

CONFUSION REGARDING THE EXTRATERRITORIAL PRESIDENTIAL POWER IN RELATION TO THE ECONOMY AND DIGITAL PRIVACY

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INTRODUCTION

Authoritarian states such as China have become more empowered in the international economic system. Since these states are generally in contrast to democratic states and the conventional international economic rules have been formed mainly by Western democracies, these current international rules have been challenged by the rise of authoritarian states.¹ Now, the US—especially the Trump administration—might share characteristics with authoritarian States due to its “uncompromising” policies on the economy and individual rights, such as free speech. In the context of the economy, these States may justify their national protectionist policies for national security.

“National security” exceptions may be used to justify states’ regulatory power under economic treaties such as the World Trade Organization (“WTO”) agreements,² which were founded on economic liberalism. While the subject matter of national security has been recognized as subject to states’ sovereignty, there seem to be limits on the scope of states’ “essential security interests” under WTO case law.

Additionally, states’ sovereignty would be legally exercised in line with constitutional limitations. There has been overlap in the concept of sovereignty in constitutional and international law, especially in relation to national security matters. Since different states have different national security policies, it should be questioned whether, and to what extent, they need to agree on the substantial scope of national security matters that can be justified under international law. For example, the matter of national security has been included as an “exception” to fundamental principles in international economic law, such as the GATT 1994³ and the GATS⁴, though it is not clear how the Panel and the Appellate Body would review states’ claims regarding “essential security” under such

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1. Tom Ginsburg, *Authoritarian International Law*, 114 AM. J. INT’L L. 221, 221-23 (2020).

2. *See generally* Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement].

3. GENERAL AGREEMENT ON TARIFFS AND TRADE ART. XXI, APR. 15, 1994, MARRAKESH AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION, ANNEX 1A, 1867 U.N.T.S. 187 [hereinafter GATT 1994].

4. General Agreement on Trade in Services art. XIV bis, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 [hereinafter GATS].

treaties.

The US, as a “conventional” world leader after the Second World War, has contributed to the rulemaking of international law, including the international economic order. However, such an existing international economic order needs to be reconsidered in the context of the digital economy. Firstly, the traditional multilateral international economic order based on the WTO regime has not functioned as well as expected, which can negatively influence the effectiveness of the WTO regime itself. Secondly, it has been suggested that the US itself has been influenced by international and foreign states’ relations when making such an order and its national policies. It seems that the US policy on the digital economy has been affected by the EU. In the Data Privacy Framework to promote economic interests for these two regions, the US and the EU reached an executive agreement on cross-border flows of personal data. This data flow framework has been established in accordance with the EU’s “adequacy decision” under the EU’s personal data protection law, “GDPR”, which came into force on 25 May 2018.⁵ To satisfy the adequacy standard, a third country (i.e., a country outside the EU), into which protected data is intended to flow, is required to satisfy “essential guarantees” to restrict interference with fundamental rights to privacy and data protection for national security and law enforcement under Article 45(2)(a) of the GDPR.⁶ In line with the case law of the Court of Justice of European Union (“CJEU”) and the European Court of Human Rights (“ECtHR”), this requirement, in particular, covers the proportionality principle, including a strict necessity test, which should be recognized in a democratic society.⁷ This strict test applies to a measure interfering with fundamental rights to privacy and protection of personal data, even for national security. The EU’s high standard of personal data protection for individuals can challenge and limit the US’s national security policy in the context of economic treaties and foreign surveillance activities.

While the EU requires a third country to protect personal data in ways

5. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of such Data, and Repealing Directive 95/46/EC, 2016 O.J. (L 119) 1, 61 [hereinafter GDPR].

6. Christopher Kuner, *Article 45: Transfers on the Basis of an Adequacy Decision*, in THE EU GENERAL DATA PROTECTION REGULATION (GDPR): A COMMENTARY 79, 103 (Christopher Kuner et al., eds 2025).

7. E.g., EUR. DATA PROT. BD., RECOMMENDATIONS 02/2020 ON THE EUROPEAN ESSENTIAL GUARANTEES FOR SURVEILLANCE MEASURES (Nov. 10, 2020), https://www.edpb.europa.eu/sites/default/files/files/file1/edpb_recommendations_202002_europeannessessentialguaranteessurveillance_en.pdf [https://perma.cc/3Z83-ZPQ7].

essentially equivalent to those of the EU's data protection law for data to be transferred from the EU to the third country, the US has not established a comprehensive privacy law at the federal level. To conclude the executive agreement with the EU, what the US did to deal with the requirements was to issue the President's executive order. Indeed, the US presidential power for foreign relations has been considered wide under the US Supreme Court case law, but the fundamental right to data privacy is at the center of the EU's requirements. Will the bilateral executive agreement relating to personal data influence the constitutional right to privacy in the context of the US foreign surveillance? Is there any possibility to admit justiciability of foreign surveillance activities for national security under the US Constitution?

Considering the relationship between foreign trade and personal data protection, the existing international economic rules based on economic liberalization should be considered in light of personal data protection rules in digitalization. This paper then examines how the US Constitution restricts the presidential power for foreign affairs for the purpose of national security. Due to the global influence of the EU's data protection law, this paper focuses on the EU's approach to personal data protection and its influence on US economic policy and presidential power. Examining the meaning of national security purpose in the context of the WTO rules and those of personal data protection, this paper considers how the US Constitution and international rules should bind the US presidential power through pursuing the concept of "sovereignty."

I. IMPACT OF DIFFERENT APPROACHES TO GOVERNMENT ACCESS TO PERSONAL DATA BETWEEN THE EU AND THE US ON THE TRADE LIBERALIZATION PRINCIPLE

A. Justiciability of the National Security Exceptions Under the WTO Agreements

The language of the national security exception under Article XXI of the GATT 1994 was copied from that of the GATT 1947,⁸ with substantially the same language being used under other WTO agreements, such as the GATS⁹ and the TRIPS agreement.¹⁰ More than

8. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

9. See GATS, *supra* note 4.

10. Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 73, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS agreement].

seventy years after the initial introduction of the GATT, the national security exception clause had been rarely endorsed by the member states. After that, it has been invoked at the WTO Dispute Settlement Body (“DSB”) panels such as *Russia – Traffic in Transit* case,¹¹ which interpreted Article XXI of the GATT and *Saudi Arabia – IPRs* case,¹² mentioning the security exception of Article 73 of the TRIPS agreement. Additionally, numerous countries exporting steel and aluminum to the US requested the establishment of panels relating to the US’s regulatory measures to impose tariffs on the imports of these goods for national security based on Section 232 of the Trade Expansion Act of 1962,¹³ which was decided under the Trump presidency in 2018.¹⁴

The open texture of section (b) of Article XXI of the GATT (and the mirroring security exception clause of the TRIPS agreement) had raised controversy over what its substantive scope is and who has the authority to determine the same, especially considering the wording of its *chapeau*.¹⁵ It has been suggested that member states should understand the security exception as “self-judging,” on the basis that the freedom of the member states not to perform their obligations for national security

11. Panel Report, *Russia – Measures Concerning Traffic in Transit*, WTO Doc. WT/DS512/R (adopted Apr. 26, 2019) [hereinafter *Russia – Traffic in Transit* case] (Ukraine alleging that Russia violated its duty under Article V of the GATT 1994 by imposing various restriction measures on traffic in transit through its territory, while Russia rebutted the security exception under Article XXI).

12. Panel Report, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, WTO Doc. WT/DS567/R (circulated June 16, 2020) [hereinafter *Saudi Arabia – IPRs* case] (Qatar claiming that, inter alia, Qatari nationals’ ability to protect intellectual property rights in Saudi Arabia was affected by Saudi Arabia’s measures and that its measures brought the result of interfering with a Qatari-Based Media Group to enforce its IP rights through Saudi Arabia’s domestic judicial system, violating Articles 3.1, 4, 41.1, 42 and 61 of the TRIPS Agreement. Saudi Arabia invoked the security exception under Article 73(b)(iii). This dispute was terminated on 21 April 2022 without the adoption of the panel report).

13. Trade Expansion Act of 1962, Pub. L. No. 87-794, § 232, 76 Stat. 872, 877 (codified as amended at 19 U.S.C. § 1862).

14. China, India, Canada, the EU, Mexico, Norway, Russia, Switzerland and Turkey commenced the DSR procedures, and the U.S. appealed to the Appellate Body certain issues of law and legal interpretations in the panel reports. See Panel Report, *United States – Certain Measures on Steel and Aluminium Products* (China), WTO Doc. WT/DS544/R (circulated Dec. 9, 2022) [hereinafter *U.S. – Steel and Aluminium Products*]; Panel Report, *U.S. – Steel and Aluminium Products* (Norway), WTO Doc. WT/DS552/R (circulated Dec. 9, 2022); Panel Report, *U.S. – Steel and Aluminium Products* (Switzerland), WTO Doc. WT/DS556/R (circulated Dec. 9, 2022); Panel Report, *U.S. – Steel and Aluminium Products* (Turkey), WTO Doc. WT/DS564/R (circulated Dec. 9, 2022); Panel Report, *U.S. – Steel and Aluminium products* (Canada), WTO Doc. WT/DS550/R (circulated July 11, 2019) (mutually agreed solution reached); Panel Report, *U.S. – Steel and Aluminium Products* (Mexico), WTO Doc. WT/DS551/R (circulated July 11, 2019) (mutually agreed solution reached); Panel Report, *U.S. – Steel and Aluminium Products* (India), WTO Doc. WT/DS547/R (circulated Aug. 8, 2023) (mutually agreed solution reached).

