EO 14241—IMMEDIATE MEASURES TO INCREASE AMERICAN MINERAL PRODUCTION: EL DORADO OR BUST?

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SUMMARY

Executive Order No. 14241, Immediate Measures to Increase American Mineral Production, attempts to create a prominent role for the federal government in accelerating and expanding domestic mineral development and processing. Like other recent EOs, it substantially relies on inherent, unenumerated executive authority, leaving doubts about whether it can accomplish its stated goals. This Article examines the Order, the authority it claims, and likely legal challenges against both the Order and agency actions taken to implement it, in the context of both past and current litigation involving similar EOs. It also discusses practical considerations for the Administration's proposed federal control of national mining and mineral industries on an expedited basis.

President Donald Trump signed Executive Order No. 14241, Immediate Measures to Increase American Mineral Production, on March 20, 2025.[1] That Executive Order (the Mineral Order) sets forth a grand vision and a prominent role for the federal government in accelerating and expanding domestic mineral development and processing industrywide.

The Mineral Order and its vision for governmental control of a major section of the economy exemplifies the method of governance promulgated by President Trump in his second term, relying almost entirely on inherent, unenumerated executive authority for the use of executive orders to implement his policies. Within the broader schema of governance for the second Trump Administration, many doubts surround the Administration's ability to accomplish its stated goals using executive orders. By invoking emergency authorities as justification for authorizing actions outlined in orders like the Mineral Order, President Trump bypasses the legislative process and claims a right to exercise greater latitude than his inherent constitutional powers provide.

This Article examines the Mineral Order, the authority it claims, and early-stage litigation of some second-term Trump Executive Orders. In doing so, the Article provides context for evaluating the law underlying the Mineral Order and understanding future outcomes for actions called for in the Mineral Order. Part I describes the intent of the Mineral Order, its asserted authority, the nature of the emergency declaration asserted in support of its directives to agencies within the federal government, and the activities to be undertaken in response to the Order.

Part II examines the legal challenges likely to be made against both the Mineral Order and agency actions taken to implement the Executive Order, in the context of past challenges to Executive Orders and the spate of other orders issued by President Trump in the first 100 days of his second administration. Part III examines the pleadings and rulings from some of the first challenges to second-term Trump Executive Orders, and in this context considers and evaluates the Mineral Order's claims of authority for the range of directives sought by the president. Part IV then discusses practical considerations for the Trump Administration's proposed federal control of national mining and mineral industries on an expedited basis. Part V concludes.

1. Exec. Order No. 14241, 90 Fed. Reg. 13673 (Mar. 25, 2025).

I. Components of and Authority for the Mineral Order

The Mineral Order envisions an industrywide minerals policy that expands the federal government's role in promoting mineral development on federal public lands and presumably on private lands as well. As part of the broader executive framework charted by President Trump that relies heavily on executive orders, the Mineral Order couches its actions in language of national security concerns and emergency declarations to justify the rollback of existing regulations. In this case, the Mineral Order restructures mineral policy in response to the energy emergency declared by President Trump in Executive Order No. 14156, Declaring a National Energy Emergency (the Emergency Order).[2] Authority for doing so is provided presumably by the inclusion of "critical minerals" as defined by the Energy Act of 2020[3] within the definition of "energy" or "energy resources" in §8 of the Emergency Order.[4]

The Mineral Order envisions a massive overhaul of mining and mineral processing in the United States. It opens essentially all federal lands to mining as a priority use, provides immediate government funding to support new mines and processing facilities, and directs expedited permitting for new or expanded operations at a scale and pace unseen in modern U.S. history. The Mineral Order relies on an expansive assertion of executive authority to achieve these goals, invoking presidential authority in the U.S. Constitution and in statute. The breadth of this order and lack of specific, identifiable authorities to support its many actions will expose the Mineral Order to legal challenge. Determining the extent of the Mineral Order is the first step in understanding how it fits into the second Trump Administration's use of emergency authority and the legal scrutiny to follow.

A. *The Components of the Mineral Order*

The Mineral Order introduces a suite of federal actions directed toward developing an ever-expanding group of minerals throughout their life cycle.[5] The Order defines "Mineral" by incorporating the definition of "critical minerals" from the Energy Act of 2020,[6] as well as including "uranium, copper, potash, gold, and any other element, compound or material as determined by the Chair of the National Energy Dominance Council (NEDC)."[7] On April 8, 2025, President Trump signed Executive Order No. 14261, Reinvigorating America's Beautiful Clean Coal Industry and Amending Executive Order 14241,[8] amending the Mineral Order to add coal as a "Mineral."[9]

The Mineral Order does not have the primary purpose of advancing critical minerals as identified in the Energy Act of 2020, despite the Order's incorporation of the Energy Act's statutory definition. The Energy Act's critical minerals framework forms part of a comprehensive congressional effort to update national minerals policy to address ongoing threats to the mineral supply.[10] This congressional minerals policy not only directs the identification of critical minerals and a quantification of their criticality, but also actions to strengthen mineral supply chains, resource assessment, recycling, innovation, efficiency, and work force development throughout the U.S. economy, resource base, and supply chains.[11]

Compared to many other contemporary federal mineral development efforts, the Mineral Order prioritizes mining and development far beyond the minerals found most essential and vulnerable within the United States. As a result, the Mineral Order confuses much of the earlier action previously coordinated at the federal level regarding critical minerals. At a minimum, the Order grafts a critical minerals framework onto a broader mineral development scheme that could divert resources from critical mineral policy priorities. At its maximum, the Mineral Order seeks

2. Exec. Order No. 14156, 90 Fed. Reg. 8433 (Jan. 29, 2025).
3. The definition of "critical minerals" is codified at 30 U.S.C. §1606.
4. 30 U.S.C. §1606(a)(3) excludes fuel minerals and is made up of minerals listed by an ongoing review process conducted by the U.S. Geological Survey (USGS).
5. *See* Exec. Order No. 14241, 90 Fed. Reg. 13673 (Mar. 25, 2025) (directing policy on mineral development and instituting several actions to spur mineral development). Until this point, federal mineral policy in the previous decade has largely centered around providing critical mineral security. Critical minerals are determined by a definition now enshrined in law by the Energy Act of 2020. *See* Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. Z, Energy Act of 2020, 134 Stat. 1182, 2418 (codified as amended at 30 U.S.C. §§1601-1606). Statutory criteria for listing a mineral as critical requires finding two elements of essentiality, both "to the economic or national security" of the nation and by "serv[ing] an essential function in the manufacturing of a product." 30 U.S.C. §1606(c)(4)(A)(i), (iii). It also requires a measure of vulnerability, requiring finding "a supply chain that is vulnerable to disruption." *Id.* §1606(c)(4)(A)(ii). Fuel minerals are excluded in the definition of "critical minerals." *Id.* §1606(a)(3)(B)(i).
6. *See* 30 U.S.C. §1606(a)(3).
7. Exec. Order No. 14241, §2(a), 90 Fed. Reg. 13673, 13673 (Mar. 25, 2025). President Trump formed the NEDC in Executive Order No. 14243 for the purpose of leveraging the United States' leadership in natural resources and energy technologies with the goal of achieving energy dominance. The council is composed of 19 members, with the Secretary of the Interior serving as chair and the other members made up of specified executive departments and agencies as well as presidential assistants. The council is tasked with advising President Trump regarding how to exercise his authority regarding energy dominance, processes for permitting through production including exports of energy, and critical minerals and reductions in "red tape." *See* Exec. Order No. 14243, 90 Fed. Reg. 9945 (Feb. 20, 2025).
8. Section 3, 90 Fed. Reg. 15517, 15517 (Apr. 14, 2025). Section 9 of Executive Order No. 14261 also directed USGS to consider whether metallurgical coal qualifies as a critical mineral under the Energy Act of 2020. *See id.* §9(b), at 15519.
9. *See id.* §3, at 15517.
10. "Critical minerals" are defined in 30 U.S.C. §1606(a)(3). In 2022, USGS published a list of 50 critical minerals, including aluminum, antimony, arsenic, barite, beryllium, bismuth, cerium, cesium, chromium, cobalt, dysprosium, erbium, europium, fluorspar, gadolinium, gallium, germanium, graphite, hafnium, holmium, indium, iridium, lanthanum, lithium, lutetium, magnesium, manganese, neodymium, nickel, niobium, palladium, platinum, praseodymium, rhodium, rubidium, ruthenium, samarium, scandium, tantalum, tellurium, terbium, thulium, tin, titanium, tungsten, vanadium, ytterbium, yttrium, zinc, and zirconium. 2022 Final List of Critical Minerals, 87 Fed. Reg. 10381 (Feb. 24, 2022). That list is revised every three years. 30 U.S.C. §1606(c)(5)(A).
11. For example, copper was designated a "critical material" by the U.S. Department of Energy (DOE) in 2023. DOE, Critical Materials Assessment (2023), https://www.energy.gov/sites/default/files/2023-07/doe-critical-material-assessment_07312023.pdf. USGS declined to designate copper as a critical mineral in 2023 because "its supply chain vulnerabilities are mitigated by domestic capacity, trade with reliable partners, and significant secondary capacity." Letter from David Applegate, Director, USGS, to Sen. Kyrsten Sinema (Apr. 13, 2023), *available at* https://subscriber.politicopro.com/eenews/f/eenews/?id=00000188-4953-d998-ab8f-fb5f223b0000.

to add an executive definition of "critical minerals" outside the statutorily established process.[12]

The Mineral Order applies not only to initial mining activities (e.g., exploration, production), but also to the entire supply chain for covered minerals. In addition to its expansive definition of "mineral," the Order also defines "mineral production" to include all phases of production from initial mining to final commodity status.[13] For example, definitions of "processed minerals" and "derivative products," which include final products such as magnets and motors, illustrate the reach of actions covered by the Mineral Order.[14]

The Mineral Order implements the president's purpose by directing multiple federal agencies to begin support of "mineral production" through a series of rapid actions with deadlines now passed.[15] While the actions outlined in the Order have clear deadlines, there is no requirement for public reporting.[16] Thus, though we expect that parties identified in the Mineral Order have taken action to comply with the Executive Order's provisions, it remains unclear to what extent. Actions taken on the basis of the Mineral Order are not subject to any identified requirements for public update, making compliance with posted deadlines subject to a lack of transparency.

