

Breaking the Black Box: Reexamining Judicial Deference in National Security Issues Post-*Loper Bright*

ALAN Y. HUANG*

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I. INTRODUCTION

In the landscape of U.S. administrative law, few topics command as much intrigue and controversy as judicial deference to national security agencies. The Supreme Court’s decision in *Loper Bright Enterprises v. Raimondo* was a critical inflection point in the judiciary’s oversight of executive power. Traditionally, the *Chevron* deference framework has enabled courts to lean toward executive agencies’ interpretations in ambiguous statutory matters.¹ This leniency has been particularly pronounced where national security is claimed, based on the premise

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1. *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842–44 (1984).

that the executive branch is both constitutionally and functionally better equipped to address the unique demands of the immediacy and security issue.² In the realm of national security, executive agencies like the Office of Foreign Assets Control (OFAC) often wield substantial authority, operating under broad interpretations of statutory language with limited judicial interference.³ This deference, cemented in doctrines like *Chevron v. National Resource Defense Council* and *Kisor v. Wilkie*, has long afforded agencies expansive latitude in their interpretations, particularly when constantly cloaked under the veil of national security.⁴

Yet, recent shifts in judicial doctrine, highlighted by the *Loper Bright* decision, raise compelling questions about the limits of this deference: Should this recalibration apply uniformly across all agencies that claim to exercise a core Article II function? *Loper Bright* signals a pivotal moment in administrative law, challenging the judiciary to reconsider how and to what extent agencies should be granted interpretive autonomy, especially in fields where agency actions heavily impact economic activities and individual liberties under the banner of security.

This paper embarks on a reassessment of judicial deference in the context of national security, using OFAC's expanded regulatory reach as a case study. The analysis pivots on the implications of *Loper Bright* and recent Supreme Court jurisprudence that increasingly favors statutory precision over agency autonomy. While the judiciary has traditionally exercised restraint in matters of national security, citing the executive's superior expertise and access to classified information, such deference is not without its limits. Indeed, the judiciary's constitutional duty "to say what the law is" necessitates a rigorous examination of agency actions that extend beyond immediate military needs, particularly when regulatory actions risk encroaching upon individual rights.

This paper further contends that while some measure of deference may still be appropriate in contexts of imminent threats or military actions, OFAC's evolution into a comprehensive regulatory body demands a recalibrated approach to oversight. The agency's reliance on interpretative guidance and informal rulemaking, often manifested in Frequently Asked Questions (FAQs) and non-binding advisories, reflects an opaque decision-making process that raises transparency concerns. Without explicit statutory backing or proven expertise in financial regulation, OFAC's interpretations have, at times, strained the limits of congressional intent, highlighting the dangers of unchecked administrative power. Ultimately, this paper argues for a reassertion of judicial independence in an era where the stakes of agency deference are at an all-time high, calling for courts to reaffirm their role as co-equal arbiters in the complex interplay of national security and administrative power.

2. See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320–21 (1936) (recognizing the executive's distinctive role in foreign affairs).

3. See 50 U.S.C. 1701–07.

4. See *Kisor v. Wilkie*, 588 U.S. 558, 573–74 (2019).

II. INHERENT ARTICLE II POWER

A. *Historical Executive Power in National Security*

Article II of the Constitution starts with: “The executive Power shall be vested in a President of the United States of America.” The Constitution gave the president the power to command the military, defending the country, ergo, national security.⁵ Agencies, such as the Department of Defense and the Central Intelligence Agency, exercise discretion that is intentionally vested in the executive branch to manage the union’s interaction with the global community.⁶ While the Constitution assigns most of the national security determination to Congress, it assigns the responsibility of keeping national security to the president.⁷ Particularly relevant to this section of the paper, the president’s broad constitutional power rests in the use of the military in response to national security threats.⁸ The power of the president is at its peak when he directs the military operations of the armed forces.⁹

The constitutional structure also indicates that the president has a centralized role in national security, “where a unitary executive can evaluate threats, consider policy choices, and mobilize military and diplomatic resources with a speed and energy that is far superior to any other branch.”¹⁰ “Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much eminent degree than the proceedings of any greater number.”¹¹ Compared to domestic legislation, the Constitution does not list the “mandatory, detailed, congressionally driven procedure” in conducting military actions related to foreign affairs.¹² This process shows that the Framers expected the Commander in Chief to protect the nation with flexibility and speed.¹³ Lastly, the constitutional framework directs those ambiguities in executive powers, such as conducting military hostilities, in favor of the executive branch.¹⁴ The decision to deploy military

5. U.S. Const., art. II, § 2.

6. Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 545–56 (2004).

7. Jim Talent, *A Constitutional Basis for Defense*, THE HERITAGE FOUNDATION (June 1, 2010) <https://www.heritage.org/defense/report/constitutional-basis-defense> [<https://perma.cc/CPY3-WKEU>]; U.S. Constitution, art. II, § 2.

8. See *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950) (noting that the president has authority to deploy United States armed forces “abroad or to any particular region”); *Loving v. United States*, 517 U.S. 748, 776 (1996) (Scalia, J., concurring in part and concurring in judgment) (stating that the “inherent powers” of the Commander in Chief “are clearly extensive”); *Maul v. United States*, 274 U.S. 501, 515–16 (1927) (Brandeis & Holmes, JJ., concurring) (“[T]he President may direct any revenue cutter to cruise in any waters in order to perform any duty of the service.”); *Massachusetts v. Laird*, 451 F.2d 26, 32 (1st Cir. 1971) (noting that the President has “power as Commander in Chief to station forces abroad”).

9. Robert J. Delahunty & John C. Yoo, *The President’s Constitutional Authority to Conduct Military Operations against Terrorist Organizations and the Nations That Harbor or Support Them*, 25 HARV. J.L. & PUB. POL’Y 490 (citing the Prize Cases, 67 U.S. (2 Black) 635, 670 (1862)).

10. *Id.* at 492.

11. *Id.* (citing THE FEDERALIST NO. 70, at 392 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

12. *Id.* at 493–94.

13. *Id.* at 494.

14. *Id.*

force is inherently “executive,” demanding action over rulemaking and historically recognized as an executive function by the Framers.¹⁵ “The direction of war implies the direction of the common strength, and the power of directing and employing the common strength forms a usual and essential part in the definition of the executive authority.”¹⁶

The Supreme Court has acknowledged such executive power, too.¹⁷ “There can be no doubt that the use of force protects the nation’s security and helps it achieve its foreign policy goals.”¹⁸ The Court found the power particularly fitting and proper for the executive branch to act for the public’s benefit on “a sudden emergency, or to prevent an irreparable mischief[.]”¹⁹ Historically, courts defer to the executive branch regarding national security or foreign affairs law.²⁰ Courts must leave evaluation to the “political department of the Government to which this power was entrusted”²¹ and exercise restraint. And one way the restraint manifests in modern times is through the *Chevron* doctrine.