15. Jacob Gladysz, *The National Security Exception in WTO Law: Emerging Jurisprudence and Future Direction*, 52 GEO. J. INT’L L. 835, 839-840 (2021).

would be exercised rarely, and would act wisely and in good faith in striking an appropriate balance between free trade and national security as a defense.¹⁶

If the approach is indeed “self-judging,” with each member state to decide the substantive meaning as to what is “essential security interests” and “necessary” for its protection, the security exception must be a non-justiciable equivalent to a “political question” in international trade law, bringing the possible risks of states’ abuse of the power,¹⁷ and causing the inefficacy of the global trading order.¹⁸

The non-justiciability approach was taken by the U.S., joining as a Third Party in the *Russia – Traffic in Transit* case, asserting, based on the language of the exception clause, that there is no agreement between the member states that their own judgment of “essential security interests” is subject to review.¹⁹ This argument may be classified as a weak form of non-justiciability on substantive grounds,²⁰ in contrast to the strong form of non-justiciability on procedural grounds, which claims that the DSB has no jurisdiction regarding national security and that the security exception is absolutely self-judging, empowering member States to avoid the WTO dispute settlement system.²¹

On the other hand, a justiciability approach is supported by some countries, including the EU, advocating that panels, the Appellate Body and the DSB, should be the “ultimate arbiter” of the interpretation and application of the GATT rules, including the security exception clause, while member states should have a wide range of discretion in its application.²² As opposed to the non-justiciability approach, the

16. Roger P. Alford, *The Self-Judging WTO Security Exception*, 2011 UTAH L. REV. 697, 702, 758 (2011).

17. *Id.* at 698.

18. Gladysz, *supra* note 15, at 841.

19. Third-Party Oral Statement of the United States of America, *Russia – Measures Concerning Traffic in Transit*, WT/DS512, ¶ 18 (Jan. 25, 2018), <https://ustr.gov/sites/default/files/enforcement/DS/US.3d.Pty.Stmt.%28as%20delivered%29.fin.%28public%29.pdf> [https://perma.cc/7HUI-KD4A].

20. Hannes L. Schloemann & Stefan Ohlhoff, “Constitutionalization” and Dispute Settlement in the WTO: National Security as an Issue of Competence, 93 AM. J. INT’L L. 424, 426 (1999) (noting that if WTO jurisdiction is accepted, justiciability is denied when the panel must defer to the defendant state due to the latter’s exclusive interpretive authority on the merits; under the weaker version of non-justiciability, authority to decide would be divided between authority to interpret (for the DSB) and authority to define (allocated to each member state based on sovereignty)).

21. *Id.* at 439-40 (suggesting that this position is inconsistent with the WTO Agreement’s purpose and negotiation process).

22. Third Party Oral Statement by the European Union, *Russia – Measures Concerning Traffic in Transit*, DS512, ¶ 6 (Jan. 25, 2018), <https://circabc.europa.eu/ui/group/cd37f0ff-d492-4181-91a2-89f1da140e2f/library/317dea35-4f30-46ab-8939-4d7e0d5fcfe8/details> [https://perma.cc/VWH4-Z6AY].

justiciability approach would not apply the *chapeau* of (b) of Article XXI to the provisions of (i), (ii) and (iii), which some commentators argue should be more valid, taking into account concepts such as “good faith” and the “object and purpose,” under Article 31 of the Vienna Convention on the Law of Treaties.²³

While it has been noted that both panels applied a common approach to the security exception, a split has been suggested regarding how these panels applied the formal approach to the actual cases.²⁴ As for the common approach of both panels, while the security exception was deemed justiciable, the panels substantially deferred to the state parties in relation to the invocation of essential security interests and the relationship between the invoked interests and the actual actions.²⁵ Due to the deferential attitude of the panels regarding the essential security interests and good faith requirements, the analysis of both panels regarding the relationship between means and ends is not clear—only “a minimum requirement of plausibility” is examined in the *Russia – Traffic in Transit* case,²⁶ and the same analytical framework was used in the *Saudi Arabia – IPRs* case, showing the implausibility of the relevant actions is assessed considering their necessity to protect the relevant essential security interests.²⁷

However, how the minimum requirement of plausibility is to be applied is open to debate, since it is not derived from the text of the GATT itself but expressed by the panel in the *Russia – Traffic in Transit* case. In fact, the extent to which the security exception is self-judging under the WTO agreements can be questioned.²⁸

Furthermore, in today’s digitalization era, international economic rules should be considered from the perspective of personal data rules, in particular, regarding cross-border transfer of personal data, since both are intertwined with each other. The consistency of the adequacy decision, which is the EU’s rule of international transfer of personal data under the GDPR, with the WTO framework can be doubted, especially in light of non-discrimination principles between WTO member states and international and domestic businesses. It can then be questioned whether less restrictive trade measures may be reasonably available to achieve the EU’s desired level of data protection, which is founded on the EU Charter

23. Gladysz, *supra* note 18, at 841-42.

24. *Id.* at 838.

25. *Id.* at 848-49.

26. *Russia – Traffic in Transit* case, *supra* note 11, at ¶ 7.138.

27. *Saudi Arabia – IPRs* case, *supra* note 12, at ¶ 7.242.

28. Tania Voon, *The Security Exception in WTO Law: Entering a New Era*, 113 AJIL UNBOUND 45, 45 (2019).

of Fundamental Rights²⁹ and the European Convention on Human Rights³⁰ (“ECHR”).³¹

*B. Restrictions on Data Protection Principles as
‘Derogation’ in the EU Court*

1. US Surveillance Law Examined in Schrems II

The Court of Justice of the European Union (“CJEU”), the judicial authority of the EU, examined the legality of the US surveillance law in *Schrems II* from the perspective of the EU’s standard. The main questions concerned whether the EU-US frameworks for personal data flow from the EU to the US, including the Standard Contractual Clauses (“SCCs”) and the “Privacy Shield,” complied with the EU’s standards, especially in light of government access. The CJEU examined whether the US legal framework ensures an equivalent level of personal data protection standard to that of the EU, including its surveillance system for the purpose of national security in the *Schrems* judgments. This is because the EU has a strict approach toward government access to personal data, in line with the EU case law, which is referred to as the “European Essential Guarantee” adopted by the European Data Protection Board (“EDPB”).³² The EDPB draws out the four fundamental factors as applicable legal requirements which could justify limitations on the data protection and privacy rights recognized by the EU Charter and the ECHR: clear, precise, and accessible rules for processing, necessary and proportionality tests, an independent oversight mechanism, and effective remedies available to individuals.³³ This standard was developed after the

29. Charter of Fundamental Rights of the European Union, 2016 O.J. (C 202) 389 [hereinafter EU Charter].

30. The Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. No. 005.

31. Mira Burri, *Privacy and Data Protection*, in THE OXFORD HANDBOOK OF INT’L TRADE LAW 745, 756-757 (Daniel Bethlehem et al. eds., 2nd ed. 2022).

32. EDPB, *supra* note 7; see also Organization for Economic Co-operation and Development (OECD), *Declaration on Government Access to Personal Data Held by Private Sector Entities*, Dec. 14, 2022, OECD/LEGAL/0487 (launching the concept of “Legitimate Government Access on the Basis of Common Values”).

33. EDPB, *supra* note 7, at 8-15.

CJEU's *Schrems II* in 2020,³⁴ following *Schrems I* in 2015,³⁵ both of which found the European Commission's adequacy decisions regarding the US invalid. This required examination of the US domestic surveillance law, in particular, Section 702 of the Foreign Intelligence Surveillance Act ("FISA") Amendments Act of 2008³⁶ and the Executive Order 12333 ("EO 12333").³⁷

FISA authorizes government surveillance activity and is viewed as the most important statutory authorization in this regard.³⁸ Under Section 702, for national security, the US Attorney General and the Director of National Intelligence may jointly authorize the acquisition of foreign intelligence information, targeting persons "reasonably believed to be located outside the United States," with prior approval from the Foreign Intelligence Surveillance Court ("FISC"), albeit there is an exception to the prior approval requirement for national security.³⁹ With authorization, the Attorney General or the Director of National Intelligence may direct an electronic service communication service provider, which is providing service to the target of the acquisition, to provide the Government with all information necessary to accomplish the acquisition.⁴⁰

EO 12333 provides independent sources of authorization for foreign intelligence activities by the US Government: the "Intelligence

34. Case C-311/18, *Data Prot. Comm'r v. Facebook Ir. Ltd.*, ECLI:EU:C:2020:559, ¶¶ 50-68, 168-202 (July 16, 2020) [hereinafter *Schrems II*] (following remand from *Schrems I*, Schrems reformulated his complaint challenging SCC validity; Data Protection Commissioner referred the case to the Irish High Court, which sought CJEU preliminary ruling).

35. Case C-362/14, *Maximilian Schrems v. Data Prot. Comm'r*, ECLI:EU:C:2015:650, ¶¶ 26-36, 68-106 (Oct. 6, 2015) [hereinafter *Schrems I*] (noting that *Schrems I* invalidated the Privacy Shield Framework; Schrems's complaint to the Irish Data Protection Commissioner challenging EU-U.S. data transfers prompted the High Court in Ireland to refer the case to the EU Court and the CJEU preliminary ruling).

36. Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, § 702, 122 Stat. 2436, 2440-41, 2446-47 (2008) (codified as amended at 50 U.S.C. § 1881a); Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (1978).

37. Exec. Order No. 12333, 46 Fed. Reg. 59941 (Dec. 4, 1981) (as amended by Exec. Orders No. 13284 (2003), 13355 (2004) and 13470 (2008)) [hereinafter EO 12333].

38. *More Data, More Problems: Standing, Surveillance, and Technology Companies*, 131 HARV. L. REV. 1742, 1742-43 (2018) [hereinafter *More Data, More Problems*]; see also Laura K. Donohue, *Section 702 and the Collection of International Telephone and Internet Content*, 38 HARV. J.L. & PUB. POL'Y 117, 125 (2015) (noting that "Section 702 is a product of history," reflecting the Bush Administration's post-9/11 response via executive order, later replaced by FISA framework).

39. 50 U.S.C. § 1881a (g)(1)(B) (2008).

40. See *id.* (h)(1)(A); See also 50 U.S.C. § 1881a (h)(4)(A) (2008) (an electronic communication service provider may file a petition with the FISC "to modify or set aside such directive" when it receives the directive); 50 U.S.C. § 1881a (h)(6)(A)-(B) (2008) (allowing government or electronic communication service providers to petition Foreign Intelligence Surveillance Court of Review, then Supreme Court, for FISC directive review).