The first action to support mineral production included listing all mineral production projects for which a plan of operations, permit, permit application, or other application for approval has been submitted.[17] The Mineral Order imposed several deadlines for such action as follows:

- By April 4, 2025, the Mineral Order required NEDC to submit mineral production projects for consideration as "transparency projects" on the permitting dashboard under the Fixing America's Surface Transportation (FAST) Act of 2020, also known as FAST-41.[18]

- By April 9, 2025, the Mineral Order required relevant federal agencies to identify from the initial list priority projects for immediate approval and permit issuance.[19]

- By April 19, 2025, the Mineral Order required the executive director of the Permitting Council to publish the projects selected and establish schedules for expedited review.[20]

As of September 1, 2025, there were 34 mineral production projects posted to the FAST-41 Transparency Projects Permitting Dashboard as a result of the Mineral Order.[21]

The second action to support mineral production tasked the U.S. Department of the Interior (DOI) to prepare a list of all federal lands known to hold mineral deposits or reserves by March 30, 2025.[22] The Mineral Order then required the Secretary of the Interior to designate and prioritize mineral production and mining-related purposes as the primary land uses in these areas. To carry out this action, the Mineral Order requires land use plans adopted under the Federal Land Policy and Management Act (FLPMA) to provide for and be amended or revised to support the intent of the Executive Order.[23] It appears that DOI will rely on some as yet to be disclosed authority to avoid the statutory procedures required under FLPMA for such amendments.[24]

Similarly, a third action to support mineral production required that by April 19, 2025, the U.S. Departments of Defense (DOD), Agriculture (USDA), Energy (DOE), and DOI identify as many sites as possible on federal lands managed by federal agencies that may be suitable for leasing or development by private commercial enterprises.[25] The Mineral Order then required the various executive departments to provide that list to the assistant to the president for economic policy, the assistant to the president for national security affairs, and the chair of the NEDC, prioritizing sites that can be quickly made operational.[26] On these specially identified lands, the Secretaries of Defense and Energy must thereafter execute extended use leases to private entities developing mineral production projects.[27]

Alongside resource identification and development, and by the same April 19 date, a fourth action required DOD, USDA, DOE, and the Small Business Administration to coordinate to provide private entities with loans, capital assistance, technical assistance, and working capital.[28] That directive is to ensure that the private parties who enter into leases and commercial agreements use as many favorable terms and conditions as are available.[29]

12. Executive Order No. 14241 adds copper, uranium, gold, and potash. The addition of copper is a logical extension of Executive Order No. 14220, given the role copper plays in energy production and transmission. It also reflects strong industry demand for adding copper to the list of critical minerals. Likewise, uranium represents a significant import from Canada whose production and export are now shaped by the deterioration of trade relations under the Trump Administration.
13. Exec. Order No. 14241, §2(b), 90 Fed. Reg. 13673, 13673 (Mar. 25, 2025).
14. *Id.* §2(c), (d).
15. These agencies include the U.S. Department of Defense (DOD); DOD's Office of Strategic Capital; U.S. Department of the Interior (DOI); U.S. Department of Agriculture (USDA); U.S. Department of Energy (DOE); U.S. International Development Finance Corporation; Export-Import Bank; and Small Business Administration, among others. *See generally id.* (implicating the agencies listed).
16. The potential exception in the Mineral Order is the requirement for identified and qualifying projects to be published on the FAST-41 Permitting Dashboard. *See id.* §3(b), at 13673-74.
17. *Id.* §3.
18. *Id.* §3(b).
19. *Id.* §3(a).
20. *Id.* §3(b).
21. *See* Permitting Dashboard, *FAST-41 Transparency Projects*, https://www.permits.performance.gov/projects/transparency-projects (last visited Sept. 1, 2025). Search conducted by selecting "Mining" under "Sector" dropdown menu. Each of the 34 projects referred to the Mineral Order. Three were complete, four were planned, and the remaining 27 were in progress.
22. Exec. Order No. 14241, §5(a), 90 Fed. Reg. at 13674.
23. *Id.*
24. *See* 43 U.S.C. §§1711-1712; 43 C.F.R. pt. 1600.
25. Exec. Order No. 14241, §5(b), 90 Fed. Reg. 13673, 13674 (Mar. 25, 2025).
26. *Id.*
27. These leases are to be conducted "as authorized by 10 U.S.C. 2667 or by 423 U.S.C. 7256(a) respectively or using any other authority they deem appropriate." *Id.* §5(c).
28. *Id.* §5(d).
29. *Id.*

In addition to those major actions, the Mineral Order required various other supportive measures to increase mineral production. The Export-Import Bank was to provide program guidance for mineral production financing tools under the Supply Chain Resiliency Initiative.[30] DOD was to meet with buyers of minerals and work toward a request for bids to supply minerals, as well as add mineral production as a priority development area for the Industrial Base Analysis and Sustainment Program.[31] DOD, the Office of Strategic Capital, and the U.S. International Development Finance Corporation were to propose a plan to use DOD funds, including Defense Production Act (DPA) funds and the Office of Strategic Capital funds, to establish a domestic mineral production fund.[32] DOD would then transfer appropriated DPA funds or Office of Strategic Capital funds to the U.S. International Development Finance Corporation to reimburse its implementation of the Order.[33]

Several provisions of the Mineral Order connect, if not by clear direction, then by logic, to previous executive action. First, the Mineral Order, in furtherance of the Emergency Order, delegates DPA authority to DOD and waives limitations on the Department's use of the DPA to facilitate mineral production.[34] Second, although Executive Order No. 14154, Unleashing American Energy, ordered the Council on Environmental Quality (CEQ) to rescind all National Environmental Policy Act (NEPA) regulations it has promulgated,[35] mining entities must otherwise comply with other NEPA regulations and NEPA itself.[36]

Taking these two directives in order, the delegation of DPA authority in the Mineral Order allows DOD to make available subsidy payments for domestic mineral production, including for equipment and facilities.[37] Applications for this funding will not require applicants to submit Regulation S-K 1300 disclosures (material factors relevant to an investor in mineral properties and operations).[38] However, it remains unclear what criteria will be used to make leasing and financing decisions under the mandatory provisions and timelines provided in the Executive Order.

Additionally, although it is unclear how these expedited projects will satisfy NEPA in apparent reliance on the Emergency Order, DOI has adopted "alternative arrangements" to comply with NEPA before taking urgently needed actions.[39] These alternative actions provide for the issuance of a finding of no significant impact within 14 days of receipt of a completed application, or an environmental impact statement within 28 days of a completed application.[40] It appears that the May 2, 2025, date for posting of scheduling on the FAST-41 Permitting Dashboard refers to implementation of these alternative actions, but that is not clear at this time.[41]

DOI's own NEPA regulations are promulgated under authority of the interim final rule as ordered by the Administration's rejection of CEQ's authority to make rules.[42] Although not conceding that the interim final rule removing CEQ's NEPA implementing regulations does not comply with Administrative Procedure Act (APA) notice-and-comment requirements, the rule also argues that notice-and-comment rulemaking is not required.[43] This is mirrored in DOI's interim final rule published in July 2025, which similarly argues exclusion from APA notice-and-comment requirements, citing the recent *Seven County Infrastructure Coalition v. Eagle County, Colorado* case and earlier interim final rule repealing the CEQ regulations as justification.[44]

The Mineral Order's reach is far greater than increased mining activity. It also emphasizes an expanded concept of supply chains through expedited lease and permit issuance and government financial assistance. The Mineral Order is global in its scope and seeks to achieve national mineral independence through an all-of-government prioritization of restructured law, policy, and resources.

B. Authority for the Mineral Order

To conduct the actions directed by the Mineral Order, President Trump invokes presidential authority based on the Constitution[45] and Title 3, §301 of the U.S. Code.[46] Specific actions under the Mineral Order reference the prior claim of authority invoked by the declaration of a national emergency in the Emergency Order, Executive

30. *Id.* §6(f), at 13676.
31. *Id.* §6(b), at 13675.
32. *Id.* §6(e), at 13675-76.
33. *Id.*
34. *See id.* §6(d), at 13675 ("To address the national emergency declared pursuant to Executive Order 14156, I hereby waive the requirements of 50 U.S.C. 4531(d)(1)(a)(ii), 4332(d)(1)(B), and 4533(a)(1) through (a)(6).").
35. *See* Exec. Order No. 14154, 90 Fed. Reg. 8353 (Jan. 29, 2025).
36. *See id.* §5, at 8355-56.
37. *See supra* note 34 and accompanying text.
38. Exec. Order No. 14241, §6(c), 90 Fed. Reg. 13673, 13675 (Mar. 25, 2025).
39. DOI adopted these alternative arrangements in reliance on 43 C.F.R. §46.150. *See* DOI, Alternative Arrangements for NEPA Compliance, https://www.doi.gov/sites/default/files/documents/2025-04/alternative-arrangements-nepa-during-national-energy-emergency-2025-04-23-signed_1.pdf.
40. *Id.*
41. Clarity is further complicated by the use of the terms "Status," which is defined in the "Permitting Dashboard Glossary of Terms" as referring to projects, actions, or milestones, and "Complete," which is defined as "all work has been performed and a decision rendered." *See* Permitting Dashboard, Permitting Dashboard Glossary of Terms (2017), https://www.permits.performance.gov/sites/permits.dot.gov/files/2019-10/Permitting%20Dashboard%20Glossary.pdf.
42. *See* Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. 10610 (Feb. 25, 2025), *corrected by* 90 Fed. Reg. 11221 (Mar. 5, 2025) (removing CEQ NEPA implementing regulations); National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. 29498 (July 3, 2025) (removing DOI NEPA implementing regulations referencing and supplementing CEQ regulations).
43. 90 Fed. Reg. at 10614.
44. Specifically, DOI states that *Seven County* establishes that NEPA is a purely procedural statute and does not constrain the ultimate decisionmaking of the Department or its agencies, so long as DOI complies with necessary process. Because the conditions imposed by NEPA are not substantive, DOI argues that the revision to its NEPA regulations falls under the APA exception for "rules of agency organization, procedure, or practice," and thus does not require notice-and-comment procedure. 90 Fed. Reg. at 29502. Further, DOI argues that even in the event notice and comment would be required, these changes fall under the APA's "good cause" exception. DOI's NEPA implementing regulations were left "hanging in the air" after recission of the CEQ regulations and required immediate recission as soon as a new procedural regime was developed. *Id.* at 29502-03.
45. U.S. Const. art. II.
46. 3 U.S.C. §301.