B. Modern Framework for National Security Agencies

There are two frameworks when it comes to national security agencies—*Youngstown* and *Chevron*.²² In *Youngstown Sheet & Tube Co. v. Sawyer*, the Supreme Court invalidated President Truman’s executive order seizing steel mills during the Korean War, ruling it an overreach of executive power without congressional authorization.²³ Justice Black’s majority opinion emphasized that the president’s authority must come from either the Constitution or an act of Congress,²⁴ neither of which applied in this case. Justice Jackson’s concurring opinion, which many considered the “gold standard” of emergency law jurisprudence,²⁵ introduced a tripartite framework for assessing executive power based on the degree of congressional support.²⁶

However, the *Chevron* framework is the dominant modern jurisprudence that provides legal scholars a clearer roadmap to navigate challenges against national security agencies.²⁷ *Chevron* provided “a level of simplicity” by asking lower

15. *Id.* at 495.

16. THE FEDERALIST NO. 74, at 415.

17. Delahunty & Yoo, *supra* note 9, at 495 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 812 n.19 (1982) (“Conducting foreign affairs and protecting the national security are, as the Supreme Court has observed, ‘central Presidential domains.’”)).

18. *Id.* at 496.

19. *The Apollon*, 22 U.S. (9 Wheat.) 362, 366–67 (1824) (Story, J.).

20. See John C. Yoo, *The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them*, U.S. DEP’T OF JUSTICE (Sept. 25, 2001).

21. *Id.* at 191 (citing the Prize Cases, 67 U.S. (2 Black) 625, 670 (1862)).

22. Joseph Landau, *Chevron Meets Youngstown: National Security and the Administrative State*, 92 B.U.L. REV. 1917, 1923 (2013).

23. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952).

24. *Id.* at 585–89.

25. Neal Kumar Katyal, *Hamdan v. Rumsfeld: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65, 99 (2006) (“*Youngstown*’s framework has become the gold standard . . .”).

26. *Youngstown*, 343 U.S. at 635–38 (Jackson, J., concurring).

27. Landau, *supra* note 22, at 1925.

courts to simply point to legislative checks to afford the executive agency “super deference” and allows lower courts to take the easy way out on the judiciary’s responsibility.²⁸ Courts found support for this “super deference” not only in congressional statutory delegations but also in the Constitution for the president’s implied power.²⁹ Even though the Court has overturned *Chevron*, this paper acknowledges the legitimate governmental interest in maintaining national security, particularly in scenarios involving traditional life-and-death national security that requires speedy responses. In these cases, courts may still need to accord a high level of deference comparable to existing standards. This should not deviate substantially from how courts historically afford agencies deference. Applying *Loper Bright* to national security would disrupt this delicate balance, compelling courts to second-guess executive decisions in matters where timeliness, secrecy, and expertise are paramount.

Furthermore, national security is an area where the judiciary traditionally exercises heightened restraint, deferring to the executive’s superior access to information and its constitutionally vested prerogatives in military and foreign affairs.³⁰ Thus, *Loper Bright* should not be extended to curtail agency deference in the national security sphere, as doing so would not only undermine effective governance but also violate the separation of powers by encroaching on the executive’s constitutional command over matters of national security and foreign policy.

If there is any area of law that justifies the *Chevron* deference, it is in the traditional national security context. Unlike conventional regulatory domains, in the national security context, the law must be speedy and adaptable to the demands of unpredictable and evolving circumstances.³¹ The judiciary, as the branch of government least equipped to swiftly adjust its rules in response to the complex and multifaceted challenges of national security and intelligence, renders the dependence both imprudent and perilous.³² The judicial branch is simply not equipped to balance civilian interests against military confrontation in all cases, with the outlier exceptions, because “[i]t is ‘obvious and unarguable’ that no governmental interest is more compelling than the security of the Nation.”³³ The Constitution entrusts the “power [. . . to . . .] the executive branch of the government to preserve order and ensure the public safety in times of emergency, when other branches of the government are unable to function, or their functioning would itself threaten the public safety.”³⁴

28. Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1265 (1988) (explaining how lower courts almost always choose to defer to the executive branch).

29. *Id.*

30. *See* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319–20 (1936).

31. Delahunty & Yoo, *supra* note 9, at 492.

32. Nino Guruli, *Pro-Constitutional Engagement: Judicial Review, Legislative Avoidance and Institutional Interdependence in National Security*, 12 HARV. NAT’L SEC. J. 1, 5 (2021).

33. *Haig v. Agee*, 453 U.S. 280, 307 (1981) (internal citation omitted).

34. *Duncan v. Kahanamoku*, 327 U.S. 304, 335 (1946) (Stone, C.J., concurring).

III. THE LONG OVERDUE REVAMPED JUDICIAL REVIEW OVER OFAC DOES NOT VIOLATE THE SEPARATION OF POWERS

As discussed above, there are two primary frameworks when courts evaluate national security cases. In modern administrative law, however, especially in the context of national security, *Chevron* has dominated.³⁵ Even though many considered Justice Jackson's concurring opinion as the "gold standard" of emergency law jurisprudence,³⁶ as judicial deference to agencies has grown, courts increasingly treat the president's exercise of power as falling into Justice Jackson's "Zone of Twilight" by default without further inquiry—a zone where executive action enjoys significant deference in the absence of clear congressional guidance.³⁷ This shift has given rise to a form of circular reasoning in judicial review under *Chevron*: to determine whether the president acted within the congressionally granted authority, courts defer to the interpretation of executive agencies, which, unsurprisingly, often affirm such authority. This self-reinforcing cycle arguably conflicts with the judiciary's role in determining the limits of executive power.

However, unlike what was traditionally imagined by the Framers of the Constitution, modern economic sanctions that OFAC regulates may be a different beast altogether from what the Framers envisioned when granting the president power in keeping national securities, as discussed in the previous section. Granting deference to interpreting the statutes however the agency wants to, in the form of FAQs, nonetheless, implicates fundamental concerns regarding the separation of powers. Historically, the judiciary has upheld agency deference under the *Chevron* doctrine, where agency interpretations of ambiguous statutes were granted deference based on presumed expertise and presumed congressional intent via broad and vague language.³⁸ Now that *Chevron* is overturned, this *carte blanche* deference to the executive branch should stop for national security agencies as well. *Loper Bright* changed the Court's approach, curtailing the deference when agency interpretations are beyond the limits of the statute's text and encroach on individual liberties or extend beyond traditional statutory bounds.³⁹ The Court in *Loper Bright* indicated that where statutory language lacks clarity, deference cannot serve as a *carte blanche* for agencies to expand their reach into areas implicating profound constitutional interests.⁴⁰ This doctrinal shift suggests a reassertion of the judiciary's role in strictly interpreting statutory limits and protecting against agency overreach that might affect constitutionally protected rights.⁴¹ But when it comes to OFAC, courts also

35. Landau, *supra* note 22.

36. *Id.*

37. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

38. *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 865 (1984).

39. See *Loper Bright Enter. v. Raimondo*, 603 U.S. 369, 378 (2024).

40. *Id.* at 399 ("Presumptions have their place in statutory interpretation, but only to the extent that they approximate reality," rejecting the *Chevron* blanket presumption).