Community,” where the Director of National Intelligence serves as head, subject to the President by EO 12333,⁴¹ and to the Attorney General and the Director of National Intelligence by Section 702 of FISA. While the overall operation of the Intelligence Community is set forth in the National Security Act, the scope of its roles and responsibilities is largely determined by EO 12333 and FISA, together with other directives.⁴² Unless FISA and its 2008 amendments apply to government surveillance, which is subject to judicial review in limited cases, EO 12333 affords the sole basis of authorization under the broad remit of the executive branch.⁴³ *Schrems II* judgment found that the US government’s access to data “in transit” to the United States was also allowed under the surveillance programs based on EO 12333 without being subject to any judicial review.⁴⁴

The purpose of EO 12333 is to “provide for the effective conduct of United States intelligence activities and the protection of constitutional rights,”⁴⁵ including “freedoms, civil liberties and privacy rights guaranteed by Federal law.”⁴⁶ The surveillance target of EO 12333 is foreign intelligence activities, but here, too, the requirement is to strike a balance “between the acquisition of essential information and protection of individual interests.”⁴⁷ Foreign intelligence, including “SIGINT,”⁴⁸ is controlled by statutory authorization under FISA and/or by EO 12333.⁴⁹ Based on these, the US surveillance programs such as “PRISM” and “UPSTREAM” were carried out in relation to individuals who are not US citizens, located outside of the United States, requiring selected US internet service providers and telecommunications companies to provide the National Security Agency (“NSA”) with communication information,

41. EO 12333, *supra* note 37, § 1.3 (requiring the Director of National Intelligence to serve as “principal advisor to the President, to the NSC (National Security Council), and to the Homeland Security Council for intelligence matters related to national security” and to implement and execute the National Intelligence Program budget).

42. Diana Lee et al., *Gathering Intelligence: Drifting Meaning and the Modern Surveillance Apparatus*, 10 J. NAT’L SECURITY L. & POL’Y 77, 85 (2019).

43. *Id.* at 78.

44. *Schrems II*, *supra* note 34, ¶ 183.

45. EO 12333, *supra* note 37, pmb1.

46. *Id.* § 1.1(b).

47. *Id.* § 2.2.

48. *Signals Intelligence (SIGINT) Overview*, NAT’L SEC. AGENCY, <https://www.nsa.gov/Signals-Intelligence/Overview/> [https://perma.cc/5JDX-224S] (referring to SIGINT as “intelligence derived from electronic signals and systems used by foreign targets”).

49. Lee et al., *supra* note 42, at 77-78.

which they stored.⁵⁰

2. EU's Proportionality Test to Justify the Derogation from Data Protection Principles

The "Privacy Shield" established the data protection principles, which may be limited "to the extent to necessary to meet national security, public interest, or law enforcement requirements."⁵¹ The CJEU found such limitations to be a "derogation" from the data protection principles, which enables interference with the fundamental rights of persons whose personal data "is or could be" moved to the US.⁵² The CJEU noted that the EU-US Privacy Shield Decision presupposed that the derogation's requirements have primacy over the principles, meaning that US companies joining the Privacy Shield Framework "are bound to disregard" the principles in certain cases.⁵³ The Court considered that such interference can arise when US intelligence organizations have access to or use the data under plans code-named "PRISM" or "UPSTREAM," based on Section 702 of FISA and EO 12333.⁵⁴

Under the EU standard, the interference with fundamental rights for data protection must be provided for by law and be subject to the principle of proportionality.⁵⁵ This requires that the interference be "limited to what is strictly necessary to achieve the legitimate objective in question," and that effective legal safeguards against such interference exist.⁵⁶ Ensuring "effective and enforceable data subject rights" for data subjects requires compliance with a legal basis for processing their personal data that provides specific purposes for processing and the scope of limitations. The Court found neither Section 702 of FISA nor EO 12333 sufficient to indicate any limitations on the US intelligence power for intelligence purposes, nor to confer enforceable rights against the US authorities.⁵⁷ Additionally, the Court found that the Presidential Policy

50. *Schrems II*, *supra* note 34, ¶¶ 60-62 (referring to Irish High Court judgment and noting that some NSA communication information is also shared with the Federal Bureau of Investigation (FBI) and the Central Intelligence Agency (CIA)).

51. Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-U.S. Privacy Shield, 2016 O.J. (L 207) L207/49, ¶ (I)(5) [hereinafter Privacy Shield Decision].

52. *Schrems II*, *supra* note 34, ¶ 165.

53. *Id.* ¶ 164.

54. *Id.* ¶ 165.

55. EU Charter, *supra* note 29, art. 52(1).

56. *Schrems II*, *supra* note 34, ¶ 167.

57. *Id.* ¶¶ 179-80 (noting that the FISC authorizes PRISM and UPSTREAM programs via annual certification basis, not individual measures).

Directive 28 (“PPD-28”) was not enough to safeguard the rights of the EU citizens since the policy directive allowed for the “‘bulk’ collection” of information when “the Intelligence Community cannot use an identifier associated with a specific target . . .” and did not give them rights for accessing the courts.⁵⁸ Overall, the Court declared the interference by US surveillance activities under Section 702, EO 12333, and PPD-28 was not limited to “what is strictly necessary.”⁵⁹

As an independent oversight mechanism and source of effective administrative or judicial redress, the US introduced a Privacy Shield Ombudsperson, though the Court denied it as providing actionable rights and a judicial remedy.⁶⁰

C. EU’s Fundamental Rights Approach for Personal Data Protection and Its Influence on US Extraterritorial Power

1. Derogation as “Exceptions” to Limit the Scope of Rights and Obligations

The above conclusions would mean that the EU’s strict fundamental rights approach, supported by its judicial branch, may require the EU to intervene in US executive power in foreign affairs as long as the US surveillance law applies outside of US territory. In this sense, the EU Court may not accept that the US extraterritorial surveillance activity falls within the scope of self-judging for the US, even if it is for national security.⁶¹ Additionally, since “national security remains the sole responsibility of each Member State” in the EU,⁶² it can be questioned whether the CJEU gives the EU member states more discretion to limit fundamental rights for national security than the US or, more generally, non-EU countries.

The CJEU apparently was strictly restricting its member states’ latitude to construct an extensive data retention framework, while establishing new possibilities for them to implement surveillance of

58. *Id.* ¶¶ 181-83.

59. *Id.* ¶ 184.

60. *Id.* ¶¶ 186-97.

61. Privacy Shield Decision, *supra* note 51, Annex II, § 1.5 (establishing limitations for “national security, public interest, or law enforcement requirements”); *Schrems II*, *supra* note 34, ¶¶ 164-65 (recognizing these exceptions as a “derogation” from the principles, enabling interference with EU citizens’ fundamental rights for U.S. data transfers).

62. Consolidated Version of the Treaty on European Union art. 4(2), Oct. 26, 2012, 2012 O.J. (C 326) 1 [hereinafter TEU].

telephony and internet use on a large scale.⁶³ The CJEU judgments confirmed that EU member states' measures authorizing requirements on providers of electronic communication services to transmit traffic and location data to intelligence agencies for national security purposes on a general and indiscriminate basis are precluded by the "e-Privacy Directive."⁶⁴ The EU member states may still establish measures imposing obligations to retain such data on the telecommunication providers on a general and indiscriminate basis for national security purposes under certain conditions.⁶⁵ Indeed, the CJEU judgments found that, under Article 15(1) of the e-Privacy Directive, the member states are required to comply with the general principles of EU law, including proportionality, and with the fundamental rights guaranteed in the EU Charter, when intending to legislate limitations on particular rights and duties of the Directive.⁶⁶ These include the confidentiality of communications provided for in Article 5 of the Directive.

In the *Privacy International* judgment, however, the CJEU stated that "the objective of safeguarding national security is therefore capable of justifying measures entailing more serious interferences with fundamental rights than those which might be justified by those other objectives," such as combating crime, including serious crime, and safeguarding public security.⁶⁷ The CJEU noted that the responsibility of each member state for safeguarding national security under Article 4(2) of TEU is referred to as "the primary interest in protecting the essential functions of the State and the fundamental interests of society," which includes the "prevention and punishment of activities capable of seriously destabilizing the fundamental constitutional, political, economic or social structures of a country."⁶⁸

The derogation from the rights and obligations provided under the e-Privacy Directive "cannot permit the exception to the obligation of

63. Sarah Eskens, *The Ever-Growing Complexity of the Data Retention Discussion in the EU: An In-Depth Review of La Quadrature du Net and others and Privacy International*, 8 EUR. DATA PROT. L. REV. 143, 154 (2022).

64. Case C-623/17, *Priv. Int'l v. Sec'y of State for Foreign and Commonwealth Affs.*, ECLI:EU:C:2020:790, ¶¶ 50-82 (Oct. 6, 2020) [hereinafter *PI* judgment]; see also Directive 2002/58/EC, 2002 O.J. (L 201) 37 [hereinafter e-Privacy Directive].

65. Joined Cases C-511/18, C-512/18 & C-520/18, *La Quadrature du Net and Others v. Premier Ministre & Others*, ECLI:EU:C:2020:791, ¶¶ 137-39 (Oct. 6, 2020) [hereinafter *LQDN* judgment] (requiring time-limited data retention with strict safeguards and effective judicial review where genuine national security threats exist).

66. *PI* judgment, *supra* note 64, ¶ 60; *id.* ¶ 113.

67. *PI* judgment, *supra* note 64, ¶ 75; *LQDN* judgment, *supra* note 65, ¶ 136 (noting that Article 4(2) TEU national security objective prevails over Article 15(1) e-Privacy Directive objectives).

68. *PI* judgment, *supra* note 64, ¶ 74; *LQDN* judgment, *supra* note 65, ¶ 135.

principle to ensure . . . confidentiality . . . to become the rule.”⁶⁹ This means that the derogation must be kept as an “exception” to the principles of rights and obligations for states. This also would lead to the conclusion that intelligence activities for national security purposes are not necessarily excluded from judicial review. The scope of duties imposed on the member states by the e-Privacy Directive may be limited in light of each state’s national security being recognized as a primary interest that allows states to protect essential functions and fundamental interests, as well as the state’s economic structures, including fundamental economic structures.

Additionally, the *LQDN* judgment suggested new possibilities for its member states to carry out large-scale surveillance of telephony and internet use for a variety of purposes.⁷⁰ The court then found that the member states are allowed to make domestic rules on the retention of IP addresses and data relating to the identity of the telecommunication users who accessed the electronic communication service on a general and indiscriminatory basis for the purposes of combating crime and safeguarding public security.⁷¹ Also, transmission of traffic and location data by electronic communications service providers to intelligence for national security in a general and indiscriminate way is not allowed.⁷² Furthermore, the Court held that the national legislation authorizing the automated analysis of and real-time collection of traffic and location data retained by electronic communications service providers for national security purposes can be justified.⁷³ The justification for the interference with certain fundamental rights guaranteed in the EU Charter is reviewed in accordance with the principle of proportionality, using the standards developed in non-national security cases.⁷⁴

The *PI* and *LQDN* judgments leave open the question of how the EU measures influence mass surveillance for national security purposes,⁷⁵ while it has been argued that the US and the EU come into conflict over

69. *PI* judgment, *supra* note 64, ¶ 59.

