

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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LEARNING RESOURCES, INC., ET AL.,)
 Petitioners,)
 v.) No. 24-1287
DONALD J. TRUMP, PRESIDENT)
OF THE UNITED STATES, ET AL.,)
 Respondents.)
- - - - -
DONALD J. TRUMP, PRESIDENT)
OF THE UNITED STATES, ET AL.,)
 Petitioners,)
 v.) No. 25-250
V.O.S. SELECTIONS, INC., ET AL.,)
 Respondents.)
- - - - -

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17
18 Washington, D.C.
19 Wednesday, November 5, 2025
20
21 The above-entitled matter came on for
22 oral argument before the Supreme Court of the
23 United States at 10:04 a.m.
24
25

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8 behalf of the state parties.

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1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	GEN. D. JOHN SAUER, ESQ.	
4	On behalf of the federal parties	4
5	ORAL ARGUMENT OF:	
6	NEAL K. KATYAL, ESQ.	
7	On behalf of the private parties	97
8	ORAL ARGUMENT OF:	
9	BENJAMIN GUTMAN, ESQ.	
10	On behalf of the state parties	159
11	REBUTTAL ARGUMENT OF:	
12	GEN. D. JOHN SAUER, ESQ.	
13	On behalf of the federal parties	184
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (10:04 a.m.)

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

7 General Sauer.

8 ORAL ARGUMENT OF GEN. D. JOHN SAUER

9 ON BEHALF OF THE FEDERAL PARTIES

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

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

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

1 again.

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

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

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

1 and other tariff equivalents.

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

12 I welcome the Court's questions.

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

17 GENERAL SAUER: Yes, Justice Thomas.
18 And I may make two or three points on that
19 front.

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

1 that's for at least two reasons.

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

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

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

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

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

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

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

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

1 major questions to Justice Thomas?

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

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

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

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

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

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

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

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

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

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

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

4 The way the Court thought about it is
5 we're looking at this through the lens of
6 Justice Jackson's opinion in Youngstown. And
7 the Court held specifically that these verbs
8 placed the President in Youngstown Zone 1. The
9 Court held that -- that he's subject -- subject
10 to the widest latitude of judicial
11 interpretation, that he received --

12 JUSTICE SOTOMAYOR: Counsel --

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

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

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

1 but it doesn't generate revenue.

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

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

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

13 JUSTICE SOTOMAYOR: But we have --

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

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

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

24 JUSTICE SOTOMAYOR: Commerce --
25 everything --

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

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

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

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

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

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

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

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

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

1 phrase "regulate importation" in IEEPA
2 naturally evokes --

3 JUSTICE SOTOMAYOR: Why is it --

4 GENERAL SAUER: -- not the power to
5 tax. What's --

6 JUSTICE SOTOMAYOR: Why -- could you
7 tell me why it is that when Congress intended
8 to permit a president to regulate by imposing
9 tariffs, it's always used "tariff" and
10 "regulate."

11 I have about 16 laws in the past that
12 when Congress intended "regulate" to mean
13 taxing, that it used taxes simultaneously.

14 GENERAL SAUER: This Court --

15 JUSTICE SOTOMAYOR: But it didn't
16 here.

17 GENERAL SAUER: Respectfully, this
18 Court came to the opposite conclusion, if I
19 may, in Algonquin, where the phrase was not
20 impose duties from the --

21 JUSTICE SOTOMAYOR: Well, but that
22 was -- we did something in Algonquin. It was
23 in the duties section, unlike here. It was
24 paired with questions about decreasing tariffs
25 and increasing tariffs.

1 So it's a very different statute than
2 the one at -- at issue here.

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

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

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

14 GENERAL SAUER: -- where "regulate"
15 here naturally encompasses --

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

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

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

25 In other words, the analysis that the

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

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

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

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

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

25 JUSTICE JACKSON: Let me ask you about

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

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

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

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

25 JUSTICE JACKSON: What part do you

1 disagree with? I'm sorry.

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

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

11 GENERAL SAUER: Because --

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

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

16 JUSTICE JACKSON: Yes.

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

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

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

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

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

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

6 JUSTICE JACKSON: No, those --

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

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

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

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

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

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

6 GENERAL SAUER: -- address foreign
7 emergencies.

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

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

12 JUSTICE JACKSON: Not a tariff.

13 GENERAL SAUER: -- were visibly --

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

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

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

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

1 very phrase, "regulate" --

2 JUSTICE JACKSON: But can I --

3 GENERAL SAUER: -- "importation."

4 JUSTICE JACKSON: -- back you up just
5 a second? I'm sorry. You're talking so
6 quickly.

7 GENERAL SAUER: Sorry.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9 GENERAL SAUER: Well -- yes. Yeah.

10 JUSTICE BARRETT: Putting aside
11 Yoshida.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 So can you describe what you mean by

1 "capacious"?

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

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

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

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

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

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

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

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

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

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

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

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

4 GENERAL SAUER: Right. Understand.
5 Yeah, we agree to that, yes.

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

10 GENERAL SAUER: Because that is how --

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

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

20 JUSTICE SOTOMAYOR: We're going --

21 GENERAL SAUER: -- the phrase --

22 JUSTICE SOTOMAYOR: Assume --

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

1 regulate trading in securities --

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

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

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

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

23 CHIEF JUSTICE ROBERTS: Counsel --

24 JUSTICE KAVANAUGH: What about --

25 CHIEF JUSTICE ROBERTS: -- sometime

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22 GENERAL SAUER: They're --

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

25 GENERAL SAUER: There's a --

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

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

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

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

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

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

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

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

15 GENERAL SAUER: The question why
16 the --

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

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

23 JUSTICE SOTOMAYOR: Regulate it by --

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

1 tariffs.

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

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

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

22 JUSTICE JACKSON: General --

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

25 JUSTICE JACKSON: -- General, the

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

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

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

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

1 includes regulate importation.

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

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

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

25 GENERAL SAUER: And let me say two

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

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

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

17 JUSTICE JACKSON: Could the answer
18 be --

19 GENERAL SAUER: -- to illustrate that.

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

25 GENERAL SAUER: I'd say two things in

1 response to that. That's the very argument
2 that this Court rejected in Algonquin, that the
3 fact that these other specific statutes --

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

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

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

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

14 JUSTICE JACKSON: Yes.

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

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

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

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

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

21 GENERAL SAUER: Hamilton against
22 Dillin.

23 JUSTICE BARRETT: Yeah.

24 GENERAL SAUER: Exactly. Yes, it
25 does.

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

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

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

1 do --

2 JUSTICE BARRETT: But, if that were
3 true, why couldn't you just call this a
4 license? And it's also true that in the cotton
5 example, the Court said the exaction itself was
6 not properly a tax but a bonus required as a
7 condition precedent for engaging in the trade.
8 So it seems like it was a little squirrely
9 about how it was proceeding. And if -- if --
10 if there really is no distinction, why couldn't
11 you just call it a license here?

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

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Justice Thomas, anything further?

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

24 GENERAL SAUER: Yes, Justice Thomas.
25 I'd say a couple things in response to that.

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

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

1 the area of Youngstown Zone 1.

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

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

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

25 And then, in 1933, when that power was

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

14 CHIEF JUSTICE ROBERTS: Justice Alito?

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

25 So do you think that Congress -- to

1 the extent Congress had that decision in mind
2 and relied on it, do you think it also relied
3 on those statements in the opinion?

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

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

22 JUSTICE ALITO: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Sotomayor?

25 JUSTICE SOTOMAYOR: I'd like to go

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

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

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

20 JUSTICE SOTOMAYOR: But that's --

21 GENERAL SAUER: -- license fees to get
22 it in, and those are economic --

23 JUSTICE SOTOMAYOR: -- but that's the
24 point I'm making, which is that the only use of
25 "license" here is a noun. You can license to

1 accomplish the powers that (b) gives the
2 President.

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

6 JUSTICE SOTOMAYOR: Exactly. You're
7 not relying on licenses for that reason,
8 correct?

9 GENERAL SAUER: No. I only cite that
10 language, that introductory language about, you
11 know, instruments, licenses, and otherwise, as
12 --

13 JUSTICE SOTOMAYOR: That you -- you
14 can't rely on it when you --

15 GENERAL SAUER: -- another layer of
16 breadth in this particular statute.

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

22 GENERAL SAUER: Yes, we're relying on
23 "regulate importation" here.

24 JUSTICE SOTOMAYOR: All right. And
25 despite the fact that no other president in the

1 history of IEEPA has ever used -- has ever
2 imported -- used tariffs as a power under
3 IEEPA?

4 GENERAL SAUER: Well, President Nixon
5 did so under TWEA.

6 JUSTICE SOTOMAYOR: Under a
7 predecessor, and we have all the limitations of
8 that. All right.

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

13 GENERAL SAUER: I don't concede that.
14 I mean, two very visible examples, again, are
15 TWEA and Section 122 --

16 JUSTICE SOTOMAYOR: We're -- we're
17 back to the -- the question here. Okay. Thank
18 you, counsel.

19 CHIEF JUSTICE ROBERTS: Justice
20 Sotomayor?

21 JUSTICE KAGAN: No, she's Justice
22 Sotomayor.

23 JUSTICE SOTOMAYOR: Yeah.

24 (Laughter.)

25 JUSTICE KAGAN: She just finished.

1 (Laughter.)

2 CHIEF JUSTICE ROBERTS: Justice Kagan?

3 JUSTICE KAGAN: General Sauer --

4 JUSTICE SOTOMAYOR: And they're
5 friends?

6 JUSTICE KAGAN: -- I want to take you
7 back to Justice Thomas's question about
8 nondelegation. And if I understood your answer
9 correctly, it was really similar to the answer
10 that you started off with when you talked with
11 Justice Thomas about the Major Questions
12 Doctrine, which is sort of everything's
13 different because the President has independent
14 constitutional powers in this area.

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

22 And, in fact, when you look at J.W.
23 Hampton, which gives rise to the nondelegation
24 test that we usually use, J.W. Hampton is a
25 tariffs case, and the Court did not say, oh, we

1 need some special new principle here, some
 2 stricter rule, because we're dealing with
 3 tariffs in which presidents are directly
 4 concerned as a matter of foreign relations. It
 5 enunciated the test we use for all
 6 nondelegations. So how does that fit with your
 7 theory?

8 GENERAL SAUER: Eight years later in
 9 Curtiss-Wright, the Court held the
 10 nondelegation doctrine for domestic affairs
 11 does not apply with the same force as it does
 12 in foreign affairs.

13 JUSTICE KAGAN: But not with respect
 14 to tariffs. Not with respect to quintessential
 15 taxing powers, which are given by the
 16 Constitution to Congress.

17 GENERAL SAUER: I think Justices of
 18 this Court have recognized in their opinions
 19 that one of the reasons that the nondelegation
 20 doctrine -- you know, that intelligible
 21 principle test hasn't packed as much punch as
 22 Justice Kavanaugh said in one of his opinions
 23 as it might otherwise have done is it did arise
 24 in the foreign affairs context because there,
 25 the Court has historically been very, very

1 comfortable with very broad delegations.
2 Chicago and Southern Air Lines and other cases
3 of the 1930s. Shortly after, J.W. Hampton
4 talked about the very large delegations of the
5 foreign commerce power being very effective.

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

14 So I do think there is a profound
15 consistency between the announcement of the
16 intelligible principle test in J.W. Hampton and
17 then the subsequent recognition by this Court
18 in Curtiss-Wright that the nondelegation
19 doctrine --

20 JUSTICE KAGAN: In --

21 GENERAL SAUER: -- doesn't apply with
22 the same force in this context.

23 JUSTICE KAGAN: In Consumers' Research
24 just last year, we had a tax before us, and the
25 question was, was this a delegation issue? It

1 was, of course, a much smaller tax which dealt
2 with many fewer taxpayers. Notwithstanding
3 that, we said, if there's no ceiling on this
4 tax, we sort of assumed that if there were no
5 ceiling on this tax, it would raise a
6 delegation problem. And most of the opinion
7 was given over to showing that there, in fact,
8 was a ceiling on the tax, not a quantitative
9 one but a qualitative one.

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

15 GENERAL SAUER: First of all, I can't
16 say enough, it is a regulate -- regulatory
17 tariff, not a tax, and that, I think, ties to
18 my response to that, which is that this is a
19 totally different context. This is IEEPA, a
20 statute that Congress carefully crafted to
21 grant the President admittedly broad powers to
22 address foreign-arising emergencies. It's
23 outward-facing to foreign affairs, where
24 there's the broadest level of deference to the
25 political branches that this Court has

1 recognized in many cases.

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

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

22 JUSTICE KAGAN: Yeah. So the last --

23 GENERAL SAUER: -- where you have a
24 lot of powers that some --

25 JUSTICE KAGAN: -- my last question

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

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

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

22 The President has to make a formal
23 declaration of a national emergency, which
24 subjects him to particularly intensive
25 oversight by Congress, repeat -- you know,

1 natural lapsing, repeated review, reports, and
2 so forth. It says you have to consult with
3 Congress to the -- the maximum extent possible.

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

12 GENERAL SAUER: But it is a --

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

18 GENERAL SAUER: Well, this particular
19 emergency is particularly existential, as
20 Executive Order 14257 says, and, of course, no
21 one disputes the existential nature of the
22 fentanyl crisis, which, you know, we had an
23 agreement last week to create progress on,
24 which illustrates the effectiveness of the
25 tariffs tool here.

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

15 Then there's, you know, 1701(b), which
16 talks about how it can be used for this and for
17 no other purpose. Then there are limitations
18 in Section 1702(b). Then there is the
19 limitations I referred to earlier about what he
20 can actually do. He can do a heck of a lot but
21 only when he's dealing with property in which
22 foreigners have an interest, and that's a
23 pretty narrow domain. That's -- that's quite a
24 silo, so to speak.

25 And, then, of course, overarching it

1 all, there is congressional oversight. And you
2 may say congressional oversight may not have
3 much bite, but Congress didn't think so.
4 Congress crafted this compromise. It balanced
5 the never-ending tension.

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

12 JUSTICE KAGAN: Thank you, General.

13 CHIEF JUSTICE ROBERTS: Justice
14 Gorsuch?

15 JUSTICE GORSUCH: General, just a few
16 questions following up on the major questions
17 discussions you've had.

18 You say that we shouldn't be so
19 concerned in the area of foreign affairs
20 because of the President's inherent powers.
21 That's the gist of it, as I understand it, why
22 we should disregard both major questions and
23 nondelegation.

24 So could Congress delegate to the
25 President the power to regulate commerce with

1 foreign nations as he sees fit --

2 GENERAL SAUER: We don't --

3 JUSTICE GORSUCH: -- to lay and
4 collect duties as he sees fit?

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

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

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

14 JUSTICE GORSUCH: But you're saying we
15 shouldn't look --

16 GENERAL SAUER: He has broad powers in
17 this very narrow assignment.

18 JUSTICE GORSUCH: -- we shouldn't be
19 concerned with -- I want you to explain to me
20 how you draw the line, because you say we
21 shouldn't be concerned because this is foreign
22 affairs, the President has inherent authority,
23 and so delegation off the books more or less.

24 GENERAL SAUER: Or at least --

25 JUSTICE GORSUCH: And if that's true,

1 what would -- what would prohibit Congress from
2 just abdicating all responsibility to regulate
3 foreign commerce, for that matter, declare war
4 to the President?

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

7 JUSTICE GORSUCH: Why not?

8 GENERAL SAUER: Well, because we're
9 dealing with a statute, again, that has a whole
10 list of limitations.

11 JUSTICE GORSUCH: I'm not asking about
12 the statute. General, I'm not asking about the
13 statute. I'm asking for your theory of the
14 Constitution and why the major questions and
15 nondelegation, what bite it would have in that
16 case.

17 GENERAL SAUER: Yes. I would say by
18 then you would move from the area where there's
19 enormous deference to the President in actually
20 both the political branches, where, here,
21 there's inherent authority, and pile on top of
22 that there's a broad delegation of the duty
23 and --

24 JUSTICE GORSUCH: You're saying
25 there's inherent authority in foreign affairs,

1 all foreign affairs, so regulate commerce,
2 duties and -- and -- and -- and tariffs and
3 war. It's inherent authority all the way down,
4 you say. Fine.

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

8 What would stop Congress from doing
9 that?

10 GENERAL SAUER: That would be
11 different than a situation where there are
12 metes and bounds, so to speak. It would be a
13 wholesale abdication.

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

22 GENERAL SAUER: I think what the Court
23 has said in its opinions is just that it
24 applies with much less force, more limited
25 application in this context.

1 So perhaps the right way to approach
2 it is a very, very deferential application of
3 the intelligible -- intelligible principle
4 test, that -- that sort of wholesale abdication
5 of --

6 JUSTICE GORSUCH: All right. So now
7 you're admitting that there is some
8 nondelegation principle at play here and,
9 therefore, major questions as well, is that
10 right?

11 GENERAL SAUER: If so, very limited,
12 you know, very, very deferential --

13 JUSTICE GORSUCH: Okay.

14 GENERAL SAUER: -- and limited is
15 what -- and, again, the phrase that Justice
16 Jackson used is it just does not apply, at
17 least --

18 JUSTICE GORSUCH: I know, but that's
19 where you started off, and now you've retreated
20 from that as I understand it.

21 GENERAL SAUER: Well, I think we would
22 as our frontline position assert a stronger
23 position, but if the Court doesn't accept it,
24 then, if there is a highly deferential
25 version --

1 JUSTICE GORSUCH: Can you give me a
2 reason to accept it, though? That's what I'm
3 struggling and waiting for. What's the reason
4 to accept the notion that Congress can hand off
5 the power to declare war to the President?

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

8 JUSTICE GORSUCH: Well, you do. You
9 say it's unreviewable, that there's no
10 manageable standard, nothing to be done. And
11 now you're -- I think you -- tell me if I'm
12 wrong. You've backed off that position.

13 GENERAL SAUER: Maybe that's fair to
14 say.

15 JUSTICE GORSUCH: Okay. All right.
16 Thank you.

17 (Laughter.)

18 GENERAL SAUER: Because that would be,
19 I think, an abdication. That would really be
20 an abdication, not a delegation.

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

23 And then I wanted to return to
24 something Justice Sotomayor asked under this
25 statute, okay, so now we're in this statute.

1 It's a major questions question, though.

2 Could the President impose a
3 50-percent tariff on gas-powered cars and auto
4 parts to deal with the unusual and
5 extraordinary threat from abroad of climate
6 change?

7 GENERAL SAUER: It's very likely that
8 that could be done, very likely.

9 JUSTICE GORSUCH: I think that has to
10 be the logic of your view.

11 GENERAL SAUER: Yeah. In other words,
12 I mean, obviously, this Administration would
13 say that's a hoax, it's not a real crisis,
14 but -- but, obviously --

15 JUSTICE GORSUCH: I'm sure you would.

16 GENERAL SAUER: Yes, but that would be
17 a question for Congress under our
18 interpretation, not for the courts.

19 JUSTICE GORSUCH: All right. And
20 then, on this inherent authority idea, does --
21 I -- I take -- I understand the President's
22 inherent authority in wartime -- and a lot of
23 your examples of regulating commerce and maybe
24 your best one, Hamilton during the Civil War --
25 they -- they occurred during wartime, when the

1 President's commander-in-chief power is clearly
2 in play.

3 Does the President have inherent
4 authority over tariffs in peacetime?

5 GENERAL SAUER: No, we do not contend
6 that.

7 JUSTICE GORSUCH: Okay.

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

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

21 And yet this Court said, well, we're
22 not going to see a delegation problem here,
23 even though it's really a wholesale delegation,
24 which would otherwise be legislative authority.
25 It would be kind of like a small version of

1 what your hypothetical would be, an abdication.

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

13 JUSTICE GORSUCH: General, if I can
14 cut through those words, I think you're saying
15 that, no, the President doesn't have inherent
16 authority over tariffs in peacetime.

17 GENERAL SAUER: Absolutely. That
18 is --

19 JUSTICE GORSUCH: Okay.

20 GENERAL SAUER: We do not assert that.
21 We say that Congress can delegate that to him.
22 And when Congress does so, as it does when it
23 uses the frayed -- phrase "regulate
24 importation" --

25 JUSTICE GORSUCH: I -- I -- I -- I

1 follow all -- all of that.

2 GENERAL SAUER: I agree with that. I
3 agree.

4 JUSTICE GORSUCH: Okay. You emphasize
5 that Congress can always take back its powers.
6 You mentioned that a couple of times.

7 But don't we have a serious retrieval
8 problem here because, once Congress delegates
9 by a bare majority and the President signs
10 it -- and, of course, every president will sign
11 a law that gives him more authority -- Congress
12 can't take that back without a super majority.
13 And even -- you know, even then, it's going to
14 be veto-proof. What president's ever going to
15 give that power back? A pretty rare president.

16 So how -- how should that inform our
17 view of delegations and major questions?

18 GENERAL SAUER: I would look at the
19 balance that Congress struck because what
20 Congress did, initially, it had a two-House
21 legislative veto that was held unconstitutional
22 in Chadha --

23 JUSTICE GORSUCH: And we struck that
24 down, yeah.

25 GENERAL SAUER: -- and then Congress

1 went back to the statute and amended it.

2 JUSTICE GORSUCH: Yeah.

3 GENERAL SAUER: It took out the
4 legislative veto and left in the joint
5 resolution but still left the President with
6 all those powers.

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

9 GENERAL SAUER: Yes.

10 JUSTICE GORSUCH: Fair enough. As a
11 practical matter, in the real world, it can
12 never get that power back.

13 GENERAL SAUER: I disagree because, in
14 January of 2023, Congress voted to terminate
15 one of the biggest IEEPA emergencies ever, the
16 COVID emergency, and the President went along
17 with that.

18 So what the statute reflects is
19 there's going to be the ability for a sort of
20 political consensus against a declared
21 emergency. Nevertheless, that's a political
22 discipline.

23 JUSTICE GORSUCH: But what happens
24 when the President simply vetoes legislation to
25 try to take these powers back?

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

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

16 GENERAL SAUER: I disagree with that.
17 And the recent historical counterexample of
18 Congress's termination of the COVID emergency
19 demonstrates that political -- the political
20 oversight that's baked into the statute's --

21 JUSTICE GORSUCH: With the President's
22 assent.

23 GENERAL SAUER: -- meaning will hold.

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

1 GENERAL SAUER: Once he lost it by a
2 veto-proof majority in the Senate, I think the
3 position --

4 JUSTICE GORSUCH: Yeah. Right?

5 GENERAL SAUER: I think he realized --
6 and that's -- that's the political process
7 working. There was a little consensus against
8 it to coalesce.

9 JUSTICE GORSUCH: Yeah. It takes a
10 super-majority, a veto-proof majority to get it
11 back. Yeah. Okay.

12 One other question. Do you think
13 tariffs are always foreign affairs?

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

21 However, as in *Gibbons against Ogden*,
22 if they are revenue-raising tariffs, they would
23 not raise the same sort of, like, foreign
24 affairs issues as regulatory tariffs, which are
25 imposed not for the purpose of raising revenue

1 but to induce foreign powers to change their
2 behaviors and --

3 JUSTICE GORSUCH: So revenue-raising
4 tariffs are not foreign affairs, but regulatory
5 tariffs are?

6 GENERAL SAUER: I don't think a
7 revenue-raising tariff would be foreign affairs
8 to the same degree at least. I think it has a
9 foreign application, obviously, but I don't
10 think it would raise the same issues.

11 JUSTICE GORSUCH: Okay. Thank you,
12 General.

13 CHIEF JUSTICE ROBERTS: Justice
14 Kavanaugh?

15 JUSTICE KAVANAUGH: Figuring out what
16 "regulate importation" means is -- is obviously
17 central here, and for major question purposes,
18 I think the way we think about that kind of
19 question is, does the specific authority,
20 power, major power now asserted pursuant to
21 that general statutory authorization, was that
22 the kind of power that would have been
23 understood by people, by Congress at the time
24 the general statute was passed, as distinct
25 from being a novel kind of use of that general

1 authority to do something different?

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

3 One problem you have is that

4 presidents since IEEPA have not done this.

5 Your primary answer or one of your many answers

6 to that is the Nixon example, and that's a good

7 example for you because Nixon relied on

8 "regulate importation" to impose a worldwide

9 tariff. Good example.

10 What is our understanding of Congress

11 in 1977 vis-à-vis that Nixon example when

12 Congress re-enacts or enacts the "regulate

13 importation" language into IEEPA?

14 GENERAL SAUER: Congress at that time

15 was fully aware that a court of appeals of

16 exclusive jurisdiction had interpreted that

17 very phrase very visibly, very prominently, to

18 include the power to tariff and then re-enacted

19 it without change. The Court addressed a kind

20 of lesser situation in Algonquin when it came

21 to Section 122, and the Court said President

22 Nixon -- the Court said President Nixon

23 interpreted this to include a -- a tariffing

24 power, a tariffing-like power. And then

25 Congress a few months later re-enacted the

1 language without change, and that's powerful
2 evidence of congressional acquiescence.

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

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

19 GENERAL SAUER: If you look at those
20 69 emergencies, in fact, you go through them
21 one at a time, which we had our team do --

22 JUSTICE KAVANAUGH: Mm-hmm.

23 GENERAL SAUER: -- it's really hard to
24 find one where you look at that emergency and
25 you say, oh, tariffs is the natural tool that

1 you would use to address that emergency. So,
2 for example, the blood diamond emergency, you
3 know, tariffing these sort of, you know,
4 criminal organizations in Africa that are
5 financing terrorism through the sale of
6 diamonds, you don't really tariff them. Or you
7 take, you know, the Iranian hostage crisis,
8 President Carter didn't say, oh, you seized all
9 of our, you know, embassy personnel, you're
10 holding them hostage, we're going to tariff
11 you. Right? And if you go through those
12 emergencies, there are two emergencies, though,
13 where tariffs are the obvious natural tool for
14 a president to use. One is the Nixon
15 balance-of-payments deficit problem, and the
16 other is these -- this particular emergency.

17 And also, there's political reasons.
18 And they weren't just solved.

19 JUSTICE KAVANAUGH: But I think the
20 question --

21 GENERAL SAUER: I think that it's no
22 question that President Trump is by far the
23 most comfortable with the tariffing -- tariffs
24 as a tool both of, you know, economic and
25 foreign policy than many of the others, other

1 presidents may have been. I mean, there are
2 presidents like President Bush who, you know,
3 probably wouldn't have naturally, you know,
4 selected that particular tool or method.

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

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

19 And I just want you to -- to give your
20 best answer to why "regulate importation"
21 encompasses tariffs when "adjust" -- we -- we
22 held that "adjust imports" would -- would
23 encompass monetary exactions.

24 GENERAL SAUER: Sure. Three answers
25 if I may.

1 JUSTICE KAVANAUGH: Mm-hmm.

2 GENERAL SAUER: "Adjust" is narrower
3 than "regulate." And so, therefore --

4 JUSTICE KAVANAUGH: So --

5 GENERAL SAUER: -- the greater
6 includes the lesser.

7 JUSTICE KAVANAUGH: -- it follows --

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

17 And then I think far more importantly,
18 "regulate importation," I can't emphasize
19 enough, going back to the time of the founding,
20 going back to the time of the founding has been
21 understood that the manner in which you
22 regulate importation, the natural way to do
23 that is to tariff.

24 So it would be textually astonishing
25 given that historical pedigree going back to

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

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

20 But we can't rely on what the counsel
21 said in Algonquin. You know, isn't there a --
22 a difference of sorts at least between a tariff
23 and a license fee? You answered this, I think,
24 briefly before, but I want to make sure because
25 I think this could be an important point

1 because I want to know Algonquin to decide this
2 case. So --

3 GENERAL SAUER: Yeah. I --

4 JUSTICE KAVANAUGH: -- give your best
5 shot on that.

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

8 JUSTICE KAVANAUGH: Mm-hmm.

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

21 JUSTICE KAVANAUGH: You know, at one
22 time, the Court said monetary methods, i.e.,
23 license fees, and the next page said monetary
24 exactions, i.e., license fees and duties.

25 GENERAL SAUER: Yeah. No, and I think

1 the Court bought the argument correctly --

2 JUSTICE KAVANAUGH: It's important to
3 be consistent.

4 GENERAL SAUER: -- that there's --
5 there's really not a lot of daylight between
6 those two. As a practical matter, certainly
7 almost no daylight. And so then the question,
8 as the Court said --

9 JUSTICE KAVANAUGH: When you say
10 almost no daylight, just --

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

21 Well, if -- if we're talking about a
22 distinction between "regulate importation"
23 including licenses that could come with fees
24 but not tariffs, that logic applies all the
25 more so.

1 JUSTICE KAVANAUGH: Thank you.

2 GENERAL SAUER: It makes no sense.

3 CHIEF JUSTICE ROBERTS: Justice
4 Barrett?

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

15 So I do think there are some
16 distinctions, but keeping that in mind, if you
17 say that there really is, as a practical
18 matter, no difference, this is kind of what I'm
19 hung up on in "license" that maybe you can
20 help.

21 So, in IEEPA, Justice Sotomayor is
22 right, "license" is used as a noun, but it's
23 one of the means necessary. So, in Algonquin,
24 it was "by any means necessary adjust." Here,
25 the statute says the President may under such

1 regulations as he may prescribe by means of
2 instructions, licenses, or otherwise regulate
3 importation, which is the key part for our
4 purposes.

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

17 How do I understand that language,
18 or -- or am I just misunderstanding it and this
19 language is totally irrelevant?

20 GENERAL SAUER: I think that -- here,
21 is the way I'd respond to that. I think that
22 language powerfully reinforces our position the
23 way you've laid it out right there because,
24 first of all, "regulate importation" we say,
25 and based on extensive historical pedigree, the

1 core application of that is tariffing.

2 To -- to list tariffing again would
3 have been essentially redundant and
4 unnecessary, especially if you look at the
5 specific historical background of TWEA, where
6 TWEA was enacting a tariffing power or a
7 licensing-like power, you know, that was
8 described as again duties and tariffs
9 equivalently.

10 JUSTICE BARRETT: Okay. But I -- I --
11 I don't understand because I think you have to
12 put together (a)(1) and then (b). So I think
13 what you would be saying is he may prescribe by
14 means of tariffs, tariffs.

15 GENERAL SAUER: I think what you're
16 saying is by means of instruments, licenses, or
17 otherwise.

18 JUSTICE BARRETT: By instructions,
19 licenses, or otherwise?

20 GENERAL SAUER: Yeah, instructions.
21 Sorry. Yeah, instructions, licenses, or
22 otherwise.

23 JUSTICE BARRETT: Impose tariffs?
24 Okay.

25 GENERAL SAUER: Otherwise, I mean, if

1 you say instructions, licenses, or otherwise,
2 and we're asserting a power that's very, very
3 similar to licensing --

4 JUSTICE BARRETT: The licensing?

5 GENERAL SAUER: -- "otherwise"
6 naturally carries that with it. But that's not
7 our principal position. Our principal position
8 is "regulate importation" means that. Right?

9 JUSTICE BARRETT: Okay.

10 GENERAL SAUER: And so you don't need
11 to say it again. However, if -- if -- Congress
12 has authorized them to do it by licenses that
13 could come with fees that are economically
14 equivalent to tariffs and then says
15 otherwise --

16 JUSTICE BARRETT: Then tariffs would
17 be in there.

18 GENERAL SAUER: -- you know, that just
19 reinforces the same conclusion that we get by
20 using the phrase "regulate" --

21 JUSTICE BARRETT: Okay. Then a
22 question just to follow up on Justice Gorsuch's
23 thing about how could Congress ever get this
24 delegation back, you said, well, listen, you
25 point to the -- Congress's ability to terminate

1 emergencies, which it's done.

2 But, if Congress ever wanted to get
3 the tariffing power back, it would have to have
4 a veto-proof majority because, regardless of
5 the emergency, so if Congress wanted to reject
6 the -- let's say that we adopt your
7 interpretation of the statute.

8 If Congress said, whoa, we don't like
9 that, that gives a president too much authority
10 under IEEPA, it's going to have a very hard
11 time pulling the tariff power out of IEEPA,
12 correct?

13 GENERAL SAUER: Well, I don't know if
14 it wouldn't be a hard time. Certainly, we'd
15 have to have a statutory amendment --

16 JUSTICE BARRETT: Well, veto --

17 GENERAL SAUER: -- which would be true
18 of any case this Court definitively interprets
19 the statute, yes, I think that the Court --
20 Congress have to pass a statutory --

21 JUSTICE BARRETT: But -- but
22 definitively interpreting a statute that grants
23 presidential power makes it particularly hard
24 to get the President to not want to veto
25 something, which, as Justice was pointing

1 out -- Justice Gorsuch was pointing out, has
2 him lose power. All right.

3 I want to ask you a question about
4 unusual and extraordinary threat, which we have
5 not talked about yet, and I specifically want
6 to talk about the reciprocal tariffs.