41. See Abbe R. Gluck & Richard Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1311 (2018).

add the Article II argument to the *Chevron* deference, even though it does not really serve any purpose independently.⁴² It is almost as if that was just a blanket and correct presumption because of the initial purpose envisioned for OFAC at its inception.

Thus, the current deferential legal framework should not allow the executive branch to invoke separation of powers principles to shield its interpretation of IEEPA from rigorous judicial review. Rather, because this authority is rooted more in statutes and supported by the president's Article II responsibility in the same way as any other regulation, courts should exercise the principle of statutory construction and administrative review closer to ordinary regulations under *Loper Bright*.

A. *OFAC No Longer Regulates As It Was Intended—the Core Functions of Article II*

The framers of the statutes that created the Office of Foreign Assets Control (OFAC) initially envisioned an agency in response to specific, discrete events, such as armed conflicts, within a limited timeframe.⁴³ Rooted in Article II of the Constitution, OFAC's authority reflects the president's foreign affairs and national security powers, enabling economic regulation during emergencies.⁴⁴ The agency originated in World War I with the 1917 *Trading with the Enemy Act* (TWEA), which granted the U.S. government power to impose *wartime* economic sanctions.⁴⁵ OFAC was formalized in 1950 during the Korean War under President Truman, establishing its initial mission of freezing adversarial nations' assets to prevent their economic benefit from U.S. ties.⁴⁶ This initial framing of OFAC's role aligns with the constitutional understanding of executive authority: swift, targeted responses to immediate threats fall within the president's Article II powers, particularly as they relate to national defense and foreign relations.⁴⁷ Fitting to its role, OFAC's powers were tailored to be broad and multifaceted, but critics argue that their exercise disturbs the balance between the exercise of federal authority and individual liberties, with OFAC's extensive exercise of its power actions envisioned as temporary, targeted measures.⁴⁸

42. See *Consarc Corp. v. Iraqi Ministry*, 27 F.3d 695, 702 (1994) (citing *United Staes v. Stinson*, 508 U.S. 36, 44–45 (1993) (“That judgment [of OFAC], as a contemporaneous application of OFAC’s own regulations, receives an even greater degree of deference than the *Chevron* standard, and must prevail unless plainly inconsistent with the regulation.”)).

43. HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 78–79 (Yale University Press 1990) (discussing the historical underpinnings of emergency economic powers).

44. *Id.*; see generally ERIC POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 28–95 (Oxford University Press, 2007) (explaining the relationship between emergency power and constitutional law).

45. *Trading With the Enemy Act*, 50 U.S.C. §4301.

46. U.S. Department of the Treasury, *50 Years of the Office of Foreign Assets Control*, <https://ofac.treasury.gov/> [<https://perma.cc/9ZZM-J5TH>].

47. U.S. Const. art. II, § 2.

48. *Trade Restrictions: Trading Barriers: OFAC's Role in Trade Restriction*, *FASTER CAPITAL* (June 12, 2024) <https://fastercapital.com/content/Trade-Restrictions-Trading-Barriers-OFAC-s-Role-in-Trade-Restrictions.html> [<https://perma.cc/8SGR-Q2R4>].

Though initially focused on wartime economic threats, OFAC's mission evolved after the Cold War, expanding its role as a tool for managing diverse emergencies, including terrorism and destabilizing non-war threats.⁴⁹ By the late 20th century, OFAC had become a permanent regulatory force, responding to the rise of global terrorism, nuclear threats, and cyber risks. OFAC's reach continued to expand with the 1977 *International Emergency Economic Powers Act* (IEEPA), which allowed sanctions during even peacetime to address broader "national security" issues.⁵⁰ With more frequent declarations of emergency, most declarations since 1976 have relied on IEEPA.⁵¹ IEEPA grants the president significant powers to impose *economic* sanctions on entities after determining that they pose an "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."⁵²

In the post-9/11 era, OFAC expanded its focus on terrorist financing, rogue states, and non-state actors, targeting individuals, groups, and networks beyond traditional state adversaries.⁵³ Additional legislation, like the 2001 *PATRIOT Act*, further strengthened OFAC's role in preventing *financial* crimes related to counter-terrorism.⁵⁴ The statute also requires that the declaration be fitting to the threat. "Any exercise of such authorities to deal with any new threat shall be based on a new declaration of national emergency which must be with respect to such threat."⁵⁵

This shift marked OFAC's transition from wartime actions to permanent regulatory enforcement, targeting both foreign and domestic individuals, corporations, and entities. The change grounded OFAC's role in economic sanctions, now central to addressing complex, modern, and never-ending global threats.⁵⁶ After all, it seems that "at war" has become a norm rather than a discrete "emergency" with the government's overly broad interpretation of the ambiguous "emergency" bill.⁵⁷ The agency increasingly interprets its mandate to encompass a wide range of activities, including those with tenuous connections to direct national security threats on our soil.⁵⁸

However, as many government actions started with national security or counter-terrorism, this expansion raised concerns about the potential for executive power overreach. In *Youngstown Sheet & Tube Co. v. Sawyer*, the Supreme Court ruled

49. See Christopher A. Casey & Jennifer K. Elsea, *The International Emergency Economic Powers Act: Origins, Evolution, and Use*, CONGRESSIONAL RESEARCH SERVICE (January 30, 2024) <https://crsreports.congress.gov/product/pdf/R/R45618> [<https://perma.cc/N5FY-ARLU>].

50. IEEPA, 50 U.S.C. 35 §§ 1701–1707.

51. See A Guide to Emergency Powers and Their Use, BRENNAN CTR. FOR JUST. (Dec. 5, 2018), <https://www.brennancenter.org/our-work/research-reports/guide-emergency-powers-and-their-use> [perma.cc/4L45-9SUE].

52. 50 U.S.C. § 1701(a).

53. USA Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

54. *Id.*

55. International Emergency Economic Powers Act, 50 U.S.C. 35 § 1701(b).

56. Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L. J. 1385, 1400 (1989).

57. *Id.*; *End Mass Surveillance Under the Patriot Act*, AM. C. L. UNION (last visited Dec. 29, 2024), <https://www.aclu.org/end-mass-surveillance-under-the-patriot-act> [perma.cc/42V5-WWSN].

58. See e.g., Paul R. Chavez et al., *The OFAC List*, 2, LAWYERS COMM. FOR C. R. OF THE S.F. BAY AREA (July 2014).

against President Truman's attempt to seize steel mills during the Korean War, underscoring limits on executive power, even in crises.⁵⁹ *Korematsu v. United States* shows the extreme consequences of unchecked power, as the internment of Japanese Americans was upheld under wartime justification, infringing civil liberties.⁶⁰ The *USA PATRIOT Act*, passed post-9/11, expanded surveillance capabilities far beyond counter-terrorism, sparking privacy concerns.⁶¹ Similarly, the indefinite detention at Guantanamo Bay reveals how powers initially framed for security can erode constitutional protections, bypassing due process. Together, these cases highlight the tension between national security needs and constitutional checks on executive authority.

