significant powers in foreign commerce.[72] Since its enactment in 1977, the President has invoked IEEPA 67 times, which last on average nearly nine years—a number growing each decade.[73] Whereas these emergencies were originally geographic in scope, Presidents since 1990 have increasingly identified amorphous threats[74] as emergencies—such as weapons proliferation, global terrorism, and malicious cyber activities.[75] This allows for broad application of IEEPA not only to countries but also to groups and individuals. While Congress emphasized the importance of emergencies remaining limited when passing IEEPA as a response to

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67. 50 U.S.C. § 1703.

68. I.N.S. v. Chadha, 462 U.S. 919 (1983).

69. Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, Pub. L. No. 99–93, § 801, 99 Stat. 405, 448 (1985).

70. When it was initially enacted, IEEPA allowed U.S. persons to engage in the exchange of communications with foreign persons subject to sanctions, so long as it did not involve the transfer of anything of value. Amendments in 1988 and 1994 updated this with additional formats of protected communications to reflect changing technologies. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, § 2502, 102 Stat. 1107, 1371–72 (1988) (amended by Foreign Relations Authorization Act for Fiscal Years 1994–1995, Pub. L. 103–236; 108 Stat. 382 (1994)). Following the attacks on September 11, 2001, this language was amended to allow for such communications provided that the exchange is not otherwise controlled for reasons related to weapons proliferation or international terrorism. USA PATRIOT Act, Pub. L. No. 107–56, 115 Stat. 272 (2001). The issue of First Amendment challenges to this aspect of IEEPA are outside of the scope of this paper.

71. USA PATRIOT Act, Pub. L. No. 107–56, 115 Stat. 272 (2001).

72. While broad usage of IEEPA does not mean that it is a per se unconstitutional delegation of authority, the degree to which successive presidential administrations have successfully expanded their scope and usage suggests a lack of limiting factors to guide the executive branch using an intelligible principle. For further discussion on whether Congress has set out a sufficiently intelligible principle in the NEA and IEEPA, see *infra* Section IV(A) of this paper.

73. The count is applicable between its enactment and March 25, 2022. "This tally does not include IEEPA invocations made in connection with executive orders expanding the scope of an initial declaration of national emergency." CASEY, ET AL., *supra* note 49, at 15 n.97.

74. "Amorphous," as used here, is not intended to suggest these threats are not serious; rather, it is meant to suggest they lack confinement to a certain place or time, allowing a President to respond to a constantly changing threat landscape.

75. For a list of examples of such executive orders, see CASEY, ET AL., *supra* note 49, at 15–16, n.98.

TWEA, as of March 2022, there are 37 ongoing national emergencies.[76] Additionally, while earlier invocations of IEEPA targeted solely foreign entities, several uses have removed the "foreign" specification, allowing the President to target persons in the United States, including U.S. citizens.[77]

IV. NONDELEGATION AND IEEPA

A. IEEPA and the Intelligible Principle Standard

Congress's delegation of authority to the executive branch has been challenged in several cases at both the circuit and district court level, with courts finding that IEEPA satisfies the broad intelligible principle test set forth in *J.W. Hampton*.[78] In *United States v. Dhafir*, the Second Circuit heard a challenge by a defendant convicted for attempting to transfer funds to people in Iraq.[79] This was in violation of Executive Orders 12722 and 12724, through which President George H.W. Bush, following the Iraqi invasion of Kuwait, declared a national emergency and prohibited trade, transportation, and financial transactions with Iraq[80] and Kuwait.[81] The defendant in *Dhafir* argued that IEEPA improperly delegated congressional authority to create crimes to the executive branch, the nondelegation of legislative power to the President being "a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution."[82] He further criticized the "intelligible principle" standard as an insufficiently strict limit on Congress to authorize another branch of government to promulgate regulations contemplating criminal sanctions, noting that:

> [T]here is no limit to the Congressional delegation to the President of the unfettered power to criminalize previously lawful conduct without any Congressional review. This perpetual blanket delegation to the Executive branch of authority to criminalize any as of yet undefined conduct violates Article 1, Section 1 of the United States Constitution.[83]

Interestingly, the defendant's brief in *Dhafir* makes a similar point to one Justice Gorsuch makes in his *Gundy* dissent. There, Justice Gorsuch argues that a stricter standard is necessary for the delegation of authority to contemplate criminal sanctions, as