70. Eskens, *supra* note 63, at 154.

71. *Id.* at 155; *LQDN* judgment, *supra* note 65, ¶¶ 152-59.

72. *Id.* at 154; *PI* judgment, *supra* note 64, ¶¶ 50-82.

73. Eskens, *supra* note 63, at 155; *LQDN* judgment, *supra* note 65, ¶¶ 172-89.

74. Eskens, *supra* note 63, at 146-47.

75. *Id.* at 155; *PI* judgment, *supra* note 64, ¶ 75 (stating that national security objectives justify more serious fundamental rights interferences than other objectives); *LQDN* judgment, *supra* note 65, ¶ 136 (noting that Article 4(2) TEU national security objective prevails over Article 15(1) e-Privacy Directive objectives).

the data privacy policies in this regard.⁷⁶ The EU could adopt a less restrictive approach to reviewing surveillance measures of EU member states than to those of third countries, including the US.

Such restrictions based on personal data protection can restrict the economic activities of certain businesses, including electronic communication service providers. The EU's arguably stricter approach to foreign countries for the protection of personal data can be compared with its economic approach of maintaining a broad discretion over the member states regarding essential security interests under the WTO agreements, because there is a correlation between the free flow of personal data and the liberalization of trade and investment.

2. The US Revision to Meet the EU Standard for Cross-Border Flow of Personal Data

After long bilateral negotiations, the former US President Joe Biden and the European Commission President Ursula von der Leyen announced the new mechanism for the transatlantic data flow, the EU-US Data Privacy Framework ("EU-US DPF"), in March 2022, which was finally adopted as adequate by the European Commission in July 2023.⁷⁷ This was expected to enhance the transatlantic commerce of both parties.⁷⁸ To implement the US commitments under the EU-US DPF, President Biden signed the EO on Enhancing Safeguards for United States Signals Intelligence Activities (EO 14,086) in October 2022.⁷⁹

The US regulatory framework for US government access to personal data of EU data subjects may prove significant for the EU's cross-border transfer standard, since both countries reached an agreement despite the

76. Kristina Irion, Margot E. Kaminski & Svetlana Yakovleva, *Privacy Peg, Trade Hole: Why We (Still) Shouldn't Put Data Privacy in Trade Law*, U. CHI. L. REV. ONLINE 1, 14 (Mar. 27, 2023), <https://lawreview.uchicago.edu/online-archive/privacy-peg-trade-hole-why-we-still-shouldnt-put-data-privacy-trade-law> [https://perma.cc/7QA8-WL5E].

77. Commission Implementing Decision EU 2023/1795 of 10 July 2023 pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate level of protection of personal data under the EU-US Data Privacy Framework, 2023 O.J. (L 231) 118 [hereinafter 2023 U.S. Adequacy Decision].

78. E.g., *Fact Sheet: President Biden Signs Executive Order to Implement the European Union-U.S. Data Privacy Framework*, THE WHITE HOUSE (Oct. 7, 2022), <https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2022/10/07/fact-sheet-president-biden-signs-executive-order-to-implement-the-european-union-u-s-data-privacy-framework/> [https://perma.cc/FW7N-K85L]; European Commission Press Release IP/23/3721, Data Protection: European Commission Adopts New Adequacy Decision for Safe and Trusted EU-U.S. Data Flows (July 10, 2023).

79. Exec. Order No. 14,086, 87 Fed. Reg. 62283 (Oct. 7, 2022) [hereinafter EO 14,086].

US adopting no federal “comprehensive” data privacy legislation.⁸⁰ The new adequacy decision of the European Commission recognizes the EO 14,086 as replacing the PPD-28, which was thought of as providing insufficient safeguards in light of the requirement for an adequate level of protection in *Schrems II*, enhancing the limitations and safeguards which supplement those of Section 702 of FISA and EO 12,333, and establishing a new redress mechanism.⁸¹

This mechanism consists of two levels. At the first level, the Civil Liberties Protection Officer of the Office of the Director of National Intelligence (“ODNI CLPO”) investigates, reviews, and determines, *inter alia*, whether the specified violation occurred and the appropriate remediation.⁸² At the second level, the complainant or an element of the Intelligence Community may resort to review by the Data Protection Review Court (“DPRC”).⁸³ This was newly established as an independent tribunal based on EO 14,086 and the Regulation on the Data Protection Review Court issued by the Attorney General.⁸⁴ This mechanism is available to individuals from countries or regions designated as “qualifying states” by the Attorney General;⁸⁵ so far, the EU and EEA, the UK, and Switzerland have been designated as qualifying states.⁸⁶ The European Commission considers the admissibility requirements for the redress mechanism to be low since, for example, it is not necessary to demonstrate that “the complainant’s data has in fact been subject to the United States

80. *E.g.*, Family Educational Rights and Privacy Act of 1974 (FERPA), Pub. L. No. 93-380, § 513, 88 Stat. 484, 571 (codified as amended at 20 U.S.C. § 1232g); Children’s Online Privacy Protection Act of 1998 (COPPA), Pub. L. No. 105-277, § 231, 112 Stat. 2681-728 (codified as amended at 15 U.S.C. §§ 6501-6506); Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, §§ 261-264, 110 Stat. 1936 (codified as amended in scattered sections of the 42 U.S.C.) (establishing sectoral federal privacy protections); Cal. Civ. Code §§ 1798.100-.199 (West 2023) (CCPA, amended by Cal. Privacy Rights Act of 2020); Colo. Rev. Stat. §§ 6-1-1301 to -1314 (2023) (CPA); Va. Code Ann. §§ 59.1-575 to -585 (2023) (Consumer Data Prot. Act) (establishing comprehensive consumer privacy legislation in California, Colorado, and Virginia).

81. 2023 U.S. Adequacy Decision, *supra* note 77, recitals 124-25; Data Prot. Review Ct., 28 C.F.R. pt. 201 (2023); Att’y Gen. Order No. 5517-2022, 87 Fed. Reg. 62,305 (Oct. 14, 2022) [hereinafter AG Regulation].

82. Data Prot. Review Ct., 87 Fed. Reg. 62,303-04 (Oct. 14, 2022) (Supplementary Information).

83. *Id.* at 62,304 (noting that the DPRC reviews ODNI CLPO determinations pursuant to AG authority under 28 U.S.C. §§ 510-12 and EO 14,086).

84. EO 14,086, *supra* note 79, § 3(d); AG Regulation, *supra* note 81.

85. EO 14,086, *supra* note 79, § 3(f); 2023 U.S. Adequacy Decision, *supra* note 77, recital 176.

86. *Executive Order 14086*, U.S. DEP’T OF JUST. OFF. OF PRIV. & C.L., <https://www.justice.gov/opcl/executive-order-14086> [<https://perma.cc/5KUD-QV4L>] (last updated June 11, 2024).

signals intelligence activities.”⁸⁷

When a DPRC panel finds an ODNI CLPO determination inconsistent with the standard mentioned in EO 14,086, the panel is to issue its own determination.⁸⁸ After a written decision of a DPRC panel is issued, the Office of Privacy and Civil Liberties of the Department of Justice (“OPCL”) has to submit it to the ODNI CLPO.⁸⁹ Each DPRC panel decision is “final and binding with respect to the application for review before it.”⁹⁰ Moreover, a DPRC panel is to provide a report on information indicating a violation of any authority subject to the oversight of the FISC to the Assistant Attorney General for National Security, who is required to report violations to the FISC.⁹¹ The European Commission expects this would lead to additional enforcement action.⁹²

The Privacy and Civil Liberties Oversight Board (“PCLOB”), an independent executive agency consisting of five members appointed by the President with the advice and consent of the Senate, is supposed to review the redress process under the mechanism annually.⁹³ On the other hand, OPCL is under an obligation to maintain records relating to the decisions of the DPRC panel, as well as related information, which are available to future DPRC panels for consideration as non-binding precedent.⁹⁴

In response to the *Schrems II* judgment, the US chose to issue the President’s order, EO 14,086, as supplemented by the AG Regulation, rather than enacting a new data privacy congressional law or amending existing surveillance laws. The President’s order aims to enhance the data protection framework applied to US commercial entities, especially by strengthening oversight and redress mechanisms for EU data subjects whose personal data are expected to be transferred to the US. However, these measures would not establish limitations on US surveillance activities based on US domestic law, including the US Constitution, Section 702 of the FISA, and EO 12,333. Whether the US satisfied the

87. 2023 U.S. Adequacy Decision, *supra* note 77, recital 178; EO 14,086, *supra* note 79, § 4(k)(ii).

88. AG Regulation, *supra* note 81, § 201.9 (e).

89. AG Regulation, *supra* note 81, § 201.9 (h); 2023 U.S. Adequacy Decision, *supra* note 77, recital 192.

90. AG Regulation, *supra* note 81, § 201.9 (g); 2023 U.S. Adequacy Decision, *supra* note 77, recital 191.

91. AG Regulation, *supra* note 81, § 201.9 (i); 2023 U.S. Adequacy Decision, *supra* note 77, recital 191.

92. 2023 U.S. Adequacy Decision, *supra* note 77, recital 191.

93. 42 U.S.C. § 2000ee(h)(1) (2022); EO 14,086 *supra* note 79, § 3(e).

94. AG Regulation, *supra* note 81, § 201.9 (j); 2023 U.S. Adequacy Decision, *supra* note 77, recital 192.

EU's essential guarantee requirement should be questioned, since it has been suggested that the US should provide such restrictions in Section 702 of FISA or EO 12,333 to meet the EU standard.⁹⁵

Nevertheless, the Commission adopted the adequacy decision to the US again, concluding that the US ensured an adequate level of protection for personal data. The Commission might refrain from intervening in the US surveillance policy to safeguard national security based on its own sovereignty; however, the legal validity of the adequacy decision can be questioned. Suppose the CJEU holds that it substantially requires the US executive authority to mitigate any interference with the fundamental rights to data privacy, which can be inconsistent with the US's own national security policy. Could such a judgment be justified by any international discipline, especially considering that both states do not share the same rules for data protection and flows? This question reflects the fundamental division between the EU and the US legal systems regarding the fundamental right to data protection and/or privacy, which could create obstacles for data flows and commerce between both jurisdictions. The next chapter will provide a brief background of the Fourth Amendment of the US Constitution, which covers the jurisprudence of the right to privacy.