The expansive reach does not only impose damage to the enemies of our national security but also sweeps broadly to harm domestic individuals. For example, OFAC's designation process has faced criticism for procedural limitations, raising due process concerns under the Fifth Amendment.⁶² Individuals and companies placed on the SDN list can experience severe harm to their financial stability and reputation, often without sufficient opportunity to contest their designation.⁶³ While OFAC provides a petition process for removal from the list, critics argue that it is cumbersome, with an excessive burden of proof on the affected parties.⁶⁴ This raises concerns about administrative fairness and access to a meaningful challenge, suggesting that due process rights may be compromised.⁶⁵

Given this substantial expansion of OFAC's exercise of its authority, judicial oversight over its actions does not impinge on the constitutional prerogatives of the executive branch. Rather, it is consistent with the judiciary's role in ensuring that administrative agencies remain within the bounds set by Congress. When an agency's exercise of power diverges from the statutory framework envisioned by Congress, judicial review serves as a critical safeguard in upholding the Separation of Powers.⁶⁶ The agency's actions expand into regulatory areas where Congress did not clearly intend for its reach, and that is where the executive power is "at its lowest ebb" when it is in tension with congressional intent.⁶⁷

B. The Court Should Distinguish the Deference It Affords Based on Statutory Grant and Constitutional Deference

Even if one concedes that IEEPA confers broad authority upon the executive branch, this power remains a statutory grant rather than an inherent executive

59. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

60. See *Korematsu v. United States*, 323 U.S. 214 (1944).

61. Mark M. Jaycox, *No Oversight, No Limits, No Worries: A Primer on Presidential Spying and Executive Order 12,333*, 12 HARV. NAT. SEC. J. 58, 64 (2021).

62. See generally Ian Allen, *Due Process Boundaries of U.S. Economic Sanctions*, 26 N.Y.U. J. LEGIS. & PUB. POL'Y 239 (2023-2024).

63. See generally Richard N. Haass, *ECONOMIC SANCTIONS: TOO MUCH OF A BAD THING*, BROOKINGS (June 1, 1998), <https://www.brookings.edu/articles/economic-sanctions-too-much-of-a-bad-thing/> [perma.cc/YVZ4-H9NY].

64. Allen, *supra* note 62, at 261.

65. *Id.*

66. See *Youngstown Sheet & Tube Co.*, 343 U.S. 579.

67. *Id.* at 637.

prerogative rooted in the Constitution. This distinction is critical. The Supreme Court has historically recognized a distinction between powers derived from statutes and those inherent in the executive branch's constitutional role in foreign affairs.⁶⁸ Such a line preserves the integrity of the Separation of Powers by preventing the executive branch from wielding statutory delegations as though they were constitutionally self-executing powers.⁶⁹

IEEPA itself illustrates this point:

The authorities granted to the President . . . may be exercised to deal with *an 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, if the President declares a national emergency with respect to such threat. (emphasis added).⁷⁰

First, the plain statutory reading clearly differentiates between an emergency “national security,” “foreign policy,” or the “economy” of the United States. The first two sources of emergency fall squarely into the inherent Article II powers, where courts can and should defer to the executive branch's course of action.⁷¹ However, the statutory text contemplates the economic regulations to be separated and distinguishable from those of national security and foreign policy, even though they can still be considered as an emergency. Because the statute separates “economy” with a disjunctive “or,” it strains credulity to suggest that economic measures are likewise rooted in the Executive's inherent powers and should be afforded similar deference. Second, the statute envisions the invocation of these emergency powers only under “unusual and extraordinary” circumstances. To allow the President to rely on IEEPA continuously, rather than for discrete emergencies, would subvert the statute's clear requirement that such threats be exceptional in nature. A perpetual presumption of emergency would erode the statutory framework and risk circumventing the careful limitations Congress imposed to ensure that executive authority remains tethered to concrete and extraordinary events. By framing the authority under IEEPA as purely statutory, this argument resists any sweeping presumption of conflation of congressional delegation with inherent executive prerogative. Recognizing the separation between the two, the judicial review can parse out the deference given based on the inherent constitutional Article II power and find judicial review firmly within the scope of statutory interpretation.

68. See *Id.* at 588 (distinguishing statutory powers from those constitutionally inherent to the Executive).

69. See David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 945–47 (2008).

70. IEEPA, 50 U.S.C. 35 §§ 1701.

71. See *United States v. Curtiss-Wright Export Corp. et al.*, 299 U.S. 304, 319–20 (1936) (recognizing the president's broad authority in external affairs).

OFAC would be wrong to assert, despite the evolution of its role, that its measures are linked to urgent, war-like threats, similar to those justifying its inception that were rooted in Article II. This assertion appears tenuous, given that the majority of OFAC's current sanctions target ongoing economic relationships and transactional behaviors of entities that are not directly at war with the United States.⁷² The word "emergency" has to have some meaning.⁷³ By their nature, these economic regulations serve a prophylactic role in maintaining national security as a status quo rather than addressing *immediate* military threats as envisioned by the Framers of the Constitution.⁷⁴ Courts have consistently held that preventive regulatory measures, even when justified by national security, lack the urgency and immediacy typically associated with core Article II powers.⁷⁵ In *Youngstown*, the Supreme Court emphasized that preventive executive action, particularly where it intrudes upon individual rights and liberties, must be justified by clear statutory authority rather than vague and broad national security claims.⁷⁶

If economic activity can be directly classified as a matter of national security, it begs the question of how far this rationale may extend. Does the government's interest in economic stability mean that private social media communications, text messaging, or even collective bargaining activities could fall under similar regulatory authority and deserve a heightened deferential standard from courts? Such an expansive view raises profound concerns regarding the boundaries of executive authority and the implications for individual liberty. For example, First Amendment rights can also be impacted by OFAC sanctions, especially when they affect freedom of speech and association. For instance, sanctions on foreign media outlets or NGOs operating in sanctioned countries may limit U.S. entities from receiving information or collaborating on protected speech activities.⁷⁷ This indirect censorship effect can limit Americans' access to foreign perspectives or restrict them from interacting with international organizations.⁷⁸ For some, these restrictions represent an unconstitutional overreach impacting Americans' rights to freely associate and express political beliefs.⁷⁹

72. See U.S. Dep't of the Treasury, *Sanctions Programs and Country Information*, <https://home.treasury.gov/policy-issues/office-of-foreign-assets-control-sanctions-programs-and-information> [perma.cc/A3ZQ-VVHU] (listing current sanctions programs, many of which do not involve parties in active armed conflict with the United States).

73. See 50 U.S.C. § 1701(a) (requiring a declaration of national emergency based on "any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States").

74. Cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (highlighting the narrow circumstances under which the Executive may act without explicit congressional authorization).

75. See *id.* at 609 (Jackson, J., concurring).

76. *Id.* at 637.

77. See e.g., *Blocking Faith, Freezing Charity: Chilling Muslim Charitable Giving in the "War on Terrorism Financing,"* 10, AM. C. L. UNION (2010).

78. *Id.* at 15.

79. *Id.* at 30.