Order No. 14156, pursuant to the National Emergencies Act (NEA),[47] and by the DPA.[48]

The specific authority on which the Mineral Order rests matters because presidential authority is broad, but not unlimited. In *Youngstown Sheet & Tube Co. v. Sawyer*,[49] the U.S. Supreme Court held that even in wartime, the inherent powers of the executive branch did not supplant the powers of the legislative branch, except to the extent that the U.S. Congress delegated its power by statute to the president.[50] In *Youngstown*, President Harry Truman took emergency action in reliance solely on his inherent authority as president, which the Court found lacking absent a congressional grant of authorization. The Court thus upheld a preliminary injunction barring President Truman from temporarily seizing steel plants and their operation to address a labor strike affecting steel production during the Korean War.

Under the *Youngstown* holding, when Congress delegates emergency authority to the president, that presidential emergency authority is limited to the scope defined in statutory text.[51] If the president lacks constitutionally enumerated executive authority to legislate without Congress, the Mineral Order must rest on a congressional grant of statutory authority to the president—whether cited in the earlier Emergency Order or in authority claimed in the Mineral Order.

For most emergency declarations, including the declaration within the earlier Emergency Order ostensibly supporting the Mineral Order, the president invokes the NEA.[52] Here, the president declared an energy emergency under the NEA in the Emergency Order, due to the "harmful and shortsighted policies of the previous administration."[53] However, connections between the asserted NEA authority in this earlier Emergency Order and the Mineral Order are slim. The term "critical minerals" appears only twice in the Emergency Order: first in §1, "Purpose," where it appears as a conjunctive for "energy," and second in §8, "Definitions," where "energy" or "energy resources" means "critical minerals, as defined by 30 U.S.C. 1606 (a)(3)," along with a list of conventional sources of energy.[54] Further, DPA authority invoked in the Emergency Order is also slim, appearing once in §2, "Emergency Approvals," as a possible source of adjunctive authority for approvals of activities on both federal and other lands, including presumably private lands.[55]

Meanwhile, the Mineral Order invokes executive authority to respond to a perceived threat to mineral production caused by "overbearing Federal regulation."[56] Assuming the president seeks to capitalize on the fullest extent of emergency powers, the Mineral Order views the identified national emergency as the byproduct of decades of congressional and executive action enshrined in statute and regulation. To address the cause of the emergency, the Mineral Order therefore requires immediate action to "facilitate domestic mineral production to the maximum extent possible."[57] On the face of the Mineral Order, then, the president seeks to supplant statutory and regulatory codes by citing inherent executive authority and then impliedly incorporating critical minerals from the earlier Emergency Order declaration under NEA and DPA authority.[58]

The DPA,[59] invoked in the Emergency and Mineral Orders, provides a broad set of authority to shape domestic industries to meet national defense requirements, including military conflicts, natural or man-made disasters, or acts of terrorism within the United States.[60] Pursuant to its grant of authority, the president may delegate to executive agencies authority to carry out orders adopted under the DPA.[61] The DPA has been reauthorized and amended more than 50 times since 1950 and is now set to expire on September 30, 2025, without further congressional action.[62]

Perhaps the most challenging task is identifying what additional authority, if any, the president seeks to rely on for the actions to be carried out under the Executive Orders. Both the Emergency and Mineral Orders direct agencies to search for all lawful authority to support the broad restructuring of the energy sector and minerals sector, to say nothing of the existing environmental protection regime. Clearly, this effort to restructure the mining and minerals industry did not scrutinize extant authority to support the presidential directive before proceeding.

II. Challenges to the Order, Assertion of Emergency Authority, and Resulting Regulatory Action

Exercise of statutory presidential authority in an emergency can be divided into several parts, each of which may give rise to their own legal challenge. First, the president must identify an "emergency" on which to base a presidential declaration. Second, if the existence of the emergency underlying the presidential declaration is upheld or not questioned in court, the president has the authority and responsibility to act within the bounds of controlling statu-

47. 50 U.S.C. §§1601 et seq.
48. Pub. L. No. 81-774, 64 Stat. 798; 50 U.S.C. §§4501 et seq.
49. 343 U.S. 579 (1952).
50. *Id.* at 587-89.
51. *Id.* (majority opinion), 610 (Frankfurter, J., concurring), 660 (Burton, J., concurring).
52. Exec. Order No. 14156, §1, 90 Fed. Reg. 8433, 8433 (Jan. 29, 2025).
53. *Id.*
54. *Id.* §§1, 8, at 8433, 8436.
55. *Id.* §2, at 8434.
56. *Id.*
57. *Id.*
58. *See generally* Exec. Order No. 14156, 90 Fed. Reg. 8433 (Jan. 29, 2025); Exec. Order No. 14241, 90 Fed. Reg. 13673 (Mar. 25, 2025).
59. 50 U.S.C. §§4501-4568.
60. *See id.* §4502.
61. *See id.* §4511; Exec. Order No. 13603, 77 Fed. Reg. 16651 (Mar. 22, 2012) (delegating DPA authority to cabinet Secretaries).
62. *See generally* Alexandra G. Neenan & Luke A. Nicastro, Congressional Research Service, The Defense Production Act of 1950: History, Authorities, and Considerations for Congress 1 (2023); *see also* John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, div. A, tit. XVII, §1791, 132 Stat. 1636, 2238 (2018) (providing most recent authorization) (codified at 50 U.S.C. §4564).

tory law. Finally, the president, as head executive officer, oversees rulemaking and regulatory compliance conducted by executive agencies, which are governed by the APA.

Head-on legal challenges to whether a non-pretextual emergency exists to justify a presidential emergency declaration are likely to face justiciability and related standing hurdles. Challenges to claims of emergency authority must first be prepared to overcome the governmental response that the challenge is nonjusticiable as a political question. Second, if challengers overcome the political question hurdle, they will then face a range of standing defenses. Standing, while important, is not addressed in this Article, as it requires the plaintiff to identify specific factual allegations.[63]

Because of these hurdles, successful facial challenges to executive orders are not likely to challenge whether the declared emergency exists, and are instead likely to focus on the question of scope of presidential authority to act under an emergency declaration as provided by the Constitution and statute. Successful challenges are likely to employ two related separation-of-powers arguments: (1) grants of unlimited Article I authority to the president are void as such powers are nondelegable, and (2) executive actions that intrude on congressional authority without clear textual statutory support are vulnerable in light of the recently announced major questions doctrine.

A. *Political Question Doctrine*

The political question doctrine is a narrow, but difficult to surmount, limitation on justiciability where judicial review of claims would "revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch."[64]

The seminal case outlining the political question doctrine is *Baker v. Carr*.[65] In that case, plaintiffs challenged the Tennessee Legislature's electoral redistricting under equal protection grounds, with the legislature responding that the political question doctrine barred this claim from being heard by the courts. Writing for the Supreme Court, Justice William Brennan provided clarity on the scope of the political question doctrine.

First, the political question doctrine requires consideration of whether a judicial forum can determine the wrong asserted and fashion a judicial solution. Doing so does not consider whether the matter is of a political nature, as many "political" actions are nevertheless reviewable in the courts. The determinant factor is, rather, whether the wrong is only recognizable and redressable through exercise of political discretion left to the executive or legislative branch, the so-called political branches, based on enumerated constitutional powers. In other words, "[t]he non-justiciability of a political question is primarily a function of the separation of powers."[66]

Second, and to determine whether this is the case, Justice Brennan laid out six factors for consideration still used today.[67] Those factors guide a court in determining whether the outcome is within the judicial bounds of interpreting the law, and provide a remedy for breach, or whether the question is one to be determined under legislative and executive authority.

