XIAOMI CORPORATION V. U.S. DEPARTMENT OF DEFENSE: DEFENDING THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT

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The United States Constitution fails to prescribe procedures Congress and the President must follow during a national emergency. Consequently, history demonstrates that Presidents must either act without congressional approval during a crisis pursuant to the amorphous "executive powers" conferred by the Constitution, or Congress may enact statutes ex-ante that provide the President with emergency powers in anticipation of future crises.[1] Since the mid-twentieth century the latter method has prevailed, with Congress enacting dozens of statutes permitting the President to declare a state of emergency and exercise certain delegated emergency powers therein.[2]

The International Emergency Economic Powers Act ("IEEPA") represents one example of Congress delegating emergency authority to the President in the realm of foreign affairs and national security.[3]

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1. *Compare* The Brig Amy Warwick, 67 U.S. 635, 668 (1862) (holding President Lincoln acted within his Constitutional powers when he issued blockades during the Civil War absent any "special legislative authority"), *with* Dames & Moore v. Regan, 453 U.S. 654, 674 (1981) (holding President Carter acted within his statutory power delegated to him *pursuant to congressional authorization*) (emphasis added).

2. BRENNAN CENTER FOR JUSTICE, CHECKING THE PRESIDENT'S SANCTIONS POWERS 3 (2021) [hereinafter *Brennan Center Report*] (noting that there are upwards of 120 statutory powers the U.S. President can invoke when declaring a national emergency); *see also* Amy L. Stein, *A Statutory National Security President*, 70 FLA. L. REV. 1183, 1193 (2018) (explaining that nearly 400 statutes "discuss national security authority provided to the President," and more than 60 grant the President "explicit power to act in the name of national security.").

3. International Emergency Economic Powers Act, 50 U.S.C. §§ 1701–1707.

IEEPA provides the President with the power to declare a state of emergency and affords the President sweeping economic powers during the declared emergency.[4]

Specifically, IEEPA grants the President the authority to freeze assets, block transactions subject to the jurisdiction of the United States, and exercise numerous other powers to regulate international commerce.[5]

Supported by a broad statutory delegation of power, courts have placed very few substantive limitations on a President acting under IEEPA.[6] Yet, a recent decision by the United States District Court for the District of Columbia reveals the broad and flexible power IEEPA delegates to the Executive is not without limits.[7] In *Xiaomi Corporation v. Department of Defense*, the D.C. District Court enjoined the implementation and enforcement of an executive order issued by the Trump Administration acting under the authority of IEEPA.[8] The *Xiaomi* decision represents a departure from the judiciary's traditional deference to the Executive when acting pursuant to IEEPA and presents a compelling case study to consider both the scope of, and limits on, executive power.

This Note focuses on the tripart tension between our Constitutionally mandated separation of powers, the Executive's expanding authority in the realm of national security, and the evolving nature of global conflict that is increasingly defined by economic and financial warfare.[9] Specifically, this Note contemplates the advantages

4. CHRISTOPHER A. CASEY et al., CONG. RSCH. SERV., R45618, THE INTERNATIONAL EMERGENCY ECONOMIC POWER ACT: ORIGINS, EVOLUTION, AND USE 2, 17 (2020) [hereinafter *Congressional Research Report on IEEPA*] (noting that the President often turns to IEEPA to "impose economic sanctions in furtherance of U.S. foreign policy and national security objectives.").

5. 50 U.S.C. § 1702; *see also Congressional Research Report on IEEPA*, *supra* note 4, at 25–26 (noting that the President has "turned to IEEPA to impose economic sanctions in furtherance of U.S. foreign policy and national security objectives."); *see also Brennan Center Report*, *supra* note 2, at 7 (noting that IEEPA allows the President to "'regulate' a wide array of financial transactions.").

6. *See Brennan Center Report*, *supra* note 2, at 33 (noting that most challenges to executive actions taken during a declared national security emergency under IEEPA have failed, and "[t]he few challenges that succeeded did not seriously undermine the overarching statutory scheme for sanctions.").

7. Xiaomi Corporation, *et al.*, v. Department of Defense, No. 21-280 (RC), 2021 WL 950144 (D.D.C. Mar. 12, 2021).

8. *Id.* at *1, *7.

9. *See* Paul Bracken, *Financial Warfare*, 51 ORBIS 685, 696 (2007) ("Financial warfare is likely to be an increasing form of conflict because it lies at the intersection of powerful long term trends in technology, networks, and finance."); *see also* JUAN C. ZARATE, TREASURY'S WAR:

of the Executive's broad authority to wield global capital markets as a foreign policy tool and considers the judiciary's role in policing Executive Branch activity when acting pursuant to congressionally delegated power. To this end, the *Xiaomi* decision provides a useful framework for evaluating both the Executive's expansive national security power and arguments for reining in executive power under IEEPA. Using the *Xiaomi* decision as an analytical framework, this Note rejects calls for IEEPA reform and argues IEEPA's existing statutory accountability mechanisms, in addition to proper judicial review under the Administrative Procedure Act,[10] represent sufficient constraints on the President's delegated national security powers.

Accordingly, this Note will proceed in four parts. Part I will provide an overview of the President's national security power and the various sources giving rise to that power. This section will also demonstrate the historical precedent for the President's broad discretion in the foreign policy realm. Thereafter, Part II will provide an overview of IEEPA and will consider how the evolving nature of national security to include economic warfare has impacted the Executive's national security power over time.

Following Part I and II's suggestion that the Executive's national security power has expanded over time, Part III will use the *Xiamoi* case to demonstrate the existing constraints on the Executive's national security powers. Finally, Part IV will bring each of these elements together and will argue that IEEPA should not be amended to create more Congressional oversight. This section will reject arguments for IEEPA reform and will use the *Xiaomi* decision to argue that IEEPA sensibly constrains the President when paired with appropriate judicial review, particularly in an era defined by the growing prominence of financial warfare as a U.S. foreign policy tool.[11]

I. THE NATIONAL SECURITY PRESIDENT

There has been extensive academic literature focusing on the breadth and derivation of the Executive's national security power.[12]

THE UNLEASHING OF A NEW ERA OF FINANCIAL WARFARE 2–3 (2013) ("This new warfare is defined by the use of financial tools, pressure, and market forces to isolate rogue actors from the international financial and commercial systems and gain leverage over our enemies.").

10. 5 U.S.C. §§ 701–706.

11. *See* discussion *infra* Part II.

12. *See* Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L. J. 231, 256–57 (2001) (arguing that the Vesting Clause creates the President's foreign affairs power). *But see* Curtis A. Bradley & Martin S. Flaherty, *Executive Power*

While the debate is far from settled, most scholars agree that the text of the Constitution does little to help resolve disagreements surrounding the source and scope of the Executive's national security power.[13] It is beyond the scope of this Note to assess the various constitutional arguments for a more limited or expansive executive power. Instead, this section will briefly survey the relevant legal doctrine and emphasize the key Supreme Court decisions that established the modern approach to the Executive's national security power. This Section will show that, over time, judicial deference and congressional delegation have strengthened the President's power in the realm of national security and foreign affairs.[14]

A. Inherent Presidential Power

The Constitution grants the President "executive power"—a bundle of undefined, nebulous, and circumstantial privileges historically interpreted to give the President broad authority in the realm of foreign affairs and national security.[15] Given that the Constitution provides only a select few explicit national security powers to the Executive,[16] the President's authority over foreign affairs

Essentialism and Foreign Affairs, 102 MICH. L. REV. 545 (2004) (refuting Prakash and Ramsey's Vesting Clause thesis). For opposing sides of this debate, *compare* Francis P. Sempa, *The Wartime Presidency*, 26 T.M. COOLEY L. REV. 25, 28–29 (2009) (citing United States v. Curtiss-Wright Corp., 299 U.S. 304, 320 (1936) ("the very delicate, plenary and exclusive power of the President as the *sole organ* of the federal government in the field of international relations– a power which does not requires a basis for its exercise an act of Congress . . . .") (emphasis added)) (explaining that, historically, executive power is understood to give "broad" implied powers to the President, particularly in the arena of foreign affairs), *with* Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1172–73 (2019) (rejecting the "*conventional wisdom*" that views the Vesting Clause "as a powerful presumption of indefeasible presidential authority in the arenas of foreign affairs and national security.") (emphasis added).

13. *See* Prakash & Ramsey, *supra* note 12, at 233 ("…the foreign affairs Constitution contains enormous gaps that must be filled by reference to extratextual source… .").