7 These are imposed on -- I mean, these
8 are kind of across the board. And so is it
9 your contention that every country needed to be
10 tariffed because of threats to the defense and
11 industrial base? I mean, Spain, France? I
12 mean, I could see it with some countries, but
13 explain to me why as many countries needed to
14 be subject to the reciprocal tariff policy as
15 are.

16 GENERAL SAUER: Yeah. Executive Order
17 14257 spells out the nature of the emergency
18 and basically says that there's this -- this
19 sort of lack of reciprocity, this asymmetric
20 treatment, you know, our trade with respect to
21 foreign countries, trade that does run across
22 the board is a global problem.

23 And it then puts in context the
24 argument they make that this power to tariff is
25 so broad because you're applying it to every

1 country in the world. That conflates the
2 nature of the tool, tariffing, which they're
3 challenging here, with the nature of the
4 declared emergency, which they haven't
5 disputed.

6 They haven't disputed, for example,
7 that the President has correctly identified
8 that virtually every major trading partner has
9 this longstanding sort of asymmetric unfair
10 treatment of -- of our trade.

11 So the argument this power is so
12 broad, this power is so broad is really based
13 on a conflation of two different things. One
14 is the power, right? Imagine this. Imagine
15 that, for example, President Reagan had wanted
16 to convince South Africa to change its
17 apartheid policies and he imposed tariffs on
18 them.

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

24 What they're saying, and this so
25 broad, because the emergency is so broad, but,

1 of course, that's a presidential determination
2 that -- and -- and there's all kinds of basis
3 for it. And also keep in mind that the
4 emergency is not like just the asymmetric
5 treatment. It's the impact of the asymmetric,
6 the underlying conditions, the hollowing out of
7 our manufacturing base, you -- you -- you know,
8 the -- the -- the vulnerability of our supply
9 chains, and, of course, the -- the -- our
10 defense and industrial base's vulnerability of
11 key inputs.

12 CHIEF JUSTICE ROBERTS: Justice
13 Jackson?

14 JUSTICE JACKSON: So, as I understand
15 your response to Justice Barrett in that last
16 question, you're saying that the power to
17 tariff fits naturally with the power to block
18 and seize. That was your example.

19 But I guess I'm trying to understand
20 then your argument from the text of the actual
21 statute because the statute, unlike what you
22 suggested to Justice Kagan, is focused on the
23 actual actions that the President can take. In
24 response to Justice Kagan, I understood you to
25 say that Congress was giving the President

1 broad authority to act and it was within a
2 particular domain, which is the domain of
3 emergencies with respect to foreign power, but
4 the President could basically do a lot of
5 things.

6 But, when I read the statute, it is
7 telling the President exactly what he can do,
8 investigate, block during the pendency of an
9 investigation, regulate, direct, and compel,
10 nullify, void, prevent, or prohibit.

11 And I guess what is a little
12 concerning to me is that your argument suggests
13 that we should see the word "impose" -- the
14 phrase "impose tariffs" in that same series of
15 things that the President could do. We don't
16 see that word, and, instead, you take
17 "regulate" and say that must mean that.

18 So I guess I'm getting back to Justice
19 Barrett's maybe original question, which was
20 where else in the Code has Congress used the
21 word "regulate" to sub in for "impose tariffs"?

22 GENERAL SAUER: TWEA. And then this
23 Court's opinions, of course, have used
24 "regulate" and "import" or have -- point out
25 that duties are the natural way to regulate

1 foreign commerce. But yet, the Court's --

2 JUSTICE JACKSON: But you're saying we
3 should not have expected to see the same level
4 of granularity with respect to the President's
5 authority to impose tariffs as we see here,
6 investigate, block, direct and compel, nullify,
7 et cetera.

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

11 JUSTICE JACKSON: So "regulate"
12 becomes a big catch-all. The rest of the other
13 things --

14 GENERAL SAUER: It's -- well, I mean,
15 we have a concession of that from the other
16 side that "regulate" at least includes
17 qualitative methods, quantitative methods,
18 quotas, you know, licenses.

19 They concede that "regulate" --
20 there's a lot in "regulate" that's not spelled
21 out there. And our point is you don't need to
22 spell out tariffs because that's like of all of
23 them the most natural, the most quintessential
24 method of regulating imports.

25 JUSTICE JACKSON: And yet -- and --

1 and -- and yet many, many presidents have not
2 used regulate in this way to impose tariffs.

3 I understand you point to President
4 Nixon. We have licenses from Lincoln. But no
5 one else.

6 GENERAL SAUER: As I said to Justice
7 Kavanaugh, presidents who are faced with
8 international crises to which tariffing is the
9 natural response -- that's President Nixon and
10 President Trump -- have invoked this authority.
11 And also, frankly, President Trump invoked this
12 authority in May of 2019 as well.

13 JUSTICE JACKSON: Can I ask you one
14 question --

15 GENERAL SAUER: So it's more
16 historically attested than they concede.

17 JUSTICE JACKSON: Let me just ask one
18 more question about the unusual threat. So, in
19 your conversation with Justice Gorsuch that we
20 had, the climate change tariff hypo and you
21 indicated that there would be challengers to
22 the notion that that was an unusual and
23 extraordinary threat, and I'm just wondering,
24 under your position, would they be able to make
25 a legal challenge? Are you saying the Court

1 would not be able to review that concern?

2 GENERAL SAUER: On that particular
3 hypothetical, I think I said that would be a
4 question for Congress.

5 JUSTICE JACKSON: So not a court?

6 GENERAL SAUER: Yeah. I don't -- in
7 other words, that wouldn't be the sort of thing
8 the courts are going to weigh into, is this
9 really an emergency. You know, that would not
10 be -- probably very unlikely. That would be a
11 situation where at least there would be very,
12 very, very deferential judicial review of that
13 kind of determination, a legal dispute, but --

14 JUSTICE JACKSON: No, I'm asking
15 you -- right. Those are two different things.
16 Is there no judicial review or is there
17 deferential judicial review?

18 GENERAL SAUER: Our front line -- I
19 mean, Trump against Hawaii, our front-line
20 position is that it falls within Dalton against
21 Specter, it's committed at the President's
22 discretion when he makes his determination of a
23 national emergency, but the Court doesn't have
24 to decide that because whatever review is very,
25 very deferential and it's easily satisfied

1 here.

2 JUSTICE JACKSON: Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Mr. Katyal.

6 ORAL ARGUMENT OF NEAL K. KATYAL
7 ON BEHALF OF THE PRIVATE PARTIES

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

10 Tariffs are taxes. They take dollars
11 from Americans' pockets and deposit them in the
12 U.S. Treasury. Our founders gave that taxing
13 power to Congress alone. Yet, here, the
14 President bypassed Congress and imposed one of
15 the largest tax increases in our lifetimes.

16 Many doctrines explain why this is
17 illegal, like the presumption that Congress
18 speaks clearly when it imposes taxes and duties
19 and the Major Questions Doctrine.

20 But it comes down to common sense.
21 It's simply implausible that in enacting IEEPA
22 Congress handed the President the power to
23 overhaul the entire tariff system and the
24 American economy in the process, allowing him
25 to set and reset tariffs on any and every

1 product from any and every country at any and
2 all times.

3 And, as Justices Gorsuch and Barrett
4 just said, this is a one-way ratchet. We will
5 never get this power back if the government
6 wins this case. What President wouldn't veto
7 legislation to rein this power in and pull out
8 the tariff power?

9 IEEPA is a sanction statute. It's not
10 a tax statute where Congress gave away the
11 store. Congress knows exactly how to delegate
12 its tariff powers. Every time for 238 years,
13 it's done so explicitly, always with real
14 limits. IEEPA looks nothing like those laws.
15 It uses "regulate," which Congress has used
16 hundreds of times, never once to include
17 tariffs. And it lacks the limits of every
18 other tariff statute. And that is why, even
19 though presidents have used IEEPA to impose
20 economic sanctions thousands of times, no
21 president in IEEPA's 50-year lifetime has ever
22 tried to impose tariffs.

23 And the President bypassed statutes
24 that do address tariffs, like Section 122 for
25 large and serious trade deficits, but that

1 imposes a clear guardrail, 15 percent cap,
2 150-day limit.

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

13 I welcome the Court's questions.

14 JUSTICE THOMAS: Wouldn't your
15 argument also apply to embargoes?

16 MR. KATYAL: So -- and this is the
17 argument in the -- in the fine dissent below.
18 And I think there are three answers to that,
19 Justice Thomas.

20 The first is revenue-raising.
21 Embargoes stop the shipment. Tariffs start the
22 tax bill. They are first and foremost ways of
23 regulating revenue, as some of your own
24 opinions said. This is the way we actually
25 chiefly got revenue for the first hundred years

1 of our republic. Tariffs are constitutionally
2 special because our founders feared
3 revenue-raising, unlike embargoes. You know,
4 there was no Boston embargo party, but there
5 was certainly a Boston tea party.

6 The second thing, textually, in the
7 statute, it's different. "Regulate" appears in
8 a cluster of verbs, as was said before,
9 "investigate," "block," "nullify," and the
10 like. They describe embargo-like controls,
11 "prevent" and "prohibit," for example. But
12 they don't describe revenue exactions. That's
13 Justice Kagan's point. The one verb that's
14 missing here is anything about raising revenue
15 whatsoever.

16 Another point, congressional
17 displacement. Today, there's a whole host of
18 statutes in the tariff architecture of Title 19
19 which both expressly confer the power to tariff
20 and always impose clear limits. Embargoes by
21 the President -- embargoes don't have any of
22 that. They don't set aside that whole thing.

23 If you look at the Learning Resources
24 brief at page 5, it goes through these statutes
25 in detail. Section 122 expressly says "duties"

1 and then limits it, 15 percent, 150 days.
2 Section 201, any duty on the imported article,
3 but it requires ITC findings. Section 301,
4 impose duties. That's the language of the
5 statute, but all sorts of procedural
6 restrictions. Section 338, the same.

7 I can go through this and I could
8 start, by the way, Justice Thomas, with the
9 statutes at the founding, all of which
10 expressly said the word "tariff" or an
11 equivalent.

12 JUSTICE THOMAS: Let's go back to your
13 nondelegation point. It would seem that if
14 it's -- if the power, tariff power, cannot be
15 delegated, your argument on nondelegation would
16 also have to apply to embargoes and to quotas.

17 MR. KATYAL: No, Your Honor, because I
18 think tariffs, because they're uniquely
19 revenue-raising, impose special unique concerns
20 that go back to our founding. And so I don't
21 think that they apply to embargoes.

22 And, indeed, the history of this is
23 very -- very clear. As you just heard my
24 friend say, in 1790, George Washington was
25 delegated massive embargo power from the

1 Congress. But what did Congress not do? And
2 this is why the example cuts the other way.
3 They never gave the President any sort of
4 delegation of tariff authority at the time.

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

17 CHIEF JUSTICE ROBERTS: Counsel,
18 you -- yes, sure, the tariffs are a tax and
19 that's a core power of Congress. But they're a
20 foreign-facing tax, right? And that -- foreign
21 affairs is a core power of the executive. And
22 I don't think you can dismiss the consequences.
23 I mean, we didn't stay this case. And one
24 thing is quite clear, is that the
25 foreign-facing tariffs -- tariffs have in

1 several situations been quite --

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

3 CHIEF JUSTICE ROBERTS: I'm sorry.

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

5 CHIEF JUSTICE ROBERTS: Were quite
6 effective in achieving a particular objective.
7 So I -- I don't think you can just separate it.
8 When you say, well, this is a tax, Congress's
9 power, it implicates very directly the
10 President's foreign affairs power.

11 MR. KATYAL: Yeah. Mr. Chief Justice,
12 we're not -- we don't disagree with a large
13 part of that. We think, instead of thinking
14 about foreign versus domestic, the better way
15 of thinking about it is Article I versus
16 Article II. And, as my friend finally conceded
17 to Justice Gorsuch, there is no Article II
18 power here at least when we're talking about
19 peacetime. So --

20 CHIEF JUSTICE ROBERTS: Well, you
21 don't agree with a large part. What's the
22 little part that you do agree with?

23 MR. KATYAL: So we -- we -- we
24 agree -- we agree with the idea that tariffs
25 have foreign policy implications, absolutely.

1 Our founders recognized that. That's in the
2 Federalist Papers. But, nonetheless, they
3 exclusively committed that power to the
4 Congress in Article I, Section 8, and gave it
5 as its first power. So, when you hear my
6 friend cite cases like Egan and Garamendi, they
7 just don't apply to this specific unique
8 situation in which Congress is given that
9 power.

10 And if you were tempted by this, I
11 think -- I think the best place to look is
12 Youngstown because what Justice Jackson said --
13 and I was surprised that he quoted pages 652
14 because what Justice Jackson said is,
15 "Emergency powers tend to kindle emergencies,
16 so it's essential the public may know the
17 extent and limitations of the powers that can
18 be asserted and persons affected may be
19 informed from the statute of its rights and
20 duties."

21 And Justice Jackson went on to say
22 there that it's notable our founders didn't
23 give the -- didn't give the President
24 revenue-raising power even in a time of war.

25 JUSTICE KAVANAUGH: Can I just get a

1 clarification of your answer, which is you
2 agree, if the word "tariff" were in the
3 statute, that would be acceptable and
4 constitutionally permissible, correct?

5 MR. KATYAL: No. Well, it -- it would
6 be -- it'd be constitutionally permissible.
7 The question would then be is the open-ended
8 assertion of power here because every other
9 tariff statute has limitations.

10 JUSTICE KAVANAUGH: Right. I -- I get
11 as applied to this case. But the general point
12 is, yes, Congress -- you say it's assigned to
13 Congress. But Congress can grant authority to
14 presidents to impose tariffs --

15 MR. KATYAL: Absolutely.

16 JUSTICE KAVANAUGH: -- as a general
17 proposition.

18 MR. KATYAL: Absolutely.

19 JUSTICE KAVANAUGH: Okay. So we have
20 to figure out then what "regulate importation"
21 means. And you've heard my questions. If this
22 statute came out of nowhere in 1977, I think
23 your case would be, you know, obviously
24 stronger. We have to figure out, at least I
25 want to figure out, what the Nixon precedent

1 stands for and what Algonquin stands for.

2 On the Nixon precedent, the question
3 is, I think, was Congress aware of that?
4 Meaning that when they used "regulate
5 importation" and it's now being used to
6 encompass tariffs, that's not unheralded
7 because Congress was well aware -- you know,
8 President Nixon announced those tariffs in a
9 nationwide prime-time speech, 10 percent across
10 the board in August 1971. It was not some kind
11 of little piece of paper. So it was
12 well-known.

13 The question then is, was Congress --
14 why didn't they change the language? Why
15 didn't they say "regulate" but not "tariffs"?
16 That's kind of the -- the difficult question
17 from the Nixon precedent that I'll give you an
18 opportunity --

19 MR. KATYAL: Thank you, Justice
20 Kavanaugh. So five answers on the Nixon
21 precedent. First, there is no evidence that
22 Congress thought it was ratifying Yoshida. It
23 was a single court of appeals case, not even a
24 circuit --

25 JUSTICE KAVANAUGH: It's -- it's not

1 so -- my question -- I never mentioned Yoshida.
2 It's the use by the President of that power
3 under "regulate importation."

4 MR. KATYAL: Oh. If we're just
5 talking about that, President Nixon did not
6 rely on the statute whatsoever. And that's
7 very clear. In fact, we have a Marshall
8 McLuhan moment here because you have before you
9 Alan Wolff, the person who was there in the
10 room with Nixon, saying Nixon totally disagreed
11 that this statute applied.

12 JUSTICE KAVANAUGH: Okay.

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

16 JUSTICE KAVANAUGH: The example. Go
17 to your other four. Your other four?

18 MR. KATYAL: Yeah. So I think the
19 only way it does any work is if the
20 President -- is through the -- the vehicle of
21 Yoshida. And that's what I take it --

22 JUSTICE KAVANAUGH: Okay.

23 MR. KATYAL: -- the government is
24 arguing. And with respect to that, this
25 cert-denied intermediate court of appeals

1 decision I don't think can come close to
2 overcoming the clear, plain text. The word
3 "regulate" is -- words "regulate
4 importation" -- the word "regulate" has never
5 been used. It's been -- Congress uses the term
6 1499 times. We got about that number of hits
7 when we looked at it, and maybe there's some
8 double-counting. But it is never used even
9 once to impose taxes or revenue-raising. And
10 that was the question that Justice Barrett was
11 asking.

12 And so I don't think that this
13 intermediate court of appeals decision will get
14 you there.

15 And then even if you thought that
16 Congress knew about Yoshida, and even if you
17 thought they liked it, which there's absolutely
18 zero evidence of, I don't think that helps the
19 government for reasons that Justice Alito was
20 pointing to because Yoshida said three things:
21 (a) TWEA doesn't give the unlimited authority
22 that the government is seeking here; (b) they
23 were only upholding the limited specific
24 assertion of authority that President Nixon
25 sought there; and, third, going forward, the

1 solution they said in footnote 33 was to use
2 Section 122 of the 1974 Trade Act, 15 percent,
3 150 days.

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

15 JUSTICE KAVANAUGH: Just --

16 JUSTICE ALITO: Mr. --

17 JUSTICE KAVANAUGH: -- to ask the
18 other --

19 JUSTICE ALITO: -- Katyal --

20 JUSTICE KAVANAUGH: Go ahead.

21 JUSTICE SOTOMAYOR: Mr. --

22 CHIEF JUSTICE ROBERTS: Justice Alito?

23 JUSTICE ALITO: Let's start with just
24 the bare statutory language. You have
25 arguments about structure. You have arguments

1 about history. They're strong arguments, but
2 let's just start with the bare statutory
3 language: regulate importation.

4 If we disregard all of the rest, would
5 you dispute that that would include the
6 imposition of a fee?

7 MR. KATYAL: So if it's revenue, yeah,
8 we do dispute that. Absolutely.

9 JUSTICE ALITO: What if there were a
10 statute that said -- I mean, suppose that
11 there's a particular national park that's very
12 crowded, and Congress passes a statute that
13 says the National Park Service may regulate
14 admission to the park. Would you say, well,
15 that does not allow them to impose a fee?

16 MR. KATYAL: So, you know, Your Honor,
17 sometimes we think of fees as not
18 revenue-raising but rather capturing the cost
19 of government services in your example, the
20 going to the park. That may -- you know, those
21 kinds of cases, which I think some people
22 struggle with --

23 JUSTICE ALITO: Suppose it goes beyond
24 the -- the -- the cost of -- of running the
25 park. Congress just wants to control admission

1 to the park, regulate admission. Wouldn't that
2 include the imposition of a fee?

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

6 JUSTICE ALITO: It -- it raises
7 revenue. That's the --

8 JUSTICE BARRETT: -- then I think it's
9 a tougher --

10 JUSTICE ALITO: That's the
11 hypothetical. That wouldn't -- that wouldn't
12 apply?

13 MR. KATYAL: So I think -- I think in
14 that circumstance that it wouldn't be a
15 regulation in context. It wouldn't be
16 permitted. That is, at least in the context of
17 tariffs and trade, we know, Justice Alito, that
18 --

19 JUSTICE ALITO: Okay. Well, that gets
20 into your other arguments. We start out with
21 the bare statutory language, and that's -- that
22 was what my question was about.

23 Do you think all tariffs are
24 revenue-raising? Suppose that instead of
25 imposing these -- these across-the-board

1 tariffs, suppose that an executive order
2 imposed a tariff on one particular country and
3 provided that this would take effect in 90
4 days.

5 And suppose that within those 90 days,
6 an agreement is reached with that country so
7 that no tariff -- no -- no tariff is ever
8 collected. Would that be a revenue-raising
9 tariff?

10 MR. KATYAL: I take it the initial
11 point was and on its face it is
12 revenue-raising, that that's what it's for.
13 And so I think that would.

14 And, look, I don't doubt that there
15 are edge cases. That is what this Court has
16 confronted just recently in FCC versus Consumer
17 Research. And you said, look, what is a tax is
18 sometimes very hard, what is revenue-raising.

19 This is obviously revenue-raising.
20 Their own brief to the Court says it's going to
21 raise \$4 trillion.

22 And, Justice Alito, you in your
23 Consumers Research dissent, Justice Gorsuch's
24 dissent that you joined, said taxation is
25 special and different. And it is the most

1 powerful thing the government does.

2 And the idea that Congress, when they
3 know exactly how to write tariff and tax
4 statutes, gave this power by implication
5 through the word "regulate," I think is very,
6 very hard --

7 JUSTICE ALITO: But you -- you cite
8 many different statutory provisions that impose
9 tariffs, and -- and you have a point, if that's
10 the relevant universe.

11 What if the relevant universe is
12 tariffs that are imposed in -- in emergency
13 situations?

14 MR. KATYAL: Yes. So I think it cuts
15 the other way. So, you know, as Justice
16 Jackson said, it's -- when you're in an
17 emergency situation, the statutes actually have
18 to speak with more precision. The public needs
19 to know because emergencies beget emergencies.

20 And I would say the best way of
21 understanding what Congress does in emergencies
22 is to look at their emergency statutes. Not
23 one has ever given the President a taxation
24 power or a tariff power. We've had all sorts
25 of emergencies for 238 years. No President has

1 ever said, oh, the way to deal with that is I
2 need to have a tariff authority.

3 And, as Justice Sotomayor said, IEEPA
4 gives already a quota power. So you can get
5 what the foreign policy piece of it is through
6 that.

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

21 JUSTICE ALITO: You say that this is
22 not -- this case does not -- these executive
23 orders do not address an unusual and
24 extraordinary threat. I understand that
25 argument.

1 Suppose that the facts were that it
2 was -- suppose that there was an imminent
3 threat of war, not a declared war, but an
4 imminent threat of war with a very powerful
5 enemy whose economy was heavily dependent on
6 U.S. trade.

7 Could a President under this provision
8 impose a tariff as a way of trying to stave off
9 that war, or would you say, no, the President
10 lacks that power under this?

11 MR. KATYAL: It could do tariff, it
12 could do quota embargo, all of those things.

13 JUSTICE ALITO: It could do all of
14 those things, but a President could not impose
15 a tariff. It's the one thing he couldn't do.

16 MR. KATYAL: There's a category shift
17 between a tariff and the other eight powers in
18 IEEPA because it is revenue-raising. So it's
19 not a difference in degree or something like
20 that.

21 That's why, you know, I don't doubt
22 tomorrow --

23 JUSTICE ALITO: Even if the purpose of
24 this had nothing whatsoever to do with raising
25 one penny.

1 MR. KATYAL: I --

2 JUSTICE ALITO: The President didn't
3 want to raise one penny. The President wanted
4 to deter aggression that would bring the United
5 States into war. You would say no, can't do
6 that?

7 MR. KATYAL: Yeah, Justice Alito, I
8 think you've said many times the purpose isn't
9 what you look at. You look to actually what
10 the government is doing.

11 And if you disagree, if you think
12 we're -- you know, if you think -- if -- if you
13 ruled for us and the President says, I need
14 this power, he could go across the street to
15 Congress tomorrow and get it by a simple
16 majority through reconciliation.

17 But if you vote for them, this power,
18 as Justice Gorsuch said, as Justice Barrett
19 said, is going to be stuck with us forever.
20 The power to --

21 JUSTICE GORSUCH: Mr. Katyal --

22 JUSTICE KAVANAUGH: Can I ask you --

23 JUSTICE GORSUCH: Okay. I just wanted
24 to give you a chance to address kind of the
25 other argument that's been submerged here

1 textually, again, just bare text for a moment,
2 okay?

3 We've been focused on regulate
4 importation, but actually the statute says the
5 President may, by means of licenses or
6 otherwise, regulate importation.

7 And we've had some discussion today
8 about the fact that maybe the President could
9 simply recharacterize these tariffs as licenses
10 or rejigger the -- the -- the scheme so that
11 they are licenses.

12 We have also heard the suggestion that
13 otherwise, you know, licenses and -- and
14 tariffs are very similar, so otherwise might
15 encompass tariffs there. Thoughts?

16 MR. KATYAL: Yeah, a few thoughts,
17 Justice Gorsuch.

18 First is, the SG is not even making
19 that argument, and I think they're not making
20 it for a number of reasons.

21 One is that there's a strong
22 presumption against reading statutes this way.
23 In the unique tax and duties context, Hartranft
24 is one of those cases which says, if there's
25 doubt, you don't read the statute to confer

1 such powers.

2 Second, if you were to do that, it's
3 open-ended. It allows -- and this is your
4 hypothetical -- it allows, under the word
5 "license," them to tariff the world, you know,
6 and --

7 JUSTICE GORSUCH: It seems like you're
8 putting a major questions thumb or an
9 interpretive lens thumb on the plain text
10 there. Is that fair?

11 MR. KATYAL: I think it's -- I think
12 you could call it major questions. I just
13 think it's just like Justice Barrett said in
14 Nebraska versus Biden the most natural way of
15 understanding what this statute is about.

16 We're talking about, under the
17 government's reading, a statute that gives the
18 power to the President to junk the entire
19 tariff --

20 JUSTICE GORSUCH: No, I understand
21 that, but you're not disputing "licenses or
22 otherwise" means what it says. You're --
23 you're -- you're saying that we should
24 interpret that narrowly for particular reasons.

25 MR. KATYAL: So I think -- well, I

1 think I am disputing it as well. I think the
2 licenses is something Justice Sotomayor was
3 saying don't expand the power. They are not
4 verbs. And so it is limited to the nine verbs
5 there.

6 JUSTICE GORSUCH: I understand that.

7 MR. KATYAL: And so regulate, I don't
8 think --

9 JUSTICE GORSUCH: Thank you.

10 MR. KATYAL: Yeah.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Justice Thomas, anything further?

14 JUSTICE THOMAS: I'd like to just
15 revisit the point that Justice Alito was making
16 with a similar question.

17 If one of our major trading partners,
18 for example, China, held a U.S. citizen
19 hostage, could the President, short of
20 embargoing or setting quotas, say the most
21 effective way to gain leverage is to impose a
22 tariff for the purpose of leveraging his
23 position to recover our hostage?

24 MR. KATYAL: No, Your Honor. So
25 tariffs are different because they're

1 revenue-raising, and they're -- and I think it
2 goes to the point I was saying to you in our
3 very first colloquy, which is quotas,
4 embargoes, and stuff are different for a
5 different reason, which is there's no -- there
6 is a tariff architecture around Title 19, in
7 Title 19, that a tariff would -- like in your
8 hypothetical, would supersede.

9 And, here, the President is seeking
10 the power to set aside all of our trade
11 treaties unilaterally under the word
12 "regulate." I just don't think it can bear
13 that weight.

14 CHIEF JUSTICE ROBERTS: Justice Alito?

15 JUSTICE ALITO: You mentioned other
16 tariff provisions that you think would be
17 rendered redundant if we adopted the
18 government's interpretation of IEEPA. One that
19 you didn't mention, which is discussed in an
20 amicus brief, is Section 338 of the Tariff Act
21 of 1930.

22 Why doesn't the plain language of that
23 provision, which does speak specifically about
24 duties, provide a basis for all or virtually
25 all of the tariffs that are at issue here?

1 MR. KATYAL: Yeah. The government's
2 never made that argument, Justice Alito, and I
3 think for very good reason, because it only
4 applies to MFN violations, which are not at
5 issue here. You can only tariff if the
6 President "finds as a fact that a country
7 satisfies two conditions, including that it
8 discriminates against the United States."

9 There are all sorts of hosts of other
10 reasons why Section 338 may have lapsed and
11 that's why no President has ever used it. But,
12 look, we are --

13 JUSTICE ALITO: What is the -- what is
14 the argument that it's lapsed? It's -- it's
15 regrettable -- I mean, we put this case on a
16 very expedited schedule and, therefore, there
17 are limitations on what -- and the parties'
18 ability to answer each other's arguments or
19 arguments that are made by amici.

20 The -- the amicus brief says that it
21 hasn't lapsed. There are articles that say it
22 hasn't lapsed. What is your argument -- what
23 is the basis for your argument that it lapsed?

24 MR. KATYAL: So two things, Justice
25 Alito. Sections 252 and 301 have been

1 understood by many to have superseded Section
2 338. And, second, I don't think you have to
3 get into this issue at all. We're not here
4 saying that the government doesn't have a
5 330 -- 338 power. That's something that can be
6 decided by other courts at other times.

7 As these folks come to the Court, as
8 the government comes to the Court today,
9 they're citing one statute and one statute
10 only, IEEPA, and we submit to you it doesn't
11 come even close to authorizing these worldwide
12 tariffs that they're seeking today.

13 JUSTICE ALITO: Well, what if the
14 President tomorrow were to say, I'm reissuing
15 these executives orders and -- and I'm
16 invoking, in addition to other authorities,
17 Section 338 of the Tariff Act of 1930?

18 MR. KATYAL: So I think, at that
19 point, we'd have that case. I mean, I'm not
20 here to say that 338 does or doesn't do one
21 thing. I'm responding to the government's
22 argument, which is the invocation of IEEPA and
23 IEEPA alone.

24 But perhaps that point, Justice Alito,
25 may give them some comfort --

1 JUSTICE ALITO: So then, I -- I -- I
2 mean, I understand party presentation and --
3 and all of that and not being a court of first
4 view, but, in these circumstances, if that were
5 to happen and it might be a realistic
6 possibility, you think, well, okay, then the
7 government would continue to try to collect
8 these tariffs and the plaintiffs here would
9 have to go back to the Court of International
10 Trade or the district court and challenge it
11 again, and it would have to progress through
12 those lower courts and come back to us when, a
13 year from now, six months from now, while the
14 tariffs continue to be collected and the amount
15 that's at stake amounts into the billions? I
16 mean, what are we at now? A hundred billion?
17 We get up to -- up to a trillion? That's what
18 you're suggesting?

19 MR. KATYAL: So, Justice Alito, I
20 think a few things. One is I think it's rich
21 for the government to be making this argument
22 about the refunds undermining us because they
23 opposed a preliminary injunction in this case
24 by saying, oh, don't worry, we'll give the
25 refunds later and they sought a stay in the

1 Federal Circuit on exactly that ground, which
2 was you don't need to do -- you don't need to
3 implement the Federal Circuit's decision
4 because we'll give the refunds later on. And
5 now they're suggesting that the reason it's too
6 late --

7 JUSTICE ALITO: Well, that really
8 wasn't -- that wasn't my question, Mr. Katyal.
9 The question was whether it would make more
10 sense for us to address that if that is a
11 possible justification for these tariffs, for
12 us to address that now and get it over with
13 rather than having this continue for who knows
14 how long while it goes through the -- through
15 the procedures in the lower courts.

16 MR. KATYAL: Justice Alito, I think
17 that is forfeited -- forfeited nine ways to
18 Sunday. This amicus brief has been filed in
19 every single stage of this case. The
20 government's never embraced that argument. For
21 them to be able to do so now, I think, is -- is
22 way, way too late. But I do think, if you
23 ruled, as we're suggesting you do, against the
24 government, they can go and try and seek to use
25 other authorities, whether it's 338, Section

1 122, et cetera. Those are the ways prescribed
2 by the Congress.

3 And, as Justice Kavanaugh was saying
4 earlier, every other president has used all
5 this suite of other authorities, 201 for steel,
6 for -- for autos and things like that; 301 for
7 countries like China. This President has come
8 along and said something different, and with
9 all due respect, we don't think IEEPA allows
10 him to do this junking of the worldwide tariff
11 architecture.

12 JUSTICE ALITO: And what was the
13 view -- what were the views of President
14 Trump's immediate predecessors on the question
15 of imposing tariffs or allowing free trade?
16 What was their policy view on that question?

17 MR. KATYAL: There's been a variety of
18 different views about that, but, you know, the
19 executive or -- my friend said, well, prior
20 presidents had no occasion to use the tariff
21 power, which is belied by the very executive
22 order he's defending here, which says that the
23 trade deficits have been large and persistent
24 every single quarter since 1976. And we've had
25 trade wars. President Reagan initiated, you

1 know, different ones and the use of different
2 authorities, but never once did a President try
3 and seek IEEPA as the basis to rewrite the
4 entire tariff code.

5 JUSTICE ALITO: I found it interesting
6 to hear you make the nondelegation argument,
7 Mr. Katyal. I -- I wonder if you ever thought
8 that your legacy as a constitutional advocate
9 would be the man who revived the nondelegation
10 argument.

11 (Laughter.)

12 MR. KATYAL: Heck, yes, Justice Alito.
13 I think Justice Gorsuch nailed it on the head
14 when saying that when you're dealing with a
15 statute that -- that is this open-ended, unlike
16 anything we've ever seen to give the President
17 this kind of power, yes, this isn't just
18 delegation running riot; this is delegation
19 that's a legislative abrogation.

20 JUSTICE ALITO: I mean, wouldn't
21 you -- wouldn't you agree that statutes that
22 confer on the President real emergency powers
23 are often phrased much more broadly than other
24 statutes? Isn't that the very nature of an
25 emergency? I know you dispute the fact that

1 this is a real emergency. Maybe it's not. But
2 isn't it the very nature of an emergency
3 provision that it's going to be more
4 open-ended?