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76. *Id.* at 16.
77. *Id.* at 20–22. For a list of examples of such executive orders, *see id.* at 22 n.138.
78. J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406 (1928).
79. United States v. Dhafir, 461 F.3d 211 (2d Cir. 2006).
80. Exec. Order No. 12,722, 55 Fed. Reg. 31803 (1990).
81. Exec. Order No. 12,724, 55 Fed. Reg. 33089 (1990).
82. Brief for Defendant-Appellant at 10, United States v. Dhafir, 461 F.3d 211 (2d Cir. 2006) (No. 05–4770–cr) (citing Field v. Clark, 143 U.S. 649, 692 (1892)).
83. *Id.* at 13.

> regulations that impose criminal sanctions pose a heightened risk to individual liberty, and Congress must therefore provide more specific guidance when delegating this power to the President. Although the President can issue orders and regulations to protect national security, whether criminal sanctions should be imposed for a violation of those orders or regulations is a subject that must be left to Congress.[84]

The Second Circuit, however, disagreed with the defendant in *Dhafir*, noting that the "intelligible principle" test is so broad that the Supreme Court has only struck down two statutes as impermissible delegations.[85] Further, delegation is afforded an even broader deference in the realm of foreign affairs, where "the President alone has the power to speak or listen as a representative of the nation."[86] The Court cited examples of the Supreme Court and circuit courts upholding delegations under IEEPA to nullify attachments and transfers of assets[87] and noted that in non-IEEPA contexts, the Court had upheld delegations of authority to define criminal offenses.[88]

The Second Circuit, as well as other circuit courts that have addressed IEEPA's constitutionality on nondelegation grounds, cited supposed "constraining factors" in IEEPA to find its delegation of authority sufficiently defined and limited.[89] Courts noted that to activate IEEPA, the President had to find a national emergency as per the requirements set out in the NEA, the President was limited from regulating certain transactions listed in IEEPA, and both the NEA and IEEPA set out statutory responsibilities by Congress to ensure oversight.[90] These "constraining factors," courts reasoned, were sufficient limitations on the scope of executive powers delegated through IEEPA, preventing it from becoming a "perpetual blanket delegation to the Executive branch of authority to criminalize any as of yet undefined conduct."[91]

These "constraining factors," however, amount to little more than lip service to the concept of defined and limited authorities. In several of the areas where the executive is supposedly limited—declaration of a national emergency and

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84. United States v. Gundy, 139 S. Ct. 2131 (Gorsuch, J., dissenting).

85. United States v. Dhafir, 461 F.3d 211, 215 (2d Cir. 2006) (referencing A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935)).

86. *Dhafir*, 461 F.3d at 216 (referencing United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936); Zemel v. Rusk, 381 U.S. 1, 17 (1965)).

87. *Id.*; *see also* Sardino v. Federal Reserve Bank of New York, 361 F.2d 106, 110 (2d Cir. 1966) (upholding constitutionality of the Trading with the Enemy Act); Freedom to Travel Campaign v. Newcomb, 82 F.3d 1431, 1437–38 (9th Cir. 1996) (upholding constitutionality of Congress' delegation of authority to renew the Cuban embargo solely upon a determination that it is "in the national interest").

88. *Dhafir*, 461 F.3d at 216 (referencing *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); United States v. Grimaud, 220 U.S. 506, 517 (1911); Touby v. United States, 500 U.S. 160 (1991)).

89. *See, e.g.*, *Dhafir*, 461 F.3d at 211; United States v. Amirnazmi, 645 F.3d 564, 575–78 (3d Cir. 2011); United States v. Arch Trading Co., 987 F.2d 1087, 1092–94 (4th Cir. 1993).

90. *Arch Trading Co.*, 987 F.2d at 1093.

91. Brief for Defendant-Appellant at 11, United States v. Dhafir, 461 F.3d 211 (2d Cir. 2006) (No. 05–4770–cr).

reporting and oversight requirements—these "constraining factors" exist in name only. If courts justify the delegation on grounds that the "intelligible principle" is sufficiently limited in scope by "constraining factors," yet these "constraining factors" provide no real limits, can courts really say the delegation satisfies the intelligible principle test?