14. *See* Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L. J. 1255, 1311–12 (1988) (arguing the judiciary's deference to the Executive branch has expanded the implied power of the President over foreign affairs); *see also* MICHAEL A. GENOVESE & DAVID GRAY ADLER, THE WAR POWER IN AN AGE OF TERRORISM 24 (2017) (noting that Congress has abdicated its role in making U.S. foreign policy and delegated vast power to the President).

15. U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America."); *see also* ELAINE HALCHIN, CONG. RSCH. SERV., R98505, NATIONAL EMERGENCY POWERS 1 (2021) [hereinafter *Congressional Research Report on National Emergency Powers*] (explaining that the President has "certain powers that may be exercised in the event that the nation is threatened by crisis," and these powers may be "stated explicitly or implied by the Constitution, assumed by the Chief Executive to be permissible constitutionally, or inferred from or specified by statute.").

16. U.S. CONST. art. II, § 2, cl. 1 (assigning the President the title of Command-in-Chief of

and national security is primarily an implied power.[17] Over time, the judiciary has provided the clearest articulation of the scope of the President's implied national security powers.

The Supreme Court first considered the breadth of the President's implied national security powers in *Little v. Barreme*.[18] This early case considered damages liability for an American military officer who seized a Danish vessel during hostilities with the French.[19] The case turned on whether the U.S. officer, Captain Little, could avoid damages liability when acting pursuant to an executive order issued by the President that directly conflicted with an act of Congress.[20] The Court held that Little could not be immunized by an executive order when, without such an order, his actions "would have been a plain trespass" under legislation passed by Congress.[21] Additionally, with respect to executive power, the Court held the President cannot use his implied constitutional authority to take actions contrary to the express terms of a law passed by Congress.[22] Rather, when Congress has directly spoken on an issue through legislation that provides the Executive with a specific authority, and Congress has prescribed the manner in which the law should be executed, the Executive may not act beyond that authority.[23]

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the armed forces).

17. *See* GENOVESE & ADLER, *supra* note 14, at 1 (noting that the tradition of constitutional interpretation that has resulted in so-called implied powers); *see also* David M. Driesen & William C. Banks, *Implied Presidential and Congressional Powers*, 41 CARDOZO L. REV. 1301, 1303 (2020) (noting that the President's power over foreign affairs and national security is "primarily an implied power. . . .").

18. 6 U.S. (2 Cranch) 170 (1804).

19. *Id.* at 176.

20. *Id.* at 176–77; *see also* Michael J. Glennon, *Two Views of Presidential Foreign Affairs Power: Little v. Barreme or Curtiss-Wright?*, 13 YALE J. INT'L. L. 5, 6–7 (1988) (summarizing the facts of Little v. Barreme).

21. *See Little*, 6 U.S. (2 Cranch) at 177–78 (explaining that, while Congress had passed a statute during hostilities with the French that permitted the President to give order to commanders of armed vessels to seize vessels, the President's order to Little fell outside the scope of his authority under the statute).

22. *See id.* (noting that "the fifth section [of the relevant statute] gives a special authority [to the President] to seize on the high seas, and limits that authority to the seizure of vessels bound or sailing to a French port . . . ."); *see also* David Gray Adler, *The Steel Seizure Case and Inherent Presidential Power*, 19 CONST. COMMENT. 155, 194 (2002) (discussing the impact of *Little Barreme* on the court's approach in *Youngstown*).

23. *See Little*, 6 U.S. (2 Cranch) at 177–78 ("But when it is observed that the general clause of the first section of [the legislation] . . . *obviously contemplates* a seizure within the United States, and that the fifth section gives [the Executive] a special authority to seize on the high seas, and limits that authority to the seizure of vessels bound or sailing to a French port, the legislature seem to have prescribed . . . the manner in which this law shall be carried into execution . . . .") (emphasis added).

While the *Little* decision purports to limit executive power over national security, the decision alludes to a more expansive interpretation of the President's national security power. In dicta, Justice Marshall opined that, consistent with the President's role as commander-in-chief and with his duty to "take care that the laws be faithfully executed,"[24] the President may have the implied Constitutional authority to order seizures on the high seas during a conflict absent a statutory prohibition imposed by Congress.[25] Rather, Justice Marshall suggested that the President might have had an implied power to seize vessels during hostilities if Congress had not so pointedly placed limits on the President's authority in the relevant statutory language.[26]

The Court relied on similar legal principals more than a century later in *Youngstown Sheet & Tube Co. v. Sawyer*.[27] There, the Court held President Truman did not have the authority to seize and operate the steel mills during a nationwide labor strike because he was not acting pursuant to statute and did not have the inherent constitutional authority as Commander in Chief to expropriate private enterprise for public use.[28] The majority in *Youngstown* held that Congress' failure to grant the President express authority to seize the steel mills was dispositive.[29] Both Justices Jackson and Frankfurter, however, suggested different bases for implying executive authority absent express congressional authorization.[30] Specifically, Justice Jackson's

24. U.S. CONST. art. II, § 3.

25. *See id.* ("It is by no means clear that the President of the United States, whose high duty it is to 'take care that the laws be faithfully executed,' and who is commander in chief of the armies and navies of the United States, might not, without any special authority for that purpose . . . have empowered the officers commanding the armed vessels of the United States to seize . . . ."). This holding is easily reconcilable with the court's holding in *Youngstown*, as the facts of the President's exercise of the "Commander in Chief" power in *Little* were in the context of war and foreign conflict, as opposed to nationalization of domestic industry in *Youngstown*.

26. *See id*. (considering whether the President would have had the authority to issue Executive Order to Little and other Naval captains had Congress remained completely silent on the issue).

27. 343 U.S. 579, 585–86 (1952).

28. *Id.* at 587–88 (finding the President's seizure of the steel mills "cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces" and adding the "seizure order be sustained because of the several constitutional provisions that grant executive power to the President.").

29. *Id.*

30. *Id.* at 635–38 (Jackson, J., concurring), 610–11 (Frankfurter, J., concurring) (chronicling the main arguments of Justice Jackson and Frankfurter's concurrences – the former suggesting an implied presidential power depending on the "disjunction or conjunction" of the President's power with will of Congress, and the latter arguing constitutional custom and long-standing executive practice are a source of implied presidential power).

famed concurring opinion argued that, absent express legislative authority, the President may find authority to act from congressional silence or implied congressional consent.[31] In this way, Justice Jackson hinted that the President may act pursuant to his amorphous, constitutionally vested executive power when Congress has neither expressly authorized nor prohibited the President to carry out the act in question.[32]

Together, *Little* and *Youngstown* suggest there is an undefined space in which the President may act pursuant to his implied executive authority without Congressional approval. More importantly for the below analysis, both opinions emphasize the importance of congressional delegation of power through statute. First, *Little* reveals the Executive's implied national security powers do not allow him to take actions that violate the express terms of a law passed by Congress. Second, implied by the *Youngstown* majority and explicitly written in Jackson's concurrence, executive power is at its strongest when the President acts pursuant to an express authorization from Congress.[33] Restated, when acting pursuant to statute, the President's national security power is "supported by the strongest of presumptions and the widest latitude of judicial interpretation."[34]

B. Modern Statutory National Security Power

As a result of the legal history chronicled above, the President typically acts pursuant to a statutory authorization from Congress in the context of modern national security decisions. Yet, in addition, the President often cites the Executive's broad implied national security power alongside Congress' statutory authorization to support a given

31. *See id.* at 635–38 (Jackson, J., concurring) (endorsing an "implied executive power," the scope of which changes based on how closely the President's actions are tethered to the will of Congress).

32. *See id*. at 637 (describing the so-called "twilight zone" as an area in which the President may "rely upon his own independent powers" when there is neither "a congressional grant or denial of authority").

33. *See id.* at 635 ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.").