5 MR. KATYAL: So, Justice Alito, we
6 think it actually cuts the other way, as I was
7 saying earlier. That's what Justice Jackson
8 said. And, you know, you already confronted
9 that in Dames & Moore and said it's not that
10 open-ended even though it's an emergency.

11 And, by the way, other emergency
12 statutes have very serious limits. Section 122
13 is literally about President Nixon's
14 proclamation of an emergency. That's what it's
15 about. And it's limited 15 percent, 150 days.

16 JUSTICE ALITO: And what about the
17 authorization for the use of military force in
18 2001, which gave the President the power to use
19 all appropriate force? Now that's pretty
20 open-ended. You -- would you apply the same --
21 the same nondelegation argument there that you
22 do here?

23 MR. KATYAL: Of course not because
24 there you have shared powers between the
25 President and Article I and Article II powers.

1 That's what I was saying to the Chief Justice.

2 JUSTICE ALITO: Well, it gets into the
3 question of whether it was delegated or not,
4 what was the scope of the delegation.

5 MR. KATYAL: Absolutely. But -- but
6 there, you know, it's military. There's a
7 whole unique history behind that. But, here,
8 you're talking about something that is
9 exclusively committed to Congress in Article I.
10 And there, yes, when you have delegations, I
11 would say, Justice Alito, even when you have
12 delegations in some military cases, in
13 emergency statutes, they have all sorts of
14 limits. So -- so 10 U.S.C. 2808 says that in a
15 declaration of war or a national emergency, the
16 President can "undertake military construction
17 necessary to support emergency use of the armed
18 forces" --

19 JUSTICE ALITO: All right. Thank --
20 thank you very much. Thank you.

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

22 CHIEF JUSTICE ROBERTS: Justice
23 Sotomayor?

24 JUSTICE SOTOMAYOR: I'm fascinated
25 that the two instances where presidents have

1 used their war powers to impose a tariff,
2 Lincoln and Nixon, that Congress found it
3 necessary to ratify their actions and that the
4 court in both those cases, the intermediate
5 court of appeals in Nixon and our own Court,
6 included that as part of their reasoning as
7 justifying the use of war power in that
8 situation.

9 So I'm a little concerned why the fact
10 that this Act, a domestic Act on emergency,
11 that uses a word, a general word, like
12 "regulate" should take on a war powers meaning
13 when, in every other situation, whenever
14 Congress intended domestic tax -- taxation, it
15 said "tax" and "regulate."

16 MR. KATYAL: Justice Sotomayor, I wish
17 I had an hour to talk about this with you
18 because this is just -- this argument by the
19 government, advanced in their reply brief, is
20 wrong, you know, every which way. So --

21 JUSTICE SOTOMAYOR: I'm saying that's
22 another -- that's your sixth way of
23 differentiating Yoshida, correct?

24 MR. KATYAL: So --

25 JUSTICE SOTOMAYOR: That was a war

1 powers case, TWEA --

2 MR. KATYAL: So it's a war powers
3 case. It's about conquered territory. It has
4 nothing to do whatsoever with domestic tariffs.
5 And absolutely, you're right in saying that the
6 way that court even in those cases, even at the
7 height of the government's power, war powers,
8 they said Congress had to ratify it. And
9 that's what at page 96 it was --

10 JUSTICE SOTOMAYOR: And that hasn't
11 happened here.

12 MR. KATYAL: And that has not happened
13 here, not even close.

14 JUSTICE SOTOMAYOR: Well, it might not
15 with Congress closed, but -- they can't even
16 think about it right now.

17 (Laughter.)

18 JUSTICE SOTOMAYOR: I -- I'm going to
19 assume, and maybe he can shake his head yes or
20 no, that Justice Kavanaugh will ask you to go
21 to Algonquin, which you didn't answer, and he's
22 shaking his head, so I'll let him do that part,
23 okay?

24 (Laughter.)

25 MR. KATYAL: Excellent. Algonquin,

1 Your Honor, is, you know, under --

2 JUSTICE SOTOMAYOR: No, I'll let him
3 do it.

4 (Laughter.)

5 MR. KATYAL: Oh. Oh, sorry.

6 JUSTICE SOTOMAYOR: He can --

7 CHIEF JUSTICE ROBERTS: We'll --

8 JUSTICE SOTOMAYOR: It was his
9 question, but I want to make sure you get to
10 it.

11 CHIEF JUSTICE ROBERTS: We'll hear
12 from Justice Kagan first.

13 JUSTICE KAGAN: I have one specific
14 question, one more general question. The
15 specific question is, does it matter in the way
16 we think about IEEPA what Congress thought it
17 was doing in IEEPA, what -- what IEEPA, in
18 fact, did, that at the time Congress thought it
19 had available to it a legislative veto?

20 MR. KATYAL: I do think it's relevant
21 at least for delegation purposes because, you
22 know, as this case comes to the Court, the one
23 check that was in there, the so-called
24 compromise, is a legislative veto which now no
25 longer exists. And that's why I said to

1 Justice Alito this statute now looks unlike any
2 other statute with respect to tariffs.

3 JUSTICE KAGAN: I -- I guess I'm
4 wondering whether, though, it cuts against you
5 as well that Congress thought it had a
6 legislative veto, so it didn't put in a variety
7 of checks that it might have put in had it not
8 thought it had a legislative veto, and, you
9 know, that's just tough luck on Congress now.

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

21 The idea that three years later they
22 just said, oh, no, junk the rule book, I think
23 is very difficult, and no Congress, I think,
24 would rely just on the legislative veto for
25 such -- a thing of such momentous importance.

1 As you said to my colleague earlier,
2 why would any president look to -- look to all
3 of the different tariff statutes in Title 19 if
4 you can just IEEPA them all, French Revolution
5 them all.

6 JUSTICE KAGAN: General Sauer rests a
7 lot on the President's inherent authority. And
8 I want to make sure I understand your answer to
9 the Chief Justice and to Justice Alito as to
10 where you think that authority exists in a way
11 that actually would affect our interpretation
12 of a statute and where you think it doesn't and
13 why this falls into the second category given
14 that in General Sauer's view, this is obviously
15 what the Chief Justice called foreign-facing.

16 MR. KATYAL: Yeah. So it may be
17 foreign-facing, but there is still no Article
18 II power whatsoever. There is no citation
19 whatsoever in the government's brief to any
20 notion that the President has Article II tariff
21 authority.

22 Now, look, I will say in wartime,
23 conquered territory, maybe. But this is not
24 a -- this is not a wartime or conquered
25 territory statute. This is -- use of the

1 statute, they are tariffing the entire world in
2 peacetime and they are doing it and asserting a
3 power that no president in our history has ever
4 had, even Justice Kavanaugh's example of Nixon,
5 really far more limited, didn't blow past
6 Congress's limits, as was said in Yoshida.
7 This is a whole different animal.

8 And maybe Congress has that power, as
9 I agree with Justice Gorsuch. I don't think
10 that it does. But, boy, they've got to say so
11 really clearly. And, here, there's nothing
12 like that in the text of IEEPA.

13 JUSTICE KAGAN: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Gorsuch?

16 JUSTICE GORSUCH: Well, I don't know
17 if I agree with what you say I say, but, at any
18 rate.

19 (Laughter.)

20 JUSTICE GORSUCH: -- back to the plain
21 language. And -- and just stick with me for a
22 moment. You know, with the -- the -- the
23 Constitution says that Congress gets to
24 regulate commerce, and everybody understood
25 that that meant it included the power to

1 tariff. Story, Madison, okay?

2 So that -- that's sort of a -- a
3 problem, right? "Regulate" is a capacious
4 verb. And -- and then you've got the
5 "otherwise" language as well, which we've sort
6 of discussed.

7 And just on the plain language, forget
8 about the backdrop of major, do you need major
9 questions to win? I kind of -- I kind of think
10 you might.

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

16 JUSTICE GORSUCH: Okay.

17 MR. KATYAL: Our brief at page 15
18 gives you an example. A president may regulate
19 cars coming into the city and then, if it adds
20 by charging tolls or something like that,
21 absolutely. In context, it does.

22 Here, the context you're referring to,
23 Story and so on, says nothing about this case.
24 That is the constitutional context about
25 Congress's use of power.

1 JUSTICE GORSUCH: But it's part of how
2 we understand language is used, and -- and it's
3 relevant for that purpose. And -- and then,
4 when you've got licenses, which are
5 economically the same thing as -- would you
6 agree they're basically economically the same
7 thing as tariffs?

8 MR. KATYAL: Sometimes they can be
9 revenue-raising in the same way.

10 JUSTICE GORSUCH: Okay. So you've got
11 something that's economically identical to a
12 tariff authorized by this statute.

13 MR. KATYAL: So --

14 JUSTICE GORSUCH: Where does that
15 leave you --

16 MR. KATYAL: So let me --

17 JUSTICE GORSUCH: -- as a matter of
18 plain language?

19 MR. KATYAL: -- let me take the
20 question in two parts. One is about the -- the
21 word "regulate" and the other is about
22 licensing.

23 With respect to the word "regulate,"
24 when it's used in the constitutional sense,
25 it's very different than the sense in IEEPA

1 that my friend is asserting. When we're
2 asserting IEEPA, we're talking about a statute
3 that is granting the President massive powers.
4 And so the relevant context that I think you
5 look at in asking the question what did
6 Congress mean in 1977, the best context, the
7 most natural context is what does Congress say
8 every time they grant the President such power.

9 JUSTICE GORSUCH: I understand that.
10 I understand.

11 MR. KATYAL: And then there's just one
12 other point on this. Constitutions are read
13 totally differently. Story and Madison are
14 talking about the constitutional phrase, and as
15 Chief Justice Marshall said in McCulloch, a
16 constitutional expounding the prolixity of a
17 legal code is the opposite of the way you read
18 the Constitution.

19 JUSTICE GORSUCH: Yeah. I -- I -- I
20 do follow that argument.

21 MR. KATYAL: Okay.

22 JUSTICE GORSUCH: Okay.

23 MR. KATYAL: And --

24 JUSTICE GORSUCH: What -- what about
25 "otherwise" again? I just really want to make

1 sure I understand, you say that there's --
2 there's a good reason why the Solicitor General
3 didn't make that argument. I'll be curious to
4 see what he has to say about that, but, you
5 know, what's your best reasoning of why
6 other -- the "otherwise" language
7 doesn't capture this?

8 MR. KATYAL: Because it's only a
9 mechanism to implement the nine powers. And
10 that license sometimes can be revenue-raising
11 and sometimes not.

12 JUSTICE GORSUCH: Yeah.

13 MR. KATYAL: And so --

14 JUSTICE GORSUCH: So, if licenses can
15 be revenue-raising and you can do this
16 otherwise through revenue-raising things, why
17 wouldn't that capture tariffs?

18 MR. KATYAL: So because I think,
19 again, our point to you is that -- that
20 Congress -- that license -- that there's two
21 kinds of -- two -- licenses come in two
22 flavors. If the -- if an executive order is
23 asserting a license fee to recoup the cost of
24 government services or something like that, as
25 I was saying to Justice Alito, that doesn't

1 look different than the other verbs. That's
2 not revenue-raising. It doesn't implicate the
3 founders' concern. It doesn't implicate the
4 concerns you wrote about in Consumers' Research
5 about the fear of the government --

6 JUSTICE GORSUCH: Well, you're not
7 answering my question, though, Mr. Katyal. I'm
8 talking about just the plain text here. And
9 you're moving to a major questions or a
10 nondelegation. That's the move you're making,
11 which I think, you know, fine, we can consider
12 that. I'm just talking about on the text,
13 okay? It says by means of licenses or
14 otherwise. You've conceded that licenses are
15 economically equivalent to tariffs. And the
16 statute says by means of licenses or otherwise
17 regulate.

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

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

21 MR. KATYAL: Yeah.

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

24 MR. KATYAL: Because, again, it has to
25 be related to the nine powers that are given

1 there.

2 JUSTICE GORSUCH: Well, a license can
3 be. We all have -- we have to acknowledge
4 that. And you've said a license can raise
5 revenue and you've said a license is equivalent
6 to a tariff economically. So what about
7 otherwise?

8 MR. KATYAL: Justice Gorsuch, if
9 the -- if the license where the otherwise is
10 raising revenue, then it is a difference in
11 kind from the other verbs, and we looked at the
12 history of licenses --

13 JUSTICE GORSUCH: These aren't verbs
14 either.

15 MR. KATYAL: -- under TWEA and we were
16 not able to find any involving licenses or
17 license fees.

18 JUSTICE GORSUCH: Okay. Last
19 question. A little further afield. The
20 parties discuss a little bit the analogy to the
21 Foreign Commerce Clause. Of course, next to it
22 is the Indian Commerce Clause.

23 And delegations there were very broad
24 initially, and it involved licenses once again.
25 And -- and why -- why shouldn't that inform our

1 understanding of the Foreign Commerce Clause?

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

5 JUSTICE GORSUCH: Well, if the
6 President has broad authority in one part of
7 the Commerce Clause, why wouldn't he in -- in
8 the next-door neighbor?

9 MR. KATYAL: Oh, I see, because, here,
10 Congress has specifically been given the
11 exclusive power over tariffs. And so, if they
12 were to part with it, I think, as this Court
13 has said in *J.W. Hampton*, which is a tariffs
14 case --

15 JUSTICE GORSUCH: So you'd say --
16 you'd say the same principle would apply with
17 tariffs with the Indian Commerce Clause? It is
18 a tariff-specific argument?

19 MR. KATYAL: I think it's -- at least
20 the intelligible principles is what this Court
21 has used for tariffs specifically, and we think
22 that's the way you should look at this. And
23 then, under intelligible principles, this is
24 miles away from any delegation we have ever
25 seen.

1 JUSTICE GORSUCH: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Kavanaugh?

4 JUSTICE KAVANAUGH: Just on the Nixon
5 point, because you said, I think, that the
6 current tariffs are unprecedented, I mean, that
7 was a 10 percent worldwide tax on every import
8 into the United States, I believe. I mean, I
9 -- we don't need -- I just think that's a fact.
10 You have arguments about that, you made good
11 arguments about that, but I just wanted that
12 point to be -- to be clear.

13 On -- on Algonquin, to pick up on
14 Justice Sotomayor's kind assist.

15 (Laughter.)

16 JUSTICE KAVANAUGH: Your argument here
17 is that the statute has to use the word
18 tariffs, I think, basically. And we went
19 through Nixon and Yoshida, but then Algonquin,
20 the statute for 232 does not use the word
21 "tariffs." It uses "adjust imports."

22 And President Ford imposed, again, a
23 pretty significant tariff on oil imports and
24 was challenged. It got to this Court.
25 Attorneys standing where you are stood up and

1 said the license fee now before the Court
2 involves the broadest exercise of the tariff
3 power in the history of the American republic.
4 In fact, we would have to go back to the George
5 the III's stamp tax to determine as broad an
6 executive powers as claimed in this case. The
7 statute is the simple one. It does not mention
8 the tariff on its face.

9 The argument there was the word
10 "tariff" was not mentioned; used "adjust
11 imports." The Court, obviously 9-0, rejects
12 that argument, in part because, as others have
13 pointed out, the Court does a lot of question,
14 well, what's the difference between a quota and
15 a tariff? And what's the difference between an
16 embargo and a tariff?

17 And so when -- when the Court writes
18 the opinion, it says, "We find no support in
19 the language of the statute," the language,
20 "for respondents' contention that the
21 authorization of the President to "adjust"
22 imports should be read to encompass only
23 quantitative methods -- i.e., quotas -- as
24 opposed to monetary methods -- i.e., license
25 fees -- of affecting such adjustments."

1 So on your basic point that you need
2 the word "tariff," Algonquin says you don't
3 need the word "tariff." And that was President
4 Ford's oil imports. It's 9-0. The oral
5 argument goes through this. Your answer.

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

8 First, I'd like to -

9 JUSTICE KAVANAUGH: I will.

10 MR. KATYAL: -- clarify what our
11 position is generally and then deal with
12 Algonquin.

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

1 The question is in context, is it --
2 does --

3 JUSTICE KAVANAUGH: Algonquin didn't
4 have anything like that but keep going.

5 MR. KATYAL: So Algonquin does have, I
6 think, a context that's miles apart from what
7 -- what the government is seeking here to do
8 with IEEPA. So, first of all, it is a common
9 sense statute. I understand there's some
10 rhetoric by -- counsel's reading the statute.
11 I know there's some rhetoric by the lawyer who
12 stood here before, which is, of course,
13 forgiveable, but it was a statute about one
14 product, 232, article by article. It's one
15 product. This is a billion products or even
16 more that the government is seeking.

17 Algonquin was expressly a trade
18 statute. It was the 1962 Trade Act. It's
19 everything this case isn't. Algonquin had a
20 specific reference to the word "duties" in a
21 separate provision.

22 Algonquin had a legislative history
23 that was clear as day that the President was --
24 the President was given this power. And I
25 understand this Court today doesn't look to the

1 legislative history, but the way Algonquin got
2 to where it was was by saying the legislative
3 history, the chief sponsor of the act --

4 JUSTICE KAVANAUGH: I think I'll
5 disagree with you on that. There's a plain
6 text and then says is there anything in the
7 legislative history to defeat the plain text?
8 So I disagree pretty strongly with you on that,
9 but it doesn't defeat your point. Keep going.

10 MR. KATYAL: Okay. So I would also
11 say, and maybe the most important point, 232 --
12 our argument is not just that you have to
13 specifically authorize the tariff or some sort
14 of word, but also that one way of understanding
15 whether Congress is delegating its awesome
16 tariff power, its awesome taxing power is to
17 ask are there limits to what Congress has put
18 in?

19 And in Algonquin in Section 232 the
20 Court points to and goes painstakingly through
21 all the limits. The first words of the
22 decision are all about how constrained the
23 statute is. It's a reticulated scheme. The
24 cabinet secretaries have to make certain
25 findings. There's specific statutory factors

1 Congress says the President must look at before
2 acting. There are public hearings. There are
3 limited remedies, quote, "to the extent
4 necessary."

5 All of that is in the statute. All of
6 that is in the Algonquin opinion. None of it
7 is in IEEPA. That's the problem.

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

11 JUSTICE KAVANAUGH: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Barrett?

14 JUSTICE BARRETT: So this license
15 thing is important to me. And do you agree
16 that pursuant to IEEPA, the President could
17 impose -- could regulate commerce by imposing a
18 license fee?

19 MR. KATYAL: Sorry. Could you say
20 that again?

21 JUSTICE BARRETT: Could the President
22 regulate commerce under IEEPA by using a
23 licensing fee?

24 MR. KATYAL: Not a fee. So I should
25 have said this earlier. But license is

1 different from a licensing fee. IEEPA and TWEA
2 authorize licenses, not license fees. And no
3 President has ever charged, to my knowledge,
4 fees under those two statutes for the licenses.

5 So fee is impermissible. License is
6 okay.

7 JUSTICE BARRETT: Fee is permissible
8 if they cover the cost of the scheme?

9 MR. KATYAL: Might be. Might be. I
10 mean, but once they start revenue-raising, you
11 implicate the most serious concerns --

12 JUSTICE BARRETT: But I thought you
13 conceded to Justice Gorsuch there was no
14 difference between a tariff and a licensing fee
15 functionally.

16 MR. KATYAL: Well, if the -- if the
17 licensing fee is just to -- I didn't concede
18 that.

19 JUSTICE BARRETT: Okay.

20 MR. KATYAL: And so if the licensing
21 fee is just to recoup the cost to government
22 services, I think that may be okay. I don't
23 think you need to get into it. Here the
24 government is asserting a power which they say
25 in their briefs to you raises \$4 trillion.

1 JUSTICE BARRETT: So you understand
2 the statute to permit licensing in the sense of
3 permission, like we will not allow you to trade
4 with us, we will not allow your goods to be
5 imported unless we license it.

6 MR. KATYAL: Absolutely. And, Justice
7 Barrett, I think, like, just the natural
8 reading, if you're to look at the word
9 "licenses" and think, wow, Congress smuggled
10 this incredible power to do all of these
11 different things that the government is doing
12 here, 39 percent taxes on some countries and
13 others through the word "license," that's a
14 tough one.

15 JUSTICE BARRETT: Can you license
16 exportation?

17 MR. KATYAL: I don't think so, for the
18 reason that, you know --

19 JUSTICE BARRETT: Right now -- I
20 actually looked into this. I mean, I think you
21 -- maybe not licensing fees.

22 MR. KATYAL: Exactly.

23 JUSTICE BARRETT: But could you
24 license exportation that saying we're not going
25 to allow certain products that have national

1 security implications to be exported?

2 MR. KATYAL: Yes.

3 JUSTICE BARRETT: So licensing could
4 be used in that sense --

5 MR. KATYAL: Exactly.

6 JUSTICE BARRETT: Not as a
7 revenue-raising measure.

8 MR. KATYAL: Yes.

9 JUSTICE BARRETT: You went back and
10 forth with Justice Gorsuch about the
11 implications of the President's authority over
12 foreign affairs and whether the major questions
13 doctrine applies. You say that in IEEPA, the
14 President's war powers are not implicated and
15 that was part of the reason why you say that we
16 should think of this differently than some of
17 the historical examples where the
18 commander-in-chief power, war powers were
19 implicated.

20 But the same language appears in the
21 Trading With the Enemies Act in which war
22 powers would be implicated. So do you think
23 that language should be -- and, of course, that
24 is what President Nixon relied on.

25 So do you think that the language

1 would be interpreted differently in that
2 context even though the commander-in-chief
3 power and the war power would be implicated?

4 MR. KATYAL: A hundred percent I think
5 it would be interpreted differently. And
6 Justice Jackson --

7 JUSTICE BARRETT: Same regulate
8 commerce language?

9 MR. KATYAL: Yes. Because once you're
10 talking about -- once you're carrying over
11 wartime precedents to peacetime for reasons --

12 JUSTICE BARRETT: Okay. I don't
13 understand that then because everybody agrees
14 the language came -- in IEEPA, came from the
15 Trading with the Enemy Act. So you're saying
16 it has one meaning in the Trading with the
17 Enemy Act and a different meaning in IEEPA,
18 that same regulate commerce?

19 MR. KATYAL: No. I think that the
20 conquered territory language and all of that
21 may go to the President's Article II powers,
22 his inherent powers in conquered territory, but
23 I don't think it gets the government where they
24 need to go.

25 The CAC brief and the brief by

1 Professor Paul Steven goes through and explains
2 why in 1933, when Congress decided to bring
3 these concepts into peacetime, it severed the
4 wartime roots. And there's an extensive
5 legislative history --

6 JUSTICE BARRETT: Okay. I understand
7 that. But I thought that was about -- maybe
8 I'm -- maybe I'm just not tracking. I mean, I
9 think there's been some discussion of whether
10 the President would have inherent Article II
11 authority in wartime to impose tariffs to this
12 end; is that what you're talking about? Are
13 you actually talking about a statute that said
14 regulate importation in wartime?

15 MR. KATYAL: Right.

16 JUSTICE BARRETT: And you think it
17 could have the tariff power conferred through
18 that language in a war-making statute but not
19 in IEEPA?

20 MR. KATYAL: No, I don't think it
21 confers it in either place. I think the
22 President and the -- and it is located, the
23 President's power in conquered territory is not
24 in the Trading With Enemies Act or anything
25 like that, but rather in --

1 JUSTICE BARRETT: Okay. So it is
2 inherent constitutional power --

3 MR. KATYAL: Exactly.

4 JUSTICE BARRETT: -- coming from the
5 law of war. Okay.

6 And then if you win, tell me how the
7 reimbursement process would work. Would it be
8 a complete mess? I mean, you're saying before
9 the government promised reimbursement. And --
10 and now you're saying, you know, well, that's
11 rich, but how would this work? It seems to me
12 like it could be a mess.

13 MR. KATYAL: So the first thing I
14 would say is that just underscores how major a
15 question this is, the very fact that you are
16 dealing with this with quotas, there's no
17 refund process of -- to the tunes of billions
18 of dollars or embargoes, but there is here.

19 But for our case, the way it would
20 work is, in this case the government's
21 stipulated for the five plaintiffs that they
22 would get their refunds. So for us that's how
23 it would work.

24 Your question, I take it, is about
25 everyone else. We don't have a class action or

1 anything like that.

2 With respect to everyone else, there's
3 a whole specialized body of trade law. And 19
4 U.S.C. 1514 outlines all these administrative
5 procedures. It's a very complicated thing.

6 There's got to be an administrative protest.
7 There was a Harbor Management case earlier that
8 this Court was involved with in United States
9 Shoe in which, you know, the refund process
10 took a long time. There were any number of
11 claims and equitable relief and --

12 JUSTICE BARRETT: So a mess.

13 MR. KATYAL: So it's difficult,
14 absolutely.

15 JUSTICE BARRETT: Okay.

16 MR. KATYAL: We don't -- we don't deny
17 that it's difficult, but I think what this
18 Court has said in -- in -- in the McKesson case
19 in 1990, a serious economic dislocation isn't a
20 reason to do something.

21 Northern Pipeline, you guys stayed
22 your decision for a while in order to let the
23 congressional process unfold. There may be a
24 congressional process here as well.

25 You know, your -- you know, you may be

1 able to also -- be that this Court could limit
2 its decision to prospective relief under the
3 John Q. Hammons case. There's lots of
4 possibilities.

5 CHIEF JUSTICE ROBERTS: Justice
6 Jackson?

7 JUSTICE JACKSON: So I think I read
8 Algonquin differently than Justice Kavanaugh.
9 When I look at its analysis, it absolutely does
10 a textual review, but then it says, quote,
11 "turning from Section 232's language to its
12 legislative history, again, there is much to
13 suggest that the President's authority extends
14 to the imposition of monetary exactions."

15 And I appreciate that perhaps that
16 factor is no longer in vogue, but did you look
17 into the legislative history here to determine
18 whether there is anything that supports the
19 conclusion that Congress actually intended for
20 this IEEPA statute to allow or authorize the
21 President to impose these tariffs?

22 MR. KATYAL: I did, and, if I blinked,
23 I would miss it, because it was virtually
24 nothing. And, in fact, both page -- page 2 of
25 both the House and Senate report outline all of

1 the powers that are given under IEEPA, and --
2 and -- and none -- and none of them have
3 tariff. There is one brief mention of tariff
4 in the legislative history, but nothing else.

5 And, by the way, IEEPA passed by voice
6 vote. It was, you know, there was -- not
7 controversial. We don't deny IEEPA is a big,
8 major statute, but the question is, did it
9 authorize tariffs? One of the most contested
10 things since our founding and there's not a lot
11 --

12 JUSTICE JACKSON: And you say there's
13 nothing in the legislative history --

14 MR. KATYAL: -- zilch.

15 JUSTICE JACKSON: Now, to the extent
16 that Congress did authorize the President to do
17 something, that those verbs are there, that the
18 Congress was giving the President some
19 authority, do you see a theme connecting those
20 verbs? What was Congress trying to do?

21 And let me just say that I see in the
22 Senate report, which I mentioned earlier, that
23 Congress says that it was trying to give the
24 President the authority to, quote, "control or
25 freeze property transactions where a foreign

1 interest is involved."

2 And that seems to dovetail with the
3 verbs that are being used in the statute. But
4 -- but what's your view of what Congress was
5 trying to do with this legislation?

6 MR. KATYAL: That's exactly right.
7 They're responding to all sorts of -- of
8 foreign policy emergencies and foreign threats,
9 and they're giving the President economic
10 sanctions power.

11 JUSTICE JACKSON: So what does the
12 word "regulate importation" do in -- under that
13 framework? If we understand that Congress was
14 trying to give this kind of embargo authority
15 in the time of an emergency, when it says
16 "regulate importation," what -- what was it
17 envisioning?

18 MR. KATYAL: It was envisioning all
19 the things that the President since 1977, going
20 back to Justice Kavanaugh's question, have used
21 it for.

22 So they've used it for quotas, like
23 limitations on the number of goods. They've
24 used it for screening and reporting
25 requirements, like Executive Order 12284 about

1 reporting property of the shah. And they've
2 used it for standards, like domestic safety
3 standards, environmental standards, labor
4 requirements. They've used it for embargoes.

5 So all of those are things that I
6 think Congress had a mind in IEEPA. And I
7 think the proof of this, that it's not this
8 massive statute that allows the government to
9 do anything, is Dames & Moore itself, because
10 this Court rejected the idea that regulate
11 includes the claims extinguishment that was at
12 issue in that case. It's a much more limited
13 statute.

14 And, Justice Jackson, there's a
15 predecessor Justice Jackson who said -- who
16 said, you know, that, quote, "For all its
17 defects, delays and inconveniences, men have
18 discovered no technique for long preserving
19 free government, except that the Executive be
20 under the law and that the law be made by
21 parliamentary deliberations. Such institutions
22 may be destined to pass away, but it is the
23 duty of [this] Court to be last, not first, to
24 give [it] up."

25 And I take it my friend's argument on

1 the other side is in deep tension with
2 Youngstown and that canonical principle.

3 JUSTICE JACKSON: Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Mr. Gutman.

7 ORAL ARGUMENT OF BENJAMIN GUTMAN

8 ON BEHALF OF THE STATE PARTIES

9 MR. GUTMAN: Mr. Chief Justice and may
10 it please the Court:

11 I'd like to begin by picking up with
12 the exchanges with Justice Barrett and Justice
13 Gorsuch about licenses and license fees,
14 because I think we ended on the right note, but
15 I just wanted to make sure that our -- that at
16 least my client's position is clear on this.

17 Licenses are different from license
18 fees, and I am not aware of any history in the
19 five decades that IEEPA has been in force of
20 any fees charged for the licenses under this
21 statute.

22 This is a statute that -- licenses can
23 be used, for example, the President might ban
24 certain transactions with a foreign country but
25 then grant licenses to do them for humanitarian

1 reasons, but, as far as I'm aware, there's
2 never been a fee charged for that.

3 And I -- I do welcome the Court's
4 questions, but I think that's -- I just want to
5 make --

6 JUSTICE GORSUCH: Well --

7 MR. GUTMAN: -- absolutely clear --

8 JUSTICE GORSUCH: -- I think the
9 question is what is "or otherwise" do?

10 MR. GUTMAN: "Or otherwise" could be
11 things like instructions or licenses, but,
12 again, it's -- it's fundamentally -- having
13 something that is a revenue-raising measure or
14 even that is just an exaction of some sort is a
15 -- is fun -- is fundamentally, categorically
16 different from what we understand instructions
17 and licenses to be involved. Just like we
18 think "regulate" doesn't carry the financial
19 connotation given the other verbs there.

20 If -- if I could turn to some of the
21 19th century history that we were discussing as
22 well, because I think there may be a little bit
23 more to add there.

24 The -- the 19th century cases about
25 the President's inherent Article II authority

1 to -- with respect to -- in a wartime with
2 respect to importation is -- is not the power
3 to impose tariffs on imports coming into the
4 United States.

5 That is not what any of those cases
6 were about. They were about the President's
7 power, you know, in a wartime as an occupying
8 military force to impose tariffs in occupied
9 territory, in Mexico, in the Philippines, in
10 California.

11 The Civil War case might be the
12 closest case, but even there what we were
13 talking about were essentially -- there were
14 licensing fees, but they were export fees.
15 They were fees that were being imposed on the
16 exportation of cotton from the occupied South
17 into the North.

18 And so I don't think any of that
19 provides authority for this general notion that
20 there is a background principle that the
21 President, even in wartime, has an Article II
22 authority to impose tariffs, certainly without
23 the consent of Congress.

24 JUSTICE BARRETT: Counsel, you agree,
25 I assume, given all the verbs in this list,

1 that the President could do something like just
2 shut down all trade between us and, say, you
3 know, China, right?

4 MR. GUTMAN: Yes. I mean, there are
5 other limitations in --

6 JUSTICE BARRETT: Okay. So --

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

8 JUSTICE BARRETT: -- doesn't it seem
9 -- and I think this is one of the -- one of the
10 points that Algonquin makes, and I think it's a
11 point that Justice Kavanaugh was making --
12 doesn't it seem, then -- I mean, I don't want
13 to use the phrase "lesser power" and "lesser
14 included measure," but doesn't it seem like it
15 would make sense, then, that Congress would
16 want the President to use something that was
17 less, you know, weaker medicine than completely
18 shutting down trade as leverage to try to get a
19 foreign nation to do something?

20 MR. GUTMAN: And the President can in
21 the form of, for example, quotas. But what
22 makes an embargo or quotas fundamentally
23 different from tariffs, as my -- as my friend
24 has already explained, is the revenue-raising
25 aspect of that. That makes it a far more

1 significant power. It creates additional
2 danger of -- of overuse.

3 And I think the other point, as
4 Justice Jackson was pointing out, is that it
5 cedes control over whether the transaction
6 occurs from the government to the individuals
7 engaging in this transaction.