For one thing, while the NEA allegedly limits the President to declarations of "national emergencies," the NEA provides no definition for the term, which has allowed Presidents to identify increasingly amorphous threats rather than specific geographic locations.[92] Additionally, while the NEA and IEEPA attempted to limit the longevity of executive powers in declared emergencies, the declarations and the powers themselves have only increased in frequency and length.[93] It seems unlikely that most Americans would identify as a "national emergency" human rights violations in Sudan, international stabilization efforts in the Western Balkans, or democratic demonstrations in Zimbabwe, yet a national emergency and sanctions under IEEPA have been in place for each of those since 1997, 2001, and 2003, respectively.[94]

Furthermore, the *Chadha* amendment means that Congress needs the seemingly unsurmountable two-thirds supermajority to terminate a national emergency, effectively delegating loosely limited authority to the executive that was not anticipated in the original passage of the NEA and IEEPA.

Even more notably, the delegation is not sufficiently defined and limited by the "constraining factors" of reporting and oversight requirements, as both Congress and the President have failed to satisfy the requirements set forth in the NEA and IEEPA. While Congress is supposed to limit the Executive's power to keep the country in a constant state of emergency by regularly convening to determine whether to terminate the emergency,[95] Congress has consistently failed to exercise this important oversight role.

The First Circuit has found that Congress's failure to satisfy that provision does not automatically lead to a termination of the emergency.[96] It focused on the disparity between §1622(d), which provides that the national emergency automatically terminates if the President fails to extend it, and §1622(b), which says nothing about termination if Congress fails to vote.[97] Additionally, the court argued, the legislative history showed that Congress eliminated a sunset provision

92. CASEY, ET AL., *supra* note 49, at 15–16, n.98.

93. *Id*. at 15–16.

94. Exec. Order No. 13,067, 62 Fed. Reg. 59989 (1997) ("Blocking Sudanese Government Property and Prohibiting Transactions With Sudan"); Exec. Order No. 13,219, 66 Fed. Reg. 34777 (2001) ("Blocking Property of Persons Who Threaten International Stabilization Efforts in the Western Balkans"); Exec. Order No. 13,288, 31 C.F.R. 541 (2003) ("Blocking Property of Persons Undermining Democratic Processes or Institutions in Zimbabwe").

95. 50 U.S.C. § 1622(b).

96. Beacon Products Corp. v. Reagan, 814 F.2d 1 (1st Cir. 1987).

97. *Id*. at 4.

from an earlier draft of the NEA so that termination of an emergency was an affirmative act.[98]

The Third Circuit agreed, finding that Congress's failure to convene to evaluate a continued emergency does not violate the power-sharing program contemplated by IEEPA: "[E]quating inaction with a withdrawal of authorization would be particularly improper with a statute that concerns foreign affairs."[99] The Third Circuit cited the tripartite framework for evaluating executive action laid out in Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, arguing that inaction and statutory developments that leave untouched executive rulemaking authority lead to an inference of congressional approval.[100] Thus, the President's power over foreign affairs can actually be seen as at its maximum when Congress simply abdicates its oversight duties explicitly delineated in the act.[101]

Furthermore, despite claiming that requirements that the executive abide by the limitations in the statute amount to "constraining factors" that allow the NEA and IEEPA to satisfy the intelligible principle test, courts have largely dismissed limitations on the executive's power. In *Dhafir*, one of the defendants argued that the President failed to comply with statutory reporting requirements mandated by IEEPA, noting that "only one of the statutorily-required six-month periodic reports was proffered to the district court."[102] The Second Circuit sidestepped the issue, finding that "case law does not support the idea that the government bears the burden of proving its compliance with a statute in order to establish the statute's constitutionality."[103] It further dismissed as "mere dicta" the opinion in *Panama Refining Co.*[104] In determining whether the "intelligible principle" for the delegation of authority under IEEPA has been met, therefore, circuit courts have cited limitations on the grant of power as evidence of an "intelligible principle" while simultaneously stripping these limitations of any real meaning.

B. IEEPA and Gundy *Dissent Test*

Given the centrality of IEEPA to Presidents' emergency and foreign affairs powers, it is worth analyzing the constitutionality of IEEPA under the dissent laid out by Justice Gorsuch in *Gundy*, especially considering the new composition of the Supreme Court.