34. *Id.* at 637. The Court's decision in United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318–20 (1936) also supports the notion that the President has sweeping authority to act in the realm of national security when acting pursuant to statute. This case shows that, even before *Youngstown*, the Court was extremely deferential to the President when acting (1) in the realm of foreign affairs and national security, and (2) pursuant to some grant of Congressional delegation. *But see* Koh, *supra* note 14, at 1306–07 (arguing that Presidents have sought to use *Curtis-Wright* "to add to the powers enumerated [in the Constitution] an indeterminate reservoir of executive foreign affairs authority.").

action or decision.[35] It is the job of the judiciary to parse these parallel sources of power and determine if an executive action is grounded in the Constitution, or if the President is acting pursuant to a congressional delegation. Depending on the subject matter before the Court, however, the judiciary often speaks of executive power in sweeping terms without scrutinizing the source of that authority, leading to inconsistent legal conclusions on the scope of the President's national security power.[36]

This Section demonstrates that the modern understanding of the Executive's broad national security power arose from a two-step process. First, a reform-minded Congress delegated vast authority to the President in the realm of national security. Second, the federal judiciary broadly interpreted Congress' statutory delegations. As demonstrated below, the Court has applied "extraordinary" statutory construction to congressional delegations of national security power and, in doing so, has expanded the President's power over national security and foreign affairs.[37]

1. Congressional Delegation

Much of the Executive's national security power arises from express authority delegated to the President by statute.[38] Indeed, one quantitative analysis found that nearly "400 statutes discuss national security authority provided to the President," and more than sixty statues grant the President "explicit power to act in the name of national security."[39] Congress passed many of these statutory delegations in the late 1970s and early 1980s during the post-Watergate era—a period defined by a renewed appetite for transparency and accountability. While many of these statutes purported to constrain the

35. *See* Exec. Order No. 14,032, 86 Fed. Reg. 30,145 (June 3, 2021) (titled "Addressing the Threat From Securities Investments That Finance Certain Companies of the People's Republic of China") (arguing that the President is taking executive action pursuant to both (1) the authority vested in him by the Constitution and (2) IEEPA – a statutory delegation).

36. *See* Stein, *supra* note 2, at 1186 (explaining that "[r]egardless of the source of the President's national security authority," whether it be the implied power or statutory authorization, the Executive and Judiciary often cite general notions about "the amount of deference given to the President on national security issues" rather than "clearly distinguish presidential actions that are grounded in statutory powers from those grounded in constitutional powers.").

37. *See* Driesen & Banks, *supra* note 17, at 1328–29 (explaining that the "Court often suspends the ordinary rules of statutory construction in order to grant the President broad implied authority over foreign affairs . . . .").

38. Koh, *supra* note 14, at 1263.

39. Stein, *supra* note 2, at 1193.

President's national security power with elaborate procedural restraints,[40] Congress also passed "substantial fresh delegations of foreign affairs authority" to the President.[41] By congressional design, this period of legislative reform shifted the policy making power over national security issues from Congress to the Executive.[42]

2. The Supreme Court's Interpretation

A series of Supreme Court opinions upholding and expanding the President's authority over foreign affairs and national security issues accompanied congressional delegation of national security power to the President.[43] Modern caselaw demonstrates the Court's dominant trend has been to defer to the Executive when the President acts pursuant to express or implied statutory authority.[44] As shown below, the Court has generously construed statutory language, including congressional silence, to find statutory authority for a President acting in the realm of national security.

Dames & Moore v. Regan embodies one approach the Supreme Court has used to analyze executive action in the national security sphere.[45] Here, in response to the Iranian Hostage Crisis, President Carter declared a national emergency pursuant IEEPA and issued an executive order freezing Iranian assets in the United States.[46] Acting within the scope of the executive order, the Treasury Department then

40. *See* Koh, *supra* note 14, at 1263–66 (describing this period as the "post-Vietnam flow of foreign affairs power from Congress to the Executive.").

41. *Id.* at 1264. New delegations of statutory authority falling into this category include the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701–1706 (1982); National Emergencies Act, 50 U.S.C. §§ 1601–1651 (1982); Trade Act of 1974, 19 U.S.C. §§ 2101–2487 (1982); Export Administration Act of 1979, 50 U.S.C. §§ 2401–2413 (1982); Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801–1811 (1982); and International Security Assistance and Arms Export Control Act of 1976, 22 U.S.C. §§ 2751–2796 (1982).

42. *See* GENOVESE & ADLER, *supra* note 14, at 6, 24 (noting that "presidents [have] made grander and grander claims of unilateral, independent power. . . ." and "While the Constitution established a shared model of policymaking, over time presidents have grabbed, and Congress has often willingly given to presidents, a wide range of power over foreign affairs and war."); *see also* Koh, *supra* note 14, at 1319 (describing the U.S. foreign policy making system as one "overdominated by the Executive.").

43. *See* Koh, *supra* note 14, at 1264, 1305–06.

44. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–36 (1952) (Jackson, J., concurring). This trend of judicial deference is consistent with Justice Jackson's view that the President's "authority is at its maximum" when "the President acts pursuant to an express or implied authorization of Congress."

45. 453 U.S. 654 (1981).

46. *See id.* at 662–64 (explaining the circumstances of the Iranian Hostage Crisis and the executive action taken in response to the crisis).

authorized prejudgment attachments against Iran in federal court.[47] Petitioner Dames & Moore sued Iranian defendants and secured a pre-judgment attachment of Iranian assets.[48]

Thereafter, the American hostages in Tehran were released pursuant to a diplomatic agreement in which the U.S. agreed to terminate ongoing legal proceedings and nullify existing judgments between U.S. persons and Iranian institutions in federal court.[49] As a result, the district court vacated Dame & Moore's prejudgment attachment against the Iranian defendants.[50] Petitioners then commenced litigation against the United States, arguing the President and the Secretary of the Treasury acted outside of their statutory and constitutional powers.[51]

Here, Congress had not legislated with respect to the President's power to nullify legal claims in U.S. courts through executive order.[52] Despite this, the Court used IEEPA and other ancillary statutes to infer congressional approval for the President to nullify legal claims.[53] While the Court found that no statute provides specific authorization to the President to suspend claims in federal court, the majority gleaned congressional approval for the Executive to do so from a bundle of statutes that indicated "congressional acceptance of a broad scope for executive action" in the national security context.[54] In sum, because (1) the President was acting in the realm of foreign affairs when he issued an executive order suspending legal claims against Iran, and (2) Congress previously delegated power enabling the Executive to settle

47. *See id.* at 663–64 (noting that "the President granted a general license authorizing certain judicial proceedings against Iran," and clarified in a later executive order that the previous authorization permitting judicial proceedings against Iran included prejudgment attachment).

48. *Id.*

49. *See id.* at 664–65 (explaining that the deal reached between the U.S. and Iran, via executive order, required the United States to "terminate all legal proceedings in involving claims of United States persons and institutions against Iran and its state enterprises," and "to nullify all attachments and judgments obtained therein. . . .").

50. *Id.* at 666.

51. *Id.* at 667.

52. *See id.* at 677–78 (explaining that the IEEPA does not authorize the President to nullify private claims in federal court).

53. In addition to IEEPA, the Court referenced the Hostage Act and the International Claims Settlement Act to support the idea that Congress implicitly approved "the practice of claim settlement by executive agreement." *Id.* at 680. For reference, *see* Act of July 27, 1868, 22 U.S.C. § 1732 (1976) (the Hostage Act) (requiring the President to use any "necessary and proper" means short of war and illegal acts to secure the release of an American hostage being held by a foreign government); *see also* International Claims Settlement Act of 1949, 22 U.S.C. § 1623 (2018) (creating a procedures for the federal government to settle claims by U.S. nationals against foreign governments).

54. *Dames & Moore*, 453 U.S. at 667.

certain legal claims on behalf of U.S. citizens, the Court inferred congressional approval in this instance.[55]

This tendency embodies one modern judicial approach to the President's national security power. In stark contrast to *Youngstown*, when assessing the constitutionality of an executive action in the national security space, the modern Court will examine *any* relevant statutory delegations of power that *may* indicate congressional acceptance of the executive action in question. Even without congressional delegation to the President to pursue a specific action, the Court is willing to examine all relevant statutory authorizations from Congress to determine if there are indicia of congressional acceptance in the circumstances similar to those presented in the case.[56] Rather than seeking affirmative approval, when there is "no contrary indication of legislative intent,"[57] the Court will likely find the President acted pursuant to the implied authorization of Congress.

Again, the Court revealed its extreme deference to the Executive acting in the realm of foreign affairs and national security in *Japan Whaling Association v. American Cetacean Society*.[58] There, the Court considered statutory language surrounding the United States' obligations under the International Convention for the Regulation of Whaling ("IWC").[59] Pursuant to its IWC obligations, Congress passed a series of statues directing the Secretary of Commerce to certify when foreign nations failed to comply with internationally established whaling quotas.[60] After the President refused to impose sanctions five consecutive times following a certification from the Secretary of

55. *See id.* at 680 ("Crucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement.") (citing the International Claims Settlement Act of 1949, 22 U.S.C. § 1623 (2018)).