Challenges to emergency declarations made by President Trump during his first administration have failed to surmount the political question doctrine, providing an example of the difficulties of present challengers. In *Center for Biological Diversity v. Trump*, plaintiffs challenged the declaration of a national emergency supporting construction of a border wall during the first Trump Administration as lacking authority due to erroneous determination of an emergency's existence.[68] Judge Trevor McFadden, writing for the U.S. District Court for the District of Columbia, noted that this case involved a "quintessential political question."[69] The *Center for Biological Diversity* case is not isolated. As of 2020, there were 35 national emergencies in effect declared by then-President Trump and previous presidents, none of which had been reviewed by a court on the merits for the existence of a supporting factual basis for the presidential declaration.[70]

To determine if a plaintiff's claims can be resolved without deciding a political question, U.S. Court of Appeals for the District of Columbia (D.C.) Circuit precedent employs a three-step inquiry.[71] This three-step inquiry illustrates the interplay between policy choices and value determinations in considering the nature of a plaintiff's questions and request for relief.[72] First, the court identifies the questions the plaintiff's claims raise.[73] Second, the court determines if these issues present a political question under the factors

63. Standing and the range of challenges to lack of executive authority for executive orders are fact-specific inquiries requiring individual plaintiffs to establish that "(i) they have suffered a concrete and particularized injury in fact, (ii) that was caused by or is fairly traceable to the actions of the defendant, and (iii) is capable of resolution and likely to be redressed by judicial decision." Food & Water Watch, Inc. v. Vilsack, 808 F.3d 905, 914 (D.C. Cir. 2015).
64. Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 230 (1986).
65. 369 U.S. 186 (1962).
66. *Id.* at 210.
67. These factors consider:
> [1] Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] or a lack of judicially discoverable and manageable standards for resolving it; [3] or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] or an unusual need for unquestioning adherence to a political decision already made; [6] or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217.
68. 453 F. Supp. 3d 11 (D.D.C. 2020).
69. *Id.* at 18.
70. *See generally* Keri B. Stophel, Congressional Research Service, LSB10545, Declarations Under the National Emergencies Act in Effect (2020).
71. *Center for Biological Diversity*, 453 F. Supp. 3d at 30.
72. *Id.* (citing bin Ali Jaber v. United States, 861 F.3d 241, 245 (D.C. Cir. 2017)).
73. *Id.*

identified in *Baker*.[74] Third, if a political question is presented, the court must determine if the political question is "inextricable from the case."[75]

Challenges to executive actions premised on a declaration of a national emergency implicitly raise claims of abuse of discretion. The first question presented by the *Baker* factors in these cases is whether there is a "lack of judicially discoverable and manageable standards for resolving the question,"[76] or whether the purported emergency is beyond the authority granted.[77] Even if political question analysis foreclosed a challenge to the existence of an emergency, questions regarding the scope of the authority exercised under the claimed emergency remain.[78]

In considering these questions, resolving the meaning of statutory text, including for statutes like the NEA or the DPA, is now unquestionably the province of the judiciary. In *Loper Bright Enterprises v. Raimondo*, the Court reversed precedent set in *Chevron*,[79] holding that the "Framers crafted the Constitution to ensure that federal judges could exercise judgment free from the influence of the political branches."[80] Thus, challenges concerning scope of emergency authority granted by statute and relied on in the Mineral Order are not foreclosed by the political question doctrine.[81]

B. *The Nondelegation Doctrine and Major Questions Doctrine*

A corollary of the separation-of-powers holding in *Youngstown* is a constitutional prohibition on unlimited delegation of Article I powers to another branch of government.[82] As stated in the *Youngstown* concurrence by Justice Felix Frankfurter, the broadly defined presidential powers are "not as particularized as are those of Congress. But unenumerated powers do not mean undefined powers. The separation of powers built into our Constitution gives essential content to undefined provisions in the frame of our government."[83] Concerning the separation of powers, Justice Frankfurter quoted Justice Louis Brandeis:

> The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.[84]

To maintain the sanctity of the three branches of government and their respective constitutionally enumerated powers, the Supreme Court has established multiple legal doctrines to sustain the separation of powers. These doctrines reflect the judiciary's construction of the Constitution surrounding separation of powers, and uphold distinct structural impediments to one branch invading the powers of another branch. Challenges to the assertion of powers contained in the Mineral Order will involve not only statutory construction claims, but related constitutionality claims as well.

To maintain separation of powers, the Supreme Court articulated the nondelegation doctrine restricting the delegation of congressional legislative authority.[85] To avoid an impermissible delegation, Congress must establish an "intelligible principle" constraining the exercise of authority granted.[86] Evidence of an intelligible principle demonstrates that the statute "meaningfully constrains" presidential authority.[87]

In construing claims of executive authority derived from grants of Article I powers, courts must strike down as unconstitutional any construction failing to effectively limit authority granted or providing unlimited legislative discretion to the president. Thus, a claim that the Mineral Order is supported by an unlimited grant of legislative power not subject to a defined, limited purpose of a specific grant will, under existing precedent, directly implicate the nondelegation doctrine.

The Mineral Order may also be tested under the major questions doctrine, as articulated in *West Virginia v. Environmental Protection Agency*[88] and then applied in *Biden v. Nebraska*.[89] Stated generally, the major questions doctrine guides judicial review of agency interpretations of statutory language "in [its] context and with a view to [its] place in

74. *Id.* (citing Al-Tamimi v. Adelson, 916 F.3d 1, 8 (D.C. Cir. 2019)).
75. *Id.*
76. Zivotofsky ex rel. Zivotofsky v. Clinton, 566 U.S. 189, 197 (2012) (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).
77. The range of evidence that would support a challenge to the existence of an energy emergency if the challenge were allowed is substantial. *See, e.g.*, National Renewable Energy Laboratory, Explained: Reliability of the Current Power Grid (2024), https://docs.nrel.gov/docs/fy24osti/87297.pdf; Mark Dyson & Lauren Shwisberg, *Reality Check: Electricity Load Growth Does Not Have to Undermine Climate Goals*, Rocky Mountain Inst. (Sept. 16, 2024), https://rmi.org/reality-check-electricity-load-growth-does-not-have-to-undermine-climate-goals/.
78. As the per curiam opinion in the *V.O.S. Selections* tariffs litigation explained, judicial construction of the scope and purpose of statutory language does not require reaching an argument that the orders "fail to invoke an 'unusual and extraordinary threat.'" V.O.S. Selections, Inc. v. United States, No. 25-00066, 2025 WL 1514124, at *16 n.12 (Ct. Int'l Trade May 28, 2025) (citing 50 U.S.C. §1701(b)). Thus, the existence of the emergency is obviated by the failure to operate within the authority granted.
79. Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984).
80. 603 U.S. 369, 403 (2024).
81. *See* The Federalist No. 78 (Alexander Hamilton).
82. *See* The Federalist No. 48 (James Madison).
83. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).
84. *Id.* at 613 (citing Myers v. United States, 272 U.S. 52, 240, 293 (1926)).
85. Panama Refin. Co. v. Ryan, 293 U.S. 388, 421 (1935) ("The Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested.").
86. *See* J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.").
87. *See* Touby v. United States, 500 U.S. 160, 166 (1991).
88. 597 U.S. 697 (2022).
89. *See generally* 600 U.S. 477 (2023).

the overall statutory scheme."[90] Moreover, where there is something extraordinary about the "history and breadth of the authority" asserted by an executive agency, or the "economic and political significance" of the executive assertion, courts should "hesitate before concluding that Congress meant to confer such authority."[91] Further, in such cases the Court has declined to find extraordinary grants of regulatory authority through language that is "modest, vague, subtle, or ambiguous."[92]

A judicial description of modest statutory language found full explication in the *Biden v. Nebraska* decision.[93] Prior to the end of the national emergency regarding the COVID-19 pandemic declared by both Presidents Joseph Biden and Trump, President Biden invoked emergency authority to modify or waive any statutory or regulatory provision applicable to the student financial assistance programs under Title IV of the Higher Education Act of 1965.[94] This authority was based on the Biden Administration's invocation in 2022 of the Higher Education Relief Opportunities for Students (HEROES) Act[95] to issue "waivers and modifications" reducing or eliminating federal student loan debt for most of those borrowers.[96]

Chief Justice John Roberts, writing for the majority, held that statutory authority under a presidential declaration of a national emergency to "'modify' terms and requirements of an Act does not permit 'basic and fundamental changes in the scheme' designed by Congress."[97] In short, "[t]he authority to 'modify' statutes and regulations allows the Secretary to make modest adjustments and additions to existing provisions, not transform them."[98] The grant of the power to waive statutory language was, in the Court's view, not material to its analysis because waivers resulting in modifications substituting the statutory language for new text and a new regime were not within the ambit of modification.[99] In response to the claim that the Act purposefully contained a deliberately vague grant of power "to grant substantial discretion to the Secretary to respond to unforeseen emergencies" so that "the Secretary could do something," the Court returned to separation of powers.[100] It framed the question as "not whether something should be done; it is who has the authority to do it."[101]

The opinion in *Biden v. Nebraska* did not mince words regarding the scope of executive authority. It characterized the claim of executive authority as one where the executive would enjoy unlimited power to rewrite an Act.[102] Allowing such an action would

> "effect[t] a 'fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation' into an entirely different kind."—one in which the Secretary may unilaterally define every aspect of a federal student aid, provided he determines that the recipients have "suffered direct economic hardship as a direct result of a . . . national emergency."[103]

The Court finds that the power to fundamentally revise statutes not only violates the separation of powers, but results in the assertion of "authority to exercise control over 'a significant portion of the American economy.'"[104] Thus, "'clear congressional authorization' for such a program" is required.[105]

Although the exact range and scope of this doctrine are unknown,[106] it is reasonable to assume that successful executive emergency action involving major political, economic, and values-based decisionmaking will require not only clear identification of authority within an executive order, but also for any regulatory action in furtherance of that order. Thus, the paucity of relevant authority cited within both the Mineral Order and Emergency Order on which the former relies are vulnerabilities in future litigation challenging either or both Executive Orders.

The Mineral Order provides an opportunity to see whether these two separation-of-powers doctrines are applicable to the Trump Administration. Specifically, the Mineral Order may test the bounds of executive authority when it declares that the identified emergency is the result of existing regulatory laws and rules that require a restructuring of law, policy, and existing economic structure.

III. Recent Challenges to Second-Term Trump Executive Orders

Two specific examples of recent litigation challenging executive authority taken via executive order illustrate the arguments likely to arise in challenges to the Mineral Order.