8 And that is not what IEEPA is
9 intending --

10 JUSTICE BARRETT: What makes something
11 revenue-raising? I mean, fees raise money --

12 MR. GUTMAN: Yes.

13 JUSTICE BARRETT: -- and unless
14 they're going to be kind of one-to-one this is
15 exactly what it costs, I mean, it -- it might
16 raise some surplus. It might raise some extra.

17 So is it the purpose, if the purpose
18 of the fee or the tariff is to raise money --

19 MR. GUTMAN: I don't think the --

20 JUSTICE BARRETT: -- is it the purpose
21 that makes it revenue-raising, or is it just
22 the fact of surplus created that goes to the
23 Treasury? How do we decide this?

24 MR. GUTMAN: Yes, I think it's the
25 effect. And, to be clear, I think there is --

1 there would be a serious difficulty with
2 interpreting any of these words even to allow
3 revenue-neutral exactions here, because none of
4 them involve -- none of them -- and, again, as
5 far as I'm aware, IEEPA has never been used in
6 that way.

7 But I don't think --

8 JUSTICE BARRETT: Not even a
9 processing fee?

10 MR. GUTMAN: I -- I'm not aware of any
11 use of that sort of -- under IEEPA, but -- but
12 even if -- even if that is permissible, it -- I
13 think that's permissible precisely because it
14 is -- it doesn't have the effect of raising
15 revenue.

16 JUSTICE JACKSON: Can you --

17 JUSTICE KAVANAUGH: Mr. Katyal
18 referred to common sense several times. And I
19 want to pick up on Justice Barrett's question
20 because your interpretation of the statute, as
21 she pointed out, would allow the President to
22 shut down all trade with every other country in
23 the world or to impose some significant quota
24 on imports from every other country in the
25 world, but would not allow a 1 percent tariff.

1 And that leaves, in the government's words, in
2 its brief, an odd donut hole in the statute.

3 Why would a rational Congress say:
4 Yeah, we're going to give the President the
5 power to shut down trade. I mean, think about
6 the effects. But you're admitting that power's
7 in there.

8 MR. GUTMAN: Yeah.

9 JUSTICE KAVANAUGH: But -- but can't
10 do a 1 percent tariff. That doesn't seem --
11 but I want to get your answer -- to have a lot
12 of common sense behind it.

13 MR. GUTMAN: I think it absolutely
14 does because it's a fundamentally different
15 power. It's -- it's not a donut hole; it's a
16 different kind of pastry.

17 (Laughter.)

18 JUSTICE KAVANAUGH: And on that -- on
19 that power -- that's a good one.

20 On that power, though, and you've said
21 this many times and Mr. Katyal too -- and,
22 look, I get this, obviously. But the Court has
23 repeatedly said a tariff on foreign imports is
24 an exercise of the commerce power, not of the
25 taxation power. And I'm repeating some -- but

1 John Marshall said that, Joseph Story, and
2 Chief Justice Hughes in the 1933 case, and
3 we've said that quite a bit of times, which
4 seems to at least undermine a bit your point
5 that it's an entirely different power because
6 if it is foreign commerce power, it's the same
7 power that Justice Barrett was talking about,
8 of just embargoing trade with the entire world,
9 which you admit is in this statute.

10 MR. GUTMAN: Well, there are a couple
11 of points in there. And -- and I'll try to get
12 to all of them, but, I mean, I think all of us
13 agree that context is what matters here and
14 that you certainly could use the word
15 "regulate" to -- to talk about a tariffing
16 power, like you could use it to talk about a
17 taxing power. And we impose taxes for
18 regulatory purposes as well.

19 But the -- the -- the federal
20 government hasn't identified a single other
21 federal statute that uses the term "regulate"
22 to authorize tariffs or taxes. That is just a
23 different kind of power.

24 JUSTICE JACKSON: And I thought your
25 point, in response to Justice Kavanaugh, it's a

1 different kind of power because the power
2 that's being authorized by this statute is the
3 power to control or freeze trade.

4 MR. GUTMAN: That's exactly --

5 JUSTICE JACKSON: That's what Congress
6 was getting at. And so if that's true, then we
7 have to read "regulate" in that context.

8 MR. GUTMAN: That's exactly right.
9 And I think the reason, getting back to common
10 sense, as to why a legislature might authorize
11 that is that you might not fear abuse of that
12 power in the same way that you would be
13 concerned about abuse of the power to impose
14 unlimited taxes with no -- with -- with sort of
15 no controlling principle.

16 JUSTICE KAVANAUGH: Well, plus --

17 JUSTICE KAGAN: Well, why is that?

18 JUSTICE KAVANAUGH: Yeah.

19 JUSTICE KAGAN: Because, I mean, there
20 is a sort of commonsensical intuition that one
21 is, in Justice Kavanaugh's example, that one is
22 greater and one is lesser. So why -- why is
23 that not right?

24 MR. GUTMAN: Because, to be blunt
25 about it, there's nothing -- one of them,

1 there's something in it for the government and
2 in one of them there isn't. Actions that bring
3 in revenue from -- from the pockets of
4 taxpayers to the Treasury pose a different set
5 of concerns. Our framers were very concerned
6 about that.

7 JUSTICE KAGAN: A different set of
8 concerns how? Why?

9 MR. GUTMAN: Because they bring in
10 revenue. And because that -- that creates a --

11 JUSTICE KAGAN: Well, that seems a
12 little tautological. But --

13 MR. GUTMAN: Well --

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

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

24 Setting -- setting a tariff doesn't
25 ensure that only 1,000 will come into this

1 country. It -- it cedes control over whether
2 the transaction occurs. And what it does is it
3 -- is it then, you know, adds revenue to the
4 Treasury. And that is, again, something that
5 our framers thought was extremely important and
6 -- and a core Article I --

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

16 And it -- I hear what you are saying
17 is, like, well, you can control quantity by
18 numbers by imposing hard limits but not by
19 money, but that's not what Algonquin said. So
20 I guess --

21 MR. GUTMAN: Well, no --

22 JUSTICE BARRETT: Why? Like --

23 MR. GUTMAN: And I don't mean to
24 suggest that you can't use exactions to control
25 quantity. What -- I think Algonquin just shows

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

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

16 JUSTICE JACKSON: And Algonquin --

17 JUSTICE BARRETT: And do you think
18 imposing tariffs -- I mean, sorry, do you think
19 that just blocking all trade is a bigger deal
20 than imposing a 1 percent tariff across the
21 board?

22 MR. GUTMAN: I think it would be a
23 huge deal. It is just a different kind of
24 deal.

25 JUSTICE JACKSON: Algonquin --

1 JUSTICE KAVANAUGH: And the --

2 JUSTICE JACKSON: -- was not a
3 constitutional case, right?

4 MR. GUTMAN: Correct.

5 JUSTICE JACKSON: It was a statutory
6 interpretation case.

7 MR. GUTMAN: Correct.

8 JUSTICE JACKSON: And so the question
9 there was simply was Congress actually trying
10 to give or did Congress in that statute give
11 the President the authority to impose these
12 kinds of exactions. And the Court looked at
13 the text and it looked at the legislative
14 history in which there was a number of clues
15 that Congress had actually intended to do that,
16 right?

17 MR. GUTMAN: Yes, yes. And it looked
18 not at the text of those specific words, but --
19 but also the context of what else was in the
20 statute and the fact that some of the factors
21 that the President was supposed to be
22 considering.

23 JUSTICE KAVANAUGH: But the -- keep
24 going. Sorry.

25 JUSTICE JACKSON: And it would make

1 perfect sense, I think, in a time of emergency
2 for the -- many of the reasons that General
3 Sauer pointed out that Congress would want the
4 President to have the kind of authority that is
5 imposed when you are embargoing things, when
6 you are stopping the trade, when you are
7 saying, you know, for emergency reasons we're
8 not letting any of this product come in.

9 I mean, sure, that's a big deal, but
10 the nature of it makes sense in terms of an
11 emergency. I think what you're saying is that
12 the idea that the government would use its
13 authority to be raising revenues in this
14 situation is a different kind of power.

15 MR. GUTMAN: Exactly. And this is
16 about -- this is a statute about giving the
17 President control over assets, over
18 transactions, over access to banking.

19 JUSTICE JACKSON: And tariffs don't do
20 that.

21 MR. GUTMAN: That's exactly right.

22 JUSTICE JACKSON: You said something
23 about tariffs not -- tariffs, in fact, cede
24 control --

25 MR. GUTMAN: Exactly right.

1 JUSTICE JACKSON: -- over those sorts
2 of things. So they sort of undermine the goals
3 and the purposes of this kind of statute. Is
4 that right?

5 MR. GUTMAN: Yes, that's exactly
6 right.

7 JUSTICE KAVANAUGH: Can I ask --

8 JUSTICE ALITO: From what you've said
9 --

10 JUSTICE KAVANAUGH: Go ahead.

11 JUSTICE ALITO: From what you've said,
12 it seems -- and you said this -- that the
13 reason for drawing a distinction between
14 tariffs and an embargo is the suspicion that
15 tariffs will be used to raise money and,
16 therefore, to circumvent Congress's power to
17 control taxes. So it's a question of the risk
18 that's involved; am I right?

19 MR. GUTMAN: Yeah --

20 JUSTICE ALITO: That's what it boils
21 down to?

22 MR. GUTMAN: Yes. And it's a question
23 of understanding what Congress would have
24 thought -- what -- what powers Congress would
25 have thought it was conferring. Would Congress

1 have understood the phrase "regulate" --

2 JUSTICE ALITO: Well, the question is
3 why would Congress say you can impose a quota,
4 you can impose a ban, but you can't impose a
5 tariff? And your answer, I gather, is because
6 when a tariff is imposed, we're -- we're
7 suspect about what's going on? We're
8 suspicious about what's going on? We think
9 that what the government is trying -- what the
10 executive is trying to do is to -- is to raise
11 revenue and that's our -- that's our business,
12 right? That's what it has to be.

13 MR. GUTMAN: Yes, and every -- we --
14 we know that every other time that Congress has
15 authorized the President --

16 JUSTICE ALITO: No. Well, that's --
17 you're getting into a different argument. Then
18 would you say the same thing if the measure is
19 really about an emergency?

20 MR. GUTMAN: Yes.

21 JUSTICE ALITO: An undisputed
22 emergency, and a really dire emergency.

23 MR. GUTMAN: Yes. I --

24 JUSTICE ALITO: There would you have
25 the same suspicion?

1 MR. GUTMAN: Yeah, it -- the -- yes,
2 absolutely. And, again, I'll refer back to
3 Justice Jackson's concurrence in Youngstown
4 that emergency powers tend to breed
5 emergencies. Look, Biden versus Nebraska, I
6 think, is -- you know, says very clearly --

7 JUSTICE ALITO: I -- I really don't
8 think you're answering the question. The
9 question is would you have the same suspicion
10 when it is perfectly apparent from context that
11 what the President is trying to do is to
12 achieve a goal other than the raising of money?

13 MR. GUTMAN: I -- I think what I'm
14 trying to say is that you -- you have to read
15 the statute the way that Congress would have
16 understood it when it was enacted, not how it
17 is used in any particular case.

18 It may be used for very good reasons
19 in a particular case, but the question is,
20 would Congress have understood itself to be
21 ceding this power with no limits unlike every
22 other tariffing statute with no limit --

23 JUSTICE ALITO: I -- I know -- I know
24 that point. Let me ask you an -- an unrelated
25 question. Mr. Katyal listed some of the things

1 that presidents have done under IEEPA, such as
2 screening -- screening imports.

3 Do any of the other verbs in IEEPA
4 talk about screening -- could -- could
5 screening of imports be done under any of the
6 other verbs in IEEPA?

7 MR. GUTMAN: I think maybe but it
8 would have been --

9 JUSTICE ALITO: Which one?

10 MR. GUTMAN: Prevent. And -- and so I
11 think the question would be --

12 JUSTICE ALITO: Screening is
13 preventing?

14 MR. GUTMAN: Well, it -- it -- I think
15 it depends what you're screening for. But if
16 you were -- if --

17 JUSTICE ALITO: Okay. How about
18 imposing domestic -- requirements that promote
19 -- that are needed to safeguard domestic
20 safety? Any -- any -- any other provision
21 besides regulate, any other verb besides
22 regulate that would --

23 MR. GUTMAN: Well, again, I think if
24 we're talking about potentially blocking some
25 property from coming into this country because

1 of safety concern, it might be that prevent
2 would have gotten you there.

3 What I think regulate does is it -- is
4 it clarifies and amplifies that you don't just
5 -- you know, it -- it can be nuanced in that
6 way. It can say we will let this come -- this
7 come in, if it has certain safety requirements,
8 if certain features have been disabled,
9 something like that.

10 And I think -- so I think regulate
11 harmonizes with prevent, investigate during the
12 pendency, block during the pendency of an
13 investigation, those sorts of verbs.

14 JUSTICE KAVANAUGH: On the context
15 point, the context of this statute, what
16 Congress would have understood, it's an
17 emergency statute. And presumably Congress
18 wants to give the President tools to respond to
19 the emergency in an appropriate way.

20 And it seems odd to imagine a meeting
21 in the oval office where the President is told
22 well, we have a problem with -- I won't name a
23 country -- but country X and you can stop all
24 trade with that country.

25 I mean, I'm not sure that's a, you

1 know, wise policy to give that much but it's
2 there, right? You agree it's in this statute.

3 MR. GUTMAN: Yeah.

4 JUSTICE KAVANAUGH: But -- and the
5 President says well, that's too extreme. I
6 want to calibrate my response to deal with this
7 and maybe a -- a, you know, a tariff of some
8 kind, like you can't do that. So you're
9 forcing the President to respond to an
10 emergency and, you know, Justice Alito has
11 raised the point about, you know, a real
12 emergency. And you're taking away the
13 President's suite of tools when the one is much
14 more extreme than is authorized. That just
15 seems a bit unusual.

16 You know, think about India right now.
17 The tariff on India. Right? That's designed
18 to help settle the Russian-Ukraine war, as I
19 understand it. Don't pretend to be an expert,
20 but if that's gone, you know, that's a tool
21 that's designed, talk about foreign-facing, the
22 most serious crisis in the world. And that's
23 -- that's out -- out the window.

24 So I just think this is contextually
25 emergency, it's just a bit unusual to read it

1 that way but I -- I -- I take your response,
2 taxation is different and you have got to stick
3 with that line.

4 MR. GUTMAN: I -- no, and I don't
5 think it is just that because -- I -- I mean, I
6 do think it is that but it -- but it's also
7 that there are a -- a range of tools that are
8 more calibrated that the President can do. It
9 doesn't have to be a complete embargo. It
10 could be limits on particular kinds of
11 products. It could be quantity, quality limits
12 --

13 JUSTICE KAVANAUGH: I get it. In the
14 history of trade -- trade efforts to respond
15 and push back, you're taking one away. I --

16 MR. GUTMAN: Well, and the President
17 -- and there are many other statutes that might
18 apply depending on --

19 JUSTICE KAVANAUGH: I get that.

20 MR. GUTMAN: -- the exact
21 circumstances --

22 JUSTICE KAVANAUGH: Fair -- that's --

23 MR. GUTMAN: -- 201, 301 --

24 JUSTICE SOTOMAYOR: Counsel --

25 JUSTICE KAVANAUGH: -- that's a good

1 point.

2 JUSTICE SOTOMAYOR: -- I think what
3 we're forgetting here is a very fundamental
4 point, which is the Constitution is structured
5 so that if I'm going to be asked to pay for
6 something as a citizen, that it's through a
7 bill that is generated through Congress and the
8 President has the power to veto it or not.

9 But I'm not going to be taxed unless
10 both houses, the executive and the legislature,
11 have made that choice, correct?

12 MR. GUTMAN: That's exactly right. So
13 --

14 JUSTICE SOTOMAYOR: And so there is
15 something -- it's just not the taxing power,
16 qua taxing power. The question is, do we
17 permit the President to use the taxing power to
18 effect his personal choices of what is good
19 policy for me to pay for?

20 MR. GUTMAN: That's exactly right.
21 The question is two sides.

22 JUSTICE SOTOMAYOR: It hasn't -- who
23 decides and under what circumstances. Now,
24 with respect to this, I -- I'm not even going
25 to the pretext argument, okay?

1 But the President threatened to impose
2 a 10 percent tax on Canada for an ad it ran on
3 tariffs during the World Series. He imposed a
4 40 percent tax on Brazil because its Supreme
5 Court permitted the prosecution of one of its
6 former presidents for criminal activity.

7 The point is, those may be good
8 policies, but does a statute that gives,
9 without limit, the power to a President to
10 impose this kind of tax, does it require more
11 than the word "regulate"?

12 MR. GUTMAN: Exactly.

13 JUSTICE SOTOMAYOR: That's your point.

14 MR. GUTMAN: Yes.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Did Mr. Katyal say anything this
18 morning with which you disagree?

19 MR. GUTMAN: No. I think we cleared
20 up any maybe potential disagreement about
21 licensing fees but I think we all agree on
22 that.

23 CHIEF JUSTICE ROBERTS: Okay. Justice
24 Thomas?

25 JUSTICE THOMAS: No.

1 CHIEF JUSTICE ROBERTS: Justice?

2 Anything further?

3 Justice Kagan?

4 JUSTICE GORSUCH: Briefly.

5 CHIEF JUSTICE ROBERTS: Justice

6 Gorsuch.

7 JUSTICE GORSUCH: Thank you, Chief.

8 So I just want to follow up on Justice
9 Sotomayor's question at the end of a long
10 morning -- afternoon.

11 It does seem to me, tell me if I'm
12 wrong, that the really key part of the context
13 here, if not the dispositive one for you, is
14 the constitutional assignment of the taxing
15 power to Congress, the power to reach into the
16 pockets of the American people is just
17 different and it's been different since the
18 founding and the navigation acts that were part
19 of the spark of the American revolution, where
20 Parliament asserted the power to tax to
21 regulate commerce. Some of those were
22 revenue-raising. Some of them didn't raise a
23 lot of revenue.

24 We had a lot of pirates in America at
25 the time. And -- and Americans thought even

1 Parliament couldn't do that, that that had to
2 be done locally through our elected
3 representatives.

4 Isn't that really the major questions
5 nondelegation now, whatever you want to
6 describe it, isn't that what's really animating
7 your argument today?

8 MR. GUTMAN: I think it's a huge piece
9 of what's animating our argument. Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Kavanaugh?

12 Justice Barrett?

13 Justice Jackson?

14 JUSTICE JACKSON: Can I just invite
15 you briefly to address your kind of second tier
16 arguments?

17 Assuming that the President can impose
18 these sorts of taxes-- tariffs, why do you
19 think, for example, that the trafficking tariff
20 here does not deal with the drug trafficking
21 emergency for the purpose of this analysis?

22 MR. GUTMAN: So it doesn't deal with
23 it because it's not a sanction imposed against
24 traffickers. It is a -- say it is -- if you
25 think of it as a sanction, it is a sanction

1 imposed against people importing lawful goods
2 in the hope --

3 JUSTICE JACKSON: Doesn't that
4 indirect -- that happens all the time, right?
5 I mean, all the other authorities indirectly
6 provide leverage on countries in this way.

7 MR. GUTMAN: I don't think so. I
8 think that they are -- that the history of --
9 of IEEPA and even of TWEA is imposing sanctions
10 directly on the wrong doers. These are
11 statutes about providing sanction authority
12 against -- against international actors whose
13 behavior we want to change and that's not what
14 tariffs do.

15 JUSTICE JACKSON: All right. Thank
16 you.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Rebuttal, General Sauer?

20 REBUTTAL ARGUMENT OF GEN. D. JOHN SAUER

21 ON BEHALF OF THE FEDERAL PARTIES

22 GENERAL SAUER: Thank you, Mr. Chief
23 Justice.

24 Just three points. One an
25 interpretive point. The statutory language

1 here is regulate importation and -- and again
2 by means of instruments, licenses, or
3 otherwise. Their argument is that that phrase
4 carries with it a whole host of unemunerated
5 forms of regulation including quotas, licenses,
6 licenses that come with fees as long as they're
7 not -- as long as they're sort of profit
8 neutral fees, environmental restrictions,
9 qualitative restrictions, reports and so forth.

10 It's just that the one form of
11 regulation that they would not include is
12 tariff regulation which is of course is the
13 quintessential most historically tested method
14 of regulating imports. And so that -- that --
15 that -- that additional phrase about, you know,
16 by means of instruments and licenses or
17 otherwise really sort of reinforces the plain
18 meaning, the ordinary natural meaning of
19 regulated importation here.

20 So when it comes just to plain text of
21 the statute, their argument is a donut-type
22 argument. And it's not an argument that does
23 justice to the statute's plain text.

24 On the nondelegation point, Justice
25 Gorsuch, you alluded to the founding or

1 delegations of the Indian commerce power and I
2 just remind the Court that in 1790, in July of
3 1790, Congress passed a statute that
4 essentially delegated to President Washington
5 essentially the entire scope of the Indian
6 commerce power.

7 He said you can do commerce with
8 Indians if you have a license that you had to
9 pay a fee for, but in that -- that will be
10 subject to such rules and regulations as the
11 President makes with no further guidance.

12 So when it comes to this
13 foreign-facing, there it's obviously analogous
14 because the Indian tribes are not foreign
15 sovereigns, but this foreign-facing situation,
16 we had a very sort of deep and profound
17 historical pedigree to broad delegations of the
18 -- the regulation of commerce, right? The
19 foreign commerce power in that case, the Indian
20 commerce power.

21 And that ties, I think, to what I take
22 to be the main theme of the arguments on the
23 other side. And I think that Mr. Katyal
24 started by saying tariffs are taxes. And I
25 want to complete the answer I think I was

1 giving to the Chief Justice when I got
2 interrupted, is if you look at these, these
3 tariffs, these policies, it is clear that these
4 policies are most effective if nobody ever pays
5 the tariff. If it never raises a dime of
6 revenue, these are the most effective use of
7 these -- of this particular policy.

8 And I said there's two buckets there.
9 One is, first of all, when it comes to the
10 trade deficit emergency, if no one ever pays
11 the tariff but instead they direct their
12 consumption domestically and spur the creation
13 of a rebuilding of our -- of our hollowed-out
14 manufacturing base, that directly addresses the
15 crisis. It's more effective if no one ever
16 pays the tariff. That's the point of it,
17 really. You know, that's a fundamental point
18 of it. And that's one piece of these.

19 And then as to both of them, as to
20 both of the declared emergencies, the tariffs
21 are an incentive, a pressure point, leverage,
22 bargaining chip, as the Court said in *Dames &*
23 *Moore*, to get countries to change their
24 behavior to address the foreign arising
25 emergencies. So if you look, for example, to

1 take a historical example, the last week's
2 trade deal with China, it unlocked access to
3 rare earth minerals, which of course have a
4 critical national security aspect to them, and
5 it got China for the very first time to change
6 its policy with its respect to fentanyl
7 precursors, which is a crucial piece of that.

8 That -- those tariffs, if no one ever
9 collects them but the threat of imposing those
10 tariffs gets China and our other trading
11 partners across the world to change their
12 behaviors in a way that addresses this, then
13 that's the most effective use of the policy.
14 So they're clearly regulatory tariffs, not
15 taxes. They are not -- they're not an exercise
16 of the power to tax. They are the exercise of
17 the power to regulate foreign commerce. And
18 that's why the statute says "regulate." It
19 doesn't say "tax." It says "regulate."

20 And -- and -- and for that reason, we
21 are squarely within the tradition that I was
22 talking about before of very broad,
23 historically very broad, delegations of the
24 power to regulate foreign commerce to the
25 President because he has inherent Article II

1 authority in the area of -- of -- of -- of
2 foreign affairs, although not that. It has to
3 be delegated to him; otherwise, the delegate --
4 delegation would be superfluous.

5 And for all those reasons, we ask the
6 Court to reverse both the decisions below.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 The case is submitted.

10 (Whereupon, at 12:44 p.m., the case
11 was submitted.)

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\$ \$4 [2] 112:21 148:25 1 1 [5] 12:8 49:1 164:25 165:10 170:20 1,000 [3] 168:19,23,25 10 [6] 24:2 106:9 128:14 142:7 144:23 181:2 10:04 [1] 4:2 122 [9] 50:20 54:15 77:21 98:24 100:25 109:2 125:1 127:12 132:16 12284 [1] 157:25 14257 [2] 61:20 90:17 1499 [1] 108:6 15 [7] 99:1 101:1 109:2 127:15 132:20 135:17 144:20 150 [4] 101:1 109:3 127:15 132:20 150-day [1] 99:2 1514 [1] 154:4 159 [1] 3:10 16 [1] 15:11 1701 [2] 46:23 60:21 1701(b) [1] 62:15 1702(b) [1] 62:18 1790 [7] 36:23 57:7 64:7 101:24 144:16 186:2,3 184 [1] 3:13 19 [7] 60:3,12 100:18 120:6,7 133:3 154:3 1917 [2] 33:16 49:20 1930 [2] 120:21 122:17 1930s [1] 57:3 1933 [4] 36:2 49:25 152:2 166:2 1941 [1] 41:6 1962 [1] 145:18 1971 [3] 21:11,19 106:10 1974 [2] 50:20 109:2 1976 [1] 125:24 1977 [7] 50:6 77:11 102:13 105:22 109:13 137:6 157:19 1990 [1] 154:19 19th [3] 33:19 160:21,24	2 2 [3] 4:12 48:7 155:24 2001 [1] 127:18 201 [3] 101:2 125:5 179:23 2019 [1] 95:12 2023 [1] 73:14 23 [1] 59:7 232 [5] 27:12 142:20 145:14 146:11,19 232(a) [2] 16:5,7 232(c) [1] 16:5 232's [1] 155:11 238 [2] 98:12 113:25 24-1287 [1] 4:4 252 [1] 121:25 2808 [1] 128:14 3 30 [1] 38:13 301 [4] 101:3 121:25 125:6 179:23 33 [1] 109:1 330 [1] 122:5 338 [8] 101:6 120:20 121:10 122:2,5,17,20 124:25 39 [2] 109:9 149:12 4 4 [2] 3:4 46:13 40 [1] 181:4 4074 [1] 22:20 5 5 [1] 100:24 50-percent [1] 69:3 50-year [1] 98:21 6 652 [2] 7:12 104:13 653 [1] 7:12 69 [2] 78:20 80:5 8 8 [1] 104:4 80 [1] 38:13 9 90 [2] 112:3,5	9-0 [2] 143:11 144:4 96 [1] 130:9 97 [1] 3:7 A a)(1) [1] 87:12 a.m [1] 4:2 abdicating [1] 65:2 abdication [5] 66:13 67:4 68:19,20 71:1 ability [4] 48:25 73:19 88:25 121:18 able [6] 43:11 95:24 96:1 124:21 140:16 155:1 abroad [1] 69:5 abrogation [1] 126:19 absolutely [16] 71:17 74:8 103:25 105:15,18 108:17 110:8 128:5 130:5 135:21 149:6 154:14 155:9 160:7 165:13 175:2 abuse [2] 167:11,13 abusive [1] 24:22 accept [3] 67:23 68:2,4 acceptable [1] 105:3 accepted [2] 9:5 17:13 access [2] 172:18 188:2 accompany [1] 16:20 accomplish [3] 52:13,16 53:1 accretion [1] 74:13 achieve [2] 10:12 175:12 achieving [1] 103:6 acknowledge [1] 140:3 acquiescence [1] 78:2 acquisition [1] 52:8 across [7] 24:2 90:8,21 106:9 116:14 170:20 188:11 across-the-board [1] 111:25 act [18] 22:23 49:6,20 50:20,21 93:1 109:2 120:20 122:17 129:10,10 145:18 146:3 150:21 151:15,17 152:24 170:5 acting [2] 62:6 147:2	action [1] 153:25 actions [7] 5:14 19:4 29:23 40:23 92:23 129:3 168:2 activities [1] 16:17 activity [1] 181:6 actor [1] 6:5 actors [1] 184:12 acts [1] 182:18 actual [3] 18:7 92:20,23 actually [21] 18:24 37:19 41:1,4,17 45:2,13,18 62:20 65:19 99:24 113:17 116:9 117:4 127:6 133:11 149:20 152:13 155:19 171:9,15 ad [3] 46:18,18 181:2 add [1] 160:23 addition [1] 122:16 additional [2] 163:1 185:15 address [25] 6:4 7:5,18,19,22 9:12,24 21:6 24:3 34:24 40:8 48:23 58:22 59:9,10 60:19 63:11 79:1 98:24 114:23 116:24 124:10,12 183:15 187:24 addressed [4] 7:11 11:13 17:12 77:19 addresses [3] 48:9 187:14 188:12 adds [2] 135:19 169:3 adjust [20] 16:9 17:4 27:11,14 44:16,23,25 80:15,21,22 81:2,9,12,15 85:24 142:21 143:10,21 170:2,9 adjusting [1] 170:7 adjustments [1] 143:25 administer [1] 29:18 administration [2] 69:12 99:8 administrative [2] 154:4,6 admission [3] 110:14,25 111:1 admit [1] 166:9 admittedly [4] 12:1 16:4 58:21 60:20
--	---	---	---

admitting [2] 67:7 165:6 adopt [1] 89:6 adopted [1] 120:17 advance [1] 7:25 advanced [1] 129:19 advocate [1] 126:8 affairs [27] 6:6,10,23 9:6, 13 13:18 18:5 37:8 56:10, 12,24 58:23 62:4 63:19 64: 22 65:25 66:1,16 71:3 75: 13,20,24 76:4,7 102:21 103:10 150:12 affect [1] 133:11 affected [1] 104:18 affecting [1] 143:25 affirmative [1] 29:6 afford [1] 10:21 afield [2] 140:19 141:4 africa [2] 79:4 91:16 afternoon [1] 182:10 agency [1] 58:13 aggravators [1] 70:19 aggression [1] 116:4 aggressive [1] 5:8 ago [1] 34:1 agree [22] 16:24 28:20 32: 2,5 34:20 72:2,3 83:6 103: 21,22,24,24 105:2 126:21 134:9,17 136:6 147:15 161: 24 166:13 178:2 181:21 agreement [4] 21:15 24:9 61:23 112:6 agreements [2] 5:3,6 agrees [1] 151:13 ahead [2] 109:20 173:10 aim [1] 42:22 air [1] 57:2 alan [1] 107:9 alexander [1] 59:6 algonquin [42] 15:19,22 16:23 23:21 44:2,9 45:4 77: 20 80:11,14 82:15,21 83:1, 13 84:16 85:6,23 106:1 130:21,25 142:13,19 144:2, 12 145:3,5,17,19,22 146:1, 19 147:6,9 155:8 162:10 169:8,9,13,19,25 170:16,25	alito [60] 50:14,15 51:22 108:19 109:16,19,22,23 110:9,23 111:6,10,17,19 112:22 113:7 114:7,14,21 115:13,23 116:2,7 119:15 120:14,15 121:2,13,25 122: 13,24 123:1,19 124:7,16 125:12 126:5,12,20 127:5, 16 128:2,11,19 132:1 133: 9 138:25 173:8,11,20 174: 2,16,21,24 175:7,23 176:9, 12,17 178:10 allies [2] 22:22 109:8 allocate [1] 38:4 allocated [1] 38:12 allow [10] 20:18 46:10 110: 15 149:3,4,25 155:20 164: 2,21,25 allowed [1] 84:17 allowing [2] 97:24 125:15 allows [4] 118:3,4 125:9 158:8 alluded [2] 49:3 185:25 alluding [1] 49:8 almost [3] 35:16 84:7,10 alone [2] 97:13 122:23 already [5] 10:14 49:24 114:4 127:8 162:24 altogether [1] 39:13 ambiguous [1] 13:8 amended [1] 73:1 amendment [1] 89:15 amendments [1] 41:6 america [3] 4:24 5:8 182: 24 american [9] 4:19 12:20 38:9,11 39:6 97:24 143:3 182:16,19 americans [5] 37:5,15 38: 14 39:5 182:25 americans' [1] 97:11 amici [1] 121:19 amicus [5] 33:22 49:15 120:20 121:20 124:18 among [1] 5:23 amount [3] 34:13 59:3 123: 14	amounts [1] 123:15 amplifies [1] 177:4 analogous [1] 186:13 analogy [1] 140:20 analysis [4] 16:8,25 155:9 183:21 animal [1] 134:7 animating [2] 183:6,9 announced [1] 106:8 announcement [1] 57:15 another [7] 26:6 44:10,10 53:15 99:4 100:16 129:22 answer [20] 8:25 27:4,14 43:17,20 45:2 55:8,9 77:5 80:20 81:8 99:8 105:1 121: 18 130:21 133:8 144:5 165: 11 174:5 186:25 answered [1] 82:23 answering [2] 139:7 175: 8 answers [4] 77:5 80:24 99: 18 106:20 anticipate [1] 47:22 apart [1] 145:6 apartheid [1] 91:17 apparent [1] 175:10 appeals [6] 21:25 77:15 106:23 107:25 108:13 129: 5 appear [1] 31:8 appearances [1] 2:1 appears [3] 42:8 100:7 150:20 appellate [1] 25:24 applicability [1] 34:1 applicable [2] 11:14 34:5 application [11] 14:24 23: 15 25:8 27:15 32:24 35:9 66:25 67:2 76:9 78:7 87:1 applications [1] 31:17 applied [4] 13:10,18 105: 11 107:11 applies [4] 66:24 84:24 121:4 150:13 apply [31] 6:3,15,21,25 10: 19 19:19 20:5,10 34:18 36: 9 46:22,22 48:2,13,15,17,	18 56:11 57:21 59:17,18 67:16 85:10 99:15 101:16, 21 104:7 111:12 127:20 141:16 179:18 applying [1] 90:25 appreciate [2] 41:14 155: 15 approach [2] 17:17 67:1 appropriate [4] 60:17 127: 19 168:18 177:19 april [1] 4:12 architecture [4] 100:18 109:7 120:6 125:11 area [9] 10:20 20:2,16,20 49:1 50:1 55:14 63:19 65: 18 aren't [2] 86:14 140:13 argue [3] 5:16 47:21,21 argued [1] 34:7 arguing [2] 83:11 107:24 argument [70] 3:2,5,8,11 4:4,8 12:16 13:3 17:12 18: 1,8 25:4,4 26:1,1,25 30:5 44:1 45:7 47:23 55:20 58: 10 82:15 84:1 85:7 86:7,15 90:24 91:11 92:20 93:12 97:6 99:15,17 101:15 114: 11,25 116:25 117:19 121:2, 14,22,23 122:22 123:21 124:20 126:6,10 127:21 129:18 132:12 137:20 138: 3 141:18 142:16 143:9,12 144:5 146:12 158:25 159:7 174:17 180:25 183:7,9 184: 20 185:3,21,22,22 arguments [11] 109:25,25 110:1 111:20 114:19 121: 18,19 142:10,11 183:16 186:22 arise [2] 56:23 59:8 arises [2] 60:10 62:9 arising [2] 60:18 187:24 armed [1] 128:17 around [2] 20:12 120:6 article [30] 6:11,24 8:7,7, 16,22,23,24 9:19 10:1 12: 16 70:14 101:2 103:15,16,
--	--	---	--