56. *See id*. at 667 (treating congressional silence as implicit approval and noting, "We think both statutes [IEEPA and the Hostage Act] highly relevant in the looser sense of indicating congressional acceptance of a broad scope for executive action in circumstances such as those presented in this case."). *But see* Medellín v. Texas, 552 U.S. 491, 526–27 (2008) (reading congressional silence on the issue of whether the President has authority to implement an International Court of Justice (ICJ) judgment as signaling congressional disapproval and failing to search the U.S. Code for other indicia of Congressional approval).

57. *Dames & Moore*, 453 U.S. at 678–79; *but see Medellín* 552 U.S. at 527 (finding that, under the *Dames & Moore* standard articulated above, that congressional silence indicated congressional disapproval without any direct evidence of congressional disapproval).

58. 478 U.S. 22 (1986).

59. *See id.* at 225–26, 232–33 (considering a statute directing the Secretary of Commerce to certify to the President if "nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program . . . .").

60. *Id*.

Commerce, Congress passed legislation *requiring* the President to impose sanctions in response to the Secretary of Commerce's certification.[61]

Despite Congress' mandate, the Executive Branch preferred to resolve whaling disputes with Japan through diplomacy rather than sanctions and reached a diplomatic agreement whereby the United States agreed to classify Japan as a compliant nation under the relevant statute.[62] In an effort to validate the Reagan Administration's diplomatic solution, the *Japan Whaling* Court ignored the plain language of the statute and held the statutory language does not require the Secretary "to certify a nation that fails to conform to the IWC whaling Schedule."[63] In this way, *Japan Whaling* reflects the Court's preference to defer to the President when legal questions concern foreign affairs.[64]

II. IEEPA, FINANCIAL WARFARE, & PRESIDENTIAL POWER

Thus far, this Note has framed the legal landscape with respect to the Executive's national security power and emphasized the role of congressional delegation and judicial deference in strengthening executive power. Before turning to an analysis of the *Xiaomi* decision, this Section will consider one congressional delegation of power that has served as the Executive's primary tool for declaring national emergencies – the International Emergency Economic Powers Act

61. *See id*. at 226–27 (explaining that Congress initially allowed the President discretion to impose sanctions on nations violating IWC obligations but, after the President refused to impose sanctions five consecutive times following a certification from the Secretary of Commerce, Congress "mandate[ed] the imposition of economic sanctions against offending nations" following certification from the Secretary of Commerce.).

62. *Id.* at 227–28.

63. *Id*. at 226–27, 233 (quoting the statutory language directing the Secretary of Commerce to monitor, investigate, and certify when a foreign country is conducting fishing operations that "diminish the effectiveness of an international fishery conservation program," but holding that "the statutory language itself contains no direction to the Secretary, automatically and regardless of the circumstances, to certify a nation that fails to conform to the IWC whaling Schedule."); *see also* David M. Driesen, *The Congressional Role in International Environmental Law and Its Implications for Statutory Interpretation*, 19 B.C. ENV'T. AFF. L. REV. 287, 310 (1991) (explaining that the Court "ignored clear legislative history showing that Congress intended the mandatory imposition of sanctions for violations of international whaling quotas. . . .").

64. *See* Driesen & Banks, *supra* note 17, at 1329 ("By basically ignoring the statutory language and its history, it validated a diplomatic solution preferred by the Reagan administration."); *see also* Driesen, *supra* note 63, at 310 ("All commentators have agreed that neither legislative history nor the words of the statute justified the extraordinary in this case."); *but see* Hamdan v. Rumsfeld, 542 U.S. 507, 517 (2004) (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 602 (1952)) (holding President's creation of military commissions was contrary to several statutes and the Geneva Conventions)).

("IEEPA"). In providing an overview of IEEPA and the growing importance of financial warfare, this Section will consider the benefits of broad executive power in the national security realm.

A. The International Emergency Economic Powers Act

IEEPA empowers the President to regulate commerce—including the power to prohibit, nullify, or block transactions[65]—in response to "any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States."[66] While the statutory text requires a threat to the national security or foreign policy of the United States, IEEPA's utility is trans-substantive and has been used to address a variety of crises such as hostile foreign governments, terrorism, weapons of mass destruction, and transnational white-collar crime.[67]

While some contemporary scholars argue IEEPA provides the Executive Branch with too much unilateral authority, Congress passed IEEPA in 1977 to *limit* the President's overly expansive emergency economic powers embodied in the Trading with the Enemy Act ("TWEA").[68] TWEA provided the President with an "extraordinary degree of control over international trade" during both peacetime and wartime.[69] To rein in executive power, Congress amended TWEA to limit is applicability to wartime only,[70] and enacted IEEPA to delegate to the President "a new set of authorities for use in time of national emergency which are both more limited in scope . . . and subject to procedural limitations."[71] As part of its efforts to limit executive power, Congress designed IEEPA to work in tandem with the National Emergency Act ("NEA")— creating robust procedural restraints on the Executive's powers under IEEPA.[72]

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65. 50 U.S.C. § 1702(a)(1)(B).

66. § 1701.

67. *Brennan Center Report*, *supra* note 2, at 3.

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

69. *Congressional Research Report on IEEPA*, *supra* note 4, at 3.

70. *See* Amendments to the Trading with the Enemy Act, Pub. L. No. 95-223, tit. I, 91 Stat. 1625, 1625 (1977) ("Section 5(b)(1) of the Trading With the Enemy Act is amended by striking out 'or during any other period of national emergency declared by the President' in the text preceding subparagraph (A).").

71. *Congressional Research Report on IEEPA*, *supra* note 4, at 9.

72. 50 U.S.C. §§ 1701–1702 (listing the procedural restraints of the President's IEEPA powers); *see also* H.R. Rep. No. 95-459 (1977) (explaining that presidential authority under IEEPA is "subject to various procedural limitations, including those of the National Emergencies

Procedural restraints on the President's power to use IEEPA flow from cross-cutting statutes and the statutory language of IEEPA itself. First, presidents may exercise power granted to them by IEEPA only when the President declares a national emergency under the procedures set forth in the NEA.[73] When declaring a national emergency under IEEPA, the NEA requires the President to transmit a proclamation declaring an emergency to both the public and Congress by publishing the declaration in the Federal Register.[74] The NEA also requires the President to renew the predicate national emergency required to exercise power under IEEPA through a notice of renewal in the Federal Register.[75] If the Executive Branch does not issue a notice of renewal, the predicate national security emergency will automatically end after one year.[76] Further explored in Part III, the procedural requirements of the Administrative Procedure Act (APA) constrain executive action under IEEPA.[77]

In addition to the exogenous procedural requirements of cross-cutting statutes, IEEPA creates additional formal constraints on the President's power. First, the President must confer with Congress "in every possible instance" before acting pursuant to IEEPA.[78] Second, after declaring a national emergency under IEEPA, the President must provide a report to Congress specifying the circumstances that pose an unusual and extraordinary threat to U.S. national security or foreign policy, and must include any foreign nations the Executive intends to act against.[79] Third, the President must submit "follow-up reports" to Congress every six months detailing actions taken under IEEPA.[80]

The Executive must comply with the procedural requirements

Act"); *see also Congressional Research Report on National Emergency Powers*, *supra* note 15, at 8 (noting the NEA arose from a Congressional recommendation from the Church Committee for "legislation establishing a procedure for the presidential declaration and congressional regulation of a national emergency.").

73. *See Congressional Research Report on IEEPA*, *supra* note 4, at 10 ("Presidents may invoke IEEPA under the procedures set forth in the NEA.").

74. 50 U.S.C. § 1621.

75. 50 U.S.C. § 1622.

76. *Id.*

77. *See* discussion *infra* Part III. For a preview of the intersection of executive national security powers, IEEPA, and the APA, see generally Elena Chachko, *Administrative National Security*, 108 GEO. L. REV. 1063, 1137 (noting that the APA provides "structural and functional constraints on the President's control" in the national security realm "despite the President's elevated role in foreign and security policy.").

78. 50 U.S.C. § 1703(a).