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98. *Id.* at 4–5.

99. United States v. Amirnazmi, 645 F.3d 564, 577–79 (3rd Cir. 2011).

100. *Id.* (referencing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring); Haig v. Agee, 453 U.S. 280, 300–01 (1981) (inferring congressional approval of a "longstanding and officially promulgated" executive policy from both inaction and statutory developments that left untouched authority granted in an earlier Act)).

101. *Id.*

102. United States v. Dhafir, 461 F.3d 211, 217–18 (2006).

103. *Id.* at 218 (discussing Panama Refining Co. v. Ryan, 293 U.S. 388, 415, 431 (1935)).

104. *Id.* (explaining that Congress's delegation failed to set up a standard for the President's actions and that if such prerequisites to action existed, the President would have the burden of complying and showing that compliance).

1. "Fill Up the Details"

The first principle offered by Justice Gorsuch is that "as long as Congress makes the policy decisions when regulating private conduct, it may authorize another branch to 'fill up the details.'"[105] Justice Gorsuch referred to Chief Justice Marshall's opinion in *Wayman v. Southard*, which upheld a statute instructing federal courts to borrow state court procedural rules with "alterations and additions."[106] There, Chief Justice Marshall found that the legislature must regulate important subjects, but for those of less interest, the legislature may make a general provision and grant power to "fill up the details."[107] Justice Gorsuch also cites later cases upholding "far more consequential statutes," such as a law authorizing the Secretary of Agriculture to adopt rules regulating "use and occupancy" of public forests to protect them from "destruction" and "depredations."[108] The standard, he finds, is that "Congress must set forth standards 'sufficiently definite and precise to enable Congress, the courts, and the public to ascertain' whether Congress's guidance has been followed."[109]

Here, it seems unlikely that the Supreme Court would find that Congress set forth standards that merely allow the President to "fill up the details" in IEEPA. Congress left the definition of a "national emergency" in the NEA open-ended, allowing successive presidential administrations to identify increasingly broad and amorphous threats to the United States warranting a national emergency.

IEEPA, on the other hand, is more explicit about the appropriate actions the Executive is permitted to take. However, because the NEA and IEEPA effectively go hand-in-hand, the lack of any real standard for national emergencies means that actions taken under IEEPA may still be unconstitutional. The emergency situation giving rise to IEEPA's authorities could be an unconstitutionally delegated determination due to a lack of "sufficiently definite and precise" standards against which to test the declaration. Because the NEA lacks these standards, the subsequent authorities available to the executive under IEEPA may also be unconstitutional.

2. Executive Fact-Finding

Justice Gorsuch's second principle is that "once Congress prescribes the rule governing private conduct, it may make the application of that rule depend on executive fact-finding."[110] In *Cargo of Brig Aurora*, the Court found "no sufficient reason, why the legislature should not exercise its discretion [to impose an embargo] either expressly or *conditionally*, as their judgment should see direct."[111]

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105. Gundy v. United States, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting).
106. *Id.* (citing Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 46 (1825)).
107. *Id.* (citing Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 46 (1825)).
108. *Gundy*, 139 S. Ct. at 2136 (discussing United States v. Grimaud, 220 U.S. 506, 522 (1911)).
109. *Gundy*, 139 S. Ct. at 2136 (citing Yakus v. United States, 321 U.S. 414, 426 (1944)).
110. *Gundy*, 139 S. Ct. at 2136.
111. *Id.* (citing 11 U.S. (7 Cranch) 382, 388 (1813) (emphasis added)).

He also noted that Congress permissibly made construction of the Brooklyn Bridge dependent on a finding of fact by the Secretary of War that the bridge would not interfere with navigation of the East River: rather than granting the executive legislative powers, it tasked the executive with ascertaining a fact.[112]

Gorsuch found these examples of permissible delegations differed from *A.L.A. Schechter Poultry*, where no rules were announced contingent on executive fact-finding, as well as from *Panama Refining Co*., where the statute did not call for the executive to ascertain facts to which the legislation was directed.[113] Justice Gorsuch highlighted the types of questions important for this analysis, such as: 1) whether the statute assigns to the Executive only the responsibility to make factual findings; 2) whether it sets forth facts the Executive must consider and criteria against which to measure them; and 3) "most importantly" whether Congress, and not the Executive Branch, makes the policy judgments.[114]

The NEA and IEEPA's answers to these questions are unconvincing. Regarding the first question: while the Executive Branch does make a factual finding as to whether a national emergency exists, the NEA does not define a national emergency. It does not describe the facts that the Executive must consider, not does it provide criteria against which to measure them.