17 104:4 127:25,25 128:9 133:17,20 145:14,14 151: 21 152:10 160:25 161:21 169:6 188:25 articles [1] 121:21 articulate [1] 14:23 aside [3] 26:10 100:22 120: 10 aspect [2] 162:25 188:4 assent [2] 74:22,25 assert [4] 30:17 64:6 67:22 71:20 asserted [4] 36:11 76:20 104:18 182:20 asserting [9] 28:2 35:24 43:3 88:2 134:2 137:1,2 138:23 148:24 assertion [2] 105:8 108: 24 assessment [1] 46:19 assets [2] 42:24 172:17 assign [1] 6:8 assigned [1] 105:12 assignment [2] 64:17 182: 14 assist [1] 142:14 assume [3] 32:22 130:19 161:25 assumed [1] 58:4 assuming [1] 183:17 astonishing [1] 81:24 asymmetric [4] 90:19 91: 9 92:4,5 attested [1] 95:16 attitude [1] 31:16 attorneys [1] 142:25 august [1] 106:10 authorities [5] 122:16 124:25 125:5 126:2 184:5 authority [73] 6:9,24 8:7,8 9:6,12,17,21 17:15 18:11, 12,20,22 20:2 21:2 23:12, 19,19 25:19 26:4,20 34:17 35:24 41:19 42:9,15,23 48: 22 64:22 65:21,25 66:3 69: 20,22 70:4,14,16,24 71:5,7, 16 72:11 74:2 76:19 77:1	89:9 93:1 94:5 95:10,12 102:4,6 105:13 108:21,24 114:2 133:7,10,21 141:6 150:11 152:11 155:13 156: 19,24 157:14 160:25 161: 19,22 171:11 172:4,13 184: 11 authorization [3] 76:21 127:17 143:21 authorize [10] 44:19,21 50: 22 146:13 148:2 155:20 156:9,16 166:22 167:10 authorized [5] 88:12 136: 12 167:2 174:15 178:14 authorizes [1] 5:25 authorizing [2] 41:8 122: 11 auto [1] 69:3 automobiles [1] 37:24 autos [1] 125:6 available [1] 131:19 avoid [1] 85:14 aware [8] 75:18 77:15 106: 3,7 159:18 160:1 164:5,10 away [7] 13:4 74:14 98:10 141:24 158:22 178:12 179: 15 awesome [2] 146:15,16 B back [47] 22:4 23:24 25:9 28:3 31:22 32:17 33:15 36: 22,23 39:22 43:14 49:12 50:12 51:15 52:1 54:17 55: 7 57:6 72:5,12,15 73:1,12, 25 74:11 75:11 78:5 81:19, 20,25 82:1 88:24 89:3 93: 18 98:5 101:12,20 123:9, 12 134:20 143:4 150:9 157: 20 167:9 169:8 175:2 179: 15 backdrop [1] 135:8 backed [1] 68:12 background [5] 71:7 74:4 78:4 87:5 161:20 baked [1] 74:20 balance [2] 7:16 72:19	balanced [1] 63:4 balance-of-payments [2] 24:4 79:15 balances [1] 7:20 bamzai's [2] 33:22 49:14 ban [2] 159:23 174:4 banking [1] 172:18 bans [1] 40:4 bar [1] 39:12 bare [6] 38:8 72:9 109:24 110:2 111:21 117:1 bargaining [1] 187:22 barrett [66] 25:14,23 26:10, 17 27:5,13,20 28:10,14 44: 23 45:23 46:1 47:2 49:13 85:4,5 87:10,18,23 88:4,9, 16,21 89:16,21 92:15 98:3 108:10 111:8 116:18 118: 13 147:13,14,21 148:7,12, 19 149:1,7,15,19,23 150:3, 6,9 151:7,12 152:6,16 153: 1,4 154:12,15 159:12 161: 24 162:6,8 163:10,13,20 164:8 166:7 169:7,22 170: 17 183:12 barrett's [4] 30:13 52:1 93: 19 164:19 base [4] 39:8 90:11 92:7 187:14 based [2] 86:25 91:12 base's [1] 92:10 basic [2] 37:8 144:1 basically [6] 46:11 57:9 90:18 93:4 136:6 142:18 basis [7] 34:17 37:18 49:8 92:2 120:24 121:23 126:3 bat [1] 91:19 bear [2] 120:12 144:7 became [1] 33:18 becomes [1] 94:12 bedrock [2] 4:22 9:18 beefs [1] 44:24 beget [1] 113:19 begin [1] 159:11 beginning [2] 18:2 46:23 behalf [11] 2:3,5,8 3:4,7,10, 13 4:9 97:7 159:8 184:21	behavior [2] 184:13 187: 24 behaviors [2] 76:2 188:12 behind [2] 128:7 165:12 belied [1] 125:21 believe [3] 13:10 47:22 142:8 below [2] 63:7 99:17 benjamin [3] 2:7 3:9 159: 7 besides [2] 176:21,21 best [8] 41:24 69:24 80:20 83:4 104:11 113:20 137:6 138:5 better [1] 103:14 between [18] 7:17 9:8 29: 8 37:10 45:8 46:6 57:15 82: 22 84:5,22 86:14 115:17 127:24 143:14,15 148:14 162:2 173:13 beyond [1] 110:23 biden [5] 13:6 14:3,16 118: 14 175:5 big [5] 35:9 84:14 94:12 156:7 172:9 bigger [1] 170:19 biggest [1] 73:15 bill [2] 99:22 180:7 billion [2] 123:16 145:15 billions [2] 123:15 153:17 bit [8] 26:25 34:3 140:20 160:22 166:3,4 178:15,25 bite [3] 63:3 65:15 66:19 black's [2] 81:9,11 blinked [1] 155:22 block [9] 29:5 30:4 40:17 91:23 92:17 93:8 94:6 100: 9 177:12 blocking [2] 170:19 176: 24 blood [1] 79:2 blow [2] 60:14 134:5 blunt [2] 5:17 167:24 board [8] 24:2 25:12 28:5 32:18 90:8,22 106:10 170: 21 body [1] 154:3
--	---	---	--

boils ^[1] 173:20 bonus ^[1] 47:6 book ^[1] 132:22 books ^[2] 64:23 74:5 border ^[2] 23:13,14 borne ^[3] 37:14,15 38:14 boston ^[2] 100:4,5 both ^[10] 63:22 65:20 79:24 100:19 129:4 155:24,25 180:10 187:19,20 bought ^[1] 84:1 bound ^[1] 17:22 boundary ^[1] 9:8 bounds ^[2] 66:12,15 boy ^[1] 134:10 branch ^[2] 31:21 74:14 branches ^[2] 58:25 65:20 brazil ^[1] 181:4 breadth ^[2] 19:4 53:16 breed ^[1] 175:4 brief ^[17] 33:22 35:18 49:15 50:8 100:24 112:20 120:20 121:20 124:18 129:19 133:19 135:17 144:20 151:25,25 156:3 165:2 briefly ^[4] 47:12 82:24 182:4 183:15 briefs ^[4] 46:21 82:3 83:20 148:25 bring ^[6] 24:5 46:17 116:4 152:2 168:2,9 brings ^[1] 49:21 brink ^[1] 4:14 broad ^[32] 6:8 7:24 8:6 9:6,11 11:24 18:4 22:18 36:21 40:21 48:10 50:9 57:1 58:21 59:12 64:16 65:22 70:14 90:25 91:12,12,20,20,25,25 93:1 140:23 141:6 143:5 186:17 188:22,23 broaden ^[1] 30:12 broader ^[1] 28:21 broadest ^[2] 58:24 143:2 broadly ^[1] 126:23 brought ^[2] 4:13 50:5 buckets ^[1] 187:8 bunch ^[1] 29:16	bush ^[3] 78:13,16 80:2 business ^[2] 66:6 174:11 buttressed ^[1] 78:5 bypassed ^[2] 97:14 98:23 C cabell ^[1] 82:2 cabinet ^[1] 146:24 cac ^[1] 151:25 calibrate ^[1] 178:6 calibrated ^[1] 179:8 california ^[1] 161:10 call ^[5] 45:5 47:3,11 118:12 169:11 called ^[1] 133:15 calls ^[1] 102:12 came ^[7] 15:18 17:11 45:7 77:20 105:22 151:14,14 canada ^[1] 181:2 cannot ^[2] 35:15 101:14 canonical ^[2] 40:9 159:2 cap ^[1] 99:1 capacious ^[7] 11:25 28:16,17,23 29:1 114:13 135:3 capacity ^[1] 48:25 capture ^[2] 138:7,17 capturing ^[1] 110:18 care ^[1] 42:3 careful ^[1] 45:5 carefully ^[4] 24:19 58:20 60:19 64:12 carried ^[1] 36:2 carries ^[4] 23:11 25:1 88:6 185:4 carry ^[3] 23:18 51:13 160:18 carrying ^[2] 50:6 151:10 cars ^[2] 69:3 135:19 carter ^[1] 79:8 case ^[52] 4:4,6 6:16 10:19 11:1 13:6 17:14 23:6 34:8 47:13,14 55:25 64:7 65:16 83:2 89:18 98:6 102:14,23 105:11,23 106:23 114:10,22 121:15 122:19 123:23 124:19 130:1,3 131:22 132:17 135:23 141:14 143:6 145:19 147:9 153:19,20 154:7,18 155:3 158:12 161:11,12 166:2 169:13 171:3,6 175:17,19 186:19 cases ^[26] 9:10 10:22 25:11 26:14,14,19,21 33:19 47:13 48:19 50:8 57:2 59:1 61:14 70:10 71:11 77:2 104:6 110:21 112:15 117:24 128:12 129:4 130:6 160:24 161:5 casts ^[1] 6:7 catastrophe ^[1] 4:15 catch-all ^[1] 94:12 categorically ^[1] 160:15 category ^[3] 115:16 133:13 168:15 ccpa ^[2] 24:15 50:16 cede ^[1] 172:23 cedes ^[2] 163:5 169:1 ceding ^[1] 175:21 ceiling ^[4] 58:3,5,8,11 ceilings ^[1] 99:7 central ^[2] 35:9 76:17 cents ^[1] 46:13 century ^[3] 33:19 160:21,24 certain ^[10] 11:13 41:16 42:4,23 44:7 146:24 149:25 159:24 177:7,8 certainly ^[10] 11:6 38:20 78:15 82:17 84:6 89:14 99:11 100:5 161:22 166:14 cert-denied ^[1] 107:25 cetera ^[4] 52:9 78:12 94:7 125:1 chadha ^[1] 72:22 chains ^[1] 92:9 challenge ^[2] 95:25 123:10 challenged ^[2] 22:15 142:24 challengers ^[1] 95:21 challenging ^[1] 91:3 chance ^[1] 116:24 change ^[13] 19:20 21:1 69:6 76:1 77:19 78:1 91:16 95:20 106:14 184:13 187:23 188:5,11 changes ^[1] 19:15 changing ^[2] 19:25 170:10 charged ^[3] 148:3 159:20 160:2 charging ^[1] 135:20 check ^[1] 131:23 checks ^[2] 7:20 132:7 chicago ^[1] 57:2 chief ^[56] 4:3,10 10:13 33:23,25 35:3 36:24 37:20,23 38:15 43:16 47:16,17 50:14 51:23 54:19 55:2 63:13 76:13 85:3 92:12 97:3,8 102:17 103:3,5,11,20 109:22 114:8 119:11 120:14 128:1,22 131:7,11 133:9,15 134:14 137:15 142:2 146:3 147:12 155:5 159:4,9 166:2 181:15,23 182:1,5,7 183:10 184:17,22 187:1 chiefly ^[1] 99:25 china ^[7] 5:5 119:18 125:7 162:3 188:2,5,10 chip ^[1] 187:22 choice ^[1] 180:11 choices ^[1] 180:18 circuit ^[5] 11:20 17:13 24:14 106:24 124:1 circuit's ^[2] 24:15 124:3 circumstance ^[2] 44:10 111:14 circumstances ^[3] 123:4 179:21 180:23 circumvent ^[1] 173:16 citation ^[1] 133:18 cite ^[7] 35:18 39:2 48:5 53:9 70:9 104:6 113:7 cited ^[3] 50:8 70:11 82:3 cites ^[1] 48:6 citing ^[2] 26:20 122:9 citizen ^[2] 119:18 180:6 citizens ^[1] 12:21 city ^[1] 135:19
---	--

civil ^[3] 45:19 69:24 161:11 claim ^[1] 34:17 claimed ^[2] 34:5 143:6 claims ^[3] 114:12 154:11 158:11 clarification ^[1] 105:1 clarifies ^[1] 177:4 clarify ^[1] 144:10 class ^[1] 153:25 clause ^[6] 85:8 140:21,22 141:1,7,17 clear ^[15] 13:7 18:14 53:3 99:1 100:20 101:23 102:24 107:7 108:2 142:12 145:23 159:16 160:7 163:25 187:3 cleared ^[1] 181:19 clearly ^[6] 70:1 71:9 97:18 134:11 175:6 188:14 client's ^[1] 159:16 climate ^[3] 69:5 95:20 99:5 clinton ^[1] 78:13 close ^[4] 49:17 108:1 122:11 130:13 closed ^[1] 130:15 closely ^[1] 27:10 closest ^[1] 161:12 clues ^[1] 171:14 cluster ^[1] 100:8 coalesce ^[1] 75:8 code ^[7] 25:16 30:14,24 33:8 93:20 126:4 137:17 codification ^[1] 50:3 codified ^[1] 35:25 codifying ^[1] 49:23 collateral ^[1] 38:20 colleague ^[1] 133:1 collect ^[2] 64:4 123:7 collected ^[2] 112:8 123:14 collects ^[1] 188:9 colloquy ^[1] 120:3 combination ^[1] 31:13 combined ^[1] 30:19 come ^[15] 33:4 84:23 88:13 108:1 122:7,11 123:12 125:7 138:21 168:23,25 172:8 177:6,7 185:6	comes ^[10] 19:5 49:5 97:20 102:14 122:8 131:22 168:20 185:20 186:12 187:9 comfort ^[1] 122:25 comfortable ^[2] 57:1 79:23 coming ^[4] 135:19 153:4 161:3 176:25 commander-in-chief ^[5] 70:1,15 71:3 150:18 151:2 commerce ^[45] 8:21 10:2,6 13:22,24 14:25 26:23 28:1,3,13 36:22,25 42:5 43:5 50:11 55:18 57:5,9,11 63:25 65:3 66:1 69:23 94:1 134:24 140:21,22 141:1,7,17 147:17,22 151:8,18 165:24 166:6 182:21 186:1,6,7,18,19,20 188:17,24 committed ^[3] 96:21 104:3 128:9 common ^[5] 97:20 145:8 164:18 165:12 167:9 common-sense ^[5] 7:3,8 8:4 29:10 132:12 commonsensical ^[1] 167:20 company ^[1] 38:9 compel ^[4] 29:7 40:17 93:9 94:6 complete ^[3] 153:8 179:9 186:25 completely ^[1] 162:17 complicated ^[1] 154:5 comply ^[1] 50:19 compromise ^[5] 63:4 64:12 102:12,13 131:24 concede ^[6] 5:25 54:13 83:20 94:19 95:16 148:17 conceded ^[6] 44:20 46:21 83:14 103:16 139:14 148:13 concepts ^[1] 152:3 concern ^[4] 11:6 96:1 139:3 177:1 concerned ^[10] 18:11 24:	21 42:18 56:4 63:19 64:19,21 129:9 167:13 168:5 concerning ^[1] 93:12 concerns ^[5] 101:19 139:4 148:11 168:5,8 concession ^[2] 83:19 94:15 conclusion ^[4] 15:18 17:11 88:19 155:19 concurrence ^[1] 175:3 condition ^[2] 46:15 47:7 conditions ^[6] 19:18 20:4,10 36:5 92:6 121:7 conduct ^[1] 6:9 confederate ^[1] 46:12 confer ^[9] 7:4 17:23 25:18 26:7 27:6 34:24 100:19 117:25 126:22 conferred ^[3] 26:7 57:8 152:17 conferring ^[7] 9:25 26:19 31:20 34:22 41:24 48:24 173:25 confers ^[6] 6:3 7:24 30:7,8 31:18 152:21 confine ^[1] 10:24 confined ^[2] 59:12 60:2 confirmation ^[1] 24:25 confiscate ^[1] 29:17 conflates ^[1] 91:1 conflation ^[1] 91:13 confronted ^[2] 112:16 127:8 congressional ^[7] 12:17 63:1,2 78:2 100:16 154:23,24 congress's ^[6] 74:18 88:25 103:8 134:6 135:25 173:16 conjunctive ^[1] 32:12 connecting ^[1] 156:19 connotation ^[4] 33:5 50:7 51:14 160:19 conquered ^[6] 130:3 133:23,24 151:20,22 152:23 consensus ^[2] 73:20 75:7 consent ^[1] 161:23	consequences ^[2] 5:10 102:22 consider ^[1] 139:11 considerable ^[1] 61:9 considering ^[1] 171:22 consistency ^[1] 57:15 consistent ^[3] 18:20 20:17 84:3 consistently ^[1] 17:16 consolidated ^[1] 4:5 constitution ^[6] 55:19 56:16 65:14 134:23 137:18 180:4 constitutional ^[12] 7:14,21 55:14 85:9 126:8 135:24 136:24 137:14,16 153:2 171:3 182:14 constitutionally ^[4] 32:3 100:1 105:4,6 constitutions ^[1] 137:12 constrain ^[6] 18:15,19 19:3 20:1,3,11 constrained ^[1] 146:22 constraining ^[1] 20:12 constraint ^[1] 61:11 constraints ^[4] 60:5,9,16,16 construction ^[1] 128:16 consult ^[1] 61:2 consumer ^[1] 112:16 consumers ^[1] 112:23 consumers' ^[2] 57:23 139:4 consumption ^[2] 39:5 187:12 contend ^[6] 9:15 10:4 18:7 65:5 68:6 70:5 contention ^[2] 90:9 143:20 contested ^[2] 27:15 156:9 context ^[55] 6:23 8:8 13:12,15,16 16:13,17 17:8 18:5 20:7 34:21 35:22 40:15 42:12 44:9 48:4,5,14,17,18 50:2 56:24 57:22 58:19 59:20 60:17 62:4 66:25 71:3,4,11 90:23 111:15,16 117:23
---	---	---	---

135:21,22,24 137:4,6,7 145:1,6 151:2 166:13 167: 7 170:1,3,4,8 171:19 175: 10 177:14,15 182:12 contexts [3] 6:22 45:10 75:18 contextually [1] 178:24 continual [1] 74:13 continue [3] 123:7,14 124: 13 contract [1] 38:3 contradiction [1] 35:17 control [15] 41:9,12 42:10 43:6 110:25 156:24 163:5 167:3 169:1,15,17,24 172: 17,24 173:17 controlling [2] 41:12 167: 15 controls [1] 100:10 controversial [1] 156:7 conversation [1] 95:19 conveyed [1] 99:11 convince [1] 91:16 core [10] 14:24 23:14 25:8 32:24 35:9 37:5 87:1 102: 19,21 169:6 corporation [1] 38:11 correct [11] 22:10 34:10 53:8,21 54:12 89:12 105:4 129:23 171:4,7 180:11 correctly [4] 23:6 55:9 84: 1 91:7 cost [6] 38:8 110:18,24 138:23 148:8,21 costs [1] 163:15 cotton [4] 46:12,14 47:4 161:16 couldn't [4] 47:3,10 115: 15 183:1 counsel [21] 10:13 12:12 13:17 16:22 31:25 33:23 47:18 53:17 54:18 82:15, 20 83:10 85:8 97:4 102:17 119:12 159:5 161:24 179: 24 181:16 184:18 counsel's [1] 145:10 counterexample [1] 74:	17 countries [9] 5:8 40:3 90: 12,13,21 125:7 149:12 184: 6 187:23 country [19] 4:17,25 34:13 46:17 90:9 91:1 98:1 112:2, 6 121:6 159:24 164:22,24 168:20 169:1 176:25 177: 23,23,24 country-killing [1] 4:21 country's [1] 31:23 couple [3] 47:25 72:6 166: 10 course [26] 25:3 27:17 30: 6 35:12 36:12 37:2 46:20 50:19 57:6 58:1 60:8 61:7, 20 62:25 72:10 78:5 84:15 92:1,9 93:23 127:23 140: 21 145:12 150:23 185:12 188:3 court [91] 4:11 5:12 9:3,11 10:16 11:20 12:4,7,9 13:10 15:14,18 16:6 17:1,21 21: 24 23:21 25:24 28:6 32:16 36:6 44:2 47:5 48:1 50:15 55:25 56:9,18,25 57:17 58: 25 59:5 61:8 62:4 66:22 67: 23 70:9,15,21 71:7 77:15, 19,21,22 83:13,22 84:1,8 89:18,19 95:25 96:5,23 97: 9 102:15 106:23 107:25 108:13 112:15,20 114:18 122:7,8 123:3,9,10 129:4,5, 5 130:6 131:22 141:12,20 142:24 143:1,11,13,17 145: 25 146:20 154:8,18 155:1 158:10,23 159:10 165:22 171:12 181:5 186:2 187:22 court-martial [1] 70:20 courts [5] 69:18 96:8 122: 6 123:12 124:15 court's [5] 6:12 93:23 94:1 99:13 160:3 cover [3] 29:12 114:20 148: 8 covering [1] 10:23 covid [2] 73:16 74:18	crafted [4] 58:20 60:19 63: 4 64:12 create [1] 61:23 created [2] 4:17 163:22 creates [2] 163:1 168:10 creation [1] 187:12 criminal [2] 79:4 181:6 crises [2] 7:6 95:8 crisis [6] 4:18 61:22 69:13 79:7 178:22 187:15 critical [1] 188:4 crowded [1] 110:12 crucial [2] 30:9 188:7 crucially [1] 29:20 curious [1] 138:3 current [2] 49:9 142:6 curtiss-wright [6] 9:10 48:9,10,11 56:9 57:18 cut [1] 71:14 cuts [4] 102:2 113:14 127: 6 132:4 D d.c [3] 2:3,5 17:13 daggers [1] 40:10 dalton [1] 96:20 dames [16] 5:11 7:16 10: 14,16 11:4,8,8,11,16 48:5, 6 114:7 127:9 147:8 158:9 187:22 danger [1] 163:2 dawn [1] 57:7 day [1] 145:23 daylight [3] 84:5,7,10 days [6] 101:1 109:3 112:4, 5 127:15 132:20 deal [14] 5:19 69:4 114:1 132:19 144:11 168:18 170: 19,23,24 172:9 178:6 183: 20,22 188:2 dealing [7] 56:2 62:21 64: 11 65:9 126:14 132:18 153: 16 dealings [1] 37:3 deals [1] 61:14 dealt [1] 58:1 death [1] 70:20	debates [1] 9:7 decades [1] 159:19 decide [3] 83:1 96:24 163: 23 decided [2] 122:6 152:2 decidendi [1] 48:11 decides [2] 66:5 180:23 deciding [1] 23:6 decision [11] 10:18 11:1,3 51:1 108:1,13 124:3 146: 22 147:10 154:22 155:2 decisions [1] 10:20 declaration [3] 60:23 61: 5 128:15 declare [5] 14:20 65:3 68: 5 99:5,8 declared [6] 4:20 14:4 73: 20 91:4 115:3 187:20 declares [1] 74:5 decreasing [1] 15:24 deep [3] 58:14 159:1 186: 16 deeply [1] 24:21 defeat [2] 146:7,9 defects [1] 158:17 defended [2] 22:24 23:1 defending [1] 125:22 defense [2] 90:10 92:10 defer [1] 114:16 deference [3] 58:24 61:9 65:19 deferential [6] 67:2,12,24 96:12,17,25 deficit [5] 24:4 38:17 39:3 79:15 187:10 deficits [4] 4:13 98:25 125: 23 132:19 definite [1] 28:19 definition [2] 81:10,12 definitively [2] 89:18,22 degree [2] 76:8 115:19 delays [1] 158:17 delegate [5] 17:15 63:24 71:21 98:11 102:5 delegated [7] 31:21 55:19 70:17 101:15,25 128:3 186: 4
---	---	--	--

delegates ^[1] 72:8 delegating ^[2] 27:2 146:15 delegation ^[25] 9:21 36:20 43:4 47:21,23 48:16 57:25 58:6,14 64:23 65:22 68:20 70:22,23 71:5,9,10 88:24 102:4 126:18,18 128:4 131:21 132:13 141:24 delegations ^[13] 27:25 28:2 36:21 50:9 57:1,4 72:17 128:10,12 140:23 186:1,17 188:23 deliberately ^[1] 49:21 deliberations ^[1] 158:21 delighted ^[1] 68:21 demonstrates ^[1] 74:19 deny ^[2] 154:16 156:7 department ^[3] 2:2 9:4 22:25 depend ^[1] 8:15 dependent ^[1] 115:5 depending ^[1] 179:18 depends ^[1] 176:15 deposit ^[1] 97:11 describe ^[6] 28:17,23,25 100:10,12 183:6 described ^[2] 7:16 87:8 designed ^[4] 18:10,19 178:17,21 despite ^[1] 53:25 destined ^[1] 158:22 detail ^[2] 48:8 100:25 deter ^[1] 116:4 determination ^[4] 61:8 92:1 96:13,22 determine ^[2] 143:5 155:17 determined ^[1] 4:12 developed ^[1] 7:15 devised ^[1] 7:22 diamond ^[1] 79:2 diamonds ^[1] 79:6 dicta ^[1] 48:10 dictionary ^[3] 81:10,11,12 difference ^[9] 80:17 82:22 85:18 86:13 115:19 140:10	143:14,15 148:14 different ^[45] 11:5 16:1 38:5 55:13 58:19 60:20 66:11 77:1 80:15 91:13 96:15 100:7 112:25 113:8 119:25 120:4,5 125:8,18 126:1,1 133:3 134:7 136:25 139:1 148:1 149:11 151:17 159:17 160:16 162:23 165:14,16 166:5,23 167:1 168:4,7,15 170:23 172:14 174:17 179:2 182:17,17 differentiating ^[1] 129:23 differently ^[6] 27:14 137:13 150:16 151:1,5 155:8 difficult ^[6] 45:10 106:16 109:14 132:23 154:13,17 difficulty ^[1] 164:1 dillin ^[4] 33:20 45:20,22 52:18 dime ^[1] 187:5 dire ^[1] 174:22 direct ^[9] 5:23 27:18 29:7 39:5 40:17 49:7 93:9 94:6 187:11 directly ^[7] 17:12 34:4 40:6 56:3 103:9 184:10 187:14 dirks ^[1] 40:11 disabled ^[1] 177:8 disagree ^[15] 11:22 17:5 18:23 19:1,2,10 44:4,8 73:13 74:16 103:12 116:11 146:5,8 181:18 disagreed ^[1] 107:10 disagreement ^[1] 181:20 discipline ^[2] 59:16 73:22 discovered ^[1] 158:18 discretion ^[1] 96:22 discriminates ^[1] 121:8 discuss ^[2] 140:20 170:12 discussed ^[4] 31:14 44:16 120:19 135:6 discussing ^[1] 160:21 discussion ^[3] 82:13 117:7 152:9 discussions ^[1] 63:17	dislocation ^[1] 154:19 dismiss ^[1] 102:22 dismissed ^[1] 34:1 displacement ^[1] 100:17 dispositive ^[1] 182:13 dispute ^[5] 11:11 96:13 110:5,8 126:25 disputed ^[2] 91:5,6 disputes ^[2] 61:21 78:15 disputing ^[2] 118:21 119:1 disregard ^[2] 63:22 110:4 dissent ^[4] 63:7 99:17 112:23,24 distinct ^[2] 14:1 76:24 distinction ^[12] 10:4 30:9 45:8 46:6 47:10 82:14 83:7,12 84:14,22 85:6 173:13 distinctions ^[1] 85:16 district ^[1] 123:10 doctrine ^[20] 6:2,7,15,21,25 13:5,11 14:6 34:2 36:7 48:2,13 55:12 56:10,20 57:19 59:19,20 97:19 150:13 doctrines ^[1] 97:16 doers ^[1] 184:10 doing ^[10] 17:3 41:2,6,7 66:8 109:5 116:10 131:17 134:2 149:11 dollars ^[3] 5:4 97:10 153:18 domain ^[6] 19:6 59:13,13 62:23 93:2,2 domestic ^[11] 48:4,12 56:10 71:11 103:14 129:10,14 130:4 158:2 176:18,19 domestically ^[2] 38:18 187:12 domestic-facing ^[1] 59:19 done ^[10] 56:23 68:10 69:8 77:4 80:7 89:1 98:13 176:1,5 183:2 donut ^[2] 165:2,15 donut-type ^[1] 185:21 double-counting ^[1] 108:8	doubt ^[4] 6:7 112:14 115:21 117:25 dovetail ^[1] 157:2 down ^[9] 10:23 66:3 72:24 97:20 162:2,18 164:22 165:5 173:21 drafted ^[1] 63:6 draw ^[2] 9:8 64:20 drawing ^[1] 173:13 drive ^[1] 5:8 drug ^[1] 183:20 due ^[2] 5:2 125:9 during ^[8] 21:15 33:16 69:24,25 93:8 177:11,12 181:3 duties ^[24] 15:20,23 16:5,7,18 31:1,7 43:23 47:15 60:4 64:4 66:2 83:24 87:8 93:25 97:18 100:25 101:4 104:20 117:23 120:24 144:17 145:20 169:12 duty ^[4] 50:23 65:22 101:2 158:23 dynamic ^[1] 42:13
E			
each ^[1] 121:18 earlier ^[12] 35:20 48:20 49:13 62:19 114:9 125:4 127:7 133:1 144:18 147:25 154:7 156:22 earth ^[1] 188:3 easily ^[1] 96:25 ebb ^[1] 99:3 economic ^[11] 4:14,23 5:9 52:22 78:11 79:24 82:18 84:12 98:20 154:19 157:9 economically ^[8] 43:9,10 88:13 136:5,6,11 139:15 140:6 economy ^[3] 62:12 97:24 115:5 edge ^[1] 112:15 effect ^[7] 38:20 40:6 82:18 112:3 163:25 164:14 180:18 effective ^[11] 10:10 39:1,9,			