90. *West Virginia*, 597 U.S. at 721. *West Virginia v. Environmental Protection Agency* is the first Supreme Court case to formally establish the major questions doctrine in a majority opinion.
91. *Id.*
92. *Id.* at 723 (citing Whitman v. American Trucking Ass'ns, 531 U.S. 457, 468 (2001)).
93. 600 U.S. at 500-07.
94. *See id.* at 486-88.
95. Pub. L. No. 108-76, 117 Stat. 904 (2003). The HEROES Act extended coverage of an earlier piece of legislation passed in 2001 and allowed the Secretary of Education to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the [Education Act] as the Secretary deems necessary in connection with a war or other military operation or national emergency." *Nebraska*, 600 U.S. at 485 (citing 20 U.S.C. §1098bb(a)(1)).
96. *See generally Nebraska*, 600 U.S. at 483-86 (outlining general legal structure for emergency measures regarding student loans).
97. *Id.* at 494 (citing MCI Telecomm. Corp. v. American Tel. & Tel. Co., 512 U.S. 218, 225 (1994)).
98. *Id.* at 495.
99. *Id.* at 500.
100. *Id.* (citing Reply Brief for the Petitioners at 22 n.3, Biden v. Nebraska, 600 U.S. 477 (2023) (Nos. 22-506, 22-535), 2023 WL 2142781, at *22).
101. *Id.* at 501.
102. *Id.* at 500-01.
103. *Id.* at 502 (quoting West Virginia v. Environmental Prot. Agency, 597 U.S. 697, 701 (2022), and citing 20 U.S.C. §1098ee(2)(D)).
104. *Id.* at 503 (quoting Utility Air Regul. Grp. v. Environmental Prot. Agency, 573 U.S. 301, 324 (2014)).
105. *Id.* at 506.
106. *See generally* Kate R. Bowers, Congressional Research Service, IF12077, The Major Questions Doctrine (2022).

A. *The Tariff Emergency Declarations and the Scope of Executive Authority*

The recent challenges to President Trump's imposition of tariffs provide an early example of pleadings, a trial court opinion upholding a challenge to a series of Executive Orders under a declaration of emergency, and an appellate decision upholding the trial court ruling.[107] In a complaint filed in the U.S. Court of International Trade on April 14, 2025, initiating *V.O.S. Selections, Inc. v. Donald Trump*,[108] business entity plaintiffs claimed injury from imposition of tariffs and attempted to address both the nonexistence of an emergency and lack of congressional authority granted to a president.

The complaint contains two counts against President Trump's tariff actions related to presidential authority, emergency powers, and administrative procedure. In Count I, plaintiffs claim that the International Emergency Economic Powers Act (IEEPA) does not grant authority for the imposition of tariffs.[109] Further, the tariffs implemented by President Trump constitute a clear misconstruction of the IEEPA and are outside delegated authority.[110] In Count II, plaintiffs allege that the IEEPA's transfer of Article I, §1 legislative power to a president is unconstitutional because the grant of authority under the IEEPA contains no intelligible principle and is undefined as to the scope and meaning of the claimed powers granted to the president.[111] Plaintiffs claim these executive actions should be held unlawful and set aside as in excess of statutory authority or contrary to constitutional power and not in accordance with law.[112]

The complaint alleges that the "existence of trade deficits in goods with some other countries is not an unusual and extraordinary threat, as required by IEEPA."[113] Plaintiffs focus on the language of the IEEPA, finding no implied or specific grant of authority to impose tariffs. If implied, the complaint alleges that such tariff authority would violate separation of powers because Congress is granted sole authority to impose tariffs.

On May 28, 2025, a three-judge panel of the U.S. Court of International Trade issued a per curium opinion holding in favor of the business plaintiffs.[114] The court found that the IEEPA did not delegate unbounded tariff authority to the president. The authority granted was limited and did not extend to unbounded imposition of tariffs; what emergency authority did exist was limited "only to 'deal with an unusual and extraordinary threat with respect to which a national emergency has been declared . . . and may not be exercised for any other purpose.'"[115]

Thus, what the opinion described as the "Worldwide and Retaliatory Tariffs" and "Trafficking Tariffs" fell outside the scope of the IEEPA. Embracing the nondelegation doctrine and the major questions doctrine as tools to avoid an unconstitutional result, the court ruled: "Regardless of whether the court views the President's actions through the nondelegation doctrine, through the major questions doctrine, or simply with separation of powers in mind, any interpretation of IEEPA that delegates unlimited tariff authority is unconstitutional."[116]

The court also addressed whether the challenge raised a nonjusticiable political question, answering firmly in the negative. Specifically, the court considered whether judicial review of the president's exercise of authority to "deal[ ] with an unusual and extraordinary threat" under the IEEPA lacked judicially discoverable or manageable standards or whether the decision required the exercise of nonjudicial discretion, two of the *Baker* factors.[117] The court first reaffirmed its constitutional prerogative to interpret the law (including statutes), noting that they "cannot shirk this responsibility merely because [their] decision may have significant political overtones."[118] Tackling the two *Baker* factors head-on, the court cited *Loper Bright* for the proposition that a political question did not exist simply because the court was expected to use principles of statutory interpretation to determine the scope of authority under the IEEPA.[119]

Indeed, the court noted the judiciary is obligated to determine the degree of deference granted to the president by the relevant congressional enactment. Statutorily authorized action may limit judicial inquiry into a "[p]resident's reasoning or into the existence of the facts calling for the action taken."[120] However, the question as framed by *Youngstown* is whether the president is acting "pursuant to an express or implied authorization of Congress"—in which case "his authority is at its maximum"—or whether the claimed authority is invoked "incompatibl[y] with the expressed or implied will of Congress"—meaning that "his power is at its lowest ebb."[121]

It should also be noted that the court distinguishes the IEEPA from the NEA regarding the degree of deference granted to the president. The court suggests statutory authority to "find or determine" the existence of a contingency giving rise to the delegated authority is greater in the

107. President Trump justified authority for imposing tariffs on the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§1701-1710, among other claims of authority.
108. Complaint of Plaintiffs, V.O.S. Selections, Inc. v. Trump, 772 F. Supp. 3d 1350 (Ct. Int'l Trade 2025) (No. 25-00066), 2025 WL 1109050.
109. *Id.* at 16-17.
110. *Id.* at 17-19.
111. *Id.* at 20-21.
112. *Id.* at 23-24.
113. *Id.* at 17.
114. V.O.S. Selections, Inc. v. United States, 772 F. Supp. 3d 1350 (Ct. Int'l Trade 2025) (per curiam). This case granted summary judgment to the five small business plaintiffs as well as a group of 12 state plaintiffs in a consolidated order. *Id.* at 1383.
115. *Id.* at 1370 (citing 50 U.S.C. §1701(b)).
116. *Id.* at 1372.
117. *Id.* at 1377.
118. *Id.* at 1378 (citing Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 230 (1986)).
119. *Id.* (citing Loper Bright Enters. v. Raimondo, 603 U.S. 369, 403 (2024)) (reiterating that "the traditional tools of statutory construction" are available to the courts "to ascertain the term's meaning and appl[y] that meaning to specific cases").
120. *Id.* (citing U.S. Cane Sugar Refiners' Ass'n v. Block, 544 F. Supp. 883, 895 (Ct. Int'l Trade 1982)).
121. *Id.* at 1378-79 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring)).

NEA than in the IEEPA at issue.[122] The Trump Administration appealed the grant of summary judgment.

On August 29, 2025, the U.S. Court of Appeals for the Federal Circuit, sitting en banc, affirmed the trial court's decision, finding that authority to "regulate" imports under the IEEPA does not authorize the tariffs imposed by President Trump and setting aside the five executive orders imposing tariffs.[123] The majority opinion begins with statutory interpretation, with the Federal Circuit determining that the IEEPA's grant of authority to regulate does not encompass the authority to impose tariffs or to tax. The Court also found the president's interpretation granting such authority "runs afoul of the major questions doctrine."[124]

In response to the government's argument that it is "particularly inappropriate to construe narrowly a delegation of power in the arena of foreign affairs and national security,"[125] the Federal Circuit replied "[I]t is essential the congressional role in foreign affairs be understood and respected . . . . The executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue."[126] Thus, the Court concluded, "[a]bsent a valid delegation by Congress, the president has no authority to impose taxes."[127] Though the Federal Circuit upheld the trial court's grant of summary judgment, it reversed and remanded to the court below to reconsider permanent injunction of the Executive Orders in light of equitable factors set forth in *eBay Inc. v. MercExchange, L.L.C.* and the Supreme Court's recent case *Trump v. CASA, Inc.*[128]

In the concurring opinion, four judges added their views to those of the majority opinion. The concurring judges found that (1) the government's erroneous interpretation of "regulate" is not supported by the plain language of the statute; (2) the government's reliance on ratification of *Yoshida II*[129] does not overcome the statutes' plain meaning; and (3) the government's view of the scope of authority would result in an unconstitutional delegation of congressional power.[130]

In dissent, four judges wrote to express their views concerning the meaning of "regulate" as used in the IEEPA. The dissenters' reasoning takes a circuitous route through the political question doctrine implications for challenging the president's exercise of discretion, citing the importance of domestic economic affairs and trends when imposing tariffs on foreign nations.[131] The dissent then argues that the context for reading "regulate" in the statute requires the broadest interpretation to include the missing language of taxes and tariffs.[132] Rather than find a positive grant of such authority in the statute, the dissent points to the lack of a "persuasive basis for thinking that Congress wanted to deny the President use of the tariffing tool, a common regulatory tool, to address the threats covered by the IEEPA"[133] The dissent takes umbrage with the majority's employment of the nondelegation doctrine because, "[i]n short, the majority's efforts at narrowing the section 203 tariff authorization (beyond the limits prescribed by section 202), besides being insufficiently defined, have no proper basis in the statute."[134]

Despite the dissent's determination that the emergency claimed is the domestic economic state of the country, the major questions doctrine is briefly discussed as inapplicable because "'the canon does not reflect ordinary congressional intent' in these contexts because 'the usual understanding is that Congress intends to give the President substantial authority and flexibility to protect America and the American people.'"[135] The dissent would find that when a grant of emergency authority is provided by Congress in the context of foreign relations or, by implication, for national security, the search for the limiting principle is misplaced.

In disposing of the nondelegation doctrine, the dissent wraps the president's authority to declare a national emergency around the unreviewable exercise of executive discretion, so long as the exercise employs the substantive language of the IEEPA.[136] In other words, if there is a plausible connection concerning the president's articulated "intended effect" of exercising emergency authority and the claimed emergency, the substantive requirement that the action "deal with" that emergency does not implicate the "intelligible principle" restraint of the nondelegation doctrine. Thus, inquiry into the use of tariffs to create leverage against a foreign entity to do all manner of things would not be subject to the judicial review necessary to discern whether an "intelligible principle" constrains the delegation of underlying authority.