On the second question: the declaration of an emergency is not purely a finding of "fact." This is unlike in *Cargo of Brig Aurora*, where it was an objective "fact" whether Great Britain and France were attempting to block the United States from trading with the other; or in *Miller v. Mayor of New York*, where the "fact" was whether a bridge would interfere with river navigation; or even in *Touby*, where the "fact" was whether a drug constituted an "imminent hazard to the public safety."[115] Instead, the NEA provides no guidance for what might constitute an emergency or factors a President should consider in finding an emergency, turning the "finding of fact" into more of a "perception of threat."

Finally, on the third question: the Executive is not *only* tasked with the fact-finding that then triggers another part of the statute that is legislative in nature. The NEA and IEEPA together allow the President to find the existence of an emergency and then respond accordingly, completely up to the President's own discretion, with only a few limitations set forth by Congress. This deference to the Executive on both fact-finding *and* policy choice fails the test of whether Congress, and not the Executive Branch, made the policy judgments. IEEPA does not even provide a list of statutory policy options for the President to choose

112. *Gundy*, 139 S. Ct. at 2136–37 (discussing Miller v. Mayor of New York, 109 U.S. 385, 393 (1883)).

113. *Gundy*, 139 S. Ct. at 2137–38 (Gorsuch, J., dissenting) (*comparing* Miller v. City of New York, 109 U.S. 385, 393 (1883), *with* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 521–522 (1935), *and* Panama Refining Co. v. Ryan, 293 U.S. 388, 426 (1935)).

114. *Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., dissenting) (discussing Touby v. United States, 500 U.S. 160 (1991)).

115. *Gundy*, 139 S. Ct. at 2136–41 (Gorsuch, J., dissenting) (discussing Cargo of Brig Aurora v. United States, 11 U.S. (7 Cranch) 382, 388 (1813); Miller v. Mayor of New York, 109 U.S. 385, 393 (1883); Touby v. United States, 500 U.S. 160 (1991)).

from, but instead serves as a positive grant of authority over foreign transactions that is subject to only a few statutory limitations.

3. Overlapping Powers

While the Constitution is silent on powers in some areas—such as emergency powers—it splits authority among different branches in other realms, leading to overlapping authorities on particular issues.[116] Justice Gorsuch's last consideration is whether the powers that Congress is delegating overlap with authority the Constitution separately vests in another branch.[117] For example, there may be no separation-of-powers issue if a congressional statute grants significant discretion to the Executive if that discretion is already within the scope of Executive power.[118]

Here, Justice Gorsuch explicitly mentions the foreign affairs power of the Executive. He notes that although *Cargo of Brig Aurora* was decided on different grounds, it may also be an example of permissible lawmaking because the President has many overlapping foreign affairs powers under Article II.[119] In applying this consideration to SORNA, Justice Gorsuch notes that (unlike in the realm of foreign affairs) SORNA does not involve an area of overlapping authority with the Executive:

> Congress may assign the President broad authority regarding the conduct of foreign affairs or other matters where he enjoys his own inherent Article II powers. But SORNA stands far afield from any of that. It gives the Attorney General the authority to 'prescribe the rules by which the duties and rights' of citizens are determined, a quintessentially legislative power.[120]

This issue of overlapping powers requires an assessment of whether the powers delegated to the President through the NEA and IEEPA sufficiently overlap with the President's inherent Article II authority.

Importantly, the Commerce Clause grants Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."[121] Also within Article I are Congress's powers to "provide for the common Defense and general Welfare"; its war, Armed Forces, and militia powers; and the Necessary and Proper Clause.[122] Prior to the founding of the Republic,

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116. For example, Congress and the Executive Branch both are granted powers in the realm of military affairs, with Congress empowered to declare war; raise and support armies; provide and maintain a navy; and regulate land and naval forces (U.S. CONST. art. I, § 8, cl. 11–14), while the President retains Commander-in-Chief authority over the military forces (U.S. CONST. art. II, § 2 cl. 1).