79. Ibid. § 1703(b).

80. Ibid. § 1703(c).

outlined above to exercise authority under IEEPA. But, if the formal requirements are met, the Executive has broad authority to target individuals, sovereign nations, and situations not involving a specific target or state, such as the proliferation of nuclear weapons.[81] Indeed, echoing the legal principals in *Dames & Moore v. Regan*,[82] the First Circuit aptly described IEEPA as "codif[ying] Congress's intent to confer broad and flexible power upon the President to impose and enforce economic sanctions against nations that the President deems a threat to U.S. national security interests."[83] While IEEPA's language requires an "unusual and extraordinary threat" to the U.S. economy or U.S. national security interests, the Executive Branch uses IEEPA as a routine foreign policy tool, with "an average of 1.5 IEEPA emergencies declared each year."[84] Given that Congress has the authority to terminate the predicate national emergency that provides the Executive with authority to act under IEEPA, Congress' refusal to do so suggests that the legislature approves of the systematic use of IEEPA by the Executive Branch as a broad foreign policy tool.[85]

B. National Security and Financial Warfare

While some express concerns about the Executive's broad power under IEEPA,[86] the statute has been a fixture in the United States' post-9/11 national security strategy.[87] As global power struggles

81. Ibid. § 1703(a)(1)(B) (showing that IEEPA allows the President, acting through the Office of Foreign Asset Control (OFAC), to sanction and block the real property of natural and legal persons); *see also* Chachko, *supra* note 77, at 1094 (citing Exec. Order No. 12,938, 59 Fed. Reg. 58,099 (Nov. 14, 1994) (titled "Proliferation of Weapons of Mass Destruction") (noting that the Executive Branch has used IEEPA to target states such as Iran as well as "situations" such like the proliferation of nuclear weapons)).

82. 453 U.S. 654, 674 (1981) (providing broad deference to the executive branch based on the Congress' statutory delegation of power through IEEPA).

83. United States v. McKeeve, 131 F.3d 1, 10 (1st Cir. 1997) (citing United States v. Arch Trading Co., 987 F.2d 1087, 1093–94 (4th Cir. 1993)).

84. *Brennan Center Report*, *supra* note 2, at 3; *see also Congressional Research Report on IEEPA*, *supra* note 4, at 18 ("Each year since 1990, Presidents have issued roughly 4.5 executive orders citing IEEPA and declared 1.5 new national emergencies citing IEEPA.").

85. 50 U.S.C. § 1622 (2018) (noting that a national emergency may be terminated by a privileged joint resolution of Congress); *see also* Elizabeth Goitein & Andrew Boyle, *Limiting This Governmental Emergency Power Could Curb Presidential Overreach*, FORTUNE (Mar. 4, 2020), https://fortune.com/2020/03/04/national-emergency-foreign-sanctions-ieepa/ ("To date, Congress has never attempted to terminate an IEEPA emergency."); *see also Brennan Center Report*, *supra* note 2, at 19 (noting that "Congress has largely approved of presidents' uses of IEEPA to date.").

86. *Brennan Center Report*, *supra* note 2, at 3 (noting that IEEPA delegates "potent powers with so few limits on discretion or institutional checks," and arguing for reforms that would limit IEEPA's potential for abuse).

87. *See* Chachko, *supra* note 77, at 1095 ("Use of individualized economic sanctions

increasingly play out in financial markets, as opposed to battle fields, the United States has expanded its national security infrastructure to include economic and financial warfare.[88] Indeed, the modernization of international financial markets and the growth of illicit finance has made financial warfare a central tenant of the United States' national security strategy.[89] Apart from classic sanctions or embargos, the United States is leveraging global capital markets, banking, and financial systems to attack enemies abroad—and it is relying on IEEPA to do so.[90]

The previous four presidential administrations have relied on IEEPA to apply financial pressure as part of the United States' foreign policy campaign against key adversaries such as Iran, Syria, North Korea, and Russia.[91] As early as 2006, President George W. Bush froze assets of persons connected to the assassination of former Lebanese Prime Minister Rafiq Hariri.[92] Thereafter, President Barack Obama issued a series of executive orders prohibiting investment, freezing assets, and blocking transactions as part of the United States' efforts during the Syrian civil war against Iran and the Assad regime.[93] In an even more recent example, the United States blocked transactions with and froze the assets of prominent Russian and Ukrainian individuals involved in Russia's annexation of Crimea, and imposed similar

accelerated following 9/11.").

88. *See* Zarate, *supra* note 9, at 428 (explaining that "freezing bank accounts and seizing cash at borders was a more palatable way of fighting terrorism than sending troops to warzones); *see also* Bracken, *supra* note 9, at 689 (noting that "Financial warfare, as distinct from classic economic warfare, is an expanding arena of conflict.").

89. *See* Zarate, *supra* note 9, at ix (noting that the United States has "financially squeezed and isolated America's principal enemies of this period—Al Qaeda, North Korea, Iran, Iraq, and Syria.").

90. *See* Chachko, *supra* note 77, at 1095 ("Since the early 2000s, there has been a steady increase in the application of individual sanctions pursuant to the IEEPA and other authorities in a host of policy areas.").

91. *Id.* at 1095–98 (describing various executive orders using individual sanctions to effectuate U.S. foreign policy goals).

92. *See* Exec. Order No. 13,399, 71 Fed. Reg. 25,059 (Apr. 25, 2006) (entitled "Blocking Property of Additional Persons in Connection [w]ith the National Emergency [w]ith Respect to Syria").

93. *See* Exec. Order No. 13,606, 77 Fed. Reg. 24,571 (Apr. 22, 2012) (entitled "Blocking the Property and Suspending Entry into the United States of Certain Persons [w]ith Respect to Grave Human Rights Abuses by the Governments of Iran and Syria [v]ia Information Technology"); Exec. Order No. 13,582, 76 Fed. Reg. 52,209 (Aug. 18, 2011) (entitled "Blocking Property of the Government of Syria and Prohibiting Certain Transactions [w]ith Respect to Syria"); Exec. Order No. 13,573, 76 Fed. Reg. 29,143 (May 18, 2011) (entitled "Blocking Property of Senior Officials of the Government of Syria"); Exec. Order No. 13,572, 76 Fed. Reg. 24,787 (Apr. 29, 2011) (entitled "Blocking Property of Certain Persons [w]ith Respect to Human Rights Abuses in Syria").

individual sanctions on persons involved in the Russian effort to undermine the 2016 Presidential election.[94]

Finally, Congress passed the Global Magnitsky Act in 2016 to address both global corruption and human rights abuses through the application of financial pressure.[95] Congress again invoked IEEPA and predicated the Executive's authority to designate individuals under the Magnitsky Act on IEEPA—enabling the President to use his power under IEEPA against foreign persons who commit "gross violations of internationally recognized human rights," or engage in "significant corruption."[96] Foreign persons currently designated under the Magnitsky Act include Saudi Arabian officials who allegedly played a role in the extrajudicial killing of journalist Jamal Khashoggi, six current Chinese government officials accused of human rights abuses in Xinjiang providence, and government officials from several nations in Africa accused of human rights abuses.[97]

Despite the ubiquity of IEEPA in United States foreign policy, the Executive Branch's use of IEEPA presents a dilemma. On one hand, IEEPA represents an incredibly effective foreign policy tool that serves the United States' national security interests. Indeed, according to former Deputy National Security Advisor Juan Zarate, the United States' financial warfare campaign has ostracized America's enemies and is "unprecedented in its reach and effectiveness."[98] On the other hand, critics argue IEEPA lacks appropriate procedural safeguards given the Court's general deference to the Executive acting pursuant to national security and the institutional gridlock in Congress.[99] The remaining sections of this paper attempt to reconcile the need for accountability with the equally pressing need to provide the Executive Branch with foreign policy tools that enable the President to quickly and flexibly leverage global capital markets for the benefit of the

94. *See* Exec. Order No. 13,685, 79 Fed. Reg. 77,357 (Dec. 19, 2014) (entitled "Blocking Property of Certain Persons and Prohibiting Certain Transactions [w]ith Respect to the Crimea Region of Ukraine"); Exec. Order No. 13,757, 82 Fed. Reg. 1 (Dec. 28, 2016) (entitled "Taking Additional Steps to Address the National Emergency [w]ith Respect to Significant Malicious Cyber-Enabled Activities").

95. Global Magnitsky Human Rights Accountability Act, Pub. L. No. 114-328 (2016).

96. MICHAEL A. WEBER & EDWARD J. COLLINS-CHASE, CONG. RSCH. SERV., IF10576, THE GLOBAL MAGNITSKY HUMAN RIGHTS ACCOUNTABILITY ACT 1 (2020).

97. *Id*. at 2.

98. Zarate, *supra* note 9, at ix.

99. *See* Koh, *supra* note 14, at 1297–98 (arguing that, in the national security arena, Congress has "consistently failed to check or restrain" the Executive "because of legislative myopia, inadequate drafting, ineffective legislative tools, and an institutional absence of political will.").

United States' national security interests.