This exercise of statutory grant of power in the name of Article II prerogative is not only wrong in an academic sense, but it also creates an erroneous presumption when courts consider national security agencies' actions. Like *Loper Bright*, which rejected the broad presumption of Congressional intent to leave the interpretive authority to agencies, the Court should also reject the sweeping presumption that any and all regulation claimed to be happening under the cloak of national security deserves deference. In applying this enhanced scrutiny, the judiciary cannot merely interpret statutes in a narrower scope but must consider the broader implications of agency reach. "It is emphatically the province and duty of the judicial department to say what the law is."⁸⁰ The duty, undisputedly, includes that interpretation applies to the Constitution.⁸¹ This is particularly important in the context of agencies whose deliberation process happens within a "black box"—there are no public regulatory standards governing the decision to grant or deny a request, and this lack of transparency "exacerbates this potential for abuse."⁸²

More specifically, courts should scrutinize agencies' decisions when those actions are economic in nature and claim national security prerogatives that risk infringing on individual rights or expanding the boundaries of executive power because of *Loper Bright's* emphasis on clear congressional authorization, where courts ensure that agency action aligns closely with the explicit intent and scope envisioned by Congress.⁸³ The judicial oversight function in this context is not one of passive respect or minimal deference; rather, it is an active engagement rooted in the Constitution's commitment to checks and balances. Courts must exercise independent judgment in reviewing agency interpretations, especially where national security justifications are invoked to justify extensive regulatory control over economic and social activities with minimal transparency and due process. This judicial role, strengthened by *Loper Bright*, serves as an essential safeguard against the potential for executive overreach, ensuring that the judiciary remains a co-equal branch capable of limiting the executive power encroaching into domains traditionally reserved for the legislative branch and enforcing the statutory limits Congress vested in the executive branch.

The point of discussion is not to say that the Court should afford simply a hollow "respect" to OFAC.⁸⁴ After all, OFAC was born out of a legitimate immediate national security concern during wartime when its intended regulated entities were closely tied to the war.⁸⁵ However, the argument simply recognizes that the expansion of OFAC's authority has changed the nature of its exercise of power. No matter how broad the statutes grant OFAC powers, it is just that—statutory grants. It should not pretend to enjoy the same level of deference it once had at its

80. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

81. *Id.*

82. Andrew Boyle, *Checking the President's Sanctions Powers*, 16, BRENNAN CTR. FOR JUST. (June 10, 2021).

83. *Cf. Chevron, U.S.A., Inc. v. NRDC* 467 U.S. 837 (1984).

84. *Loper Bright Enter. v. Raimondo*, 603 U.S. 369, 378 (2024).

85. OFAC, *supra* note 46.

inception. Given that IEEPA is a statute rather than a representation of intrinsic constitutional power, a judicial approach that subjects agency interpretations under IEEPA to typical statutory scrutiny gives the power to Congress's legislative primacy and respect to the executive branch's operation. In the post-*Loper Bright* landscape, Courts must vigilantly enforce statutory limits; they stand as the primary guardian of constitutional balance and serve as a vital shield against the erosion of individual liberties under the pretext of national security.

C. *The Expertise Categorical Grant of Deference Also Cannot Stand*

With *Chevron* overturned, *Kisor* still stands as tantamount for OFAC to rely on in justifying its FAQs on the website. In this section, the paper assumes that the courts will give the executive branch some deference in the guise of respect for the executive branch's prerogative, no matter how remote it is. Nevertheless, OFAC's actions can fall outside of the granted power because they stretch its capability too far and disguise it as their "specialty." This line of reasoning suggests a need for continued vigilance by the courts to prevent national security from becoming a "magic word" as a justification for hyper-specialty under *Kisor*, insulating agencies from accountability.

The president has broad authority in matters of national security, though such authority is not limitless.⁸⁶ The invocation of national security can blur lines of statutory authorization and constitutional limits on agency authority, leading to substantive questions about the appropriate boundaries of the executive branch under *Kisor*. National security statutes are often ambiguously defined and provide a broad shield that allows agencies to act with limited accountability or oversight.⁸⁷ That limit is evident even in the case of immigration, an area of law arguably closer than OFAC's missions to national security concerns by defending the physical border of this Nation with armed force.⁸⁸ OFAC should not be an exception. OFAC's authority, for which they ask courts to grant deference, is based on national security or foreign affairs.⁸⁹ But they are not the specialty of OFAC exercises daily; the economy and financial market are.⁹⁰ The *Kisor* doctrine seems like a good friend to OFAC—making rules in one area based on claimed specialty in another. But that law has changed after *Loper Bright*, and that catch-all argument cannot stand.

Agencies like OFAC rely significantly on issuing informal guidance, such as FAQs and interpretive notes, rather than formal rulemaking.⁹¹ For the regulated

86. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

87. See e.g., IEEPA, 50 U.S.C. §§ 1701–1707.

88. See generally *Trump v. Hawaii*, 585 U.S. 667 (2018) (addressing the Executive's authority over immigration matters).

89. *Casey & Elsea*, *supra* note 49.

90. *OFAC Enforcement Guidelines*, 31 C.F.R. pt. 501, app. A (detailing the enforcement process for financial transactions, reflecting OFAC's core expertise in economic regulation).

91. *OFAC Frequently Asked Questions*, U.S. DEP'T OF TREASURY (2024), <https://home.treasury.gov/policy-issues/financial-sanctions/faqs> [perma.cc/77ZQ-49TR].

entities, it is a guessing game on what the agency means. But lo and behold, the price for guessing wrong is steep. When challenged, *Kisor* (or *Auer*, its predecessor) can be grounds for deference for interpretations of ambiguous regulations. This form of deference permits agencies to interpret their own regulations when ambiguous, based on the assumption that they have particular expertise and insight.⁹²

One may argue that OFAC sits within the Treasury Department, and that has to mean something and make them somewhat expert in those areas. Similar to the Environmental Protection Agency (EPA), financial regulation seems to be so complex, an area in which the agency's expertise is worthy of significant judicial deference.⁹³ But unlike the EPA, OFAC does not show its work in its rulemaking and adjudication, and reveal its expertise. In other words, they are in the world of "expert of one" in deciding whether an individual should pay.⁹⁴ Courts have acknowledged this due process violation, yet stopped at ensuring that OFAC's procedures are made transparent and fair.⁹⁵ Even though *Chevron* is not the foundation of *Auer* and *Kisor*, *Kisor's* philosophy deeply reflects *Chevron's* reasoning, building on the presumption that agency experts can handle complex, technical, or policy-driven issues that courts may not be as equipped to address effectively.

One might question whether the perceived expertise of agencies is, in some respects, overestimated. While agencies indeed possess substantial knowledge within their regulatory domains, this expertise should serve more than just an insular technical purpose. In legal writing, clarity is paramount. It is often said that good legal prose should be comprehensible to anyone, even an eight-year-old. In the same vein, agencies would do well to ensure that their technical judgments are accessible to non-experts. If expertise is to function effectively within a democratic society, it must be presented in terms that align with the general public's understanding of statutory language and constitutional principles. After all, the law is often seen as a reflection of society's moral judgment in which judges are experts in those judgments.⁹⁶ When agency experts fail to make their insights comprehensible to the broader public or judges, they risk resembling a distant and insular elite, akin to the Galactic Senate in *Star Wars*, divorced from the foundational duty to report and be checked by those they serve. However, that is another topic that deserves another paper.