117. *Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., dissenting).

118. *Id.*

119. *Id.* (referencing Cargo of the Brig Aurora v. United States, 11 U.S. (7 Cranch) 382 (1813)).

120. *Gundy*, 139 S. Ct. at 2144 (Gorsuch, J., dissenting) (citing THE FEDERALIST NO. 78 (Alexander Hamilton)).

121. U.S. CONST. art. I, § 8, cl. 3.

122. U.S. CONST. art. I, § 8.

the Continental Congress passed acts that may be seen as the first expressions of emergency authority.[123] This suggests that the Founders may have understood Congress to have implicit emergency powers prescribed by the Constitution. If this perspective is correct, it implies that emergency powers are *not* the type of overlapping area that Justice Gorsuch would recognize as satisfying his third principle.

On the other hand, the NEA and IEEPA are not simply statutory powers that apply in *any* emergency situation. Their authorities are designed to address "any unusual and extraordinary threat, *which has its source in whole or substantial part outside the United States*, to the *national security, foreign policy, or economy of the United States*."[124] This explicit reference to threats originating outside of the United States means the NEA and IEEPA are inexorably connected to the realm of foreign affairs, not merely emergency powers. A full analysis of the potential "overlapping powers" therefore not only requires an examination of constitutional authority in emergency powers but also an examination of constitutional authority in foreign affairs.

The Executive Branch is constitutionally guaranteed a significant role in the realm of foreign affairs in Article II. The Supreme Court has found as much, particularly in *United States v. Curtiss-Wright Export Corp.* and in *Youngstown Sheet & Tube Co. v. Sawyer*.[125] Of particular relevance is *Curtiss-Wright Export Corp.*, which established that the President, serving as the nation's "sole organ" in international relations, has significant powers in foreign affairs.[126]

The decision in *Curtiss-Wright* came from a constitutional challenge on nondelegation grounds. Congress had passed a joint resolution empowering the President to proclaim an embargo on American arms shipments if he found the prohibition of such sales would contribute to peace between Paraguay and Bolivia.[127] After President Franklin D. Roosevelt made such a finding and issued a proclamation establishing an embargo,[128] Curtiss-Wright Export Corp. was indicted for violating the joint resolution and embargo by conspiring to sell arms to Bolivia.[129]

Responding to Curtiss-Wright's claims that the Joint Resolution unconstitutionally delegated legislative power to the Executive, the Court analyzed the Executive's power in foreign affairs by "assuming (but not deciding) that the challenged delegation, if it were confined to internal affairs, would be invalid,

123. L. ELAINE HALCHIN, CONG. RSCH. SERV., REPORT 98-505, NATIONAL EMERGENCY POWERS 1 n.2 (updated 2021) (citing J. Reuben Clark Jr., comp., *Emergency Legislation Passed Prior to December 1917*, at 201–28, (1918)).

124. 50 U.S.C. § 1701(a).

125. United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

126. *Curtiss-Wright*, 299 U.S. at 319–20.

127. Joint Resolution, 48 Stat. 811, 34 U.S.C.A. § 626a (1934).

128. Proclamation No. 2087, 48 Stat. 1744 (1934).

129. Indictment, in Transcript of Record at 3, United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) (No. 98).

may it nevertheless be sustained on the ground that its exclusive aim is to afford a remedy for a hurtful condition within foreign territory?"[130]

Analyzing it as a separation of powers issue, the Court declared that the Constitution carved out some powers from the states and vested them in the federal government, and that those not included were to be left to the states.[131] Because the states never possessed them, foreign affairs powers were thus not delegated to the legislature. Instead, they flow from powers passed from the Crown to the collective—rather than several—states.[132] Therefore,

> the investment of the federal government with the powers of external sovereignty did not depend on affirmative grants of the Constitution. The powers . . . if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality.[133]

The implication here is that the realm of foreign affairs belongs almost exclusively to the Executive Branch. For the purposes of a nondelegation analysis, any foreign-affairs delegation by Congress to the Executive is almost certainly constitutional, as the Executive has already retained the authority.