III. THE *XIAOMI* CASE & JUDICIAL REVIEW UNDER IEEPA

The *Xiaomi* case highlights the Executive's vast power under IEEPA, as well as the effectiveness of IEEPA's procedural constrains on executive power. This Section will use the *Xiaomi* case to argue that, when paired with discerning judicial review, IEEPA as it is currently written strikes a realistic balance between the need for adequate Executive oversight and the necessity that the U.S. have effective foreign policy tools.[100]

A. Legal and Factual Background

On November 17, 2020, then-President Donald Trump issued Executive Order 13959, entitled "Addressing the Threat from Securities Investments That Finance Communist Chinese Military Companies."[101] The Executive Order declared a national emergency with respect to the "unusual and extraordinary threat" posed by China's national strategy of "[m]ilitary-[c]ivil fusion," by which the Chinese government compels its civilian companies to support its military and intelligence activities.[102] The Order argued that these same civilian companies "raise capital by selling securities to United States investors" and thus concluded that the United States is inadvertently financing "the development and modernization of [the PRC's] military."[103] EO 13959 was designed to protect the United States' national security interests by prohibiting U.S. investment in select Chinese companies involved in the development of "weapons of mass destruction, advanced conventional weapons, and malicious cyber-enabled actions against the United States and its people."[104]

The Trump Administration resurrected an obscure section from the National Defense Authorization Act for Fiscal Year 1999 to sanction Chinese companies.[105] The relevant section—Section 1237 of NDAA

100. *See* Xiaomi Corp., v. Dep't of Def., No. 21-280 (RC), 2021 WL 950144, at *5 (D.D.C. Mar. 12, 2021).

101. *See* Exec. Order. No. 13,959, 85 Fed. Reg. 73,185 (Nov. 17, 2020) (entitled "Addressing the Threat from Securities Investments That Finance Communist Chinese Military Companies") [hereinafter *Executive Order Regarding CCMCs*].

102. *Id.* ("Through the national strategy of Military-Civil Fusion, the PRC increases the size of the country's military-industrial complex by compelling civilian Chinese companies to support its military and intelligence activities.").

103. *Id.*

104. *Id.*

105. *See Xiaomi Corp.*, 2021 WL 950144, at *1 ("This suit concerns Xiaomi's designation as

1999—instructs the Secretary of Defense to publish a list of Communist Chinese military companies ("CCMCs") that "operate directly or indirectly in the United States or any of its territories and possessions."[106] CCMCs are defined as any company "owned or controlled by, or affiliated with, the People's Liberation Army or a ministry of the government of the People's Republic of China or that is owned or controlled by an entity affiliated with the defense industrial base of the People's Republic of China."[107] Once a company is designated a CCMC by the Department of Defense ("DoD") under Section 1237, the President may exercise his powers under IEEPA and declare a national emergency with respect to the threat posed by CCMCs.[108] Thus, the President may sanction listed CCMCs, prohibit United States persons from investing in CCMCs, and require divestment from CCMCs.[109]

Section 1237 laid dormant for more than twenty years before the DoD issued a list of CCMCs.[110] The spontaneous revival of Section 1237 occurred after several legislators sent a letter to then-Defense Secretary Mark Esper in 2019 calling on Esper to release a CCMC list in compliance with Section 1237.[111] In response to legislative prodding, the DoD issued an initial list of twenty designated CCMCs in June 2020, predominately composed of technology and aviation companies, but also notably including Chinese telecommunications giant Huawei.[112] On January 14, 2021, the DoD released the most recent iteration of designated CCMCs, which included Xiaomi.[113]

Acting pursuant to IEEPA, President Trump issued EO 13959 and prohibited "any transaction in publicly traded securities, or any securities that are derivative of, or are designed to provide investment exposure to such securities" involving identified CCMCs.[114] Xiaomi, a multinational consumer electronics company headquartered in China,

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a CCMC under Section 1237 of the National Defense Authorization Act for Fiscal Year 1999.").

106. *Id*.

107. *Id*.

108. *Id*. at *2.

109. *See Executive Order Regarding CCMCs*, *supra* note 101 (prohibiting "any transaction in publicly traded securities, or any securities that are derivative of, or are designed to provide investment exposure to such securities, of any Communist Chinese military company . . . .").

110. *Xiaomi Corp.,* 2021 WL 950144, at *3.

111. Jordan Brunner, *Communist Chinese Military Companies and Section 1237: A Primer*, LAWFARE BLOG (Mar. 22, 2021, 8:01 AM) https://www.lawfareblog.com/communist-chinese-military-companies-and-section-1237-primer.

112. *Id*.

113. *Xiaomi Corp.*, 2021 WL 950144, at *2.

114. *See Executive Order Regarding CCMCs*, *supra* note 101.

was just one of several Chinese companies impacted by EO 13959.[115] In response to its designation as a CCMC, Xiaomi filed suit in the D.C. District Court in January 2021.[116]

B. The D.C. District Court Opinion

Xiaomi challenged its designation as a CCMC under the Administrative Procedure Act's arbitrary and capricious standard.[117] In granting Xiaomi's motion for a preliminary injunction, the court held that the Department of Defense's explanation for Xiaomi's designation as a CCMC was "inadequate" and that Xiaomi's designation lacked the required "substantial evidence" necessary to fulfill the APA's arbitrary and capricious standard.[118]

As a threshold matter, while the President issues sanctions under IEEPA, the Treasury Department is the executive branch agency responsible for implementing sanctions under IEEPA.[119] The APA applies to all executive branch and independent agencies and prescribes procedures for agency actions.[120] Thus, courts review sanctions promulgated by the Treasury Department pursuant to IEEPA under the judicial review provisions of the APA.[121] This is true even for foreign national defendants such as *Xiaomi*. While not automatically entitled to the full suite of due process rights provided by the Constitution, foreign nationals retain the right to procedural review under the APA.[122]

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115. *See Xiaomi Corp.*, 2021 WL 950144, at *3 ("On January 14, 2021, the Department of Defense submitted to Congress, pursuant to Section 1237, a list of designated CCMC companies that included Xiaomi.").

116. *Id.*

117. *Id.* at *4.

118. *Id*. at *4, *7.

119. *See Executive Order Regarding CCMCs*, *supra* note 101, at 73,186 ("The Secretary of the Treasury . . . is hereby authorized to take such actions . . . to carry out the purposes of this order."); *see also* Holy Land Found. for Relief & Dev. v. Ashcroft, 333 F.3d 156, 162 (D.C. Cir. 2003) (noting the Treasury Department implements IEEPA).

120. TODD GARVEY, A BRIEF OVERVIEW OF RULEMAKING AND JUDICIAL REVIEW, R41546, CONG. RSCH. SERV., 1 (2017) (explaining the APA applies to all executive branch and independent agencies and proscribes the rules agencies must follow when making agency rulemakings as well as the standards for judicial review of final agency actions).

121. *See Holy Land Found. for Relief*, 333 F.3d at 162 (noting that the actions of the Treasury Department carrying out IEEPA sanctions "are governed by the judicial review provisions of the APA.").

122. *See* Rakhimov v. Gacki, No. CV 19-2554 (JEB), 2020 WL 1911561, at *6 (D.D.C. Apr. 20, 2020) (rejecting full due process for a foreign national sanctioned under IEEPA but holding that the court must follow "the APA's [5 U.S.C. § 706(2)(A)] 'highly deferential standard,' meaning that [it] may set aside Treasury's action 'only if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'") (quoting Zevallos v. Obama, 793 F.3d 106,

Courts review agency decisions under a highly deferential standard, and agency actions are struck down only if the action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[123] Consistent with the Judiciary's traditional deference to the Executive in the realm of national security, courts afford heightened deference to an agency's determination in actions involving national security.[124] Still, the reviewing court must ensure the agency engaged in reasoned decision-making.[125] To fulfill the reasoned decision-making requirement and meet the APA's arbitrary and capricious standard, an agency must "articulate a satisfactory explanation for its action" with a "rational connection between the facts found and the choice made."[126] In applying the reasoned decision-making standard, courts focus on whether an agency action was supported by substantial evidence.[127]

Here, despite the deference built into APA review, the district court held the DoD failed to articulate a satisfactory explanation supported by substantial evidence for its decision to add Xiaomi to the CCMC list and thus failed the APA's arbitrary and capricious standard.[128] First, the court concluded the DoD did not provide a reasoned decision for adding Xiaomi to the CCMC list.[129] The DoD's proffered explanation for classifying Xiaomi as a CCMC consisted of only two pages and included the *misquoted* statutory language of Section 1237, two business-related facts sourced from Xiaomi's annual report, and a conclusory statement that Xiaomi meets the threshold requirements for CCMC designation as a company "owned or controlled by" the Chinese government.[130] Based on the insufficient evidentiary record, the district court concluded Xiaomi's designation was not sufficiently reasoned and held the DoD circumvented the most "critical step" of an

112 (D.C. Cir. 2015)).