B. *State of Washington's Challenge to National Energy Emergency Executive Order*

A second example of early litigation is a multistate challenge in *Washington v. Trump* to the Emergency Order and agency action taken in furtherance of the Order. On May 9, 2025, the state of Washington and other states

122. *Id.* at 1379.
123. V.O.S. Selections, Inc. v. Trump, Nos. 2025-1812, 2025-1813, 2025 WL 2490634 (Fed. Cir. Aug. 29, 2025). The Federal Circuit had earlier consolidated the appeals of the group of five small business plaintiffs (including V.O.S.) and the 12 state plaintiffs. *See* Order at 3, V.O.S. Selections, Inc. v. Trump, No. 2025-1812, 2025 WL 1527040, at *1 (Fed. Cir. May 29, 2025). The Court of International Trade had previously granted motions for summary judgment to both parties in a consolidated order. *See V.O.S. Selections, Inc.*, 772 F. Supp. 3d at 1383.
124. *V.O.S. Selections, Inc.*, 2025 WL 2490634, at *13.
125. *Id.* at *15 (citing Opening Brief for Appellants at 45, V.O.S. Selections, Inc. v. Trump, 2025 WL 2490634 (Fed. Cir. Aug. 29, 2025) (Nos. 25-1812, 25-1813)).
126. *Id.* (citing Zivotofsky v. Kerry, 576 U.S. 1, 21 (2025)).
127. *Id.*
128. *Id.* at *17-*18.
129. United States v. Yoshida Int'l, Inc., 526 F.2d 560 (C.C.P.A. 1975).
130. *V.O.S. Selections, Inc.*, 2025 WL 2490634, at *18 (Cunningham, Cir. Judge, concurring).
131. *Id.* at *31-*33 (Taranto, Cir. Judge, dissenting).
132. *Id.* at *35.
133. *Id.*
134. *Id.* at *39.
135. *Id.* at *44 (citing Federal Commc'ns Comm'n v. Consumers' Research, 145 S. Ct. 2482, 2516 (Kavanaugh, J., concurring)).
136. *Id.* at *46.

filed a complaint against President Trump and relevant U.S. Army Corps of Engineers (the Corps) officers and personnel challenging Executive Order No. 14156.[137] The complaint alleges (1) a common-law claim of ultra vires conduct outside the scope of executive authority[138]; (2) APA claims against Corps defendants involving implementation of emergency procedures under Clean Water Act (CWA) regulations,[139] and invocation of emergency procedures to permit projects under CWA §404 within the regulatory meaning of an emergency[140]; and (3) APA claims against the Advisory Council on Historic Preservation's use of emergency procedures to meet the president's directives in contravention of the National Historic Preservation Act[141] and the Advisory Council on Historic Preservation's emergency procedures.[142]

Although the states' complaint addresses and challenges the assertions of the president concerning the existence of a national energy emergency, the complaint is structured to avoid a direct challenge to the president's determination of an emergency. The states thereby possibly avoid a political question challenge. The complaint instead focuses on a major questions doctrine challenge. It does so by tying the Emergency Order back to the asserted authority for the declaration, that is the NEA, specifically 50 U.S.C. §1621(a). The NEA requires the president to specify the statutory provisions of law under which he and his officer will act prior to the exercise of that power.[143]

The Mineral Order's directive to find authority for the president's emergency actions runs afoul not only of the NEA, but also of the separation-of-powers concerns underlying major questions doctrine analysis.[144]

The *Washington v. Trump* litigation also uses an ultra vires claim and the APA framework to gain traction, challenging the emergency actions as unlawful or arbitrary and capricious in evaluating the emergency claim itself.[145]

The Mineral Order's fate in the courts is closely tied to the fate of these two cases. The Order's reliance on authority claimed under statutes that do not grant unlimited discretion and require substantive and procedural compliance with the statute is subject to judicial review. Indeed, all these Orders deal with executive actions of great "economic and political significance."[146]

C. *The Search for Authority for the Mineral Order*

Because the Mineral Order directs numerous agencies to take actions that are subject to specific statutory constraints, such as those in NEPA and FLPMA, actions not clearly authorized or appearing to conflict with statutory requirements are certain to result in challenges like the above examples. Although these second-term Executive Orders differ in their claimed source of emergency authority, with the challenged order implementing tariffs[147] relying on the IEEPA and the Emergency and Mineral Orders relying on the NEA, separation-of-powers principles still constrain executive power to the circumstances Congress describes in statute. Even when authority appears to exist and is identified in an order, the identified authority may be subject to further limitation under separation-of-powers analysis such as the nondelegation and major questions doctrines.

The Mineral Order on its face lacks a clear connection to sources of executive authority, and instead appears to rely on more tenuous connections to the emergency declared under the NEA in the earlier Emergency Order.[148] The Mineral Order identifies minerals as potentially contributing to an "energy emergency," presumably due to a long-standing and preexisting trend toward mineral production outside the United States.[149] This "emergency" has resulted from years of globalization of the mining industry, or, as the Trump Administration claims, from onerous legislative and executive action in the form of laws and regulations.[150]

Regardless of whether an actual emergency exists or is subject to challenge, to accomplish its outlined goals, the Mineral Order must still identify and follow legal authorities. The Mineral Order, however, does not clearly identify these authorities. While declaration of an emergency under the NEA unlocks authorities in other statutes and regulations, the NEA itself does not provide authority for emergency response. In fact, the NEA requires actions invoking emergency authority to state with specificity the legal authorities providing for emergency action.[151] As noted above, however, the Mineral Order directs agencies to search for all lawful authorities that can be used to meet directives. This undercuts any claim that the Min-

137. Complaint, Washington v. Trump, No. 2:25-cv-00869 (W.D. Wash. May 9, 2025).
138. *Id.* at 49-51.
139. *Id.* at 51-52. The CWA is codified at 33 U.S.C. §§1251-1387. The Corps' emergency regulatory procedures for permit approval are codified at 33 C.F.R. §325.2(e)(4).
140. Complaint at 52-53, Washington v. Trump, No. 2:25-cv-00869 (W.D. Wash. May 9, 2025). Section 404 of the CWA is codified at 33 U.S.C. §1344.
141. Complaint at 54-56, Washington v. Trump, No. 2:25-cv-00869 (W.D. Wash. May 9, 2025). The National Historic Preservation Act provision at issue in the complaint is codified at 54 U.S.C. §306108.
142. Complaint at 53-54, Washington v. Trump, No. 2:25-cv-00869 (W.D. Wash. May 9, 2025). The Advisory Council on Historic Preservation's emergency regulatory procedures for permit approval are codified at 36 C.F.R. §800.12.
143. 50 U.S.C. §1621.
144. *See supra* Section II.B.
145. Complaint at 49-51, 53-56, Washington v. Trump, No. 2:25-cv-00869 (W.D. Wash. May 9, 2025).
146. *See* West Virginia v. Environmental Prot. Agency, 597 U.S. 697, 700 (2022).
147. *See* Exec. Order No. 14195, 90 Fed. Reg. 9121 (Feb. 7, 2025).
148. *Compare* Exec. Order No. 14156, 90 Fed. Reg. 8433 (Jan. 29, 2025) ("The energy and critical minerals ('energy') identification, leasing, development, production, transportation, refining, and generation capacity of the United States are all far too inadequate to meet our Nation's needs."), *with* Exec. Order No. 14241, 90 Fed. Reg. 13673 (Mar. 25, 2025) ("It is imperative for our national security that the United States take immediate action to facilitate domestic mineral production to the maximum possible extent.").
149. *See* Exec. Order No. 14241, §§1, 6(b), 90 Fed. Reg. 13673, 13673, 13675 (Mar. 25, 2025).
150. *Id.* §1, at 13673 ("The United States was once the world's largest producer of lucrative minerals, but overbearing Federal regulation has eroded our Nation's mineral production.").
151. 50 U.S.C. §1621.

eral Order's use of emergency authority complies with the specificity requirement.

Even where the Mineral Order does identify specific authority,[152] as it does in the case of the DPA, it is unclear whether required statutory conditions are satisfied. For example, the DPA allows the president to take several actions in an emergency, but the types of emergencies justifying action are limited. These emergencies include military conflicts (none are presently declared), natural and man-made disasters (none of which are identified), and acts of terrorism within the United States (similarly not featured in the Mineral Order).[153]

The Mineral Order's directive to develop domestic minerals by prioritizing mining on federal lands is a mission in search of authority. Its chain of directives, all on an executively dictated timeline, fail to identify a clear source of executive authority.[154] This is true for many of the actions, including identifying all federal lands known to hold mineral deposits, directing the Secretary of the Interior to designate mining and mining-related uses as priority uses by amending or revising land use plans, and requiring the agencies to lease such lands while providing funding assistance for private enterprises.

Those activities implicate many legal authorities; however, emergency response requires emergency authorization. In this case, emergency authorities are not identified because they do not exist. Some of the activities, such as leasing, rely on authority for which no emergency provisions are provided, such as the Mineral Leasing Act.[155] Statutes such as FLPMA[156] include emergency authority related to search and rescue or wildfire response,[157] but do not provide the type of authority for the activity the Mineral Order seeks to implement. Other provisions of law require that certain criteria be met to qualify under the definition of "emergency."

One example of such a statutory requirement for emergency action is the Natural Gas Act, which empowers the Federal Energy Regulatory Commission to issue temporary certificates for construction or operation in cases of emergency to assure maintenance of adequate service.[158] This authority has been construed by the D.C. Circuit to apply to a limited number of situations, but not for an emergency created by a foreseeable increase in demand.[159] The Mineral Order's reliance on the DPA and "alternative arrangements for compliance"[160] do not provide a broad description of emergency sufficient for the Order's purpose. Except for already accessible DPA funding, using appropriated funding for non-designated purposes and the repurposing of Acts such as FLPMA to make mining a primary use on federal lands are legislative powers, not executive prerogatives. The Trump Administration's everything, everywhere, all at once invocation of emergencies and executive orders share a common DNA.