14 57:5 103:6 119:21 187:4,6,15 188:13 effectiveness [1] 61:24 effects [1] 165:6 efforts [1] 179:14 egan [4] 9:3,4,9 104:6 eight [2] 56:8 115:17 either [3] 59:7 140:14 152:21 ejusdem [1] 86:11 elected [2] 74:14 183:2 eligible [1] 70:19 embargo [8] 100:4 101:25 115:12 143:16 157:14 162:22 173:14 179:9 embargoes [10] 99:15,21 100:3,20,21 101:16,21 120:4 153:18 158:4 embargoing [3] 119:20 166:8 172:5 embargo-like [1] 100:10 embassy [1] 79:9 embraced [1] 124:20 embraces [1] 5:22 emergencies [29] 4:21 5:20 7:7,19 9:14,24 21:7 34:25 48:23 58:22 60:18 61:16 63:11 73:15 78:20 79:12,12 80:6 89:1 93:3 104:15 113:19,19,21,25 157:8 175:5 187:20,25 emergency [62] 13:4,7,15 14:4 18:15 24:20 39:4 49:9 60:23 61:5,15,19 63:9 73:16,21 74:3,6,18 78:24 79:1,2,16 89:5 90:17 91:4,25 92:4 96:9,23 99:5 104:15 113:12,17,22 114:15 126:22,25 127:1,2,10,11,14 128:13,15,17 129:10 157:15 168:17 172:1,7,11 174:19,22,22 175:4 177:17,19 178:10,12,25 183:21 187:10 emphasize [2] 72:4 81:18 empirical [1] 38:12 empirically [1] 37:17 enact [1] 51:6	enacted [6] 20:13,22 41:5 49:20 51:18 175:16 enacting [2] 87:6 97:21 enactment [1] 33:15 enacts [1] 77:12 encompass [4] 80:23 106:6 117:15 143:22 encompasses [2] 16:15 80:21 end [3] 11:1 152:12 182:9 ended [1] 159:14 enemies [5] 22:23 49:6,19 150:21 152:24 enemy [7] 42:15,24 49:20 50:21 115:5 151:15,17 enforceable [1] 102:10 engaging [2] 47:7 163:7 enjoys [1] 6:10 enormous [1] 65:19 enough [3] 58:16 73:10 81:19 ensure [2] 168:22,25 entire [9] 30:14 57:9 97:23 109:6 118:18 126:4 134:1 166:8 186:5 entirely [2] 62:11 166:5 enunciated [1] 56:5 environmental [2] 158:3 185:8 envisioning [2] 157:17,18 episodic [1] 10:21 equally [1] 11:14 equitable [1] 154:11 equivalence [1] 47:15 equivalent [10] 12:24 13:3 43:10 44:22 46:16 52:14 88:14 101:11 139:15 140:5 equivalently [1] 87:9 equivalents [2] 6:1 84:13 especially [1] 87:4 esq [4] 3:3,6,9,12 esquire [1] 2:5 essential [1] 104:16 essentially [7] 18:22 43:9 49:23 87:3 161:13 186:4,5 established [2] 33:18 81:14	estimates [1] 38:12 et [4] 52:8 78:12 94:7 125:1 even [38] 13:4 30:22,23 61:6 62:2 70:23 72:13,13 98:18 104:24 106:23 108:8,15,16 115:23 117:18 122:11 127:10 128:11 130:6,6,13,15 134:4 144:19,20 145:15 151:2 160:14 161:12,21 164:2,8,12,12 180:24 182:25 184:9 everybody [2] 134:24 151:13 everyone [5] 28:9 31:15 51:17 153:25 154:2 everything [3] 13:25 61:16 145:19 everything's [1] 55:12 evidence [4] 41:17 78:2 106:21 108:18 evokes [1] 15:2 evoking [2] 33:17 49:21 exact [2] 132:17 179:20 exacted [1] 82:16 exaction [4] 47:5 84:20 160:14 169:14 exactions [7] 80:23 83:24 100:12 155:14 164:3 169:24 171:12 exactly [27] 6:14 8:1,17 9:7 12:19 45:24 53:6 80:13 93:7 98:11 113:3 124:1 149:22 150:5 153:3 157:6 163:15 167:4,8 168:22 172:15,21,25 173:5 180:12,20 181:12 example [36] 9:3 10:1 11:15 23:4,22 26:13,14 36:9 40:9 47:5 57:8 59:4 70:12 74:3 77:6,7,9,11 79:2 91:6,15 92:18 100:11 102:2 107:16 109:7 110:19 119:18 134:4 135:18 159:23 162:21 167:21 183:19 187:25 188:1 examples [3] 54:14 69:23 150:17	excellent [1] 130:25 except [3] 29:15 158:19 169:7 excessive [2] 24:22 63:10 exchanges [1] 159:12 exclusive [4] 21:25 24:16 77:16 141:11 exclusively [2] 104:3 128:9 excuse [1] 21:21 executive [20] 7:18 31:21 37:11 53:5 61:20 63:9 74:13 90:16 102:21 112:1 114:22 125:19,21 132:18 138:22 143:6 157:25 158:19 174:10 180:10 executives [1] 122:15 exercise [9] 21:3 23:1 24:22 25:9 35:4 143:2 165:24 188:15,16 exercised [1] 10:5 exigencies [3] 59:8,9,11 existential [2] 61:19,21 exists [2] 131:25 133:10 expand [2] 48:24 119:3 expanded [1] 50:1 expansion [1] 170:5 expect [4] 7:4,9 8:5 18:3 expected [2] 10:18 94:3 expedited [1] 121:16 expert [1] 178:19 explain [4] 34:3 64:19 90:13 97:16 explained [2] 41:4 162:24 explains [1] 152:1 explicit [1] 17:16 explicitly [3] 34:22 82:6 98:13 exploding [1] 4:13 export [1] 161:14 exportation [3] 149:16,24 161:16 exportations [4] 32:1,3,12,14 exported [1] 150:1 expose [1] 5:6 expounding [1] 137:16
---	---	--	--

expressed ^[1] 135:13 expressly ^[4] 100:19,25 101:10 145:17 extends ^[1] 155:13 extensive ^[2] 86:25 152:4 extent ^[5] 51:1 61:3 104:17 147:3 156:15 external ^[1] 48:18 extinguishment ^[1] 158:11 extra ^[1] 163:16 extraordinary ^[5] 62:9 69:5 90:4 95:23 114:24 extreme ^[2] 178:5,14 extremely ^[2] 50:9 169:5 eyelash ^[1] 91:19 eyes ^[2] 63:7,8 F face ^[3] 14:15 112:11 143:8 faced ^[1] 95:7 fact ^[26] 7:10 10:8 30:23 36:10 42:21 44:3 53:25 55:22 58:7 61:13 70:8 74:25 78:20 107:7 117:8 121:6 126:25 129:9 131:18 142:9 143:4 153:15 155:24 163:22 171:20 172:23 factor ^[1] 155:16 factors ^[2] 146:25 171:20 facts ^[2] 115:1 147:10 failure ^[1] 5:9 fair ^[4] 68:13 73:10 118:10 179:22 faith ^[1] 62:6 falls ^[3] 96:20 114:13 133:13 far ^[10] 5:7 9:7 39:1,8 79:22 81:17 134:5 160:1 162:25 164:5 fascinated ^[1] 128:24 fcc ^[1] 112:16 fear ^[2] 139:5 167:11 feared ^[1] 100:2 features ^[1] 177:8 federal ^[11] 2:4 3:4,13 4:9 24:14,15 124:1,3 166:19,	21 184:21 federalist ^[2] 59:6 104:2 fee ^[25] 45:6,9,12 46:2 82:13,23 86:16 110:6,15 111:2 138:23 143:1 147:18,23, 24 148:1,5,7,14,17,21 160:2 163:18 164:9 186:9 fees ^[26] 46:6 52:19,21 83:23,24 84:23 85:13 88:13 110:17 140:17 143:25 148:2,4 149:21 159:13,18,20 161:14,14,15 163:11 169:11,12 181:21 185:6,8 fentanyl ^[3] 4:16 61:22 188:6 few ^[7] 6:13 10:19 49:2 63:15 77:25 117:16 123:20 fewer ^[1] 58:2 figure ^[3] 105:20,24,25 figuring ^[2] 23:5 76:15 filed ^[1] 124:18 finally ^[2] 11:2 103:16 financial ^[1] 160:18 financially ^[1] 4:25 financing ^[1] 79:5 find ^[5] 30:14 35:2 78:24 140:16 143:18 findings ^[2] 101:3 146:25 finds ^[1] 121:6 fine ^[4] 66:4 99:17 111:5 139:11 finer ^[1] 99:6 finished ^[1] 54:25 first ^[26] 6:20 7:2 8:14 11:20 17:6 37:13 43:1 48:1 58:15 86:24 99:20,22,25 104:5 106:21 117:18 120:3 123:3 131:12 144:8 145:8 146:21 153:13 158:23 187:9 188:5 fish ^[1] 40:14 fit ^[5] 6:25 56:6 58:10 64:1,4 fits ^[2] 91:22 92:17 five ^[4] 24:9 106:20 153:21 159:19 fix ^[1] 50:22	fixing ^[1] 4:24 flavors ^[1] 138:22 flip ^[1] 31:3 floor ^[1] 59:2 floors ^[1] 99:6 focus ^[1] 42:17 focused ^[2] 92:22 117:3 folks ^[1] 122:7 follow ^[5] 39:17 72:1 88:22 137:20 182:8 following ^[1] 63:16 follows ^[1] 81:7 footnote ^[2] 48:7 109:1 force ^[9] 48:3,13 56:11 57:22 66:24 127:17,19 159:19 161:8 forces ^[1] 128:18 forcing ^[1] 178:9 ford ^[1] 142:22 ford's ^[1] 144:4 foreign ^[88] 5:20 6:6,9,22 7:6 8:20 9:6,12,13,13 10:2, 6 13:3,11,15,18,22 14:13, 25 18:4 21:6 27:25 28:2 36:22,25 37:3,7,15,16 38:6,6, 9,11 41:10 42:11 43:5 46:11 48:4,14 50:11 55:18 56:4,12,24 57:5 58:23 59:14 62:4,13 63:19 64:1,21 65:3, 25 66:1,16 71:2 75:13,20, 23 76:1,4,7,9 79:25 90:21 93:3 94:1 102:20 103:10, 14,25 114:5 140:21 141:1 150:12 156:25 157:8,8 159:24 162:19 165:23 166:6 186:14,19 187:24 188:17, 24 foreign-arising ^[4] 7:7 9:14 48:23 58:22 foreigners ^[2] 19:7 62:22 foreign-facing ^[12] 13:21 14:14,21 62:11 75:16 102:20,25 133:15,17 178:21 186:13,15 foremost ^[1] 99:22 foresee ^[1] 59:7 forever ^[1] 116:19	forfeited ^[2] 124:17,17 forget ^[1] 135:7 forgetting ^[1] 180:3 forgiveable ^[1] 145:13 forgiveness ^[2] 14:5,8 form ^[5] 16:21 43:22 81:16 162:21 185:10 formal ^[3] 60:22 83:7 85:6 former ^[1] 181:6 forms ^[1] 185:5 formulation ^[1] 17:23 forth ^[10] 10:12 17:18 29:9 33:20,21 40:18 61:2 91:23 150:10 185:9 forward ^[1] 108:25 forward-facing ^[1] 23:13 fossil ^[1] 14:15 found ^[2] 126:5 129:2 founders ^[6] 31:14 35:11 97:12 100:2 104:1,22 founders' ^[1] 139:3 founding ^[11] 36:23 50:12 78:6 81:19,20 101:9,20 144:16 156:10 182:18 185:25 founding-era ^[1] 28:6 four ^[2] 107:17,17 framers ^[2] 168:5 169:5 framework ^[1] 157:13 france ^[1] 90:11 frankly ^[2] 12:2 95:11 frayed ^[1] 71:23 free ^[2] 125:15 158:19 freeze ^[5] 41:9 42:10,24 156:25 167:3 freezing ^[1] 41:12 freighted ^[1] 82:10 french ^[1] 133:4 friend ^[8] 80:16 101:24 102:8 103:16 104:6 125:19 137:1 162:23 friends ^[1] 55:5 friend's ^[2] 99:7 158:25 front ^[2] 6:19 96:18 frontline ^[1] 67:22 front-line ^[1] 96:19 fuel ^[1] 14:16
---	---	---	--

fully ^[1] 77:15 fun ^[1] 160:15 functionally ^[1] 148:15 functioned ^[1] 169:12 functions ^[1] 45:13 fundamental ^[2] 180:3 187:17 fundamentally ^[6] 27:23 51:17 160:12,15 162:22 165:14 further ^[7] 4:15 26:25 47: 19 119:13 140:19 182:2 186:11 future ^[1] 50:18	81:25 104:8 113:23 133:13 139:25 141:10 145:24 156: 1 160:19 161:25 gives ^[12] 24:24 53:1 55:23 60:13 72:11 82:10 89:9 114:4 118:17 135:18 168: 21 181:8 giving ^[9] 35:14 43:15 45: 18 49:12 92:25 156:18 157: 9 172:16 187:1 global ^[4] 14:4,10 51:21 90:22 goal ^[1] 175:12 goals ^[2] 10:12 173:2 goods ^[6] 37:16 46:17 144: 23 149:4 157:23 184:1 gorsuch ^[88] 63:14,15 64: 3,8,14,18,25 65:7,11,24 66: 14 67:6,13,18 68:1,8,15,21 69:9,15,19 70:7 71:13,19, 25 72:4,23 73:2,7,10,23 74: 9,21,24 75:4,9 76:3,11 90: 1 95:19 98:3 99:7 103:17 116:18,21,23 117:17 118:7, 20 119:6,9 126:13 134:9, 15,16,20 135:14,16 136:1, 10,14,17 137:9,19,22,24 138:12,14 139:6,20,22 140: 2,8,13,18 141:5,15 142:1 144:18 148:13 150:10 159: 13 160:6,8 182:4,6,7 185: 25 gorsuch's ^[2] 88:22 112: 23 got ^[18] 46:13,18 51:15 62: 8 99:25 102:6 108:6 114: 16 134:10 135:4 136:4,10 142:24 146:1 154:6 179:2 187:1 188:5 gotten ^[3] 14:5,8 177:2 governing ^[1] 16:3 government ^[33] 59:14 85:12 98:5 99:4 107:15,23 108:19,22 110:19 113:1 116:10 122:4,8 123:7,21 124:24 129:19 138:24 139: 5 145:7,16 148:21,24 149:	11 151:23 153:9 158:8,19 163:6 166:20 168:1 172:12 174:9 government's ^[9] 118:17 120:18 121:1 122:21 124: 20 130:7 133:19 153:20 165:1 gradual ^[1] 74:12 grammatical ^[2] 29:10 31: 10 grant ^[10] 5:19 8:5 29:12 46:3 58:21 61:8 83:17 105: 13 137:8 159:25 granted ^[2] 59:11 62:5 granting ^[1] 137:3 grants ^[2] 5:13 89:22 granularity ^[1] 94:4 greater ^[2] 81:5 167:22 ground ^[2] 22:25 124:1 guardrail ^[1] 99:1 guess ^[7] 18:6 42:18 92:19 93:11,18 132:3 169:20 guidance ^[1] 186:11 guidelines ^[1] 10:23 gulf ^[1] 25:12 gutman ^[57] 2:7 3:9 159:6, 7,9 160:7,10 162:4,7,20 163:12,19,24 164:10 165:8, 13 166:10 167:4,8,24 168: 9,13,16 169:21,23 170:22 171:4,7,17 172:15,21,25 173:5,19,22 174:13,20,23 175:1,13 176:7,10,14,23 178:3 179:4,16,20,23 180: 12,20 181:12,14,19 183:8, 22 184:7 guys ^[1] 154:21	109:13 happen ^[1] 123:5 happened ^[2] 130:11,12 happening ^[1] 42:14 happens ^[2] 73:23 184:4 harbor ^[1] 154:7 hard ^[8] 46:8 78:23 89:10, 14,23 112:18 113:6 169:18 harder ^[1] 64:7 harmonizes ^[1] 177:11 hartranft ^[1] 117:23 hawaii ^[1] 96:19 head ^[3] 126:13 130:19,22 health ^[1] 4:17 hear ^[6] 4:3 68:22 104:5 126:6 131:11 169:16 heard ^[5] 101:23 102:8 105: 21 114:11 117:12 hearings ^[1] 147:2 heavily ^[1] 115:5 heck ^[2] 62:20 126:12 height ^[1] 130:7 held ^[12] 5:12 11:16 12:7,9 16:9 25:21,24 56:9 70:16 72:21 80:22 119:18 help ^[4] 45:3,4 85:20 178: 18 helpful ^[1] 50:17 helps ^[1] 108:18 hence ^[1] 82:18 heralded ^[1] 36:19 higher ^[1] 51:11 highly ^[1] 67:24 historical ^[17] 25:5 27:23, 24 33:15 35:17,19 51:15 74:17 78:3 81:25 82:2,9 86: 25 87:5 150:17 186:17 188: 1 historically ^[5] 35:8 56:25 95:16 185:13 188:23 history ^[35] 17:2,9 19:12 25:17 26:2 27:2,2 33:21 42: 3,8 49:3,15 54:1 101:22 109:11 110:1 128:7 134:3 139:19 140:12 143:3 145: 22 146:1,3,7 152:5 155:12, 17 156:4,13 159:18 160:21
G gain ^[1] 119:21 garamendi ^[2] 9:10 104:6 gas-powered ^[1] 69:3 gather ^[1] 174:5 gave ^[7] 8:25 97:12 98:10 102:3 104:4 113:4 127:18 gen ^[5] 2:2 3:3,12 4:8 184: 20 generally ^[4] 9:5 41:14 50: 11 144:11 generate ^[1] 13:1 generated ^[1] 180:7 generating ^[2] 12:20 40:5 generis ^[1] 86:11 george ^[2] 101:24 143:4 gets ^[6] 38:12 111:19 128: 2 134:23 151:23 188:10 getting ^[4] 93:18 167:6,9 174:17 gibbons ^[8] 25:10 26:15, 21 28:4 32:17 51:16 75:21 82:1 gist ^[1] 63:21 give ^[27] 18:3 28:22 42:9, 22 43:15 47:22 68:1 72:15 80:19 83:4 104:23,23 106: 17 108:21 116:24 122:25 123:24 124:4 126:16 156: 23 157:14 158:24 165:4 171:10,10 177:18 178:1 given ^[13] 11:24 56:15 58:7	H half ^[1] 61:17 hamilton ^[5] 33:20 45:21 52:17 59:6 69:24 hammons ^[1] 155:3 hampton ^[5] 55:23,24 57: 3,16 141:13 hand ^[2] 66:7 68:4 handed ^[3] 74:11 97:22		

171:14 179:14 184:8 hits ^[1] 108:6 hoax ^[2] 69:13 99:9 hold ^[2] 29:17 74:23 holding ^[2] 48:11 79:10 hole ^[2] 165:2,15 hollowed-out ^[2] 39:7 187:13 hollowing ^[1] 92:6 honor ^[4] 101:17 110:16 119:24 131:1 hope ^[1] 184:2 host ^[2] 100:17 185:4 hostage ^[4] 79:7,10 119:19,23 hostile ^[1] 46:10 hosts ^[1] 121:9 hour ^[1] 129:17 house ^[3] 41:5,12 155:25 houses ^[1] 180:10 however ^[3] 11:12 75:21 88:11 huge ^[3] 99:5 170:23 183:8 hughes ^[1] 166:2 humanitarian ^[1] 159:25 hundred ^[3] 99:25 123:16 151:4 hundreds ^[3] 4:18 39:24 98:16 hung ^[1] 85:19 hurdles ^[1] 62:7 hypo ^[1] 95:20 hypothetical ^[5] 71:1 96:3 111:11 118:4 120:8 i i.e ^[4] 83:22,24 143:23,24 idea ^[9] 58:11 69:20 103:24 109:12 113:2 132:21 158:10 169:10 172:12 identical ^[1] 136:11 identified ^[4] 36:6 80:7 91:7 166:20 identify ^[3] 27:5,9 70:18 ieepa ^[84] 5:2,25 6:3,7 8:2 11:5 12:3 15:1 18:8,9,16 19:15 20:24 23:18 24:19	27:16 28:16 34:5 36:2,17 45:15 50:6 51:7,18 52:2,15 54:1,3 58:19 63:6 73:15 74:5 77:4,13 78:14,17 85:21 89:10,11 91:21 97:21 98:9,14,19 102:9 114:3,19 115:18 120:18 122:10,22,23 125:9 126:3 131:16,17,17 132:16 133:4 134:12 136:25 137:2 145:8 147:7,16,22 148:1 150:13 151:14,17 152:19 155:20 156:1,5,7 158:6 159:19 163:8 164:5,11 176:1,3,6 184:9 ieepa's ^[4] 5:12,17 36:11 98:21 ii ^[18] 6:11,24 8:7,16,22,24 9:19 70:14 103:16,17 127:25 133:18,20 151:21 152:10 160:25 161:21 188:25 iii's ^[1] 143:5 illegal ^[1] 97:17 illustrate ^[1] 43:19 illustrates ^[1] 61:24 imagine ^[5] 41:15 91:14,14 144:21 177:20 immediate ^[1] 125:14 immediately ^[2] 36:12 78:3 imminent ^[2] 115:2,4 impact ^[1] 92:5 impermissible ^[2] 148:5 169:10 implausible ^[1] 97:21 implement ^[2] 124:3 138:9 implicate ^[3] 139:2,3 148:11 implicated ^[4] 150:14,19,22 151:3 implicates ^[1] 103:9 implication ^[2] 109:12 113:4 implications ^[3] 103:25 150:1,11 import ^[5] 12:25 32:13 46:4 93:24 142:7	importance ^[1] 132:25 important ^[13] 10:3 23:6 38:22 49:3 80:13 82:25 83:12 84:2 114:9 146:11 147:15 169:5 170:1 importantly ^[3] 20:23 36:4 81:17 importation ^[58] 5:22,24 15:1 20:24 22:3 23:11,16 25:1,18,21 26:3 27:11 30:19 31:12,16 32:8 33:17 35:8,15,22 39:13,22 40:4 42:1 49:22 50:4 51:13,19 53:4,23 71:24 76:16 77:8,13 78:7 80:20 81:18,22 82:9 84:22 86:3,24 88:8 105:20 106:5 107:3 108:4 110:3 117:4,6 144:22 152:14 157:12,16 161:2 170:12 185:1,19 importations ^[4] 32:1,9,12,15 imported ^[4] 37:17 54:2 101:2 149:5 importer ^[3] 38:2,7,8 importers ^[1] 144:22 importing ^[1] 184:1 imports ^[33] 16:10 25:6 26:13 27:12,14 31:19 32:24 35:11 39:25 43:6 44:16 46:10 75:17 78:9,16 80:15,22 82:5,16 94:24 142:21,23 143:11,22 144:4 161:3 164:24 165:23 170:3,9 176:2,5 185:14 impose ^[53] 8:20 14:23 15:20 17:18 21:9 22:9 23:12,19 34:12 35:4,15,24 43:8,23 69:2 77:8 78:14 87:23 93:13,14,21 94:5 95:2 98:19,22 99:5 100:20 101:4,19 105:14 108:9 110:15 113:8 115:8,14 119:21 129:1 147:17 152:11 155:21 161:3,8,22 164:23 166:17 167:13 171:11 174:3,4,4 181:1,10 183:17	imposed ^[18] 24:1 36:14 37:21 59:2,4 75:25 90:7 91:17 97:14 112:2 113:12 142:22 161:15 172:5 174:6 181:3 183:23 184:1 imposes ^[2] 97:18 99:1 imposing ^[10] 15:8 111:25 125:15 147:17 169:18 170:18,20 176:18 184:9 188:9 imposition ^[5] 24:8 37:4 110:6 111:2 155:14 impossible ^[1] 59:7 incentive ^[1] 187:21 incidental ^[3] 10:9 12:22 38:20 incidents ^[1] 82:18 include ^[12] 24:17 26:3 40:5 42:21 51:20 77:18,23 84:19 98:16 110:5 111:2 185:11 included ^[3] 129:6 134:25 162:14 includes ^[11] 16:10 26:23 28:9 30:15,18 32:8 42:1 81:6 83:14 94:16 158:11 including ^[7] 5:4 9:14 10:1 84:23 121:7 132:15 185:5 inconsistent ^[1] 18:17 inconveniences ^[1] 158:17 increases ^[1] 97:15 increasing ^[1] 15:25 incredible ^[1] 149:10 indeed ^[2] 101:22 102:11 independent ^[1] 55:13 india ^[2] 178:16,17 indian ^[7] 57:9 140:22 141:17 186:1,5,14,19 indians ^[2] 57:11 186:8 indicated ^[1] 95:21 indirect ^[1] 184:4 indirectly ^[1] 184:5 individuals ^[1] 163:6 induce ^[1] 76:1 industrial ^[3] 24:5 90:11 92:10
--	---	---	---

inference ^[3] 20:25 29:10 31:13 inform ^[2] 72:16 140:25 informed ^[1] 104:19 inherent ^[29] 6:10,23 8:7, 15 9:12,16,19,23 33:17 48: 22 49:23 63:20 64:22 65: 21,25 66:3 69:20,22 70:3, 14,16 71:7,15 133:7 151: 22 152:10 153:2 160:25 188:25 inherently ^[1] 50:2 initial ^[2] 22:16 112:10 initially ^[3] 22:9 72:20 140: 24 initiated ^[1] 125:25 injunction ^[1] 123:23 inputs ^[1] 92:11 instance ^[1] 26:6 instances ^[1] 128:25 instead ^[6] 39:5 59:11 93: 16 103:13 111:24 187:11 institutions ^[1] 158:21 instructions ^[10] 52:5 86: 2,6,10 87:18,20,21 88:1 160:11,16 instruments ^[6] 46:24,25 53:11 87:16 185:2,16 intelligible ^[8] 56:20 57: 16 66:18 67:3,3 102:7 141: 20,23 intend ^[1] 21:1 intended ^[6] 15:7,12 18: 10 129:14 155:19 171:15 intending ^[1] 163:9 intends ^[1] 54:9 intensive ^[1] 60:24 intent ^[2] 19:25 20:14 intention ^[1] 29:11 interest ^[6] 19:8 41:10 42: 11 59:15 62:22 157:1 interesting ^[1] 126:5 intermediate ^[5] 25:24 29: 8 107:25 108:13 129:4 internal ^[1] 48:17 international ^[6] 7:6 9:24 95:8 123:9 168:17 184:12	internationally ^[1] 60:18 interpret ^[5] 18:18 20:17 60:8 84:19 118:24 interpretation ^[12] 5:16 7: 3 8:4 12:11 17:4 25:4 69: 18 89:7 120:18 133:11 164: 20 171:6 interpreted ^[8] 23:16,18 27:10 49:10 77:16,23 151: 1,5 interpreting ^[4] 49:4,9 89: 22 164:2 interpretive ^[4] 11:15 27: 1 118:9 184:25 interprets ^[1] 89:18 interrupt ^[1] 8:11 interrupted ^[1] 187:2 intervening ^[1] 80:6 introductory ^[1] 53:10 intuition ^[1] 167:20 investigate ^[5] 29:9 93:8 94:6 100:9 177:11 investigation ^[2] 93:9 177:13 invite ^[1] 183:14 invocation ^[2] 22:18 122: 22 invoke ^[1] 36:11 invoked ^[2] 95:10,11 invoking ^[4] 22:19,22,24 122:16 involve ^[2] 75:19 164:4 involved ^[8] 10:24 41:11 42:11 140:24 154:8 157:1 160:17 173:18 involves ^[1] 143:2 involving ^[1] 140:16 iranian ^[1] 79:7 irrelevant ^[1] 86:19 isn't ^[14] 64:8 66:18 82:21 83:11 116:8 126:17,24 127: 2 139:22 145:19 154:19 168:2 183:4,6 issue ^[9] 11:4,6 16:2 57:25 114:17 120:25 121:5 122:3 158:12 issues ^[2] 75:24 76:10	issuing ^[1] 10:17 itc ^[1] 101:3 it'd ^[1] 105:6 itself ^[3] 47:5 158:9 175:20 J j.w ^[5] 55:22,24 57:3,16 141: 13 jackson ^[71] 7:11 16:22 17: 19,25 18:25 19:9,12,16,21, 24 20:6,9 21:4,8,12,14,20 22:2,4,8,13 40:22,25 42:2 43:17,20 44:4,8,14 67:16 92:13,14 94:2,11,25 95:13, 17 96:5,14 97:2 104:12,14, 21 113:16 127:7 151:6 155: 6,7 156:12,15 157:11 158: 14,15 159:3 163:4 164:16 166:24 167:5 170:16,25 171:2,5,8,25 172:19,22 173:1 183:13,14 184:3,15 jackson's ^[3] 12:6 48:7 175:3 january ^[1] 73:14 john ^[7] 2:2 3:3,12 4:8 155: 3 166:1 184:20 joined ^[1] 112:24 joint ^[2] 73:4 74:7 joseph ^[1] 166:1 judge ^[1] 66:15 judicial ^[6] 5:15 12:10 62: 3 96:12,16,17 judicially ^[1] 102:10 july ^[1] 186:2 junk ^[3] 99:10 118:18 132: 22 junking ^[1] 125:10 jurisdiction ^[3] 21:25 24: 16 77:16 justices ^[2] 56:17 98:3 justice's ^[1] 27:4 justification ^[2] 34:11 124:11 justify ^[1] 34:6 justifying ^[1] 129:7 K kagan ^[31] 8:11 29:14 30:	10,21 54:21,25 55:2,3,6 56: 13 57:20,23 59:22,25 61:4, 13 63:12 92:22,24 131:12, 13 132:3,11 133:6 134:13 167:17,19 168:7,11,14 182: 3 kagan's ^[1] 100:13 kavanaugh ^[64] 23:3,23 25:25 33:24 56:22 76:14, 15 78:10,22 79:19 80:11 81:1,4,7 82:12 83:4,8,21 84:2,9 85:1 95:7 104:25 105:10,16,19 106:20,25 107:12,16,22 109:15,17,20 116:22 125:3 130:20 142:3, 4,16 144:7,9 145:3 146:4 147:11 155:8 162:11 164: 17 165:9,18 166:25 167:16, 18 171:1,23 173:7,10 177: 14 178:4 179:13,19,22,25 183:11 kavanaugh's ^[4] 134:4 157:20 167:21 169:9 keep ^[5] 51:11 92:3 145:4 146:9 171:23 keeping ^[1] 85:16 key ^[3] 86:3 92:11 182:12 keyed ^[1] 17:1 kick ^[1] 85:9 kind ^[43] 7:2 8:24 18:4 22: 22 24:2 28:8 31:2 36:18 37: 9 42:23 44:24 61:7 70:25 76:18,22,25 77:19 81:16 82:3 85:18 90:8 96:13 106: 10,16 116:24 126:17 135:9, 9 140:11 142:14 157:14 163:14 165:16 166:23 167: 1 169:8 170:23 172:4,14 173:3 178:8 181:10 183:15 kindle ^[1] 104:15 kinds ^[6] 60:4 92:2 110:21 138:21 171:12 179:10 knives ^[1] 40:10 knowledge ^[1] 148:3 knows ^[4] 28:9 31:15 98: 11 124:13
---	---	---	--