Additionally, the Court found that "[i]n this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation."[134] First, the Court cited writings from the early Republic identifying the President as the "sole" and "constitutional" representative of the United States in the external realm.[135] Next, it reasoned that the President's exercise of his foreign affairs power in *Curtiss-Wright* did not even require an act of Congress but was an exercise of the President's plenary and exclusive powers as the sole organ of the federal government.[136]

The Court found this vast implied power had a practical effect; it avoids embarrassment, affords the President discretion and freedom from statutory restrictions where he has access to greater confidential information to inform his decisions, and allows the United States to act as sovereign nation.[137] Therefore, the Court concluded it was entirely unnecessary to consider clauses said to evidence the unconstitutionality of the Joint Resolution on nondelegation grounds.[138]

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130. *Curtiss-Wright*, 299 U.S. at 315.
131. *Id.* at 315–16 (citing Carter v. Carter Coal Co., 298 U.S. 238, 294 (1936)).
132. *Curtiss-Wright*, 299 U.S. at 315–17.
133. *Id.* at 318.
134. *Id.* at 319.
135. *Id.* (citing S. COM. ON FOR. REL, 8 U.S. SEN. REPORTS COMM. ON FOREIGN RELATIONS, 24 (1816) ("As Marshall said in his great argument of March 7, 1800, in the House of Representatives, 'The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.'").
136. *Curtiss-Wright*, 299 U.S. at 319–20.
137. *Id.* at 319–22.
138. *Id.* at 329.

Relying on principle and precedent, it was clear that the President had sufficiently broad discretion to determine whether enforcement of the statute would achieve peace.[139]

The vast foreign affairs powers found by the Court in *Curtiss-Wright* to belong to the Executive regardless of a grant of authority by Congress likely satisfy Justice Gorsuch's third principle of overlapping powers. Indeed, in establishing the third principle, Justice Gorsuch even cited *Curtiss-Wright* positively, suggesting that there is no nondelegation issue where Congress's legislative authority overlaps with authority the Constitution separately vests in another branch. This implies that under his analysis, Congress may permissibly delegate powers that overlap with the Executive's authority—like in the realm of foreign affairs—without disrupting or altering the constitutional structure, such as in the case of the NEA and IEEPA.

It may be argued that IEEPA is not truly the "external realm" because rather than dealing exclusively with issues external to the United States (such as diplomatic relations or war powers), IEEPA allows the President to restrict the liberties of U.S. persons domestically through civil and criminal penalties. After all, Justice Gorsuch's dissent focused on the risk of unconstitutional delegations of power that allow the Executive, in an excessive law-making capacity, to restrict the people's freedoms without the "detailed and arduous" processes for legislation that were designed to be "bulwarks of liberty."[140] But *Curtiss-Wright* also dealt with the indictment of a U.S. entity for violating an arms embargo, suggesting that the President's wide discretion to operate in the "external realm" extends to the ability to potentially restrict the freedoms of U.S. persons.[141]

One might also argue that the holding in *Curtiss-Wright* was part of the jurisprudential trend toward findings in favor of New Deal legislation and deference to executive powers. The only two cases that struck down legislation on nondelegation grounds—*Schechter Poultry*[142] and *Panama Refining*[143]—were both decided in 1935, before *Curtiss-Wright*.[144] But the composition of the Court in *Curtiss-Wright* was the same as in both of those cases, and it was decided prior to the end of an era skeptical of legislatures exerting significant powers to combat the Great Depression, both by granting powers to the executive and by passing significant regulatory legislation.[145]

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139. *Id*. at 329.
140. Gundy v. United States, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting).
141. United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).
142. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).
143. Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).
144. *Curtiss-Wright*, 299 U.S. 304 (1936).
145. That era did not end until 1937, with *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), generally seen as marking the end of the era and beginning an era of deference.

V. CONCLUSION

Although the powers delegated to the Executive Branch through the NEA/IEEPA likely fail to satisfy Justice Gorsuch's first two principles laid out in his *Gundy* dissent, the nature of overlapping powers in the realm of foreign affairs satisfies the third principle. This suggests that even if the Court intends to revisit nondelegation doctrine under Justice Gorsuch's proposed framework, the NEA and IEEPA will likely remain undisturbed.