II. TERRITORY AND NATIONALITY AS FUNDAMENTAL TO THE US GOVERNMENT OBLIGATIONS UNDER THE FOURTH AMENDMENT OF THE US CONSTITUTION

A. The Right to Privacy in the Context of Surveillance Under the Fourth Amendment

1. Reasonable Expectation of Privacy Test

While no comprehensive federal privacy law has been enacted, there is no doubt that the right to privacy has been recognized as significant in the US jurisprudence, but it is hard to define. It has been more difficult to define the constitutional right to privacy or its value under the US Constitution in today's era of digitalization. Indeed, it has been noted that US courts are unwilling to grant relief for a breach of data privacy, often due to insufficient evidence of direct or actual harm, leading to

95. EDPB, *supra* note 7, ¶ 36 (noting that legal basis permitting fundamental rights interference must define limitation scope to satisfy EU Charter art. 52 proportionality).

petitioners' lack of standing.⁹⁶

In *Whalen v. Roe*, the constitutional protection to privacy is referred to as at least two interests— “one is the individual interest in avoiding disclosure of personal matters” and the other “is the interest in independence in making certain kinds of important decisions.”⁹⁷ It has also been pointed out that the right “to be free in his private affairs from governmental surveillance and intrusion” is “directly protected by the Fourth Amendment.”⁹⁸

The Fourth Amendment provides the right of the people to be free from unreasonable searches and seizures and requires warrants based upon probable cause to be issued.⁹⁹ As for the protection of privacy under the Fourth Amendment, in *Katz v. United States*,¹⁰⁰ overruling *Olmstead v. United States*,¹⁰¹ the Court enunciated that the protection of the Fourth Amendment entails “individual privacy against certain kinds of governmental intrusion.”¹⁰² The Court makes clear that the Fourth Amendment protects not places, but people, and that it may protect what a person “seeks to preserve as private, even in an area accessible to the public.”¹⁰³ Indeed, the problem recognized by the Court is not whether the public telephone booth, to the outside of which FBI agents attached the electronic eavesdropping device, is a constitutionally protected area.¹⁰⁴ The scope of the Fourth Amendment does not depend on “the presence or absence of a physical intrusion into any given enclosure;”¹⁰⁵ rather the scope of the Fourth Amendment may cover “the recording of oral statements overheard without any technical trespass,” as well as that

96. Matthew Humerick, *The Tortoise and the Hare of International Data Privacy Law: Can the United States Catch up to Rising Global Standards?*, 27 CATH. U. J. L. & TECH. 77, 96-97 (2018).

97. *Whalen v. Roe*, 429 U.S. 589, 598-600 (1977).

98. *Id.* at 599 n.24 (referring to the three facets of the right to privacy by Professor Philip Kurland).

99. U.S. CONST. amend. IV.

100. *Katz v. United States*, 389 U.S. 347 (1967); cf. *Silverman v. United States*, 365 U.S. 505 (1961) (rejecting *Olmstead*'s “trespass doctrine” for Fourth Amendment violations while not overruling it).

101. *Olmstead v. United States*, 277 U.S. 438 (1928).

102. *Katz*, 389 U.S. at 350 (holding that Fourth Amendment protection exceeds property-based privacy interests, such that the Amendment “cannot be translated into a general constitutional ‘right to privacy’”); see also *id.* at 373 (Black, J., dissenting) (“The Fourth Amendment cannot be translated into a general constitutional ‘right to privacy.’”). *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting) (“[T]he right to be let alone . . . [is] the most comprehensive of rights and the right most valued by civilized men.”).

103. *Katz*, 389 U.S. at 351-52.

104. *Id.* at 352 (mentioning the role of the public telephone for private communication).

105. *Id.* at 353.

of tangible property.¹⁰⁶ The Court found the government activity relating to the use of electronic devices to listen to and record the petitioner's words to violate "the privacy upon which he justifiably relied."¹⁰⁷

Justice Harlan mentioned a constitutionally protected reasonable expectation of privacy for an area which may be covered by the Fourth Amendment, since reference to a place is necessary to consider what protection is given to the people under the Amendment, though the Court just indicated "the Fourth Amendment protects people, not places."¹⁰⁸ Justice Harlan noticed a twofold requirement for the protection of the precedents; one relates to a person's actual (subjective) expectation of privacy, and the other is that the expectation should be recognized as "reasonable" in society.¹⁰⁹

As *Kyllo v. United States* found the act of law enforcement utilizing a thermal imaging device to detect indoor marijuana growth violated the Fourth Amendment,¹¹⁰ it is expected that the privacy right under the Fourth Amendment can be changed according to citizens' reasonable expectation of privacy, as the public generally accepts new technological innovations.¹¹¹ While the Supreme Court noticed that "technology has enhanced the Government's capacity to encroach upon areas normally guarded from inquisitive eyes,"¹¹² it held that it was nevertheless important to maintain "the degree of privacy against government that existed when the Fourth Amendment was adopted."¹¹³

2. Critics of the Reasonable Expectation of Privacy Test in the Digital Era

The reasonable expectation of privacy test has been mentioned so often in the Supreme Court, but has been criticized as obsolete in the digital information age. Critics go further, arguing that the test is not

106. *Id.* (dismissing the "trespass doctrine" of *Olmstead v. United States*, 277 U.S. 438 (1928) and *Goldman v. United States*, 316 U.S. 129 (1942) (upholding the detectaphone use)).

107. *Id.*

108. *Id.* at 360-61 (Harlan J., concurring).

109. *Id.* at 361 (Harlan, J., concurring).

110. 533 U.S. 27 (2001).

111. April Nichols, *Constitutional Law: Fourth Amendment Search and Citizens' Right to Privacy: the Use of Thermal Imaging to Measure Heat Emanating from a Home is a Fourth Amendment Search*, 32 CUMB. L. REV. 675, 684-85 (2002); see also *United States v. Jones*, 565 U.S. 400 (2012) (holding that attaching a GPS tracker to a vehicle constitutes a Fourth Amendment search); *Riley v. California*, 573 U.S. 373 (2014) (holding that cell phone data searches incident to arrest generally require a warrant); *Carpenter v. United States*, 585 U.S. 296 (2018) (holding that warrantless government acquisition of CSLI from wireless carriers violates the Fourth Amendment).

112. *Carpenter*, 585 U.S. at 305.

113. *Kyllo*, 533 U.S. at 34.

appropriate as a “legal rule,”¹¹⁴ in particular, in light of its “subjective expectation of privacy.”¹¹⁵ Under the test, the Court must apply an objective test in asking what makes an expectation of privacy reasonable.¹¹⁶

It has been argued that a majority of the United States Supreme Court consistently answers this question based on a “rights-based approach”—where a “reasonable” or “legitimate” expectation of privacy is considered depending on “whether a given individual has an enforceable right to enjoin others from invading her privacy.”¹¹⁷ After all, the Supreme Court will focus on “whether the individual can take reasonably effective, societally acceptable steps to enjoin the government’s invasion of privacy.”¹¹⁸ In this view, the rights-based conception of the Fourth Amendment might not be able to adequately protect privacy rights in cyberspace since the jurisprudence has been established in the physical world, not on the internet.¹¹⁹

On the other hand, the Supreme Court has also assessed reasonableness under the Fourth Amendment based on widely shared social expectations such as customary social understandings in *Georgia v. Randolph*, where the validity of a seizure was challenged when one occupant of the property in common authority gave consent, but the other occupant was physically present at the scene and expressed their objection.¹²⁰

However, it has been pointed out that the Court’s widely shared social expectation approach includes a critical flaw.¹²¹ In principle, the Fourth Amendment prohibits the warrantless entry of a person’s house as unreasonable *per se*, subject to exceptions which would allow the entry to be valid. Voluntary consent is an exception when obtained, either from

114. Richard A. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173, 188 (1979) (criticizing the “circularity” of the reasonable expectation of privacy test).

115. Orin S. Kerr, *The Fourth Amendment in Cyberspace: Can Encryption Create a “Reasonable Expectation of Privacy?”*, 33 CONN. L. REV. 503, 507 (2001).

116. *Id.*

117. *Id.* at 507-08 (noting that statistical conception of Fourth Amendment holds privacy expectation “reasonable” if statistically justified).

118. *Id.* at 511 (noting that rights-based Fourth Amendment conception protects privacy even absent statistical expectation of secrecy).

119. *Id.* at 532 (arguing the role of Congress and state legislatures is significant to make rules to “restore” the privacy protections); *contra* Daniel J. Solove, *Fourth Amendment Codification and Professor Kerr’s Misguided Call for Judicial Deference*, 74 FORDHAM L. REV. 747, 747-48, 776-77 (2005) (rejecting Kerr’s view that legislatures, not courts, should regulate criminal procedure technology).

120. *Georgia v. Randolph*, 547 U.S. 103, 106, 110-11, 121 (2006).

121. Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 108 (2008).

the individual whose property is searched or from a co-occupant who has joint authority over the common area.¹²² The criticism of this approach overlooks the caller's identity when considering what any sensible person would do under the circumstances.¹²³ Without identifying the caller, it would be impossible to know "what the customary social expectations of behavior will be."¹²⁴ Then, courts might have to consider what people would reasonably expect a policeman to do under these circumstances.¹²⁵ But courts cannot ask this.¹²⁶ In order to avoid self-validation, the conduct of policemen will be measured in line with "the behavior of well-socialized or sensible non-law-enforcement callers," which would result in circularity or self-validation.¹²⁷

The "Stranger Principle" is a second defense for assessing reasonable expectations of privacy, which considers how much information people have exposed to or kept private from strangers, and uses that to "determine what policemen may and may not do."¹²⁸ This principle can be supported by case law—the implication is that the government may acquire individuals' information if they have spontaneously disclosed it to a third party.¹²⁹ In case law, when individuals voluntarily expose or share information with strangers, there is no justifiable expectation of privacy, or it is no longer considered private.¹³⁰ However, it has been argued that the "Stringer Principle" would "spell the end of the Fourth Amendment."¹³¹ The question of whether the government action can be analogous to that of private businesses should be carefully considered under the Fourth Amendment, where protection from unreasonable searches and seizures "by the government" is a bedrock point.