OFAC fails that presumption and exercise outside its specialty. Accepting that the OFAC was established for the principal purpose of protecting national

92. See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2411–13 (2019).

93. *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 865 (1984) (recognizing EPA's complex environmental expertise).

94. See e.g., FAQ 76. Can I Appeal A Denial Of My License Application, OFF. OF FOREIGN ASSETS CONTROL, <https://ofac.treasury.gov/faqs/76> [perma.cc/WCR5-EE5R].

95. Adeno Addis, *Targeted Sanctions as a Counterterrorism Strategy*, 19 TUL. J. INT'L & COMPAR. L. 187, 193–99 (2010) (a due process issue concerning the fairness for listed party and the expansive view of the office).

96. Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1063 (1975).

security and managing the United States' foreign relationships, its chief institutional expertise lies in enforcing sanctions designed to prevent contributions that could bolster an adversary's military or diplomatic posture.⁹⁷ OFAC's specialized competence, therefore, is not necessarily directed toward the intricate categorization or regulation of "investments" as a financial matter, particularly when such categorizations may involve complex domains like online brokerage services or cryptocurrencies. Its mandate, by its nature, involves interpreting the precise contours of an array of financial products, such as "investment."⁹⁸ Yet, what qualifies as an "investment" remains a complex question, especially when considering financial instruments like margin lending, loans, or digital currency, which may or may not fall under traditional definitions of investment.

While OFAC has the authority to restrict foreign investments tied to national security concerns, the line between an investment and other forms of economic activity can be ambiguous and may require careful statutory interpretation to avoid overreach into areas that the agency has not readily procured expertise on or another agency's prerogative when it comes to domestic entities.⁹⁹ Agencies like the Securities and Exchange Commission (SEC) may possess superior expertise germane to distinguishing between a "new investment" and an "existing investment" for regulatory purposes.¹⁰⁰ For example, financial transactions like loans involve nuanced financial and regulatory concepts that may intersect with the jurisdiction of other regulatory agencies, such as the SEC, both of which have mandates that cover various forms of cross-border financial flows. This overlap in jurisdiction also signals an overstep of OFAC's authority and raises the question: "Does OFAC actually have expertise in regulating all areas that it purports to exercise jurisdiction over?"

This is not a novel phenomenon. Although modern financial products, with their increasing speed and sophistication, have exacerbated these interpretive challenges, difficulties in defining and classifying financial products have arisen in previous eras.¹⁰¹ Yet it remains insufficiently recognized in some judicial decisions, where courts have not merely concluded that OFAC is "right" or "reasonable," but in effect have found the courts themselves to be inferior in reasoning when differing from OFAC's judgments.¹⁰² Even under less complicated circumstances, OFAC has occasionally disagreed with a court's interpretation—for

97. Casey & Elsea, *supra* note 49.

98. Exec. Order No. 14,071, Prohibiting New Investment in Russia, 87 Fed. Reg. 20999 (Apr. 6, 2022) (illustrates how OFAC may interpret what constitutes "new investment" in targeted jurisdictions).

99. See generally Lawrence P. Stadulis & Timothy W. Levin, *SEC Regulation of Investment Company Investments in Securities Related Businesses under the Investment Company Act of 1940*, 2 VILL. J.L. & INV. MGMT. 9 (2000) (showing the SEC's regulatory framework for investment companies, underscoring its expertise in overseeing investment activities).

100. See *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (recognizing that specialized agencies may be well-suited for certain technical matters).

101. See generally Henry T.C. Hu, *Misunderstood Derivatives: The Causes of Information Failure and the Promise of Regulatory Incrementalism*, 102 YALE L.J. 1457, 1460–63 (1993) (discussing historical challenges in defining and regulating new financial instruments).

102. See *e.g.*, *De Cuellar v. Brady*, 881 F.2d 1561, 1561–65 (11th Cir. 1989).

instance, whether a certain bond constitutes a “trust” thereby falling under various statutory exemptions. In *De Cuellar v. Brady*, the Eleventh Circuit Court of Appeals reversed the district court, holding that OFAC reasonably interpreted the Cuban Assets Control Regulations (“CACRs”) to block access to a sinking fund securing bonds issued by the Republic of Cuba.¹⁰³ The plaintiff, a Cuban refugee and American citizen, sought a license to redeem her pro rata share of the fund, but OFAC denied the request, citing Cuba’s contingent reversionary interest under the indenture agreement.¹⁰⁴ The court of appeals deferred to OFAC’s interpretation, citing *Chevron* reasoning, and found merely an appearance of reasonableness of OFAC’s reasoning would *forbid* a federal court to interpret the term otherwise, cannibalizing its own sound logic.¹⁰⁵ Such is an example when courts have invoked deference in ways that, at times, arguably strain reasonableness, effectively depriving U.S. citizens of their property interests.

Fast-forward to the modern financial world, where the proliferation of ever more complicated financial instruments further weakens the rationale for deference to OFAC’s expertise in such areas. Hypothetically, if OFAC concludes that providing money to a Russian entity would assist Russia and harm the national security interests of the United States, that determination, rooted in foreign affairs and national defense expertise, would ordinarily merit judicial deference. However, consider a scenario in which a U.S. lender extended a loan to an entity located in a comprehensively sanctioned jurisdiction prior to the imposition of new sanctions that apply solely to “new investments.” If, after issuance of that loan, the borrower failed to repay but continued to utilize accrued interest for fresh commercial activities, the pivotal question is whether that accrued interest constitutes a “new investment” or remains part of the original (pre-sanction) investment. Resolving such a nuanced issue requires significant expertise in the law of investments, debt repayment, and financial regulation—areas in which other administrative agencies or regulators may hold greater proficiency than OFAC.

OFAC does not want you to ask whether they are experts. Yet, courts should answer. Here, courts need not wholly understand the agency’s expertise but rather, at least confirm that, within common sense, the agency’s claimed expertise is actually their expertise. Courts should examine whether OFAC has claimed expertise properly as required in *Kisor*, where the Court imposed specific prerequisites for deference, such as ensuring that the regulation in question is genuinely ambiguous and that the agency’s interpretation is “reasonable” and reflects its *substantive* expertise.¹⁰⁶ When an agency ventures into fields historically under the purview of another regulator, especially areas involving domestic financial instruments and services, it risks overstepping the bounds of its congressionally

103. *De Cuellar*, 881 F.2d 1561–65.

104. *Id.*

105. *Id.*

106. *See Kisor v. Wilkie*, 588 U.S. 558, 558–69 (2019).

granted authority.¹⁰⁷ For instance, if OFAC interprets “investment” broadly to include certain loans, it may inadvertently expand its regulatory ambit into transactions that Congress did not clearly entrust to OFAC, evident in the potential conflict against the responsibilities of the Federal Reserve, the SEC, or other specialized agencies. This lack of expertise also raises due process concerns: under current practices, courts often defer substantially to the agency’s national security rationale, leaving regulated entities with limited means to challenge sanctions—even though OFAC may lack the necessary financial acumen.¹⁰⁸ In these cases, courts should ask rigorous questions about the agency’s expertise, refusing to presume it without a demonstrable track record. Otherwise, agencies with limited subject-matter competence may prevail through invocations of national security, displacing judicial scrutiny and frustrating the separation of powers by going beyond what Congress had intended for OFAC.