123. 5 U.S.C. § 706(2)(A).

124. *See* Islamic Am. Relief Agency v. Gonzales, 477 F.3d 728, 734 (D.C. Cir. 2007) (explaining that the court "is extremely deferential" when reviewing matters "at the intersection of national security, foreign policy, and administrative law.").

125. Xiaomi Corp., v. Dep't of Def., No. 21-280 (RC), 2021 WL 950144, at *4 (D.D.C. Mar. 12, 2021) (quoting Judulang v. Holder, 565 U.S. 42, 53 (2011)).

126. Motor Vehicle Mfrs. Ass'n of U.S. Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)).

127. *See Xiaomi Corp.*, 2021 WL 950144, at *4 (explaining the agency makes reasoned decisions when the agency's final determination is "supported by substantial evidence.") (quoting Dickinson v. Zurko, 527 U.S. 150, 164 (1999)).

128. *Id.*

129. *Id.*

130. *Id.* at *4–5.

agency action by failing to "connect the facts to the conclusion."[131]

Second, and relatedly, the district court found the DoD failed to support Xiaomi's designation to the CCMC list with "substantial evidence."[132] Under the APA, the reviewing court must determine if the agency supported its reasoned decision with "substantial evidence" on the record.[133] Here, the DoD relied on just two facts to designate Xiaomi as a CCMC.[134] First, the DoD pointed out that Xiaomi invested heavily in technologies "essential to modern military operations" such as 5G technology and artificial intelligence.[135] Second, the DoD argued Xiaomi had connections with the Chinese government because Xiaomi's founder and CEO received an award from the Chinese Ministry of Industry and Information Technology entitled "Outstanding Builder[] of Socialism with Chinese Characteristics."[136] Based on these facts alone, the DoD said there was "adequate" support for Xiaomi's affiliation with the Chinese government.

The district court disagreed. First, the court said Xiaomi's investment in emerging technologies such as 5G and AI "cannot be enough to support a conclusion that Xiaomi is a CCMC."[137] Such an outcome, the court said, would create an opportunity for the DoD to designate any Chinese company investing in technology with alternative military uses as a CCMC.[138] Second, the court contextualized the "award" given to Xiaomi's CEO based on evidence provided by the plaintiffs that showed the award is granted to private sector entrepreneurs in recognition of contributions to China's economic development.[139] The court said the "purported link to the Chinese Ministry of Industry and Information Technology is also far more tenuous than the Department of Defense implies."[140] In sum, the

131. *Compare* Xiaomi Corp., 2021 WL 950144, at *5 (describing that, in the case of *Xiaomi*, the Department of Defense merely "parrot[ed]" the statutory language" of Section 1237 to designate Xiaomi a CCMC without providing sufficient facts), *with* Holy Land Found. for Relief & Dev. v. Ashcroft, 333 F.3d 156, 161 (D.C. Cir. 2003) (noting that there was "ample" evidence on the record showing that defendant HLF was involved in terrorism financing including (1) HLF's financial connects to Hamas, (2) members of HLF meeting with Hamas leaders, and (3) HLF funds going to Hamas-controlled charitable organizations).

132. *Xiaomi Corp.*, 2021 WL 950144, at *7.

133. *Id.* (quoting Dickinson v. Zurko, 527 U.S. 150, 164 (1999)).

134. *Id.*

135. *Id.*

136. *Id*.

137. *Id.* at *8.

138. *Id.*

139. *Id.*

140. *Id.*

district court concluded the DoD's CCMC designation process with respect to Xiaomi "was deeply flawed and failed to adhere to several different APA requirements."[141]

Notwithstanding the President's robust power in the national security realm, the *Xiaomi* decision reveals that the APA places procedural constraints on the Executive when acting pursuant to IEEPA. The final Section of this paper will assess and ultimately reject various arguments for IEEPA reform and will use the *Xiaomi* decision to argue IEEPA sensibly constrains the President when paired with appropriate judicial review.

IV. IEEPA & ACCOUNTABILITY

Legal scholars and the public alike often reiterate concerns about the Executive's broad power under IEEPA and the perceived lack of procedural safeguards on a President acting pursuant to IEEPA.[142] As a result, many have proposed potential reforms to IEEPA.[143] This Section will assess various criticisms of IEEPA and proposals for IEEPA reform. This Section concludes by arguing that the existing procedural constraints on the President acting pursuant to IEEPA, when paired with appropriate judicial review, strike a reasonable balance between ensuring accountability and maintaining an effective and flexible foreign policy tool.

A. Proposed IEEPA Reforms

Most of the proposed reforms to IEEPA are procedural changes intended to give Congress more supervision over the President acting

141. *Id.*

142. *See Brennan Center Report*, *supra* note 2, at 3 (noting that IEEPA delegates "potent powers with so few limits on discretion or institutional checks," and arguing for reforms that would limit IEEPA's potential for abuse);
see also Barry E. Carter, *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime*, 75 CAL. L. REV. 1159, 1234 (1987) (noting that, while IEEPA is an improvement on TWEA, IEEPA remains flawed because "Congress has very little to say about its use, and there is no effective way to terminate a use that becomes inappropriate as time passes."); *see also* Elizabeth Goitein, *The Alarming Scope of the President' Emergency Powers*, THE ATLANTIC (Jan. 2019) https://www.theatlantic.com/magazine/archive/2019/01/presidential-emergency-powers/576418/ (arguing the president's national security powers create a "Kafkaesque system").

143. *See, e.g.*, Bruce Ackerman, *The Emergency Constitution*, 113 YALE L. J. 1029, 1077–81 (2004) (proposing reforms to IEEPA that would see emergencies automatically terminate after two-to-three months); *see also* Peter Harrell, *The Right Way To Reform the U.S. President's International Emergency Powers*, JUST SECURITY (Mar. 26, 2020). https://www.justsecurity.org/69388/the-right-way-to-reform-the-u-s-presidents-international-emergency-powers/ (proposing a requirement that Congress affirmatively approve IEEPA sanctions).

during a national emergency. As discussed in Part II, the existing procedural constraints on the President when acting under IEEPA flow from both cross-cutting statutes and the statutory language of IEEPA itself.[144] Specifically, IEEPA requires the President to follow the procedures set forth in the NEA, notify Congress when declaring a national emergency, publish the initial declaration of a national emergency in the Federal Register, and publish renewals of the predicate national emergency in the Federal Register annually.[145] Further, IEEPA requires the President to issue periodic reports to Congress after the initial declaration of a national emergency.[146]

Even so, critics argue Congress does not have sufficient supervision over the President when acting under IEEPA. First, observers argue both the annual renewal of national emergencies under the NEA and periodic reports from the President to Congress have become pro forma and do not represent meaningful oversight by Congress.[147] Second, observers argue Congress does not have an efficient way of terminating national emergencies.[148] To the latter point, when Congress passed IEEPA in 1977, the NEA permitted Congress to terminate the predicate national emergency through a concurrent resolution without the President's signature.[149] The Supreme Court held, however, this oversight technique is unconstitutional in *Immigration and Naturalization Service v. Chadha*.[150] After *Chadha*, Congress replaced the NEA's concurrent resolution provision with a joint resolution provision.[151] The joint resolution provision requires a two-thirds vote in both the Senate and the House of Representatives to be insulated from the presidential veto power, making it difficult for Congress to terminate national emergencies without a bipartisan majority.[152]

144. *See infra*, Part II (explaining the procedural restraints limiting the President's power under IEEPA).

145. 50 U.S.C. § 1701(a)–(b); § 1622(d).

146. *See infra*, Part II (explaining the procedural restraints limiting the President's power under IEEPA).

147. *See* Harrell, *supra* note 143 (arguing both the renewals sent to Congress from the President and the "periodic reports" have become "pro[]forma" and do not represent meaningful oversight).

148. *See id.* (noting that the "U.S. Supreme Court effectively gutted Congress's ability to terminate national emergencies.").

149. *See Congressional Research Report on IEEPA*, *supra* note 4, at 8, 11 (explaining that prior to *Chadha,* Congress could terminate a national emergency via a concurrent resolution).

150. 462 U.S. 919, 959 (1983).

151. 50 U.S.C. § 1622; *see also Congressional Research Report on IEEPA*, *supra* note 4, at 11 (explaining Congress replaced "concurrent resolution" with "joint resolution").

152. *Brennan Center Report*, *supra* note 2, at 6.