Overall, the reasonable expectation of privacy test is "doomed" since the Supreme Court has failed to provide empirical evidence to support what the Court considers reasonable social expectations of privacy.¹³² Systematic government surveillance cannot be solved with "endless attempts to find the core meaning of the Fourth Amendment or to identify a singular type of problem to trigger its protections." The pragmatic

122. *Randolph*, 547 U.S. at 109 (citing *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990) and *United States v. Matlock*, 415 U. S. 164, 170 (1974)).

123. *Rubinfeld*, *supra* note 121, at 108.

124. *Id.* at 108.

125. *Id.*

126. *Id.* at 108-09

127. *Id.*

128. *Id.* at 110-12.

129. *Id.* at 110-13.

130. *Id.* at 110-12.

131. *Id.* at 113.

132. Daniel J. Solove, *Fourth Amendment Pragmatism*, 51 B. C. L. REV. 1511, 1521 (2010).

approach to the Fourth Amendment should deal with the complicated reality of the issues, rather than the traditional approach of using the reasonable expectation of privacy standard.¹³³ The pragmatic approach will cover government information gathering comprehensively rather than haphazardly and focus on how to best regulate it.¹³⁴

3. *The Court's Response to Digitalization*

The development of technology has made private spheres public. However, in the United States Supreme Court's view, the public sphere does not lose Fourth Amendment protection because individuals have a reasonable expectation of privacy in their physical movements.¹³⁵ In *Carpenter v. United States*, the Court held that cellphone location information, as well as GPS information, can include a "person's life" such as "familial, political, professional, religious, and sexual associations," in addition to particular movements.¹³⁶

It is noteworthy that, compared with certain precedents,¹³⁷ *Carpenter* did not endorse the third-party doctrine in relation to government access to the cellphone location records, even though it acknowledged that individuals continuously reveal the location to the wireless carrier.¹³⁸ The Court stated that invoking the third-party doctrine in this case would fail to consider the seismic shifts in digital technology, because police could access cell-site records held by the wireless carrier in a wider scope of information than the targeted individual and without time limits.¹³⁹ The Supreme Court proposes that individuals could have a reasonable expectation of privacy in relation to data or information held by a third party, but that the critical factor is the sharing of the data with the third

133. *Id.* at 1527.

134. *Id.* at 1528.

135. *Carpenter v. United States*, 585 U.S. 296, 310 (2018) (citing *United States v. Jones*, 565 U.S. 400, 430 (2012) (Alito J., concurring)).

136. *Id.* at 311 (citing *Jones*, 565 U.S. at 415, (Sotomayor, J., concurring)).

137. See *United States v. Miller*, 425 U.S. 435, 443 (1976) (holding that the Fourth Amendment does not prohibit the government from obtaining third-party information); *Smith v. Maryland*, 442 U.S. 735, 743-46 (1979); *If These Walls Could Talk: The Smart Home and the Fourth Amendment Limits of the Third Party Doctrine*, 130 HARV. L. REV. 1924, 1925-29 (2017) (arguing that the third-party doctrine from *Miller* and *Smith* inadequately protects smart home privacy, predating *Carpenter*); Harvey Gee, *Last Call for the Third-Party Doctrine in the Digital Age after Carpenter?*, 26 B.U. J. SCI. TECH. L. 286, 288-89 (2020) (claiming *Carpenter* "[departed] from a long tradition of deference paid to the [third-party] doctrine").

138. *Carpenter*, 585 U.S. at 308-09.

139. *Id.* at 313.

party for the benefit of the user.¹⁴⁰ In conclusion, the reasonable expectation of privacy test is still supported in a digital age to strike the right balance between individual privacy rights and legitimate law enforcement needs, depending on the context.¹⁴¹

At the same time, the “necessary and proportionate principles” based on international human rights law may be considered in striking the right balance. These principles may be more useful in the context of surveillance, rather than in the context of the reasonable expectation of privacy test and the third-party doctrine.¹⁴² As the European Commission admitted, Section 2(a) of the EO 14,086 requires the “overarching necessity and proportionality standards” to achieve a proper balance between privacy and public interests, including national security.¹⁴³

4. *Property-Based Concept of the Fourth Amendment Revisited*

That *Katz* chose the reasonable expectation of privacy test to define the scope of “unreasonable search and seizures” under the Fourth Amendment could represent a departure from a textual, “property-based” concept of the Amendment.¹⁴⁴ While the majority opinion of *Carpenter* upheld the privacy framework established in *Katz*, Justice Gorsuch denounced the *Katz* approach based on “some abstract expectation of privacy” and focused instead on the significance of the text and original understanding of the Fourth Amendment.¹⁴⁵ Justice Thomas also criticized the reasonable expectation privacy test due to the lack of the basis of the text or history of the Fourth Amendment and supported a property-based approach.¹⁴⁶ Additionally, in his dissenting opinion, Justice Kennedy supported a property-based concept of the Fourth Amendment, asserting the legitimacy of the third-party doctrine endorsed in *Miller* and *Smith* which would limit privacy interests protected by the

140. Jay E. Town, *The Digital Person: Law Enforcement & the Purchase of Data in a Post Carpenter Age*, 11 BELMONT L. REV. 1, 17-18 (2023).

141. Zachary Silver, *Katz in the Cradle: The Second Justice Harlan and Reasonable Expectations of Privacy in Electronic Transactional Information*, 41 CARDOZO L. REV. 761, 808-09 (2019).

142. Cindy Cohn, *Protecting the Fourth Amendment in the Information Age: A Response to Robert Litt*, 126 YALE L.J.F. 107, 108-16 (2016) (the “necessary and proportionality principles” are referred to as “the International Principles on the Application of Human Rights so Communications Surveillance”).

143. *E.g.*, 2023 U.S. Adequacy Decision, *supra* note 77, recital 137.

144. Sam Kamin, *Katz and Dobbs: Imagining the Fourth Amendment Without a Right to Privacy*, 101 TEX. L. REV. 80, 81 (2022).

145. *Carpenter v. United States*, 585 U.S. 296, 391 (2018) (Gorsuch, J., dissenting).

146. *Id.* at 342-43 (Thomas, J., dissenting) (stating that “[t]his case should not turn on ‘whether’ a search occurred” but “on whose property was searched”).

Fourth Amendment.¹⁴⁷

These dissenting opinions in *Carpenter* may draw attention since the Supreme Court rejected the concept of a constitutional right to abortion in *Dobbs v. Jackson Women's Health Organization*,¹⁴⁸ which had been recognized as including a constitutional right to "privacy" under the Due Process Clause of the Fourteenth Amendment.¹⁴⁹ In particular, Justice Thomas criticized the substantive due process jurisprudence, stating that "the Due Process Clause does not secure *any* substantive rights; it does not secure a right to abortion."¹⁵⁰ While Justice Thomas suggested that the Supreme Court should follow the "text of the Constitution" in delineating certain substantive rights under the Fourteenth Amendment,¹⁵¹ the text-based privacy jurisprudence in *Dobbs* may lead to the return to the property-based view of the Fourth Amendment, rather than the reasonable expectation of privacy test.¹⁵²

Justice Gorsuch's criticism of the reasonable expectation of privacy test in *Carpenter* covered the third-party doctrine since he claimed that the Court has failed to offer a persuasive justification.¹⁵³ According to Justice Gorsuch, the justification of a third-party doctrine referred to an "assumption of risk doctrine," which premises that one would assume the risk of the information being revealed to the police by providing it to a third party. However, the doctrine originates in tort law.¹⁵⁴ Justice Gorsuch explained that the key to the doctrine should be an explicit or implicit agreement for the acceptance of risk, rather than the assumption of the risk itself.¹⁵⁵ The clarity of a third-party doctrine can also be doubted since the scope of the protection for one's information is not certain.¹⁵⁶ After all, Justice Gorsuch stated that the precedents added "[a] doubtful application of *Katz* that lets the government search almost

147. *Id.* at 322-23 (Kennedy, J., dissenting) (claiming the Court should apply a property-based Fourth Amendment and the government may obtain business records per precedent).

148. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

149. *Roe v. Wade*, 410 U.S. 113, 152 (1973), *reaffirmed by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 845-46 (1992) ("essential holding of *Roe v. Wade* should be retained" and constitutional protection for abortion "derives from the Due Process Clause of the Fourteenth Amendment"); *Dobbs*, 597 U.S. at 302 (overruling *Roe* and *Casey*); *see also* *Roe*, 410 U.S. at 115 ("[t]his right of privacy . . . [is the] woman's decision"); *Casey*, 505 U.S. at 874 (applying undue burden test).

150. *Dobbs*, 597 U.S. at 332 (Thomas, J., concurring).

151. *Id.* at 336 (Thomas, J., concurring).

152. Kamin, *supra* note 144, at 81.

153. *Carpenter v. United States*, 585 U.S. 296, 389 (2018) (Gorsuch, J., dissenting).

154. *Id.* (referring to a third-party doctrine mentioned in *Smith*, at 743-44).

155. *Id.*

156. *Id.* at 390.

whatever it wants whenever it wants.”¹⁵⁷ Justice Gorsuch examined the possibility of revisiting the holdings of such precedents under the *Katz* framework.¹⁵⁸ He offered a possibility to use the “traditional approach” for the interpretation of the Fourth Amendment.¹⁵⁹

Although Justice Gorsuch supported a textualist and originalist approach for constitutional interpretation, he sometimes accepted the judges’ capability to discern and describe existing social norms, which is particularly likely to be feasible when a judge is depending on positive law rather than intuition in identifying such norms.¹⁶⁰ Justice Gorsuch suggested that the traditional approach, which he preferred, might follow from applying *Katz* in this manner.¹⁶¹ What was needed to trigger the Fourth Amendment under the traditional approach was asking only “if a house, paper or effect was *yours* under law.”¹⁶² This approach includes ambiguities such as the sources of law possibly determining the scope of the Fourth Amendment, for example, “whether someone has a sufficient property interest to invoke Fourth Amendment protection.”¹⁶³

However, these ambiguities may make Justice Gorsuch’s approach broad and flexible.¹⁶⁴ While in *Carpenter*, Justice Thomas’s property-based approach required the defendant to prove that information accessed by the police must be his to invoke the Fourth Amendment, rather than depending on positive law,¹⁶⁵ Justice Gorsuch would refer to positive law in discerning “existing societal norms.”¹⁶⁶ Positive law would help to determine constitutionally relevant property rights under the approach suggested by Justice Gorsuch.¹⁶⁷ It has been argued that Justice Gorsuch’s mixed approach of traditional norms and positive law may expand the concept of property under the Fourth Amendment.¹⁶⁸ Although judges would be given similar levels of flexibility and discretion either by the broad property or a conventional privacy approach, which would raise a concern about democratic legitimacy, it is noteworthy that the Gorsuch model may appropriately deal with emerging threats to the people’s right

157. *Id.* at 391.