D. Courts Should Check OFAC’s Overreaching Authority Even Though Congress Has The Ultimate Power to Revise the National Security Statutes to Offer More Clarity

An alternative view posits that the core issue is not necessarily OFAC’s purported encroachment beyond its legitimate authority, but rather that Congress itself has used expansive statutory language that permits overly broad regulatory interpretations. In *United States v. Griffith*, for instance, the defendant was charged with conspiring to violate the IEEPA by attending a conference in North Korea without first obtaining government approval.¹⁰⁹ Griffith argued that the indictment failed to allege a cognizable federal crime and also violated his First and Fifth Amendment rights.¹¹⁰ The court, however, upheld the indictment, emphasizing the latitude afforded to the executive branch under the IEEPA and deferring to OFAC’s interpretation of its own regulations.¹¹¹ Specifically, the court concluded that the indictment sufficiently alleged Griffith’s participation in a conspiracy to provide “services” to North Korea, even though much of the information shared had been publicly accessible.¹¹² Given the national security context, the court declined to substitute its own assessment for that of OFAC and other executive agencies responsible for foreign policy.¹¹³ Indeed, once the statute defined “services” broadly, the

107. See Brief for Petitioner at 45, *Seven County Infrastructure Coalition v. Eagle County, Colorado*, No. 23-975 (2024) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 340 (1989)) (demonstrating when an agency who has primary responsibility for the regulated areas, it is better to leave to the experts to evaluate for a more effective regulation).

108. See *e.g. Consarc Corp. v. Iraqi Ministry*, 27 F.3d 695, 702 (1994) (citing *United States v. Stinson*, 508 U.S. 36, 42 (1993)).

109. *United States v. Griffith*, 515 F. Supp. 3d 106, 111 (S.D.N.Y. 2021).

110. *Id.* at 115-18.

111. *Id.* at 120-21.

112. *Id.*

113. *Id.*

court reasoned it was obliged to defer to OFAC's construction, regardless of any countervailing arguments regarding the breadth of that term.¹¹⁴

In a similar vein, "information" can be as broad a statutory term as "services." The term "information" may encompass specialized knowledge of news media or electronic-signal transmissions, areas that do not necessarily lie within OFAC's particular expertise. In *Capital Cities/ABC, Inc. v. Brady*, for example, the Department of the Treasury (through OFAC) declined to license exclusive live broadcasting rights to the 1991 Pan American Games, which the agency viewed as falling outside the "informational materials" exemption in the Berman Amendment.¹¹⁵ Despite credible First Amendment considerations, the court ultimately deemed OFAC's interpretation "reasonable," relying heavily on *Chevron* deference.¹¹⁶ Such is an example when Congress employs broad statutory terms, courts may position themselves as less qualified than OFAC to interpret those terms, even when OFAC's subject-matter expertise in those domains may be minimal.

A potential remedy lies in having Congress issue narrower or more precise statutory mandates, rather than conferring what amounts to a "blank check;" if Congress does not amend the statutes, courts are left with little choice but to categorically withhold deference altogether.¹¹⁷ Particularly for the textualist courts, there is an assumption that "Congress 'means . . . what it says.'"¹¹⁸ For the wide range of power that OFAC purports to exercise, there is a well-established judicial reluctance to "hide elephants in mouseholes."¹¹⁹ The latest pair of national developments underscore this tension between what the President did in the absence of a specific congressional action and what Congress should have and could have done. In January 2025, the President invoked his authority through the Committee on Foreign Investment in the United States (CFIUS), an agency similarly housed under the Department of the Treasury like OFAC, to block a proposed acquisition of U.S. Steel by Nippon Steel.¹²⁰ According to one of the two private parties, "the President cited no credible evidence of the deal presenting a national security problem."¹²¹ The President proceeded despite the fact that the Committee failed to reach consensus on the national security risks.¹²² While the CFIUS proceeding and composition of the panel differ from OFAC practice, and

114. *Id.*

115. *Capital Cities/ABC, Inc. v. Brady*, 740 F. Supp. 1007, 1011 (S.D.N.Y. 1990).

116. *Id.*

117. *See Gundy v. United States*, 588 U.S. 128, 170-71 (2019) (Gorsuch, J., dissenting) (discussing the risks of overly broad delegations).

118. *Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992).

119. *Whitman v. American Trucking Ass'n*, 531 U.S. 457, 468 (2001).

120. Fatima Hussein, *Biden blocks \$14 billion acquisition of US Steel by Japan's Nippon Steel*, ASSOCIATED PRESS (Jan. 3, 2025), <https://apnews.com/article/nippon-steel-japan-cfius-economy-biden-099564a3cddca587af0d7340e0c15ed6> [<https://perma.cc/4MLP-7DTF>].

121. *Id.*

122. Josh Boak, *Biden will decide on US Steel acquisition after influential panel fails to reach consensus*, ASSOCIATED PRESS (Dec. 24, 2024), <https://apnews.com/article/us-steel-japan-nippon-cfius-national-security-2b155b68713ce83e1cc789ec8aaf3ca7> [<https://perma.cc/U5L8-5ASX>].

steel has historically been an essential element to national security,¹²³ the President's decision appears particularly vulnerable due to its weak rationale. The case is on appeal in the U.S. Circuit Court of Appeals for the D.C. Circuit, facing judicial scrutiny at the time of this note.¹²⁴ On the other hand, when Congress deemed a foreign company as a threat to national security, particularly in the context of "new technologies with transformative capabilities," Congress enacted a statute that unambiguously required the divestiture of that corporate entity.¹²⁵ The action left no space for the executive branch to create an ambiguous, authority-expanding interpretation.¹²⁶ And indeed, in the face of such a precise legislative objective, the Supreme Court did not overturn such a command, as courts generally defer to explicit congressional directives founded on national security interests.¹²⁷

It may well be that clear congressional action remains the most effective solution. This view would extend the application of *Loper Bright* to their furthest logical boundary, treating OFAC no different than other agencies, such as the Environmental Protection Agency (EPA), and argue that courts should not afford any deference. Environmental statutes, such as those governing the Clean Air Act or the National Environmental Policy Act, frequently convey in broad language. Yet, courts still examine whether an agency's interpretation aligns with its recognized realm of expertise and legislative charge.¹²⁸ One Fifth Circuit's post-*Loper Bright* case's reasoning would seem to echo this theory when interpreting OFAC's overbroad definition.¹²⁹ The court recognizes that IEEPA grants the President broad powers to regulate a variety of *economic* transactions, but does not do so by erasing all limiting principles (emphasis added).¹³⁰ Applying *Loper Bright*, Judge Willett "determine[d] the 'best' reading of a statute," rejecting OFAC's definition of "property" and holding that OFAC exceeded its statutory authority.¹³¹

This more absolute application of *Loper Bright*, however, may face two obstacles by overlooking the fact that the federal judiciary has more duties than solely interpreting statutes when in a context where constitutional prerogatives are in play. First, while it is true that a more detailed statutory framework may further legitimize OFAC's conduct, courts still cannot abdicate their

123. See e.g., *Youngstown*, 343 U.S. at 597.

124. See *United States Steel Corp. et al v. CFIUS*, No. 25-1004, 2025 WL 1840342 (D.C. Cir. June 30, 2025).

125. See H.R.7521 Protecting Americans from Foreign Adversary Controlled Applications Act.

126. *Id.*

127. See *TikTok Inc. v. Garland*, 145 S. Ct. 57, 725–757 (2025) (upholding TikTok ban in the interest of national security).