As described, the range of relevant legal authorities for the Mineral Order (including those to be identified at some point in the future) fall into four categories.[161] These categories include (1) those with no emergency provisions; (2) those with emergency provisions irrelevant to the proposed executive directive; (3) those that require compliance with statutory criteria; and (4) those whose authority are most vague or undefined by relying on an executive or congressional declaration of emergency.[162] As demonstrated in the district court's memorandum opinion in the *V.O.S. Selections* litigation and the Washington challenge to the Emergency Order, lack of authority will affect the validity and effectiveness of the Mineral Order.

New regulations and "alternative arrangements," as well as a potpourri of agency actions ranging from expedited permitting to mandatory leasing and funding of projects made in reliance on the Mineral Order, are likely to be challenged under the APA as in the ongoing litigation discussed above. Reliance on emergency declarations to craft regulatory provisions for employing "alternative arrangements" are suspect, as the regulatory procedures for emergency agency action are limited in scope and duration.[163] The Administration's use of 43 C.F.R. §46.150(d) demonstrates such misuse of emergency regulatory authority, despite the provision's limitation of "alternative arrangements" to actions "necessary to control the immediate impacts of the emergency."[164]

It is apparent that actions taken in reliance on the Mineral Order will face litigation. If recent precedent is applied, the Mineral Order will fail for lack of executive authority. That said, it is possible that the law applicable to prior administrations will not be applied to the Trump Administration in the final analysis.[165]

IV. The Practical Course of the Mineral Order

Long lead times and capital-intensive requirements in the mining industry leave the industry poorly equipped to embrace the Mineral Order in a meaningful way. Hope that recent judicial precedent does not apply to the Trump Administration is unlikely to sustain widespread industry buy-in. The most successful miners have not always been

152. *See* Exec. Order No. 14241, 90 Fed. Reg. 13673, 13674-75 (Mar. 25, 2025).
153. *See* 50 U.S.C. §4502(a)(1).
154. *See generally* Exec. Order No. 14241, 90 Fed. Reg. 13673 (Mar. 25, 2025).
155. 30 U.S.C. §§181 et seq.
156. 43 U.S.C. §§1701-1782.
157. *Id.* §§1742, 1748(a).
158. 15 U.S.C. §717(f).
159. Pennsylvania Gas & Water Co. v. Federal Power Comm'n, 427 F.2d 568, 573-76 (D.C. Cir. 1970).
160. 40 C.F.R. §1506.11.
161. *See* Olivia Guarna & Michael Burger, *Demystifying President Trump's "National Energy Emergency" and the Scope of Emergency Authority*, Sabin Ctr. for Climate Change L.: Climate L. (Feb. 14, 2025), https://blogs.law.columbia.edu/climatechange/2025/02/14/demystifying-president-trumps-national-energy-emergency-and-the-scope-of-emergency-authority/.
162. *Id.*
163. *Id.*
164. *See* DOI, *supra* note 39 (citing 43 C.F.R. §46.150(d)).
165. For example, a recent emergency decision by the Supreme Court in *Trump v. Wilcox* appears to be at odds with precedent in the much earlier case *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). *See* Trump v. Wilcox, 145 S. Ct. 1415, 1417 (2025) (Kagan, J., dissenting).

miners, but investors, as illustrated by the merchant in the old mining districts who provided what was known as a "grubstake"—a small amount of financial support for miners who took all the risk and gave the merchant a stake in the mines that flourished.[166] While grubstakes and small miners in the gold fields of the West are no longer the stuff of today's mining industry, risk management remains the key to successful mineral production.

Today, the chief forms of risk for the industry are legal risk from regulatory change; political instability and resource nationalism; corruption and bribery; environmental and social impact concerns; licensing and permit disputes; contractual risks; and international law and treaty protections. Those risks may result in financial impacts, operational impacts, reputational damage, and reduced investment opportunities. All those risks and associated impacts have at their core the common denominator of the "rule of law" and its actual, as well as perceived, strength for management of risk.

Mining as a global industry operates in a variety of environments, ranging from strong rule-of-law regimes to strongman regimes with no rule of law other than the pleasure of the man with the most guns. Thus, risk management for mining companies consists of finding locations with both economically recoverable minerals and a strong rule-of-law framework that allows for management of the risks identified above. Historically, the United States has enjoyed a strong Transparency International (TI) rating,[167] meaning that the perception of the mining industry concerning the rule of law favored mineral development here. The question now exists as to whether that perception will remain in the face of uncertainty regarding the rule of law in the United States.

The mining industry is global for reasons beyond "overbearing Federal regulation"[168] in the United States. The first and foremost determinative factors in creating new mines and mineral production are the presence, discovery, and mapping of desired minerals capable of economic mining in sufficient quantities. Closely following is the related problem of securing long-term commitments of sufficient capital for mine and mineral processing project development. To the extent that the Mineral Order represents a bet on the success of one president or administration, it is a bet that mining companies know comes with major risks. An administration that relies on one set of rules for itself, but not for others, will not encourage long-term investment from those who have seen this movie before. The range of responses by industry to this order will vary based on individual circumstances and goals. Some of the factors that will bear watching and remain uncertain are described below.

The Mineral Order seeks to lower barriers to entry for new players while also rewarding increased investment from existing entities. Aside from those projects listed on the FAST-41 Permitting Dashboard, other potential U.S. mining projects that could benefit from this Executive Order include larger, more controversial projects such as PolyMet Mining's NorthMet copper and nickel mine in Minnesota[169]; Perpetua Resources' Stibnite gold and antimony mine in Idaho[170]; and Twin Metals' copper, nickel, and cobalt mine in Minnesota.[171] Both the Stibnite and Twin Metals mines are located on U.S. Forest Service lands. Projects such as the Copper World project in Arizona abut and could expand onto federal lands.[172] While these are important projects far along in planning and, to some degree, in development, they alone will not provide for national minerals independence.

The possibility of rapidly approving the leasing of federal lands and permitting of mines creates another issue, namely the strategic creation of private-property interests in the public commons able to survive changes in administrations and adverse court rulings.[173] Even before the first Trump Administration's rollback of environmental regulations, the grant of leases and issuance of permits during Republican administrations have worked to "salt the land" by creating legal claims against new or resumed regulation. Although the public lands of the United States and many of the natural resources they contain are a "commons" in that they are held by the people and democratically governed by Congress through Property Clause powers, the executive's grants of interests in these lands have a "sticky" quality, often enabling them to outlast the granting administration.[174]

Although the Mineral Order does not expressly purport to negate statutory law, it must also be read in the context of the Administration's directives to identify regulations to revoke, perhaps without notice or comment under the APA.[175] Whether successfully revoked or not, the Trump Administration has signaled its intent to rely on *Heckler v. Chaney*,[176] which holds that an agency exercise of discretion to not enforce a regulation is presumptively non-reviewable under the APA.[177]

Additionally, other factors play a role in the implementation of the Administration's goals, including significant

166. Merriam-Webster Dictionary, *Grubstake*, https://www.merriam-webster.com/dictionary/grubstake (last visited Aug. 18, 2025). For the merchant, the risk was small and spread among many miners, but the reward could be great.
167. Matthew Dolowy-Busch, *Mines and Mandates: Evaluating Political Risk in Mining*, Factset Insight (Mar. 26, 2024), https://insight.factset.com/mines-and-mandates-evaluating-political-risk-in-mining.
168. Exec. Order No. 14241, §1, 90 Fed. Reg. 13673, 13673 (Mar. 25, 2025).
169. *See* Minnesota Department of Natural Resources, *PolyMet's NorthMet Mining Project*, https://www.dnr.state.mn.us/polymet/permitting/index.html (last visited Aug. 18, 2025).
170. Perpetua Resources, *Project Overview*, https://perpetuaresources.com/project/ (last visited Aug. 18, 2025).
171. Twin Metals Minnesota, *About the Project*, https://www.twin-metals.com/meet-twin-metals/about-the-project/ (last visited Aug. 18, 2025).
172. *See* Hudbay Minerals, *Home Page*, https://www.copperworldaz.com/ (last visited Aug. 18, 2025).
173. *See generally* Erin Ryan, *Privatization, Public Commons, and the Takingsification of Environmental Law*, 171 U. Pa. L. Rev. 617 (2023).
174. *Id.* at 646-50.
175. *See* Exec. Order No. 14192, 90 Fed. Reg. 9065 (Feb. 6, 2025); Exec. Order No. 14219, 90 Fed. Reg. 10583 (Feb. 25, 2025); Memorandum on Directing the Repeal of Unlawful Regulations, 2025 Daily Comp. Pres. Doc. (Apr. 9, 2025).
176. 470 U.S. 821 (1985).
177. *Id.* at 832-33.

reductions in agency personnel and resulting loss of expertise.[178] Overall changes in direction, regulatory approach, and agency capacity will influence both the speed and quality of the permitting process. In some cases, this will result in agency delay and in others in reduction of oversight and compliance activity.

The Mineral Order raises several different issues in addition to those shared by other Executive Orders. Most, if not all, of these issues will require congressional action to address. First, as the Mineral Order states: "This order shall be implemented consistent with applicable law and subject to the availability of appropriations."[179] Significant funding will come from DPA authorizations, which allocated $587 million in 2024.[180] However, $587 million will not go very far in creating new production and mining operations without further appropriations. It will, however, provide an opportunity for those seeking to create new entities to "salt the land" for speculative investment opportunities or revive suspended or abandoned operations.[181]

Second, it is also unclear whether the Mineral Order is intended to supplant the enabling legislation regarding critical minerals or further legislation will be sought to meet the Executive Order's purpose. Prior to the flurry of emergency executive orders, the Secretary of the Interior's Critical Mineral List appeared to be on track for a required third-year review.[182] While the Mineral Order seeks a general expansion of domestic mining and processing, development of the Critical Mineral List serves a different purpose.[183]

Though the recently proposed 2025 Draft List of Critical Minerals expands the number of minerals listed as critical,[184] the list remains reflective of the need to "quantify the risks associated with potential disruptions" in determining criticality.[185] Rather than serving as a precursor to drum up more domestic mineral production, the Critical Minerals List identifies risk that can be addressed through a more holistic policy approach. That is, while increasing domestic production appears to be the preferred policy of the current Administration, it is but one policy among many others, including diplomacy, trade agreements, and research on mineral component substitutions and technological innovations.