158. Nicholas A. Kahn-Fogel, *Property, Privacy, and Justice Gorsuch’s Expansive Fourth Amendment Originalism*, 43 HARV. J.L. & PUB. POL’Y 425, 431 (2020).

159. *Id.* at 437.

160. *Id.* at 434.

161. *Id.*

162. *Carpenter*, 585 U.S. at 397-98 (Gorsuch, J., dissenting).

163. Kahn-Fogel, *supra* note 158, at 438.

164. *Id.*

165. *Id.* at 455.

166. *Id.*

167. *See id.* at 472.

168. *See id.* at 475.

to be secure in their persons, houses, papers, and effects.¹⁶⁹

Furthermore, Justice Kennedy argued that the principles in *Miller* and *Smith* are correct in light of the defendant's property interest and the safeguards against the compulsory process to obtain the business records held by the cell phone service providers.¹⁷⁰ According to Justice Kennedy, the concept of reasonable expectation of privacy used in *Katz* aimed to evaluate "whether a person has a sufficient connection to the thing or place searched to assert Fourth Amendment interests in it," which he claimed has been developed in property and tort law.¹⁷¹ He firmly maintained that privacy interests protected by the Amendment should be determined based on "property concepts," pointing out that *Katz* did not abandon reliance on these concepts.¹⁷² He argued that the significance of these precedents lies in limiting the *Katz* framework.¹⁷³

Justice Kennedy further explained the fundamental factor of the 'text' of the Fourth Amendment to determine the scope of the protection under the Amendment—protections must be limited to "persons, houses, papers, and effects".¹⁷⁴ Under the reasonable expectation of privacy test, individuals may have a greater expectation of privacy "in things and places that belong to them, not to others" under the settled expectations from property law.¹⁷⁵ Justice Kennedy claimed that traditional practices and positive law are significant factors in determining what the social norms should be under the *Katz* test.¹⁷⁶

While Kennedy's opinion is in line with precedents, it fails to sufficiently consider the value of privacy in striking a proper balance against security.¹⁷⁷ In particular, his main points of analysis in relation to the third-party doctrine would lead to an underestimation of customer knowledge—simply assuming it is reasonable that cell phone owners expect their information held in the phone company will be used for "a variety of business and commercial purposes."¹⁷⁸ Justice Kennedy's

169. *Id.* at 476.

170. *Carpenter*, 585 U.S., at 327 (Kennedy, J., dissenting).

171. *Id.* at 328.

172. *Id.*

173. *Id.* at 329.

174. *Id.* at 328.

175. *Id.*

176. *Id.* at 331-33 (noting that the *Carpenter* defendant did not challenge subpoenas (affording objection opportunity) and 47 U.S.C. § 222 provides no meaningful customer interest in cell-site records).

177. Tonja Jacobi & Dustin Stonecipher, *A Solution for the Third-Party Doctrine in a Time of Data Sharing, Contact Tracing, and Mass Surveillance*, 97 NOTRE DAME L. REV. 823, 863 (2022).

178. *Id.* at 863-64 (citing *Carpenter*, 585 U.S. at 332 (Kennedy, J., dissenting)).

property-based approach does not acknowledge the difference between government intervention and private companies' intervention in privacy interests, especially the protection of personal and sensitive information against government access. If the Fourth Amendment protects the right to privacy, the difference should not be overlooked.

The possible impact of *Dobbs* on the jurisprudence of privacy can be significant. It has been claimed that it generally provided a critique of unenumerated rights, including privacy under the Fourth Amendment.¹⁷⁹ However, the criticisms in abortion cases on the substantive due process theory developed under the Fourteenth Amendment should not be conflated with the jurisprudence under the Fourth Amendment. Rather, it has been argued that rights under the Fourth Amendment included a broad definition of property, as supported by John Locke, and that this theory was incorporated into the text and history of the Fourth Amendment in the eighteenth century. This theory provided a fundamental framework for the Supreme Court before *Olmstead v. United States* in the early twentieth century.¹⁸⁰ Considering the history of the Bill of Rights generally and the Supreme Court's Fourth Amendment jurisprudence, it has been suggested that viewing the Amendment as essentially a property-based protection can be "untenable."¹⁸¹

B. Domestic Law Intertwined with Foreign Relations

1. Foreign Property and the Fourth Amendment

It was not clear until 1990 whether and to what extent the Fourth Amendment governed "searches" conducted outside of the US territory.¹⁸² The Supreme Court "reject[ed] the idea that when the [US] acts against citizens abroad it can do so free of the Bill of Rights," because the power and authority of the US stem solely from the Constitution.¹⁸³ However, the Court rejected the extraterritorial applicability of rights of the Fifth or Sixth Amendments.¹⁸⁴ In *United States v. Verdugo-Urquidez*,

179. Kamin, *supra* note 144, at 100-01.

180. Morgan Cloud, *Property is Privacy: Locke and Brandeis in the Twenty-First Century*, 55 AM. CRIM. L. REV. 37, 37 (2018).

181. Kif Augustine Adams, *Foreigners, Foreign Property, and the Fourth Amendment: United States v. Verdugo-Urquidez*, 110 S. Ct. 1056, 13(3) HARV. J.L. & PUB. POL'Y 1037, 1046 (1990).

182. *Id.* at 1037.

183. *Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (plurality opinion).

184. *See, e.g., Balzac v. Porto Rico*, 258 U.S. 298, 304-05, 309 (1922) (Sixth Amendment jury trial inapplicable to territories including Puerto Rico based on locality); *Dorr v. United States*,

the Court rejected the applicability of the Fourth Amendment to the search and seizure of the property of nonresident aliens on foreign territory, which US agents conducted.¹⁸⁵

The majority found the textual reference to “the people” in the Fourth Amendment to be “a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.”¹⁸⁶ Based on the available historical data and the contemporary understanding of the Framers, the Court rejected the notion that the Fourth Amendment applied to the activities conducted by the Federal government against aliens outside of the US territory or in international waters.¹⁸⁷ To fall within the scope of the Fourth Amendment, the majority opinion indicated two factors: presence within American territory and a significant connection to the American people, as defined above.¹⁸⁸

In his concurring opinion, Justice Kennedy mentioned the plurality opinion in *Reid v. Covert* as a reminder that “the Government may act only as the Constitution authorizes, whether their actions in question are foreign or domestic.”¹⁸⁹ He further stated that the full protection of the Fourth Amendment would apply if the search were conducted within the territory of the US.¹⁹⁰ But “the Constitution does not require United States agents to obtain a warrant when searching the foreign home of a nonresident alien” since the warrant requirement by the Fourth Amendment should not be impracticable or anomalous.¹⁹¹ When US agents operate outside of US territory, they need to cooperate with the officials of other sovereign states; there is no judicial organization to issue warrants, and there have been different concepts regarding privacy and reasonableness, which all may hinder the Fourth Amendment’s

195 U.S. 138 (1904) (considering whether congressional statute required jury trial as necessary judicial procedure in the Philippines, the Court found the “Constitution does not . . . carry [jury trial] right to territory so situated”); *see also* *Ocampo v. United States*, 234 U.S. 91, 98 (1914) (Fifth Amendment grand jury inapplicable to Philippines absent congressional act); *Hawaii v. Mankichi*, 190 U.S. 197, 214 (1903) (addressing whether a congressional act relating to Fifth/Sixth Amendments should instantly change Hawaiian Islands practice, the Court held that the congressional act not intended to instantly change Hawaiian Islands practice).

185. *Adams*, *supra* note 181, at 1037-38.

186. *Verdugo-Urquidez*, 494 U.S. at 265.

187. *Id.* at 266-67.

188. *Adams*, *supra* note 181, at 1042 (pointing out that the need for a significant connection to the American people “makes the application of Fourth Amendment protections to other aliens extremely fortuitous.”).

189. *Verdugo-Urquidez*, 494 U.S. at 277 (Kennedy, J., concurring).

190. *Id.* at 278.

191. *Id.*

warrant requirement application.¹⁹²

As the majority in *Verdugo-Urquidez* mentioned, whether and to what extent the Fourth Amendment might apply depends on the presence within the US territory and a significant connection between the surveillance and the American people. For an authorization based on Section 702 of FISA and EO 12,333, whether the surveillance targets are US citizens or non-US persons and whether the surveillance activities are carried out within or outside of the US territory are significant. This is because the executive branch and Congress must act consistently with constitutional law, especially the Fourth Amendment.

2. Justiciability and Constitutionality of Section 702 of FISA

The US has recently adopted a protectionist approach toward cross-border data flows.¹⁹³ It reached a consensus with the European Commission regarding the international transfer mechanism for personal data, the EU-US Privacy Shield, whose legal validity was derived from the EU's adequacy decision. This can be considered a regime shift for the US since it had avoided establishing its own mechanisms of cross-border transfer of personal data for generations.¹⁹⁴ For example, it has been mentioned that the US-Japan Digital Trade Agreement "clearly attempts to strike a balance between 'free flow' and 'trust' in a variety of fields" based on the notion of Data Free Flow with Trust ("DFFT"),¹⁹⁵ which was launched to facilitate the free flow of data and enhance the opportunities in the digital economy while considering privacy rights.¹⁹⁶ Although this agreement reveals the United States's "newest innovations" regarding electronic commerce and the free flow of data, it has also been suggested that the US and Japan can still take a range of "necessary" measures, including cybersecurity measures, which fall within the broad scope of the national security exception.¹⁹⁷ Indeed, it has been pointed out that the US adopts fundamentally different policies from

192. Adams, *supra* note 181, at 1046.

193. Irion, Kaminski & Yakovleva, *supra* note 76, at 15.

194. *Id.* at 2.