L			
labor ^[1] 158:3 lack ^[1] 90:19 lacks ^[2] 98:17 115:10 laid ^[1] 86:23 language ^[50] 5:13 11:22 12:3 16:4 19:20 20:1,22,23 21:9 23:17 26:7 31:6,7 36: 15 41:11 45:19 46:23 49:5 50:4 53:10,10 77:13 78:1 80:18 86:17,19,22 101:4 106:14 109:24 110:3 111: 21 120:22 134:21 135:5,7 136:2,18 138:6 143:19,19 150:20,23,25 151:8,14,20 152:18 155:11 184:25 lapsed ^[5] 121:10,14,21,22, 23 lapsing ^[1] 61:1 large ^[6] 57:4 98:25 103:12, 21 125:23 132:18 largest ^[1] 97:15 last ^[10] 57:24 59:22,25 60: 7 61:23 82:12 92:15 140: 18 158:23 188:1 late ^[2] 124:6,22 later ^[7] 24:18 36:17 56:8 77:25 123:25 124:4 132:21 latitude ^[2] 5:15 12:10 laughter ^[10] 54:24 55:1 68:17 126:11 130:17,24 131:4 134:19 142:15 165: 17 law ^[7] 72:11 81:9,11 153:5 154:3 158:20,20 lawful ^[1] 184:1 laws ^[3] 15:11 98:14 99:11 lawyer ^[1] 145:11 lay ^[2] 10:22 64:3 layer ^[2] 9:18 53:15 layered ^[1] 9:20 layers ^[1] 9:17 lead ^[3] 25:4 26:1,1 leading ^[1] 25:3 learning ^[2] 4:4 100:23 least ^[18] 5:17 7:1 9:16 37:	9 64:24 67:17 76:8 80:7 82: 22 94:16 96:11 103:18 105: 24 111:16 131:21 141:19 159:16 166:4 leave ^[1] 136:15 leaves ^[1] 165:1 leeway ^[1] 18:4 left ^[2] 73:4,5 legacy ^[1] 126:8 legal ^[3] 95:25 96:13 137: 17 legally ^[1] 84:13 legislating ^[1] 66:6 legislation ^[5] 20:14 73: 24 74:2 98:7 157:5 legislative ^[25] 17:2,9 37: 11 42:3,7 70:24 72:21 73:4 102:14 126:19 131:19,24 132:6,8,24 145:22 146:1,2, 7 152:5 155:12,17 156:4, 13 171:13 legislature ^[2] 167:10 180: 10 length ^[1] 34:14 lens ^[2] 12:5 118:9 less ^[5] 64:23 66:20,21,24 162:17 lesser ^[5] 77:20 81:6 162: 13,13 167:22 letter ^[1] 82:2 letting ^[1] 172:8 level ^[3] 51:11 58:24 94:3 leverage ^[5] 24:12 119:21 162:18 184:6 187:21 leveraging ^[1] 119:22 license ^[48] 45:5,12,17,17 46:1,2,13 47:4,11 52:2,7, 10,15,18,21,25,25 53:19 82: 13,23 83:23,24 85:19,22 118:5 138:10,20,23 140:2, 4,5,9,17 143:1,24 147:14, 18,25 148:2,5 149:5,13,15, 24 159:13,17 169:11 186:8 licenses ^[50] 45:16 46:6, 25 52:5,12,18 53:7,11 57: 10 84:23 86:2,6,10,14 87: 16,19,21 88:1,12 94:18 95:	4 117:5,9,11,13 118:21 119:2 136:4 138:14,21 139: 13,14,16 140:12,16,24 148: 2,4 149:9 159:13,17,20,22, 25 160:11,17 185:2,5,6,16 licensing ^[22] 21:15 45:6, 9 46:22 52:11,14 85:13,13 86:16 88:3,4 136:22 147: 23 148:1,14,17,20 149:2,21 150:3 161:14 181:21 licensing-like ^[1] 87:7 lifetime ^[1] 98:21 lifetimes ^[1] 97:15 lifted ^[1] 24:10 likely ^[2] 69:7,8 limit ^[10] 12:25 18:10 59:2 99:2 102:9,10,11 155:1 175:22 181:9 limitation ^[1] 59:21 limitations ^[12] 48:16 51: 8 54:7 62:17,19 64:13 65: 10 104:17 105:9 121:17 157:23 162:5 limited ^[12] 62:2 66:24 67: 11,14 108:23 119:4 127:15 134:5 147:3,10,10 158:12 limits ^[16] 60:14 98:14,17 100:20 101:1 127:12 128: 14,21 132:15 134:6 146:17, 21 169:18 175:21 179:10, 11 lincoln ^[5] 21:22 35:23 46: 9 95:4 129:2 line ^[7] 27:19 38:3 48:19 49: 8 64:20 96:18 179:3 lines ^[1] 57:2 link ^[1] 81:15 liquidate ^[1] 29:18 list ^[6] 40:10,12,16 65:10 87:2 161:25 listed ^[1] 175:25 listen ^[2] 53:18 88:24 literally ^[1] 127:13 litigating ^[1] 22:14 litigation ^[1] 22:24 little ^[15] 10:16,21 18:17 34: 3 47:8 75:7 93:11 103:22	106:11 129:9 140:19,20 141:3 160:22 168:12 lives ^[1] 4:19 loaded ^[1] 60:3 loan ^[1] 14:8 locally ^[1] 183:2 located ^[1] 152:22 logic ^[4] 64:8 69:10 84:15, 24 long ^[8] 26:2 27:24 124:14 154:10 158:18 182:9 185:6, 7 longer ^[3] 102:15 131:25 155:16 longstanding ^[2] 36:20 91:9 look ^[48] 11:21 27:1 29:3 31:3,4 35:1 36:4 38:25 39: 3 40:11,16,18,19 41:15 42: 7 55:22 60:3,11 64:15 72: 18 78:19,24 83:14 87:4 100:23 104:11 112:14,17 113:22 116:9,9 121:12 133: 2,2,22 137:5 139:1 141:22 145:25 147:1 149:8 155:9, 16 165:22 168:16 175:5 187:2,25 looked ^[7] 108:7 139:19 140:11 149:20 171:12,13, 17 looking ^[3] 12:5 29:4 63:8 looks ^[3] 42:21 98:14 132: 1 lose ^[1] 90:2 lost ^[1] 75:1 lot ^[19] 8:15 29:22,23 38:10 40:4 48:10 59:24 62:20 69: 22 84:5 93:4 94:20 133:7 143:13 144:6 156:10 165: 11 182:23,24 lots ^[1] 155:3 loving ^[4] 59:5 70:10,11,13 lower ^[2] 123:12 124:15 lowering ^[1] 16:18 lowest ^[1] 99:3 luck ^[1] 132:9

M made ^[7] 19:14 114:10 121:2,19 142:10 158:20 180:11 madison ^[2] 135:1 137:13 madison's ^[1] 82:1 magic ^[2] 17:17 144:14 main ^[2] 102:11 186:22 major ^[48] 5:4 6:2,3,4,5,14,20,25 7:4,5 8:5,7 9:1 13:5,10 14:6 24:3,5 34:2,17,21,22,24,24 35:2 36:6 55:11 63:16,22 65:14 67:9 69:1 72:17 76:17,20 91:8 97:19 114:16 118:8,12 119:17 135:8,8 139:9 150:12 153:14 156:8 183:4 majority ^[6] 72:9,12 75:2,10 89:4 116:16 man ^[1] 126:9 manageable ^[1] 68:10 management ^[1] 154:7 manner ^[1] 81:21 manufacturing ^[3] 39:7 92:7 187:14 many ^[16] 58:2 59:1 77:5 79:25 80:12 82:8 90:13 95:1,1 97:16 113:8 116:8 122:1 165:21 172:2 179:17 marshall ^[3] 107:7 137:15 166:1 massage ^[1] 82:4 massive ^[3] 101:25 137:3 158:8 matter ^[12] 7:2 8:4 27:1 56:4 65:3 73:11 74:10 83:10 84:6 85:18 131:15 136:17 mattered ^[1] 85:7 matters ^[2] 46:7 166:13 maximum ^[1] 61:3 mazurie ^[1] 70:11 mcculloch ^[1] 137:15 mcgoldrick ^[4] 25:12 26:21 28:5 32:18 mckesson ^[1] 154:18 mckinley ^[2] 35:24 47:14 mcluhan ^[1] 107:8	mean ^[60] 11:25 15:12 19:10 26:12 27:18 28:25 30:11 31:5 34:4 36:25 38:15 41:2,16 54:14 61:4 69:12 74:3 75:17 80:1 82:14 84:11 86:7 87:25 90:7,11,12 93:17 94:14 96:19 102:23 110:10 121:15 122:19 123:2,16 126:20 132:11 135:12,15 137:6 142:6,8 148:10 149:20 152:8 153:8 162:4,12 163:11,15 165:5 166:12 167:19 169:8,23 170:18 172:9 177:25 179:5 184:5 meaning ^[11] 17:7 50:3 74:23 81:15 82:11 106:4 129:12 151:16,17 185:18,18 meanings ^[2] 28:19,24 means ^[23] 20:11 44:24 52:5 59:9 76:16 85:23,24 86:1,5,9 87:14,16 88:8 105:21 117:5 118:22 139:13,16,19,20,23 185:2,16 meant ^[2] 21:21 134:25 measure ^[4] 150:7 160:13 162:14 174:18 mechanism ^[1] 138:9 medicine ^[1] 162:17 meeting ^[1] 177:20 members ^[1] 36:5 men ^[1] 158:17 mention ^[4] 120:19 143:7 156:3 170:14 mentioned ^[7] 10:14 72:6 80:12 107:1 120:15 143:10 156:22 mess ^[3] 153:8,12 154:12 metes ^[2] 66:12,15 method ^[6] 80:4 81:13 83:16,17 94:24 185:13 methods ^[10] 5:24 46:24,25 83:22 84:17,20 94:17,17 143:23,24 mexico ^[1] 161:9 mfn ^[1] 121:4 midst ^[1] 42:16 might ^[21] 34:4 42:20 56:	23 86:8 117:14 123:5 130:14 132:7 135:10 148:9,9 159:23 161:11 163:15,16 167:10,11 170:1,7 177:1 179:17 miles ^[2] 141:24 145:6 military ^[6] 71:4 127:17 128:6,12,16 161:8 mind ^[5] 51:1,11 85:16 92:3 158:6 minerals ^[1] 188:3 minutes ^[1] 6:14 misfit ^[1] 34:18 miss ^[1] 155:23 missing ^[1] 100:14 misunderstanding ^[1] 86:18 mix ^[1] 37:19 mm-hmm ^[3] 78:22 81:1 83:8 mode ^[2] 81:13,14 moment ^[3] 107:8 117:1 134:22 momentous ^[1] 132:25 monetary ^[6] 80:23 83:22,23 84:20 143:24 155:14 money ^[7] 12:20 163:11,18 169:14,19 173:15 175:12 moneys ^[1] 82:16 months ^[3] 24:9 77:25 123:13 moore ^[15] 5:11 7:16 10:14,16 11:4,9,11,16 48:5,6 114:8 127:9 147:9 158:9 187:23 morning ^[3] 4:4 181:18 182:10 most ^[29] 5:5,17,23 6:5 10:10 20:23 29:5,6 30:20 31:17 39:1,8,14 58:6 79:23 94:23,23 112:25 118:14 119:20 137:7 146:11 148:11 156:9 178:22 185:13 187:4,6 188:13 move ^[2] 65:18 139:10 moving ^[1] 139:9 much ^[19] 10:18 11:8 20:	19 38:14 56:21 58:1 61:10 63:3 64:6 66:24 83:11 84:13 89:9 126:23 128:20 155:12 158:12 178:1,13 must ^[3] 50:19 93:17 147:1 N nailed ^[1] 126:13 name ^[1] 177:22 narrow ^[5] 10:18 11:12 19:5 62:23 64:17 narrower ^[2] 16:11 81:2 narrowly ^[1] 118:24 narrowness ^[1] 11:3 nation ^[1] 162:19 national ^[15] 4:14,23 5:10 14:4 59:14 60:23 62:12 74:3 96:23 110:11,13 114:17 128:15 149:25 188:4 nations ^[2] 24:6 64:1 nationwide ^[1] 106:9 natural ^[24] 7:8 20:25 28:8 29:9 30:20,22 31:17 32:7 44:17 61:1 62:3 78:25 79:13 81:22 86:8 93:25 94:23 95:9 118:14 137:7 149:7 170:2,8 185:18 naturally ^[10] 8:19 15:2 16:15 31:19 40:18 59:4 80:3 88:6 91:22 92:17 nature ^[7] 61:21 90:17 91:2,3 126:24 127:2 172:10 navigation ^[1] 182:18 navy ^[1] 9:4 neal ^[3] 2:5 3:6 97:6 nearly ^[1] 46:16 nebraska ^[2] 118:14 175:5 necessary ^[8] 7:24 10:25 44:24 85:23,24 128:17 129:3 147:4 need ^[18] 7:17 14:14,14 33:11 56:1 63:11 88:10 94:21 114:2 116:13 124:2,2 135:8 142:9 144:1,3 148:23 151:24 needed ^[4] 59:9 90:9,13 176:19
--	--	---	---

needs ^[2] 42:14 113:18 negative ^[1] 29:5 negotiated ^[2] 5:3 24:8 negotiating ^[2] 24:6,13 neighbor ^[1] 141:8 neutral ^[1] 185:8 neutralize ^[1] 37:10 never ^[18] 13:10,18 34:6 36:11 73:12 98:5,16 102:3 107:1 108:4,8 121:2 124: 20 126:2 135:15 160:2 164: 5 187:5 never-ending ^[3] 7:17,23 63:5 nevertheless ^[1] 73:21 new ^[1] 56:1 next ^[3] 83:23 99:9 140:21 next-door ^[1] 141:8 nimble ^[1] 5:17 nine ^[5] 29:3 119:4 124:17 138:9 139:25 nixon ^[31] 22:8 23:4,22,24, 25 36:14 54:4 77:6,7,11,22, 22 79:14 95:4,9 105:25 106:2,8,17,20 107:5,10,10, 14 108:24 129:2,5 134:4 142:4,19 150:24 nixon's ^[3] 21:11,19 127: 13 nobody ^[3] 39:1,4 187:4 nondelegation ^[22] 6:6 48:2,12 50:13 55:8,23 56: 10,19 57:18 59:19,20 63: 23 65:15 67:8 101:13,15 126:6,9 127:21 139:10 183: 5 185:24 nondelegations ^[1] 56:6 none ^[8] 26:18 40:5 60:9 147:6 156:2,2 164:3,4 nonetheless ^[1] 104:2 north ^[1] 161:17 northern ^[1] 154:21 notable ^[1] 104:22 note ^[1] 159:14 nothing ^[12] 16:20 68:10 98:14 115:24 130:4 134:11 135:23 155:24 156:4,13	167:25 170:13 notion ^[9] 19:3 30:2 36:9 37:13 43:1 68:4 95:22 133: 20 161:19 notwithstanding ^[1] 58: 2 noun ^[5] 16:19 52:3,25 53: 20 85:22 novel ^[1] 76:25 nowhere ^[1] 105:22 nuanced ^[1] 177:5 nullify ^[8] 11:17 12:1 28:18 29:5 52:7 93:10 94:6 100:9 number ^[7] 54:9 59:6 108: 6 117:20 154:10 157:23 171:14 numbers ^[1] 169:18 O obama ^[1] 78:13 objective ^[1] 103:6 obvious ^[3] 23:9 79:13 80: 9 obviously ^[14] 25:22 26: 12 44:13 69:12,14 76:9,16 80:12 105:23 112:19 133: 14 143:11 165:22 186:13 occasion ^[1] 125:20 occupied ^[2] 161:8,16 occupying ^[1] 161:7 occurred ^[1] 69:25 occurs ^[2] 163:6 169:2 odd ^[2] 165:2 177:20 office ^[1] 177:21 often ^[1] 126:23 ogden ^[6] 25:10 26:15 28: 4 32:18 51:16 75:21 oil ^[3] 25:13 142:23 144:4 okay ^[47] 25:23,23 27:21 46:10 54:17 67:13 68:15, 22,25 70:7 71:19 72:4 75: 11 76:11 77:2 87:10,24 88: 9,21 105:19 107:12,22 111: 19 116:23 117:2 123:6 130: 23 135:1,16 136:10 137:21, 22 139:13 140:18 146:10 148:6,19,22 151:12 152:6	153:1,5 154:15 162:6 176: 17 180:25 181:23 once ^[12] 22:15 52:18 72:8 74:11 75:1 98:16 108:9 126:2 140:24 148:10 151:9, 10 one ^[92] 7:3 8:3,3,18 16:2 18:3 23:8 28:11 29:24 30:5 31:16 34:7 45:19 46:9 55: 15,16 56:19,22 58:9,9 59: 17 60:7 61:21 69:24 73:15 75:12 77:3,5 78:21,24 79: 14 80:8 83:21 85:23 86:7 91:13,19 95:5,13,17 97:14 100:13 102:9,23 109:8 112: 2 113:23 115:15,25 116:3 117:21,24 119:17 120:18 122:9,9,20 123:20 131:13, 14,22 136:20 137:11 141:6 143:7 145:13,14 146:14 149:14 151:16 156:3,9 162: 9,9 165:19 167:20,21,22,25 168:2 176:9 178:13 179:15 181:5 182:13 184:24 185: 10 187:9,10,15,18 188:8 ones ^[1] 126:1 one-to-one ^[1] 163:14 one-way ^[2] 74:12 98:4 ongoing ^[1] 7:25 only ^[21] 5:18 10:9,19,25 21:23 27:8 52:12,16,24 53: 9 62:21 102:13 107:19 108: 23 121:3,5 122:10 138:8 139:18 143:22 168:25 open ^[2] 63:7,8 open-ended ^[7] 99:10 105:7 118:3 126:15 127:4, 10,20 opinion ^[13] 7:11 10:25 11: 2,12,20 12:6 16:23 17:6 48: 8 51:3 58:6 143:18 147:6 opinions ^[5] 56:18,22 66: 23 93:23 99:24 opioids ^[1] 4:16 opportunity ^[2] 60:13 106: 18 opposed ^[2] 123:23 143:	24 opposite ^[4] 15:18 36:18 51:16 137:17 oral ^[10] 3:2,5,8 4:8 45:7 82: 15 85:7 97:6 144:4 159:7 order ^[9] 53:5 61:20 90:16 112:1 125:22 132:18 138: 22 154:22 157:25 orders ^[2] 114:23 122:15 ordinary ^[2] 40:19 185:18 oregon ^[1] 2:7 organizations ^[1] 79:4 original ^[2] 81:11 93:19 origins ^[1] 31:23 other ^[90] 4:16 6:1,22 9:10 10:23 12:2 16:25 25:16,16 26:13 28:7,11,16 30:2 31: 11 32:25 33:9,13 34:9 37:1 43:21 44:3 45:4 46:24,25 47:13,20 50:18 51:5 53:25 54:11 57:2 62:17 69:11 75: 12,18 79:16,25 80:16,17 94:12,15 96:7 98:18 102:2 105:8 107:17,17 109:18 111:20 113:15 115:17 116: 25 120:15 121:9 122:6,6, 16 124:25 125:4,5 126:23 127:6,11 129:13 132:2 136: 21 137:12 138:6 139:1 140: 11 144:14 159:1 160:19 162:5 163:3 164:22,24 166: 20 174:14 175:12,22 176:3, 6,20,21 179:17 184:5 186: 23 188:10 others ^[4] 40:3 79:25 143: 12 149:13 other's ^[1] 121:18 otherwise ^[33] 46:3 52:6 53:11 56:23 70:24 86:2,6, 10,12 87:17,19,22,25 88:1, 5,15 117:6,13,14 118:22 135:5 137:25 138:6,16 139: 14,16 140:7,9 160:9,10 170:14 185:3,17 out ^[34] 10:17 11:8 23:5 29: 15,16 30:12 49:7,14 61:16 73:3 76:15 85:8 86:23 89:
--	---	---	---

11 90:1,1,17 92:6 93:24 94:9,21,22 98:7 105:20,22,24,25 111:20 143:13 163:4 164:21 172:3 178:23,23 outline ^[1] 155:25 outlines ^[1] 154:4 outside ^[1] 62:10 outward-facing ^[1] 58:23 oval ^[1] 177:21 over ^[17] 24:16 36:2 58:7 60:6 70:4 71:16 74:11 124:12 141:11 150:11 151:10 163:5 169:1 172:17,17,18 173:1 overarching ^[1] 62:25 overcoming ^[1] 108:2 overhaul ^[1] 97:23 oversight ^[5] 8:1 60:25 63:1,2 74:20 overuse ^[1] 163:2 own ^[10] 6:10,23 8:6 48:22 49:6 60:16 71:5 99:23 112:20 129:5 P pack ^[1] 28:22 packed ^[1] 56:21 page ^[8] 3:2 83:23 100:24 130:9 135:17 144:20 155:24,24 pages ^[2] 7:12 104:13 paid ^[1] 10:11 painstakingly ^[1] 146:20 paired ^[1] 15:24 paper ^[1] 106:11 papers ^[1] 104:2 park ^[6] 110:11,13,14,20,25 111:1 parliament ^[2] 182:20 183:1 parliamentary ^[1] 158:21 part ^[18] 18:25 24:12 36:25 62:10 78:11 86:3 103:13,21,22 129:6 130:22 136:1 141:6,12 143:12 150:15 182:12,18 particular ^[26] 7:22 11:23	17:23 34:8 35:19 40:15 41:18 42:19 43:22 53:16 59:13 61:18 79:16 80:4 93:2 96:2 103:6 110:11 112:2 118:24 144:25 168:21 175:17,19 179:10 187:7 particularly ^[6] 6:24 19:5 45:16 60:24 61:19 89:23 parties ^[12] 2:4,6,8 3:4,7,10,13 4:9 97:7 140:20 159:8 184:21 parties' ^[1] 121:17 partner ^[1] 91:8 partners ^[5] 5:4 24:3,12 119:17 188:11 parts ^[2] 69:4 136:20 party ^[3] 100:4,5 123:2 pass ^[2] 89:20 158:22 passage ^[1] 83:13 passed ^[5] 31:5 76:24 132:16 156:5 186:3 passes ^[2] 74:7 110:12 past ^[3] 15:11 60:14 134:5 pastry ^[1] 165:16 paul ^[1] 152:1 pausing ^[1] 40:2 pay ^[8] 38:7 46:13,18 52:19 144:23 180:5,19 186:9 pays ^[7] 37:20,24 39:1,4 187:4,10,16 peacetime ^[9] 9:16 36:1 50:2 70:4 71:16 103:19 134:2 151:11 152:3 pedigree ^[11] 25:5,6 27:25 33:15 35:19,21 49:6 81:25 82:10 86:25 186:17 penalty ^[1] 70:20 pendency ^[3] 93:8 177:12,12 penny ^[2] 115:25 116:3 people ^[4] 76:23 110:21 182:16 184:1 people's ^[1] 74:14 per ^[1] 24:1 percent ^[20] 24:2 38:13,13 60:6 99:1 101:1 106:9 109:2,9 127:15 132:20 142:7	144:23 149:12 151:4 164:25 165:10 170:20 181:2,4 perfect ^[2] 42:12 172:1 perfectly ^[3] 170:2,8 175:10 perhaps ^[5] 6:5 14:11 67:1 122:24 155:15 permissible ^[6] 105:4,6 139:23 148:7 164:12,13 permission ^[3] 45:18 46:3 149:3 permit ^[5] 15:8 52:6 54:10 149:2 180:17 permits ^[2] 39:12 52:16 permitted ^[2] 111:16 181:5 permitting ^[1] 32:14 persistent ^[1] 125:23 person ^[2] 10:11 107:9 personal ^[1] 180:18 personnel ^[1] 79:9 persons ^[1] 104:18 philippines ^[1] 161:9 philosophy ^[1] 78:12 phrase ^[34] 5:21 15:1,19 16:9 20:24 22:1 23:10,15 24:18,25 25:17 26:2 27:6 32:21 33:16 44:16 48:15 53:4 67:15 71:23 77:17 78:6 80:14 82:11 88:20 93:14 137:14 162:13 170:2,9,12 174:1 185:3,15 phrased ^[1] 126:23 phrases ^[1] 16:7 pick ^[2] 142:13 164:19 picking ^[2] 86:12 159:11 piece ^[6] 35:9 106:11 114:5 183:8 187:18 188:7 pike ^[1] 40:14 pikes ^[1] 40:11 pile ^[1] 65:21 pipeline ^[1] 154:21 pirates ^[1] 182:24 place ^[4] 25:16 30:13 104:11 152:21 placed ^[1] 12:8 places ^[1] 43:21	plain ^[17] 17:7 28:15 41:25 42:4 81:14 108:2 118:9 120:22 134:20 135:7 136:18 139:8 146:5,7 185:17,20,23 plainly ^[1] 5:22 plain-meaning ^[1] 81:12 plaintiffs ^[4] 5:16,25 123:8 153:21 play ^[2] 67:8 70:2 please ^[4] 4:11 97:9 144:7 159:10 plus ^[1] 167:16 pockets ^[3] 97:11 168:3 182:16 point ^[51] 8:9 13:9 20:13 25:15 34:23 40:8 52:24 60:1 62:1 70:9 82:25 83:12 88:25 93:24 94:21 95:3 100:13,16 101:13 102:5 105:11 112:11 113:9 119:15 120:2 122:19,24 137:12 138:19 142:5,12 144:1 146:9,11 162:11 163:3 166:4,25 169:9 175:24 177:15 178:11 180:1,4 181:7,13 184:25 185:24 187:16,17,21 pointed ^[4] 85:8 143:13 164:21 172:3 pointing ^[4] 89:25 90:1 108:20 163:4 points ^[5] 6:18 146:20 162:10 166:11 184:24 policies ^[5] 39:2 91:17 181:8 187:3,4 policy ^[19] 9:13 13:11,15,16 38:25,25 39:8 62:13 79:25 90:14 103:25 114:5 125:16 157:8 178:1 180:19 187:7 188:6,13 political ^[9] 7:25 58:25 65:20 73:20,21 74:19,19 75:6 79:17 polk ^[2] 35:23 47:13 poor ^[1] 6:24 pose ^[1] 168:4 position ^[19] 22:14 50:17
---	---	--	---

51:12 67:22,23 68:12 75:3 86:22 88:7,7 95:24 96:20 102:13 119:23 135:14 141: 3 144:11,13 159:16 possibilities [1] 155:4 possibility [1] 123:6 possible [5] 26:22 29:14, 15 61:3 124:11 potential [1] 181:20 potentially [1] 176:24 pound [1] 46:14 powerful [8] 23:9 28:22 40:21 71:12 78:1,4 113:1 115:4 powerfully [1] 86:22 powers [67] 6:3,11 7:4,19, 24 8:5,16,17,22,23,24 9:20, 24 13:4 18:15 20:15 21:2 24:20 29:4,7 34:23,24 37:3, 10 41:23 46:11 53:1 55:14 56:15 58:21 59:12,24 61: 15 63:9,20 64:16 72:5 73:6, 25 74:4 76:1 91:22 98:12 104:15,17 115:17 118:1 126:22 127:24,25 129:1,12 130:1,2,7 137:3 138:9 139: 25 143:6 150:14,18,22 151: 21,22 156:1 173:24 175:4 power's [1] 165:6 practical [6] 73:11 74:10 83:9 84:6 85:17 86:13 precedent [6] 23:4 47:7 105:25 106:2,17,21 precedential [1] 10:21 precedents [1] 151:11 precisely [1] 164:13 precision [1] 113:18 precursors [1] 188:7 predecessor [5] 18:13 24: 15 36:13 54:7 158:15 predecessors [1] 125:14 preliminary [1] 123:23 premise [1] 18:1 prescribe [3] 52:5 86:1 87: 13 prescribed [2] 50:24 125: 1	presentation [1] 123:2 presenting [1] 41:19 preserving [1] 158:18 presidential [7] 12:17 18: 10,19 20:1 24:20 89:23 92: 1 presidents [16] 18:12 35: 23 49:16 56:3 77:4 78:13 80:1,2 95:1,7 98:19 105:14 125:20 128:25 176:1 181:6 president's [24] 5:13 8:15 9:19 37:7 49:24 61:15 63: 20 69:21 70:1 72:14 74:21, 24 94:4 96:21 103:10 133: 7 150:11,14 151:21 152:23 155:13 160:25 161:6 178: 13 press [1] 45:11 pressure [1] 187:21 presumably [1] 177:17 presumption [5] 5:14 12: 14 62:6 97:17 117:22 pretend [1] 178:19 pretext [1] 180:25 pretty [10] 10:18 18:14 20: 19 58:13 62:23 72:15 84: 13 127:19 142:23 146:8 prevent [7] 42:15 52:8 93: 10 100:11 176:10 177:1,11 preventing [2] 20:14 176: 13 primary [1] 77:5 prime-time [1] 106:9 principal [3] 51:12 88:7,7 principle [11] 11:15 56:1, 21 57:16 66:18 67:3,8 141: 16 159:2 161:20 167:15 principles [4] 11:13 102:7 141:20,23 prior [2] 29:19 125:19 private [3] 2:6 3:7 97:7 probably [3] 80:3 83:10 96:10 problem [17] 7:22 24:20 58:6,14 63:8 70:22 71:9,10 72:8 77:3 79:15 90:22 109: 4 132:17 135:3 147:7 177:	22 problems [1] 6:4 procedural [1] 101:5 procedure [1] 7:14 procedures [5] 19:19 20: 4,10 124:15 154:5 proceeding [1] 47:9 process [8] 24:24 75:6 97: 24 153:7,17 154:9,23,24 processing [1] 164:9 proclamation [2] 22:20 127:14 producer [1] 38:6 producers [2] 37:16 39:6 product [6] 34:13 98:1 145:14,15 168:20 172:8 products [4] 39:13 145:15 149:25 179:11 professor [3] 33:21 49:14 152:1 profit [1] 185:7 profound [2] 57:14 186:16 programs [1] 14:17 progress [2] 61:23 123:11 prohibit [8] 29:6 30:4 40: 17 52:8 65:1 91:23 93:10 100:11 proximity [1] 137:16 prominently [2] 51:20 77: 17 promised [1] 153:9 promote [1] 176:18 pronounced [1] 4:15 proof [1] 158:7 properly [1] 47:6 property [7] 41:9 42:10 59: 13 62:21 156:25 158:1 176: 25 proposition [1] 105:17 prosecution [1] 181:5 prospective [1] 155:2 protest [1] 154:6 provide [2] 120:24 184:6 provided [1] 112:3 provides [1] 161:19 providing [1] 184:11 provision [7] 11:5,24 115:	7 120:23 127:3 145:21 176: 20 provisions [6] 34:9 51:6 113:8 114:12 120:16 170:6 public [4] 4:17 104:16 113: 18 147:2 pull [1] 98:7 pulling [1] 89:11 punch [2] 28:22 56:21 purpose [13] 12:23 14:21 18:8 62:17 75:25 115:23 116:8 119:22 136:3 163:17, 17,20 183:21 purposes [5] 76:17 86:4 131:21 166:18 173:3 pursuant [2] 76:20 147:16 push [1] 179:15 put [13] 9:22 11:10 14:18 22:17 29:2 31:12 32:2 86:9 87:12 121:15 132:6,7 146: 17 puts [1] 90:23 putting [2] 26:10 118:8 Q qua [1] 180:16 qualitative [5] 58:9 83:17 84:19 94:17 185:9 quality [1] 179:11 quantitative [5] 58:8 83: 16 84:17 94:17 143:23 quantity [4] 169:15,17,25 179:11 quarter [1] 125:24 question [77] 6:14 8:13 24: 16 25:15 26:5 27:4 28:11 30:13 37:1 39:15 43:11,14 45:3 50:13 52:1 53:18 54: 17 55:7 57:25 59:25 60:10 69:1,17 75:12 76:17,19 79: 20,22 84:7 88:22 90:3 92: 16 93:19 95:14,18 96:4 105:7 106:2,13,16 107:1 108:10 111:22 119:16 124: 8,9 125:14,16 128:3 131:9, 14,14,15 136:20 137:5 139: 7 140:19 143:13 145:1 153:
---	---	---	---