Third, the Mineral Order's breadth of focus in addressing "mineral production"[186] is likely to fall short of its goals. The broadening of "mineral production" to include extractive activity was only recently supported under the Inflation Reduction Act through the final advanced manufacturing production credit regulations issued in October 2024.[187] Further, lack of processing and smelting capacity in the United States remains an impediment to effectuating the whole of the Mineral Order's purpose and will require massive capital investment and regulatory certainty to achieve.[188]

Fourth, clarification of the reach of the Mining Act of 1872 is a recurring, and now-pressing, legislative issue.[189] Clarification is required to address the feasibility of processing metals that have been mined and milled but left behind in tailings ponds. These tailings could be important sources of supply, but questions of environmental responsibility or liability and ownership of these tailings remain unresolved without additional legislation.[190]

The mining industry, to say nothing of related processing and manufacturing industries, typically faces uncertainty. Chief among the challenges to opening new mines are years of exploration for economically viable mineral deposits, requiring not only identification of the minerals, but also exploration of the extent and grade of the deposits to be mined. The presence of valuable minerals in low-grade ore bodies, ore bodies at too great a depth, or ore bodies in insufficient quantities to justify development all hamper private investment. Further, all of these technical considerations occur in the context of rapidly fluctuating mineral prices, changing economic conditions, trade disputes, and markets, lenders, and administrations that come and go.

V. Conclusion

Executive authority beyond that clearly enumerated in the Constitution is subject to limitations imposed by separation of powers between coordinate branches of the federal

178. *See* Jamie Pleune & Edward Boling, *This Permit Reform Already Works. Why Aren't More Mining Projects Using It?*, 53 ELR 10463 (June 2023), https://www.elr.info/articles/elr-articles/permit-reform-already-works-why-arent-more-mining-projects-using-it.

179. Exec. Order No. 14241, §7(b), 90 Fed. Reg. 13673, 13676 (Mar. 25, 2025).

180. Further Consolidated Appropriations Act 2024, Pub. L. No. 118-47, 138 Stat. 476.

181. One example is the fast track Utah uranium mine, although this mine will not receive private funding without a market. *See* Associated Press, *Trump Fast-Tracks Utah Uranium Mine, but Any Revival May Wait for Higher Prices*, KUER 90.1 (June 3, 2025), https://www.kuer.org/politics-government/2025-05-31/trump-fast-tracks-utah-uranium-mine-but-any-revival-may-wait-for-higher-prices.

182. *See* Mineral Resources Program, *What Are Critical Minerals?*, USGS (Nov. 1, 2024), https://www.usgs.gov/programs/mineral-resources-program/science/what-are-critical-minerals-0 (noting "[t]he most recent List of Critical Minerals was published in 2022" and that the list must be updated "at least once every three years").

183. Wesley Peebles, *The United States Critical Minerals List: Between a Rock and a Hard Place*, 36 Fordham Env't L. Rev. __ (Fall 2025) (forthcoming) (on file with author).

184. 2025 Draft List of Critical Minerals, 90 Fed. Reg. 41591 (Aug. 26, 2025).

185. Nedal T. Nassar et al., Methodology and Technical Input for the 2025 U.S. List of Critical Minerals—Assessing the Potential Effects of Mineral Commodity Supply Chain Disruptions on the U.S. Economy, U.S. Geological Survey (2025), https://pubs.usgs.gov/of/2025/1047/ofr20251047.pdf.

186. The Mineral Order defines "mineral production" as "the mining, processing, refining and smelting of minerals, and the production of processed minerals and other derivative products." Exec. Order No. 14241, §2(b), 90 Fed. Reg. 13673, 13673 (Mar. 25, 2025).

187. *See* Advanced Manufacturing Production Credit, 89 Fed. Reg. 85798, 85801, 85817 (Oct. 28, 2024).

188. Tess Kazdin, *Aluminum Association Publishes White Paper Outlining Pathways Toward Domestic Aluminum Supply Chain Resilience*, Recycling Today (May 16, 2025), https://www.recyclingtoday.com/news/aluminum-association-publishes-white-paper-united-states-aluminum-industry-self-sufficiency/.

189. Exec. Order No. 14241, §4, 90 Fed. Reg. 13673, 13674 (Mar. 25, 2025).

190. Barry Barton, *The Ownership of Mine Tailings* (2024), https://www.researchgate.net/publication/384678925_THE_OWNERSHIP_OF_MINE_TAILINGS.

government. That authority is limited to prevent intrusion on the enumerated authority of the other two branches of government. Executive actions that have legislative effect, levy taxes, or implicate other Article I prerogatives depend on authority granted by Congress in legislation.

Like any other legal authority, emergency authorities granted by Congress are statutorily codified, and limited by procedural and substantive requirements. The second Trump Administration is failing to follow established procedure and substantive requirements in the law to support its decisionmaking. This creates both legal and practical challenges for the future of the Mineral Order and likely other executive orders flowing from an overabundance of reliance on inherent executive authority.

The Mineral Order's reach is very broad, going beyond increasing mining activity to expanding supply chains through expediting lease and permit issuance and providing government financial assistance. Yet, the Mineral Order relies on authority claimed under statutes that do not grant unlimited discretion and require substantive and procedural compliance with statutory terms that should be subject to judicial review. Actions taken in reliance on the Mineral Order will face litigation, with present challenges to emergency presidential authority providing a window into the Mineral Order's potential fate. If recent precedent is applied, actions outlined in the Mineral Order will fail for lack of executive authority.

Despite President Trump's broad vision of executive authority, in a great irony the Supreme Court, as shaped by President Trump during his first Administration, has decided several recent cases limiting executive agency power. These cases not only limit executive authority, which is reliant on implied or unenumerated powers, but also statutory powers, narrowing claims of executive discretion exercisable by executive order or regulation. These Supreme Court cases have greatly cabined executive regulatory authority.[191] Challenges to President Biden's executive orders and rulemaking resulted not only in eliminating doctrines of deference to executive agencies, but also in extending judicial authority to define congressionally delegated powers to the executive and to determine inherent limits in such grants.

If this Court's Biden-era precedent also applies to the second-term Trump Administration's actions, then the Mineral Order is likely to be voided or constrained. This is, of course, a big "if," as the same Court that cabined President Biden's executive authority was chosen in part for its perceived loyalty to President Trump.[192] Regardless of the Court's interpretations, the Mineral Order is unlikely to result in increased mineral production.

Bringing mines from exploration to production requires decades of effort and reliable commitments of private capital to assure the success of a project. Uncertainty, whether caused by the rule of law or by the characteristics of a project, does not produce conditions necessary for long-term investment. The necessary level of certainty for successful projects is simply unlikely to flow from the shifting, unstable legal ground the Mineral Order implicates. While speculation and stock promotion may initially flourish in the grandiosity of the Order's vision, increased production of the minerals necessary to meet the future needs of the national economy is unlikely.

In addition to testing the bounds of executive authority, the Mineral Order also tests the bounds of the mining industry. The industry is made up of a range of business enterprises. At one end of the spectrum are entities that develop and operate large mines across the globe. A limited number of mining companies with the necessary global reach, depth of experience, and financial capacity exist to engage in years of mine development across varying political environments. Of the 50 largest mining companies in the world, only four are based in the United States.[193]

At the other end of the spectrum, however, are mineral property promoters possessing limited capacity to engage in project development. The business models of these smaller companies rely on creating interest in mineral prospects for larger entities to develop, all while seeking to retain a royalty, sell penny stock, or be acquired by a larger firm.[194] While the Mineral Order has the potential to support a burst of activity for the penny stock trade, it provides little certainty for the commitment required to develop and produce minerals at scale over time. An investment environment that relies purely on national investments in the face of tariffs, global trade, and uncertainty regarding the rule of law will face challenges in finding sufficient financial and industrial competence to exploit the nation's mineral reserves.

191. *See generally* Erin Ryan, *The Four Horsemen of the New Separation of Powers: The Environmental Law Implications of* West Virginia, Sackett, Loper Bright, *and* Corner Post, 109 Minn. L. Rev. 2839 (2025).

192. Recent emergency, or "shadow docket," decisions expose this possibility. *See, e.g.*, Trump v. Wilcox, 145 S. Ct. 1415 (2025) (allowing Trump to proceed with firing members of the National Labor Relations Board and Merit Systems Protection Board); Department of Homeland Sec. v. D.V.D., 145 S. Ct. 2153 (2025) (allowing Trump Administration to conduct third-country removals in light of due process concerns); McMahon v. New York, No. 24A1203, 2025 WL 1922626 (U.S. July 14, 2025) (permitting Trump to proceed with action to dismantle the U.S. Department of Education).

193. *The Top 50 Biggest Mining Companies in the World*, Mining.com (Apr. 21, 2025), https://www.mining.com/top-50-biggest-mining-companies/.

194. For a primer on legal and business perspectives concerning the roles of major and junior mining companies in the mining industry, see Roger Taplin & Shawn Doyle, *The Differing Perspectives of Junior and Major Mining Companies in Joint Ventures*, McCarthy Tétrault (July 16, 2012), https://web.archive.org/web/20230610030826/https://www.mccarthy.ca/en/insights/articles/differing-perspectives-junior-and-major-mining-companies-joint-ventures.