However, a finding that the NEA and IEEPA are not unconstitutional delegations does not mean that all executive actions taken by virtue of IEEPA's authorities will necessarily be upheld as constitutional. The Court seems willing to adopt new doctrines to address specific instances of overly expansive applications of executive powers rather than revisit and revise the issue of nondelegation entirely, as changing the standard for nondelegation risks disturbing nearly 100 years of precedent since the establishment of the "intelligible principles" test.

In particular, the Court has recently applied the major questions doctrine, which says that Congress must delegate *expressly* to the Executive Branch the authority to address a "question of 'deep economic and political significance' that is central to [a] statutory scheme."[146] Because the NEA and IEEPA provide the President with broad authority over international commerce, and because that authority may be used to adopt economic policies that are certainly of "deep economic and political significance," courts may apply the doctrine to limit specific applications of the NEA and IEEPA without having to address the constitutionality of the delegation itself. Furthermore, it is possible that even returning to the doctrine of "foreign affairs exceptionalism"[147] would not prevent the Court from limiting applications of the NEA and IEEPA due to the difficulty of distinguishing "foreign" and "domestic" issues, particularly in the realm of sanctions and international commerce.[148]

Additionally, courts may limit specific applications of IEEPA by applying a greater degree of scrutiny in judicial review. Recently, the D.C. Circuit departed from the traditional deference shown to executive agencies in the realm of national security and foreign policy,[149] by granting Xiaomi, a Chinese company that had been designated a Communist Chinese Military Company by the

146. King v. Burwell, 576 U.S. 473, 486 (2015).

147. *Compare* Panama Refining Co. v. Ryan, 293 U.S. 388 (1935), *and* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), *with* United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). The concept of "foreign affairs exceptionalism" is demonstrated by the Court limiting New Deal legislation delegating broad domestic economic power while upholding delegations related to national security and foreign affairs.

148. For a longer discussion of the national security implications of the major questions doctrine and its potential impact on IEEPA, see Timothy Meyer & Ganesh Sitaraman, *The National Security Consequences of the Major Questions Doctrine* 22–28 (Vand. L. Sch., Working Paper No. 22-43, 2022), https://ssrn.com/abstract=4181908 [https://perma.cc/MD2B-XGKJ].

149. Bailey Williams, Xiaomi Corporation v. U.S. Department of Defense*: Defending the International Emergency Economic Powers Act*, 17 DUKE J. CONST. L. & PUB. POL'Y 353 (2022).

Department of Defense, a preliminary injunction against its designation status.[150] The Executive placed Xiaomi on the list pursuant to Executive Order 13959, adopted under IEEPA authority, allowing the Secretary of the Treasury to sanction it.[151] The D.C. Circuit found that Xiaomi's designation as a CCMC lacked the "substantial evidence" required to meet the APA's arbitrary and capricious standard.[152] The court's decision was a significant departure from the normal deference courts show towards the government in these types of cases involving national security and foreign policy.[153] This suggests that courts can—and sometimes will—constrain the President's IEEPA powers by showing less deference to executive agencies' interpretations, particularly when it seems clear the executive branch is exceeding its authorities.[154]

Justice Gorsuch's framework is not, at present, the Court's approach to nondelegation. Even if it were, the NEA and IEEPA would likely remain untouched. Despite failure to satisfy the first two prongs in Justice Gorsuch's framework, as foreign affairs-related provisions, they fall in the area where the Executive's authority overlaps sufficiently so a delegation of power by Congress does not disrupt the constitutional structure. That does not mean, however, that all actions taken under the NEA and IEEPA will necessarily be upheld; challenges to specific applications of it may become more frequent as Presidents increasingly rely on IEEPA to impact foreign commerce. To ensure that courts do not limit executive actions taken under the NEA and IEEPA, Presidents should be careful in their usage to avoid overreach.

150. Xiaomi Corp. v. Department of Defense, No. 21-280 (RC), 2021 WL 950144 (D.D.C. Mar. 12, 2021).

151. Addressing the Threat from Securities Investments That Finance Communist Chinese Military Companies, Exec. Order No. 13,959, 85 Fed. Reg. 73185 (2020).

152. *Xiaomi Corp.*, 2021 WL 950144, at *7–8.

153. Williams, *supra* note 149.

154. Williams, *supra* note 149, at 360.