128. See generally Richard J. Lazarus, *The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal*, 100 GEO. L.J. 1507 (2012) (examining how courts scrutinize NEPA-related agency decisions to ensure they fit within the statute's environmental mandate).

129. See *Van Loon v. Department of the Treasury*, 122 F.4th 549, 563 (5th Cir. 2024) (rejecting OFAC's interpretation of "property," reversing district's heightened deference).

130. *Id.* at 571.

131. *Id.* at 563 (citing *Loper Bright Enter. v. Raimondo*, 603 U.S. 369, 400).

responsibility to safeguard individual rights and liberties.¹³² The judiciary's constitutional duty to "say what the law is" becomes especially critical when an agency's interpretation impacts the rights of individuals, even under the guise of national security.¹³³ When Congress does not speak clearly, courts should not shy away from adjudicating cases just like they have done in other domains. Additionally, even if the statutory basis proves tenuous, the Government may well invoke alternative grounds for deference that courts must evaluate. In cases such as *Van Loon*, after the court decided that OFAC's action may fall outside of the statutory grant of authority, the action may arguably enter the "Zone of Twilight" articulated in *Youngstown*.¹³⁴ The Government's brief only invoked "national security" vaguely in the hope of justifying its actions, without more comprehensively arguing that the President's prerogative commands judicial deference.¹³⁵ As a result, the court did not engage with how the President's Article II mandate might empower OFAC.¹³⁶ If the Government chose to argue the inherent Article II power demands certain deference, courts would still be tasked with discerning the genuine nexus between the challenged agency action and legitimate national security imperatives, rather than acceding to the agency's request of deference. These cases are yet to come in a future administration that more prominently asserts constitutional claims.

Ultimately, OFAC's actions in interpreting highly technical and complex services that they have not adequately understood fail *Kisor*. The authoritarian-like, near-absolute power to dictate the definition of the regulated entities' actions highlights the problematic approach of OFAC's operation. This manner of operation undermines the balance of power that Congress intended in the regulatory framework.¹³⁷ This balance is crucial, as agencies operate within defined statutory bounds to prevent conflicts of jurisdiction that could create regulatory uncertainty and inefficiency.¹³⁸ National security agencies should not be the exception to this fundamental norm of this democratic government's operation. Particularly, in sensitive areas like national security, where agencies wield such significant power, judicial oversight plays a vital role in preventing agencies from encroaching on the prerogatives of other parts of the government, executive or legislative, and encroaching on individuals' liberty. This approach reflects the judiciary's essential function in the separation of

132. See *Kent v. Dulles*, 357 U.S. 116, 129 (1958) (noting that national security concerns do not justify ignoring constitutional freedoms).

133. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

134. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

135. Brief for Appellees, *Van Loon v. Department of the Treasury*, 2024 WL 1219987, at 38, 42, 44 (5th Cir. 2024).

136. See *Van Loon*, 122 F.4th at 549.

137. Cf. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928) (allowing broad delegation when Congress uses an intelligible principle for agencies to follow).

138. See e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125-26 (2000) (one guiding principle is that agencies should remain within the scope of their delegated authority).

powers—maintaining a clear, lawful structure for agency authority and ensuring that agencies like OFAC cannot expand their power unilaterally.¹³⁹

Thus, even analyzing OFAC's request for deference under the *Kisor* framework, courts should carefully evaluate whether OFAC's interpretation is within its specialized expertise and genuinely reflects its regulatory mandate.¹⁴⁰ Reflecting the fact that *Kisor* restricted *Auer*'s approach, the Court meant to apply a more restrictive standard that would likely prevent OFAC from extending its jurisdiction into areas more complicated beyond the framer's initial vision and would be intended for other agencies. Without robust expertise in the updated and more complicated world, OFAC's overbroad interpretation of complex financial technology and services should fail under judicial scrutiny until the agency has proved its capability otherwise.¹⁴¹ By limiting the scope of *Kisor* to situations where agencies demonstrate clear, specialized knowledge tied directly to their statutory responsibilities, courts can avoid unwarranted expansions of agency power and reaffirm their own role in the separation of powers.

IV. CONCLUSION

A recalibrated approach to judicial deference in national security contexts is not only warranted but essential in light of agencies like OFAC, whose reach now strays into expansive regulatory territory with profound economic implications. What began as a focused national security agency has evolved into a quasi-regulatory power whose activities increasingly parallel those of specialized financial bodies. Such broad regulatory assertions, made under the banner of national security, invite heightened judicial scrutiny to ensure that agency interpretations stay within their statutory mandates and respect the contours of legislative intent. In this light, a more tailored deference framework—one that acknowledges the nuances of both statutory language and agency expertise—is critical.

Ultimately, this paper calls for courts to reclaim a more assertive role in monitoring agency actions where national security is invoked to justify far-reaching economic regulatory actions. Echoing principles in *Loper Bright*, this approach reinforces the judiciary's constitutional mandate to safeguard the separation of powers while affirming individual rights. By demanding a clearer nexus between agency expertise and its interpretive claims, courts can prevent the "national security" rationale from becoming a *carte blanche* for unchecked authority. This nuanced judicial stance not only protects the democratic underpinnings of administrative law but also upholds a balanced regulatory landscape, essential for both governance integrity and the preservation of individual liberties.

In practical terms, the judiciary should first answer whether OFAC's actions fall under the core function of Article II that the Framers envisioned. Furthermore, in

139. See *INS v. Chadha*, 462 U.S. 919, 951-52 (1983) (underscoring the judiciary's role in policing legislative and executive boundaries and preventing agencies from operating outside statutory limits).

140. *Kisor v. Wilkie*, 588 U.S. 558, 574 (2019).

141. See generally Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187 (2016).

reviewing OFAC's actions, courts must not only verify that OFAC's actions comply with statutory limits but also assess whether the statutory grants themselves were intended to authorize such pervasive regulatory practices under the guise of national security. Where an agency's interpretation strains statutory language to justify a sweeping regulatory scope short of immediate war, as OFAC often does in cases involving global economic sanctions, it falls upon the courts to reject such interpretations and to realign agency actions within narrower statutory boundaries. This is not a new principle; *Youngstown* has taught us that the executive cannot unilaterally extend its reach under vague national security claims.¹⁴²

142. See generally *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 597 (1952).