15,24 156:8 157:20 160:9 164:19 171:8 173:17,22 174:2 175:8,9,19,25 176: 11 180:16,21 182:9 questions [31] 6:2,12,21, 25 9:1 10:25 13:5,11 14:6 15:24 34:2,24 36:7 55:11 63:16,16,22 65:14 67:9 69: 1 72:17 97:19 99:13 105: 21 118:8,12 135:9 139:9 150:12 160:4 183:4 quickly [1] 22:6 quintessential [7] 8:23 25:8 56:14 78:7 82:8 94:23 185:13 quite [7] 11:7 62:23 99:9 102:24 103:1,5 166:3 quota [9] 12:24,25 43:11 83:15 114:4 115:12 143:14 164:23 174:3 quotas [18] 5:25 40:2 43:8, 9 44:20 46:21 83:15 84:17 94:18 101:16 119:20 120:3 143:23 153:16 157:22 162: 21,22 185:5 quote [4] 147:3 155:10 156: 24 158:16 quoted [2] 11:20 104:13 quotes [1] 10:19 quoting [1] 59:5 R raise [19] 10:9 38:21 39:20 52:11 58:5,13 75:23 76:10 111:4 112:21 116:3 140:4 163:11,16,16,18 173:15 174:10 182:22 raised [1] 178:11 raises [3] 111:6 148:25 187:5 raising [14] 16:18,21 29:22 38:18 41:20 42:21 45:12 75:25 100:14 115:24 140: 10 164:14 172:13 175:12 ran [1] 181:2 range [5] 8:6 22:19 28:24 38:13 179:7	rare [3] 10:21 72:15 188:3 ratchet [2] 74:12 98:4 rate [1] 134:18 rates [4] 50:22,23 170:7,10 rather [3] 110:18 124:13 152:25 ratify [2] 129:3 130:8 ratifying [1] 106:22 ratio [1] 48:11 rational [1] 165:3 raw [1] 27:25 reach [1] 182:15 reached [1] 112:6 read [14] 17:6 51:5 93:6 117:25 137:12,17 143:22 155:7 167:7 170:2,8,11 175:14 178:25 reader [1] 40:19 reading [4] 117:22 118:17 145:10 149:8 reagan [2] 91:15 125:25 real [9] 23:6 60:5 62:7 69: 13 73:11 98:13 126:22 127: 1 178:11 realistic [1] 123:5 realized [1] 75:5 really [35] 17:1 28:17 36:8 42:22 47:10 55:9,19 60:1 68:19 70:23 78:23 79:6 80: 16,17 83:11 84:5,14 85:17 86:13 91:12 96:9 109:14 114:9 124:7 134:5,11 137: 25 174:19,22 175:7 182:12 183:4,6 185:17 187:17 realm [2] 6:5 9:6 reason [20] 8:3,3,14 41:3 48:20 53:7,19 68:2,3 85:12 120:5 121:3 124:5 138:2 149:18 150:15 154:20 167: 9 173:13 188:20 reasoning [2] 129:6 138:5 reasons [14] 7:1 30:5 56: 19 79:17 108:19 117:20 118:24 121:10 135:13 151: 11 160:1 172:2,7 175:18 rebellious [1] 46:11 rebuilding [2] 39:7 187:13	rebuttal [3] 3:11 184:19,20 received [1] 12:11 recent [1] 74:17 recently [4] 5:5 13:6 61:14 112:16 recharacterize [1] 117:9 reciprocal [2] 90:6,14 reciprocity [1] 90:19 recodified [2] 36:1,16 recognition [1] 57:17 recognized [6] 9:11 32:17 49:24 56:18 59:1 104:1 reconciliation [1] 116:16 record [2] 37:18 38:2 recoup [2] 138:23 148:21 recover [1] 119:23 red [1] 83:19 reduction [1] 38:17 redundant [2] 87:3 120: 17 re-emphasize [1] 11:2 re-enacted [4] 23:17 24: 19 77:18,25 re-enacts [1] 77:12 refer [7] 9:2 16:6,6 30:25 31:11 36:10 175:2 reference [3] 16:4 33:10 145:20 referred [4] 28:15 62:19 114:8 164:18 referring [4] 21:18 35:20 135:22 170:10 refers [3] 29:21 40:10 45: 16 reflects [1] 73:18 refund [2] 153:17 154:9 refunds [4] 123:22,25 124: 4 153:22 regan [1] 5:11 regard [1] 50:23 regarding [1] 6:9 regardless [2] 38:1 89:4 regrettable [1] 121:15 regulated [2] 51:18 185: 19 regulating [9] 5:24 25:6 26:22 32:23 69:23 82:8 94:	24 99:23 185:14 regulation [9] 13:21 43:22 55:18 81:16 111:15 185:5, 11,12 186:18 regulations [5] 19:6 52:4 57:13 86:1 186:10 regulatory [16] 10:7 12:23 13:22 23:12 30:8,11 35:16 38:22 39:9 43:4,13 58:16 75:24 76:4 166:18 188:14 reimbursement [2] 153:7, 9 rein [1] 98:7 reinforced [1] 50:7 reinforces [3] 86:22 88:19 185:17 reissuing [1] 122:14 reject [1] 89:5 rejected [4] 17:12 44:2 114:19 158:10 rejects [2] 143:11 169:9 rejigger [1] 117:10 relate [2] 19:17 35:18 related [2] 27:11 139:25 relations [1] 56:4 relevant [5] 113:10,11 131: 20 136:3 137:4 relied [4] 51:2,2 77:7 150: 24 relief [2] 154:11 155:2 relies [1] 80:17 rely [11] 22:9 26:14 27:23 31:8 48:19 53:4,14 82:20 86:12 107:6 132:24 relying [5] 8:25 53:7,18,20, 22 remains [1] 50:3 remedies [1] 147:3 remind [1] 186:2 rendered [1] 120:17 repeat [1] 60:25 repeated [1] 61:1 repeatedly [1] 165:23 repeating [1] 165:25 reply [1] 129:19 report [6] 41:5,5,9,13 155: 25 156:22
--	--	--	--

reporting [2] 157:24 158:1 reports [2] 61:1 185:9 representatives [2] 74:15 183:3 republic [3] 57:7 100:1 143:3 require [2] 78:11 181:10 required [2] 47:6 59:10 requirement [1] 85:10 requirements [4] 157:25 158:4 176:18 177:7 requires [1] 101:3 requiring [1] 144:22 research [4] 57:23 112:17, 23 139:4 reset [1] 97:25 resolution [2] 73:5 74:7 resources [2] 4:5 100:23 respect [20] 23:22 32:13, 15 33:9 41:18 55:16 56:13, 14 90:20 93:3 94:4 107:24 125:9 132:2 136:23 154:2 161:1,2 180:24 188:6 respected [1] 4:25 respectfully [1] 15:17 respond [4] 86:21 177:18 178:9 179:14 respondents' [1] 143:20 responding [2] 122:21 157:7 response [14] 37:13 43:1, 15 44:1 47:25 49:12 58:18 62:1 92:15,24 95:9 166:25 178:6 179:1 responsibility [1] 65:2 responsible [1] 38:16 rest [2] 94:12 110:4 restrictions [3] 101:6 185:8,9 rests [1] 133:6 retains [1] 74:4 retaliation [1] 5:7 reticulated [1] 146:23 retreated [1] 67:19 retrieval [1] 72:7 return [1] 68:23 revenue [29] 10:9 12:21	13:1 29:22 38:18,21 39:20 40:5 41:21 42:21 45:12 52:12 75:25 99:23,25 100:12, 14 110:7 111:4,7 140:5,10 164:15 168:3,10 169:3 174:11 182:23 187:6 revenue-neutral [1] 164:3 revenue-raisers [1] 168:15 revenue-raising [37] 10:8 12:24 30:3,7 31:6 38:23 40:20 43:2 52:15 75:22 76:3,7 99:20 100:3 101:19 104:24 108:9 110:18 111:24 112:8,12,18,19 115:18 120:1 136:9 138:10,15,16 139:2 148:10 150:7 160:13 162:24 163:11,21 182:22 revenues [2] 16:21 172:13 review [8] 61:1 62:3 96:1, 12,16,17,24 155:10 revisit [1] 119:15 revived [1] 126:9 revolution [2] 133:4 182:19 rewrite [1] 126:3 rhetoric [2] 145:10,11 rich [2] 123:20 153:11 rights [1] 104:19 riot [1] 126:18 rise [1] 55:23 risk [1] 173:17 roberts [40] 4:3 10:13 33:23,25 35:3 36:24 37:20,23 38:15 47:17 50:14 51:23 54:19 55:2 63:13 76:13 85:3 92:12 97:3 102:17 103:3, 5,20 109:22 119:11 120:14 128:22 131:7,11 134:14 142:2 147:12 155:5 159:4 181:15,23 182:1,5 183:10 184:17 robust [1] 7:18 room [1] 107:10 roots [1] 152:4 ruinous [1] 5:9	rule [4] 56:2 81:13,13 132:22 ruled [2] 116:13 124:23 rules [2] 57:12 186:10 run [1] 90:21 running [2] 110:24 126:18 runs [1] 25:11 russian-ukraine [1] 178:18 ruthless [1] 5:7 S safeguard [1] 176:19 safety [4] 158:2 176:20 177:1,7 sale [1] 79:5 salem [1] 2:7 same [33] 11:19,19 20:22, 24 24:18 48:3,13 50:4 51:4 56:11 57:22 75:23 76:8,10 84:14 88:19 93:14 94:3 101:6 127:20,21 136:5,6,9 141:16 150:20 151:7,18 166:6 167:12 174:18,25 175:9 sanction [5] 98:9 183:23, 25,25 184:11 sanctions [3] 98:20 157:10 184:9 satisfied [1] 96:25 satisfies [1] 121:7 sauer's [1] 133:14 saying [40] 18:2 30:6,8 32:25 42:20 53:5 64:14 65:24 66:20 71:14 82:5 87:13,16 91:24 92:16 94:2 95:25 107:10 118:23 119:3 120:2 122:4 123:24 125:3 126:14 127:7 128:1 129:21 130:5 138:25 144:18 146:2 149:24 151:15 153:8,10 169:16 172:7,11 186:24 says [45] 7:13 30:12 32:1 39:18,21 45:15,16 46:16 48:9,16 61:2,20 63:8 81:12 83:14 85:25 88:14 90:18 100:25 110:13 112:20 116:13 117:4,24 118:22 121:20 125:22 128:14 134:23 135:23 139:13,16 143:18 144:2, 20,21 146:6 147:1 155:10 156:23 157:15 175:6 178:5 188:18,19 schedule [1] 121:16 scheme [5] 85:13 86:16 117:10 146:23 148:8 scope [4] 21:1 23:25 128:4 186:5 screening [7] 157:24 176:2,2,4,5,12,15 second [10] 8:9,13 22:5 81:8,9 100:6 118:2 122:2 133:13 183:15 secretaries [1] 146:24 section [25] 15:23 16:5 27:12 44:20 50:20 54:15 60:21 62:18 77:21 98:24 100:25 101:2,3,6 104:4 109:2 120:20 121:10 122:1,17 124:25 127:12 132:16 146:19 155:11 sections [1] 121:25 securities [1] 33:1 security [7] 4:15,23 5:10 62:12 114:17 150:1 188:4 see [17] 8:1 12:23 38:24 46:9 47:15 70:22 71:9 84:14 90:12 93:13,16 94:3,5 138:4 141:9 156:19,21 seek [2] 124:24 126:3 seeking [5] 108:22 120:9 122:12 145:7,16 seem [8] 34:16 61:10 101:13 162:8,12,14 165:10 182:11 seemed [1] 8:14 seems [15] 18:17 34:4,15, 18 37:9 42:16 47:8 118:7 153:11 157:2 166:4 168:11 173:12 177:20 178:15 seen [2] 126:16 141:25 sees [2] 64:1,4 seize [2] 91:23 92:18 seized [1] 79:8
---	--	--

selected ^[1] 80:4 sell ^[1] 29:18 senate ^[5] 41:4,8 75:2 155:25 156:22 sense ^[21] 28:24 42:12 44:19 51:9 82:17 83:16 84:18 85:2 97:20 124:10 136:24,25 145:9 149:2 150:4 162:15 164:18 165:12 167:10 172:1,10 sentence ^[1] 11:19 separate ^[2] 103:7 145:21 series ^[4] 19:15 36:7 93:14 181:3 serious ^[8] 72:7 98:25 127:12 132:19 148:11 154:19 164:1 178:22 service ^[1] 110:13 services ^[3] 110:19 138:24 148:22 set ^[8] 33:21 49:14 85:12 97:25 100:22 120:10 168:4,7 sets ^[1] 12:25 setting ^[3] 119:20 168:24,24 settle ^[1] 178:18 several ^[3] 50:16 103:1 164:18 severed ^[1] 152:3 sg ^[1] 117:18 shah ^[1] 158:1 shake ^[1] 130:19 shaking ^[1] 130:22 shared ^[1] 127:24 she's ^[1] 54:21 shift ^[1] 115:16 shipment ^[1] 99:21 shoe ^[1] 154:9 short ^[1] 119:19 shortly ^[1] 57:3 shot ^[1] 83:5 shouldn't ^[6] 59:17 63:18 64:15,18,21 140:25 show ^[2] 26:22 27:24 showing ^[1] 58:7 shows ^[2] 26:17 169:25	shut ^[3] 162:2 164:22 165:5 shutting ^[1] 162:18 side ^[10] 31:3 37:1 40:6 45:4 47:20 80:16,17 94:16 159:1 186:23 sides ^[1] 180:21 sign ^[1] 72:10 significance ^[3] 23:4 45:14 51:10 significant ^[6] 38:17 59:21 62:8 142:23 163:1 164:23 signs ^[1] 72:9 silentio ^[1] 60:12 silo ^[1] 62:24 similar ^[7] 41:11 44:9 55:9 88:3 114:11 117:14 119:16 simple ^[2] 116:15 143:7 simply ^[5] 73:24 97:21 102:6 117:9 171:9 simultaneously ^[1] 15:13 since ^[8] 77:4 83:15 125:24 144:16,16 156:10 157:19 182:17 single ^[6] 102:9 106:23 124:19 125:24 132:13 166:20 situation ^[14] 7:12 48:21 66:11 71:8 75:15 77:20 96:11 104:8 113:17 114:15 129:8,13 172:14 186:15 situations ^[5] 9:13 10:24 70:12 103:1 113:13 six ^[1] 123:13 sixth ^[1] 129:22 sketch ^[1] 49:7 small ^[1] 70:25 smaller ^[1] 58:1 smithsonian ^[1] 24:9 smuggled ^[1] 149:9 so-called ^[1] 131:23 solicitor ^[4] 2:2,7 114:10 138:2 solution ^[1] 109:1 solved ^[1] 79:18	sometime ^[1] 33:25 sometimes ^[7] 38:6,7 110:17 112:18 136:8 138:10,11 sorry ^[13] 19:1 21:21 22:5,7 31:24 87:21 103:3,4,4 131:5 147:19 170:18 171:24 sort ^[41] 7:5,8 18:2 24:23,24,24 25:7 27:18 29:5,11 30:3 31:9,15 36:5 38:3 42:19 55:12 58:4 59:16 67:4 73:19 75:23 79:3 82:10 90:19 91:9,22 96:7 102:3 135:2,5 146:13 160:14 164:11 167:14,20 168:17 173:2 185:7,17 186:16 sorts ^[10] 82:22 101:5 113:24 121:9 128:13 157:7 170:5 173:1 177:13 183:18 sotomayor ^[62] 12:12,15 13:13,17,24 14:3,9,13,20 15:3,6,15,21 16:12,16 27:3 31:24 32:6,11,20,22 33:2,6 39:11,17,23 40:2 51:24,25 52:20,23 53:6,13,17,24 54:6,16,20,22,23 55:4 68:24 85:21 109:21 114:3 119:2 128:23,24 129:16,21,25 130:10,14,18 131:2,6,8 179:24 180:2,14,22 181:13 sotomayor's ^[2] 142:14 182:9 sought ^[2] 108:25 123:25 sound ^[1] 55:21 source ^[1] 34:5 sources ^[6] 27:24 28:6 35:18 51:15 78:5 82:3 south ^[2] 91:16 161:16 southern ^[1] 57:2 sovereigns ^[1] 186:15 spain ^[1] 90:11 spark ^[1] 182:19 speaking ^[1] 8:18 speaks ^[1] 97:18 spear ^[1] 40:14 special ^[4] 56:1 100:2 101:19 112:25	specialized ^[2] 144:15 154:3 specific ^[14] 21:16 33:14 35:21,22 44:3 76:19 87:5 104:7 108:23 131:13,15 145:20 146:25 171:18 specifically ^[11] 6:22 12:7 22:23 25:6 44:18 50:10 90:5 120:23 141:10,21 146:13 specifies ^[1] 86:5 specter ^[1] 96:21 spectrum ^[1] 29:4 speculated ^[1] 85:11 speculation ^[1] 78:11 speech ^[1] 106:9 spell ^[2] 94:9,22 spelled ^[1] 94:20 spells ^[1] 90:17 spend ^[1] 6:13 sponsor ^[1] 146:3 spook ^[1] 22:22 spot ^[1] 73:7 spur ^[1] 187:12 squarely ^[1] 188:21 squirrely ^[1] 47:8 stage ^[1] 124:19 stake ^[1] 123:15 stamp ^[1] 143:5 standard ^[1] 68:10 standards ^[3] 158:2,3,3 standing ^[1] 142:25 stands ^[2] 106:1,1 start ^[7] 31:9 99:21 101:8 109:23 110:2 111:20 148:10 started ^[4] 18:2 55:10 67:19 186:24 state ^[4] 2:8 3:10 11:12 159:8 stated ^[1] 48:1 statements ^[2] 51:3,5 states ^[10] 46:12 62:10,13 70:10,13 116:5 121:8 142:8 154:8 161:4 statutes ^[23] 22:19 27:9 31:4,11 33:10,13 44:3 98:23 100:18,24 101:9 113:4,
--	--	--	--

17,22 117:22 126:21,24 127:12 128:13 133:3 148:4 179:17 184:11 statute's [2] 74:20 185:23 statutory [13] 17:8 26:13 50:23 76:21 89:15,20 109: 24 110:2 111:21 113:8 146: 25 171:5 184:25 stave [1] 115:8 stay [2] 102:23 123:25 stayed [1] 154:21 steel [2] 78:16 125:5 steven [1] 152:1 stick [2] 134:21 179:2 still [4] 51:7 73:5 74:5 133: 17 stimulate [1] 39:6 stipulated [1] 153:21 stood [2] 142:25 145:12 stop [4] 30:11 66:8 99:21 177:23 stopping [1] 172:6 store [1] 98:11 story [4] 135:1,23 137:13 166:1 story's [2] 25:10 26:15 street [1] 116:14 strength [1] 5:9 strict [1] 48:16 stricter [1] 56:2 strike [1] 7:15 strong [4] 4:24 24:24 110: 1 117:21 stronger [2] 67:22 105:24 strongest [2] 5:14 12:13 strongly [1] 146:8 struck [2] 72:19,23 structure [4] 29:11 31:10 86:16 109:25 structured [1] 180:4 struggle [1] 110:22 struggling [2] 66:17 68:3 stuck [1] 116:19 student [2] 14:5,8 studying [1] 24:19 stuff [1] 120:4 sub [2] 60:12 93:21	subject [7] 7:19 12:9,9 46: 12 57:12 90:14 186:10 subjecting [1] 40:3 subjects [2] 7:25 60:24 submerged [1] 116:25 submit [1] 122:10 subsequent [2] 10:22 57: 17 subsequently [1] 24:14 subsidiary [1] 38:11 substantial [1] 62:10 successfully [2] 23:2 24: 7 suggest [2] 155:13 169:24 suggested [2] 38:16 92: 22 suggesting [4] 34:15 123: 18 124:5,23 suggestion [1] 117:12 suggests [1] 93:12 suite [2] 125:5 178:13 sunday [1] 124:18 super [1] 72:12 superfluous [1] 33:10 super-majority [1] 75:10 supersede [1] 120:8 superseded [1] 122:1 supply [1] 92:8 support [2] 128:17 143:18 supports [1] 155:18 suppose [7] 110:10,23 111:24 112:1,5 115:1,2 supposed [1] 171:21 supreme [1] 181:4 surcharges [1] 50:19 surplus [3] 109:9 163:16, 22 surprised [1] 104:13 surprises [1] 10:15 suspect [1] 174:7 suspicion [3] 173:14 174: 25 175:9 suspicious [1] 174:8 sustainable [1] 4:22 sweeping [5] 5:12 9:21 11: 21 51:21 63:9 switzerland [1] 109:8	swords [1] 40:10 system [5] 7:13,15,21,23 97:23 T table [2] 24:7,13 tactic [1] 43:2 takeaway [1] 23:9 talked [6] 26:19 48:20 55: 10 57:4 64:13 90:5 talks [5] 17:6,7 46:23 62: 16 170:3 tariffed [1] 90:10 tariff-equivalent [1] 49: 17 tariff-imposing [1] 25:19 tariffing [20] 9:16 30:18 32: 24 33:5 49:16,18 77:23 79: 3,23 82:7 87:1,2,6 89:3 91: 2 95:8 109:8 134:1 166:15 175:22 tariffing-like [1] 77:24 tariff-specific [1] 141:18 tautological [1] 168:12 tax [41] 10:5 12:18 13:19 14:2,15 15:5 17:18 28:1 33: 7,13 43:23 47:6 54:11 57: 24 58:1,4,5,8,11,11,17 97: 15 98:10 99:22 102:18,20 103:8 112:17 113:3 117:23 129:14,15 135:15 142:7 143:5 181:2,4,10 182:20 188:16,19 taxation [5] 112:24 113:23 129:14 165:25 179:2 taxed [1] 180:9 taxes [21] 8:20 12:19 15:13 16:21 30:24 31:1,7 32:2 37: 4,14 97:10,18 108:9 149: 12 166:17,22 167:14 173: 17 183:18 186:24 188:15 taxing [14] 15:13 30:16 32: 8 33:10 54:10 55:17 56:15 97:12 146:16 166:17 180: 15,16,17 182:14 taxpayers [2] 58:2 168:4 tea [1] 100:5	team [1] 78:21 technique [1] 158:18 tempted [1] 104:10 ten [1] 24:1 tend [2] 104:15 175:4 tension [4] 7:17,23 63:5 159:1 term [4] 28:21 108:5 114: 14 166:21 terminate [3] 73:14 74:2 88:25 termination [1] 74:18 terms [1] 172:10 territory [7] 130:3 133:23, 25 151:20,22 152:23 161:9 terrorism [1] 79:5 test [7] 55:24 56:5,21 57:16 66:17,18 67:4 tested [1] 185:13 text [16] 28:15 41:25 42:4 92:20 108:2 117:1 118:9 134:12 139:8,12 146:6,7 171:13,18 185:20,23 textual [1] 155:10 textualist [1] 16:23 textually [3] 81:24 100:6 117:1 theme [2] 156:19 186:22 themselves [1] 43:13 theory [2] 56:7 65:13 therefore [7] 20:25 40:13 67:9 81:3 84:18 121:16 173:16 thereof [1] 59:15 there's [70] 9:7,18 23:8 25: 5 27:18,24 35:21 36:3,7,20 37:18,25 40:4 41:11 48:9 50:8 58:3,24 62:2,15 65:18, 21,22,25 68:9 73:19 79:17 81:14 82:14 83:7,18 84:4,5 90:18 92:2 94:20 100:17 102:10 108:7,17 110:11 115:16 117:21,24 120:5 125:17 128:6 134:11 137: 11 138:1,2,20 144:6 145:9, 11 146:5,25 152:4,9 153: 16 154:2,6 155:3 156:10,
--	---	--	--

12 158:14 160:1 167:25 168:1 187:8 they'll [1] 57:12 they've [6] 83:14 134:10 157:22,23 158:1,4 thinking [2] 103:13,15 thinks [1] 55:17 third [1] 108:25 thomas [17] 6:13,17 9:1 47:19,20,24 49:2,11 55:11 99:14,19 101:8,12 119:13, 14 181:24,25 thomas's [1] 55:7 though [16] 6:20 17:3 30: 23 42:8,22 64:9 68:2 69:1 70:23 79:12 98:19 127:10 132:4 139:7 151:2 165:20 thoughts [2] 117:15,16 thousands [2] 4:18 98:20 threat [9] 62:9 69:5 90:4 95:18,23 114:24 115:3,4 188:9 threaten [1] 4:22 threatened [1] 181:1 threats [2] 90:10 157:8 three [9] 6:18 10:15,15 17: 9 80:24 99:18 108:20 132: 21 184:24 thumb [2] 118:8,9 tier [1] 183:15 ties [3] 50:12 58:17 186:21 tired [1] 66:6 title [6] 60:3,12 100:18 120: 6,7 133:3 today [6] 100:17 117:7 122: 8,12 145:25 183:7 together [6] 9:23 25:17 29: 3 33:8,14 87:12 tolls [1] 135:20 tomorrow [4] 66:5 115:22 116:15 122:14 took [6] 20:21 22:14 24:18 29:16 73:3 154:10 tool [10] 5:18,18 61:25 78: 25 79:13,24 80:4,9 91:2 178:20 tools [8] 9:25 10:1 21:2 48:	24 59:8 177:18 178:13 179: 7 top [2] 9:20 65:21 torn [1] 109:6 totally [4] 58:19 86:19 107: 10 137:13 tough [3] 132:9,12 149:14 tougher [1] 111:9 toward [1] 74:12 towards [1] 39:6 tracking [1] 152:8 trade [40] 4:13 5:7 39:3 46: 4 47:7 50:20 78:15 90:20, 21 91:10 98:25 109:2,9 111:17 115:6 120:10 123: 10 125:15,23,25 132:19 145:17,18 149:3 154:3 162: 2,18 164:22 165:5 166:8 167:3 170:4,5,19 172:6 177:24 179:14,14 187:10 188:2 trading [17] 5:4 22:23 24:3, 12 33:1 42:15 49:5,18,19 50:21 91:8 119:17 150:21 151:15,16 152:24 188:10 tradition [2] 36:21 188:21 traditional [1] 5:23 traditionally [1] 43:7 traffic [1] 4:16 traffickers [1] 183:24 trafficking [2] 183:19,20 transaction [3] 163:5,7 169:2 transactions [6] 19:7 41: 10 42:10 156:25 159:24 172:18 transfer [1] 38:4 treasury [5] 97:12 144:24 163:23 168:4 169:4 treat [1] 52:14 treaties [1] 120:11 treatise [2] 25:11 26:16 treatment [3] 90:20 91:10 92:5 trials [1] 70:20 tribes [1] 186:14 tried [1] 98:22	triggering [4] 19:18 20:4, 9 36:5 trillion [3] 112:21 123:17 148:25 trillions [1] 5:3 true [6] 47:3,4 64:25 89:17 144:15 167:6 trump [9] 4:5,12,20 5:2 37: 8 79:22 95:10,11 96:19 trump's [1] 125:14 trustees [3] 25:12 28:5 32: 19 try [6] 73:25 123:7 124:24 126:2 162:18 166:11 trying [17] 11:9 18:14 19:3 24:5 41:17 42:9 92:19 115: 8 156:20,23 157:5,14 171: 9 174:9,10 175:11,14 tunes [1] 153:17 turn [2] 43:14 160:20 turning [2] 49:12 155:11 turns [1] 61:15 twea [28] 18:13 19:20 20: 22 21:5,9 22:9 23:1 25:21, 24 27:9,15 36:1,1 41:6 42: 12 50:5 51:6,7 54:5,15 87: 5,6 93:22 108:21 130:1 140:15 148:1 184:9 two [34] 6:18 7:1 9:17,22 23:16 24:17 27:8 30:5 31: 12 36:17 37:2,10,12 39:2 42:25 43:25 47:13 54:9,14 70:9 79:12 84:6 91:13 96: 15 121:7,24 128:25 136:20 138:20,21,21 148:4 180:21 187:8 two-facing [1] 37:2 two-house [1] 72:20 two-word [2] 23:10 82:11 typically [3] 30:25 38:1 75: 19 U u.s [3] 97:12 115:6 119:18 u.s.c [2] 128:14 154:4 ultimately [1] 50:5 unconstitutional [1] 72:	21 unconvincing [1] 30:5 under [37] 18:13 21:5,9,25 29:23 36:15 43:12,12 52:4 54:2,5,6 68:24 69:17 85:25 89:10 95:24 107:3 115:7, 10 118:4,16 120:11 131:1 140:15 141:23 147:22 148: 4 155:2 156:1 157:12 158: 20 159:20 164:11 176:1,5 180:23 underlying [1] 92:6 undermine [2] 166:4 173: 2 undermining [1] 123:22 underscores [1] 153:14 understand [36] 11:7 12: 16 13:2 18:9 27:21 30:25 32:4 41:3 45:9 52:13 63:21 67:20 69:21 80:13 86:17 87:11 92:14,19 95:3 114: 24 118:20 119:6 123:2 133: 8 136:2 137:9,10 138:1 145:9,25 149:1 151:13 152: 6 157:13 160:16 178:19 understanding [11] 18: 20 20:18 22:21 30:22 47: 23 77:10 113:21 118:15 141:1 146:14 173:23 understood [14] 22:13 26: 3,20 41:24 55:8 76:23 81: 21 92:24 122:1 134:24 174: 1 175:16,20 177:16 undertake [1] 128:16 undisputed [1] 174:21 unemunerated [1] 185:4 unfair [1] 91:9 unfold [1] 154:23 unforeseeable [1] 63:11 unheralded [4] 36:10,19 77:2 106:6 uniformity [2] 85:8,10 unilaterally [1] 120:11 unique [4] 101:19 104:7 117:23 128:7 uniquely [1] 101:18 united [9] 62:10,13 70:10,
--	--	---	--

13 116:4 121:8 142:8 154:8 161:4 universe [2] 113:10,11 unless [3] 149:5 163:13 180:9 unlike [6] 15:23 92:21 100:3 126:15 132:1 175:21 unlikely [1] 96:10 unlimited [4] 18:22 20:15 108:21 167:14 unlocked [1] 188:2 unnatural [1] 170:11 unnecessary [1] 87:4 unprecedented [1] 142:6 unqualified [2] 5:13 11:21 unrelated [1] 175:24 unreviewable [3] 61:6,7 68:9 until [1] 34:7 unusual [11] 34:25 35:13 62:8 69:4 90:4 94:9 95:18, 22 114:23 178:15,25 unwinding [1] 5:5 up [18] 22:4 44:24 45:7 63:16 85:12,19 86:12 88:22 109:6 123:17,17 142:13,25 158:24 159:11 164:19 181:20 182:8 upheld [4] 21:24 24:14 36:15 51:20 upholding [1] 108:23 uses [11] 17:15 30:24 34:8 35:7 54:10 71:23 98:15 108:5 129:11 142:21 166:21 using [6] 17:1 18:12 49:16 88:20 144:17 147:22 V validity [2] 5:14 12:14 valorem [2] 46:18,19 value [2] 10:22 144:23 variety [2] 125:17 132:6 various [2] 19:6 60:4 vehicle [2] 37:4 107:20 verb [9] 11:25 16:10 40:8	52:3,11 53:20 100:13 135:4 176:21 verbs [29] 11:25 12:2,7 16:19 28:16 29:3,16,22 30:2 40:4,16 41:1 42:5 52:6,13 100:8 119:4,4 139:1 140:11,13 156:17,20 157:3 160:19 161:25 176:3,6 177:13 version [2] 67:25 70:25 versus [8] 4:5 63:10 82:13 103:14,15 112:16 118:14 175:5 vest [1] 29:17 veto [14] 72:21 73:4 74:2,8 89:16,24 98:6 102:14 131:19,24 132:6,8,24 180:8 vetoed [1] 73:24 veto-proof [4] 72:14 75:2, 10 89:4 viable [1] 4:25 view [10] 9:5 42:20 64:9 69:10 72:17 123:4 125:13,16 133:14 157:4 views [2] 125:13,18 violations [1] 121:4 virtually [4] 5:18 91:8 120:24 155:23 vis-à-vis [1] 77:11 visible [1] 54:14 visibly [3] 21:13 51:19 77:17 vocabulary [1] 144:16 vogue [1] 155:16 voice [1] 156:5 void [6] 11:17 12:1 28:19 29:6 52:7 93:10 vote [2] 116:17 156:6 voted [1] 73:14 vulnerability [2] 92:8,10 W waiting [1] 68:3 wanted [11] 18:21 20:18, 19 68:23 89:2,5 91:15 116:3,23 142:11 159:15 wants [8] 17:14,23 43:21 58:12,13 107:15 110:25	177:18 war [27] 33:16 42:16 45:19 65:3 66:3 68:5 69:24 104:24 115:3,3,4,9 116:5 128:15 129:1,7,12,25 130:2,7 150:14,18,21 151:3 153:5 161:11 178:18 war-making [1] 152:18 warming [1] 14:5 warns [1] 5:6 wars [1] 125:25 wartime [15] 21:16 35:25 42:13 49:18 69:22,25 133:22,24 151:11 152:4,11,14 161:1,7,21 washington [6] 2:3,5 57:9,13 101:24 186:4 waterfront [1] 29:12 way [71] 10:17 11:11 12:4 14:18,23 22:18 25:11 26:18 28:4 29:3 30:20 38:24 39:14,25 43:6 44:7,7,17 45:17 46:2 51:4 60:8 63:10 66:3 67:1 76:18 81:22 82:8 85:11 86:21,23 93:25 95:2 99:24 101:8 102:2 103:14 107:19 113:15,20 114:1 115:8 117:22 118:14 119:21 124:22,22 127:6,11 129:20,22 130:6 131:15 132:19 133:10 136:9 137:17 141:22 146:1,14 153:19 156:5 164:6 167:12 168:18 175:15 177:6,19 179:1 184:6 188:12 ways [5] 82:8 94:10 99:22 124:17 125:1 weaker [1] 162:17 weapons [1] 40:13 week [1] 61:23 week's [1] 188:1 weigh [1] 96:8 weight [1] 120:13 welcome [3] 6:12 99:13 160:3 well-defined [1] 17:16 well-known [1] 106:12	whatever [5] 20:19 57:12 96:24 169:13 183:5 whatsoever [7] 100:15 102:11 107:6 115:24 130:4 133:18,19 whenever [2] 54:9 129:13 whether [12] 18:6 60:2 124:9,25 128:3 132:4 146:15 150:12 152:9 155:18 163:5 169:1 whoa [1] 89:8 whole [12] 22:19 24:23,23 29:16 62:9 65:9 100:17,22 128:7 134:7 154:3 185:4 wholesale [3] 66:13 67:4 70:23 wholly-owned [1] 38:10 wide [1] 28:24 widest [2] 5:15 12:10 will [18] 4:3,24 44:12 50:23 60:12 72:10 74:23 98:4 108:13 130:20 133:22 144:9 149:3,4 168:25 173:15 177:6 186:9 win [3] 135:9,12 153:6 window [1] 178:23 wins [2] 98:6 99:4 wise [1] 178:1 wish [1] 129:16 within [7] 7:13,14 93:1 96:20 112:5 114:13 188:21 without [8] 50:23 72:12 77:19 78:1 99:6,6 161:22 181:9 wolff [1] 107:9 wonder [1] 126:7 wondering [4] 8:16 18:6 95:23 132:4 word [39] 17:4 26:18 35:5, 7 42:19 52:1 54:11 77:2 93:13,16,21 99:12 101:10 105:2 108:2,4 113:5 118:4 120:11 129:11,11 136:21,23 142:17,20 143:9 144:2,3, 14,14,19,25 145:20 146:14 149:8,13 157:12 166:14 181:11
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