Based on the above criticisms, observers have proposed procedural reforms to IEEPA that remedy the perceived lack of Congressional oversight. Most importantly, reformers argue IEEPA should be amended to include a sunset provision that would require Congress to affirmatively approve sanctions under IEEPA after an initial period, such as six months or a year after the President declared the national emergency.[153] Under the proposed reform, if Congress refused to reauthorize the President's IEEPA powers with respect to the given national emergency, the predicate national emergency required for the President to exercise power under IEEPA would terminate and the President would not be permitted to use IEEPA to address the given national security issue.[154] Additionally, this procedural reform would ensure Presidents use IEEPA for short-term national security issues and would "restore the basic" pre-*Chadha* structure that Congress intended.[155] Without such reforms, critics argue IEEPA creates opportunities for abuse and threatens the United States' institutional balance of power by ceding too much discretion to the Executive.[156]

Yet, reform must strike a balance between limiting IEEPA's potential for abuse and ensuring the United States has adequate tools to respond to urgent foreign policy crises. While the above reform would enhance accountability, the requirement that Congress affirmatively approve the President's use of IEEPA will have negative practical consequences for United States national security.

B. IEEPA Reform & National Security

The above reforms detract from IEEPA's utility as an effective and flexible foreign policy tool. As discussed in Part II, IEEPA represents an invaluable foreign policy instrument, particularly in an age defined by the growing prominence of financial warfare. Sanctions, transaction

153. *See* sources cited *supra* note 143; *see also Brennan Center Report*, *supra* note 2, at 20 ("[I]f Congress does not affirmatively approve the use of IEEPA within 90 days [of the President declaring a national emergency], the authority would terminate.").

154. *See* Ackerman, *supra* note 143, at 1047 (arguing that, when the Executive act's unilaterally through a state of emergency, the Executive's power should expire two or three months); *see* Koh, *supra* note 14, at 1321 n.314 (arguing predicate national emergency should expire after a set period of time).

155. *See* Harrell, *supra* note 143 ("Congress intended to give itself the authority to terminate IEEPA actions with a simple majority vote.").

156. *See id.* (explaining that "strong procedural checks and balances would improve oversight [over IEEPA] and limit the scope for abuse."); *see also* Sanford Levinson, *Constitutional Norms in a State of Permanent Emergency*, 40 GA. L. REV. 699, 705–07 (2006) (explaining times of "emergency" threaten the constitutional balance of power by providing too much power to the executive).

blocking, asset freezing, and other IEEPA powers are intended to impose financial pain on the United States' adversaries—to deny resources to nations, companies, or natural persons engaged in activities that present national security threats to the United States. IEEPA functions as a tool to address threats ranging from terrorism financing to election interference, and even denies access to U.S. capital markets for persons engaged in human rights abuses abroad.[157]

Yet, reforming IEEPA to require Congress to affirmatively authorize sanctions after a set period will likely result in serious national security threats going unaddressed. The political reality of institutional gridlock that plagues the U.S. legislative system likely means Congress would be unable to cobble together sufficient votes to reauthorize the President's IEEPA powers after the requisite amount of time passed under the sunset provision, regardless of how dire the national security crisis. This would make U.S. sanctions under IEEPA a waiting game for foreign adversaries. Under the proposed reforms, after the initial period during which the President could unilaterally impose IEEPA sanctions passed, Congress would likely fail to reauthorize the sanctions and foreign adversaries would be free to engage with U.S. capital markets once more. Such an outcome would make U.S. sanctions a slap on the wrist as opposed to a financial death sentence—decreasing leverage of foreign adversaries that threaten U.S. interests.

Additionally, advocates of IEEPA reform fail to specify what procedures Congress would use to affirmatively authorize IEEPA sanctions. Under the status quo, Congress may terminate the predicate national emergency required for the President to act under IEEPA through a joint resolution.[158] While reformers argue that the joint resolution represents too high of a bar for Congress to terminate a national emergency under IEEPA,[159] the inverse is equally problematic.

Rather, if the amended IEEPA requires Congress to *reauthorize* a predicate national emergency through a joint resolution, it will be extremely difficult for Congress to enable the President to take

157. *See* sources cited *supra* notes 89–94 (describing the U.S. national security interests being addressed through IEEPA).

158. 50 U.S.C. § 1622.

159. *See* sources cited *supra* notes 148–152; *see* Harrell, *supra* note 143 ("In today's polarized political system, it is extremely unlikely that two thirds [sic] of both houses of Congress will vote to override the almost certain presidential veto of legislation terminating a national emergency.").

emergency action under IEEPA—even when such emergency action is needed, effective, and beneficial to U.S. foreign policy interests. Given the reality of congressional gridlock, changing the standard to require Congress to affirmatively support IEEPA sanctions through a joint resolution maintains the same unattainable voting standard but stunts the Executive's ability to protect the United States' national security interests.

C. Judicial Review as Adequate Oversight on Executive Power

IEEPA represents a carefully crafted legislative regime that engages all three branches of government. In passing IEEPA, Congress delegated authority to the Executive Branch subject to the procedural requirements found in IEEPA itself, the NEA, and the APA. Meanwhile, the Judiciary ensures the Executive remains within the confines of its delegated power and limits the Executive's national security power when acting pursuant to IEEPA.

Rather than calling for legislative reform that will negatively impact the United States' ability to respond to national security threats, the *Xiaomi* decision shows proper judicial review under the Administrative Procedure Act operates as a powerful constraint on the Executive's national security powers when acting under IEEPA.

To the extent there is distrust in the President or fear of Executive Branch abuse of IEEPA, judicial review under the APA provides adequate oversight. The APA provides foreign persons with an avenue for contesting their designation under IEEPA in federal court. As *Xiaomi* demonstrates, the Executive Branch—even when acting pursuant to national security—must present a reasoned decision with substantial evidence to show a foreign national should be sanctioned under IEEPA. Further, foreign persons targeted under IEEPA may present evidence in federal court to rebut the Treasury Department's sanctions against them. The federal judiciary, particularly the D.C. district court, should continue to use administrative national security law to restrain the Executive Branch acting pursuant to IEEPA. Unlike congressional reform, addressing any oversight concerns through a more active judiciary maintains the Executive's access to an important foreign policy tool while providing remedies on a case-by-case basis.

Importantly, the aftermath of the *Xiaomi* decision supports the notion that judicial review acts as an effective constraint on the Executive's national security powers. After the D.C. district court granted Xiaomi's motion for a preliminary injunction, the DoD

removed Xiaomi from the CCMC list and the Treasury discontinued any sanctions it previously levied at Xiaomi under IEEPA.[160] Additionally, the *Xiaomi* case does not stand alone. In May 2021, the D.C. district court again enjoined the Executive Branch from classifying another Chinese company, Luokung Technology Corporation, as a CCMC and subjecting the company to IEEPA sanctions.[161] After assessing a nearly identical set of facts to those in *Xiaomi*, the district court again held the government failed to provide a reasoned decision for classifying Luokung as a CCMC.[162] These cases show the APA and the federal judiciary are effective mechanisms to challenge and constrain the Executive when acting pursuant to IEEPA.

V. CONCLUSION

As global conflicts increasingly play out in financial markets, administrative national security law represents a sensible constraint on the President while still enabling the Executive to respond to national security crises. Motivated by practical political concerns, this Note rejects IEEPA reforms that require Congress to affirmatively approve executive actions under IEEPA. Instead, as the *Xiaomi* decision shows, IEEPA's existing statutory accountability mechanisms, when paired with proper judicial review under the APA, are sufficient constraints on the President's IEEPA powers.

However, other IEEPA reforms that do not hinder the Executive's ability to respond to foreign policy threats should be considered. For example, Congress could require the Executive Branch to provide more information about sanctions levied under IEEPA, such as a thorough explanation of the sanctions' goals and criteria the sanctioned entity must comply with for the sanctions to be removed.[163] These reforms ensure more congressional accountability without denying the Executive the speed and flexibility required to wield global capital markets as an effective foreign policy tool.

160. Sophie Jin & Antonia I. Tzinova, *U.S. Removes Xiaomi from List of Banned Chinese Companies*, HOLLAND & KNIGHT ALERT (May 27, 2021) https://www.hklaw.com/en/insights/publications/2021/05/us-removes-xiaomi-from-list-of-banned-chinese-companies.

161. Luokung Tech. Corp., v. Dep't of Def, 538 F. Supp. 3d 174, 178 (D.D.C. May 5, 2021).

162. *Id*. at 188.

163. Harrell, *supra* note 143.