195. David G. Litt & A. Reid Monroe-Sheridan, *The US-Japan Digital Trade Agreement and "Data Free Flow with Trust": Can the US Lead without a Uniform Data Privacy Law?*, U.S.-ASIA L. INST. (Feb. 3, 2022), <https://usali.org/usali-perspectives-blog/the-us-japan-digital-trade-agreement-and-data-free-flow-with-trust> [<https://perma.cc/S966-W5HZ>].

196. G20 2019 Japan, *G20 Osaka Leaders' Declaration*, (June 28–29, 2019), https://www.mofa.go.jp/policy/economy/g20_summit/osaka19/en/documents/final_g20_osaka_leaders_declaration.html [<https://perma.cc/A7ZT-HQJM>] (last visited Aug. 29, 2025).

197. J. Benton Heath, *Trade and Security Among the Ruins*, 30 DUKE J. COMP. & INT'L L. 223, 238–39 (2020).

the EU regarding how to balance the free flow of information and personal data protection, particularly for safeguarding national security.¹⁹⁸

Any action of the executive branch should be subject to constitutional limits. However, under US case law, the constitutionality of executive extraterritorial activities based on the US surveillance law may be considered non-justiciable.¹⁹⁹

In *Clapper v. Amnesty Int'l. USA*, the US Supreme Court declined to grant Amnesty International standing under Article III in their challenge to the constitutionality of Section 702 of FISA and further rejected Amnesty's request for an injunction to stop the government's overseas surveillance.²⁰⁰ The Supreme Court seemed to think restrictions on government activities should be imposed by the political branches "through diplomatic understanding, treaty, or legislation" in the extraterritorial spheres,²⁰¹ since "modern nation-states must be able to function effectively outside their own borders."²⁰²

One can see a difference in approach between the CJEU and the US Supreme Court regarding how broad the constitutionality of US law is justifiably reviewed. This raises the question of whether EU and US organizations legally exercise their powers; in particular, it asks how the intervention of the EU judicial branch can be legally assessed, especially in the context of political decisions for national security. The CJEU found the Privacy Shield, the adequacy decision of the EU's executive branch, invalid in *Schrems II*, but the declaration was based on a review of foreign (US) surveillance law and on its inconsistency with the EU's data protection standard, which was considered left to the political branches in the US Supreme Court's jurisprudence. Ultimately, President Biden agreed with the EU-US DPF; however, it remains unclear whether the US Supreme Court considers foreign intelligence surveillance for the national security purpose as an "exception" to the reasonable expectation of privacy test under the Fourth Amendment.²⁰³

198. Irion, Kaminski & Yakovleva, *supra* note 76, at 2.

199. In re Directives to Yahoo! Inc., Pursuant to Section 105B of the Foreign Intelligence Surveillance Act, No. 08-01, 2008 WL 10632524, at *2, *4 (FISA Ct. Rev. 2008) (accepting the statutory standing of Yahoo on behalf of customers for challenging the constitutionality of the directives based on the Fourth Amendment, where the U.S. government commanded Yahoo to assist with warrantless surveillance of certain customers).

200. *Clapper v. Amnesty Int'l. USA*, 568 U.S. 398 (2013).

201. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 275 (1990).

202. Adams, *supra* note 181, at 1044.

203. Noah C. Chauvin, *The Warrant Exception That Isn't: FISA Section 702, "Defensive" Searches, and the Fourth Amendment*, 74 AM. U. L. REV. 563, 605 (2025) (noting the Supreme

The bedrock of Fourth Amendment jurisprudence is considered to be that “warrantless searches and seizures are *per se* unreasonable unless an established exception applies.”²⁰⁴ The US Supreme Court mentioned that such exceptions have been “jealously and carefully drawn.”²⁰⁵ The question is then whether foreign intelligence surveillance falls within the scope of such an exception. As opposed to foreign intelligence surveillance under EO 12333, which is not subject to judicial review, foreign intelligence surveillance under Section 702 of FISA has been reviewed by “regular” judicial branches since 2013, when the Department of Justice changed its notification policies for criminal defendants.²⁰⁶ Before that time, only the FISA Court reviewed such surveillance since the government avoided its statutory duty to notify criminal defendants of the use of evidence obtained or derived from surveillance under Section 702.²⁰⁷

Among recent judgments of circuit courts, it has been pointed out that none of these decisions depend on the nationality or location of the other party to the communication when considering a US citizen’s expectation of privacy in its communications.²⁰⁸ The Second, Ninth, and Tenth Circuits held that the Constitution requires there a balance between national security and individual privacy, lending more weight to the importance of the government’s interests, after considering the totality of the circumstances.²⁰⁹

The courts acknowledged that an individual’s privacy interest in already-received emails will be “diminished,” rather than extinguished, when he/she sends a message under the reasonableness test.²¹⁰ This rationale can be considered similar to the third-party doctrine,²¹¹ though the receiver is not regarded as a “third-party.” It has been suggested that the third-party doctrine can be criticized for failing to understand the concept of privacy, because it equates disclosure to one with disclosure

Court has never clarified a foreign intelligence exception to the Fourth Amendment; judiciary no longer needs to address post-FISA (1978); however, the FISA constitutional basis should still be questioned).

204. Elizabeth Goitein, *Another Bite out of Katz: Foreign Intelligence Surveillance and the “Incidental Overhear” Doctrine*, 55 AM. CRIM. L. REV. 105, 120 (2018).

205. *Jones v. United States*, 357 U.S. 493, 499 (1958).

206. Goitein, *supra* note 204, at 108-10.

207. *Id.* at 109-110.

208. *Id.* at 116.

209. *United States v. Hasbajrami*, 945 F.3d 641, 645, 667 (2nd Cir. 2019); *United States v. Mohamud*, 843 F.3d 420, 441-442 (9th Cir. 2016); *United States v. Muhtorov*, 20 F.4th 558, 603-04 (10th Cir. 2021).

210. Goitein, *supra* note 204, at 116-17, 125.

211. *Id.* at 117.

to all or to the public.²¹² Justice Marshall condemned the third-party doctrine in the context of the third-party consensual surveillance cases, stating that “[i]t is idle to speak of ‘assuming’ risks in contexts where, as a practical matter, individuals have no realistic alternative.”²¹³ While there has been an attempt to justify third-party cases by understanding these as consent cases,²¹⁴ Justice Gorsuch’s analysis held that the consent theory was just “re-labeled” by the assumption of risk idea.²¹⁵

Carpenter “modernized” the reasonable expectation of privacy test in line with digitalization, rejecting the application of third-party doctrine precedents. The rejection of the third-party doctrine would mean that the concept of privacy may be understood as an individual’s interest in their personal information, even after it is disclosed to others, including the public.

The modern digital era has seen numerous states establish their own domestic data protection laws and regulations, as well as their own regulatory frameworks. However, digitalization also requires an international discipline, as data flows easily across national borders. The lack of such domestic legislation would pose risks to the improper processing of citizens’ personal data. A state may be required to introduce a measure to ensure that its citizens’ personal data is appropriately processed, regardless of its location and movement, within or outside the state’s territory, in light of its domestic legislation. The regulatory power of a state must be extended beyond its territory, as international law and domestic law share the same subject matter: personal data.

The US tries to regulate transnational data flows through trade rules, recognizing its protectionist approach to data flows as a “national security bracket” to trade law based on US sovereignty, rather than carving out exceptions for data privacy.²¹⁶ The EU addresses the same subject matter, and data flows from the perspective of fundamental rights, with the CJEU as the final authority on the interpretation and application of fundamental rights. The two Courts’ approaches to the same subject matter appear to conflict. The *Schrems II* judgment examined the legality of the Commission’s decision regarding the flow of personal data to the US, outside of the EU’s territory. The CJEU now needs to factor in considerations under international law as well as its domestic law.

212. Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561, 571 (2009).

213. *Smith v. Maryland*, 442 U.S. 735, 750 (1979) (Marshall, J., dissenting).

214. Kerr, *supra* note 212, at 587.

215. *Carpenter v. United States*, 585 U.S. 296, 390 (2018) (Gorsuch, J., dissenting).

216. Irion, Kaminski, & Yakovleva, *supra* note 76, at 15.

3. *Judicial Uncertainty of the 'Foreign Intelligence Exception' Under the Fourth Amendment*

While the Court in *Katz* disagreed with the government's claim that surveillance should be exempt from the usual requirement of a prior warrant based on probable cause under the Fourth Amendment, it carefully avoided answering that question in a case involving national security.²¹⁷ Justice White's concurring opinion agreed that no warrant is reasonably required to search under some circumstances, including national security matters, mentioning the power of the President or the Attorney General to authorize electronic surveillance without the warrant procedure for national security.²¹⁸

United States v. United States District Court for the Eastern District of Michigan (Keith) articulated the limitation on the President's power to authorize electronic surveillance in "internal" security matters, suggesting that there should be a distinction between domestic and foreign national security matters.²¹⁹ *Keith* carefully limited the scope of this decision to the domestic aspects of national security and did not deal with the issues relating to activities of foreign powers and their agents.²²⁰ This raised the question of how to strike the right balance of basic values relating to the government's duty to protect domestic security against unlawful subversion of the government itself and the citizens' rights to individual privacy and free expression, which are to be protected against unreasonable intrusion by the government.²²¹ The question presented in the case was limited and left open by *Katz*, *i.e.*, whether the Fourth Amendment required the President or the Attorney General to obtain prior authorization in a national security context.²²²

In contrast to the cases concerning the activities of foreign powers within or outside the territory of the US, where the Court does not reach in the case,²²³ the Court noted the values under the First and Fourth Amendments in national security cases, stating that "[t]he danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect 'domestic security'," regardless

217. *Katz v. United States*, 389 U.S. 347, 358 (1967).

218. *Id.* at 363-64 (White, J., concurring).

219. *United States v. U.S. Dist. Ct. for E. Dist. of Mich.*, 407 U.S. 297, 299 (1972) [hereinafter *Keith*].

220. *Id.* at 321-22.

221. *Id.* at 299.

222. *Id.* at 309 (citing *Katz*, 389 U.S. at 358).

223. *Id.* at 308-09.

of the difficulty of defining the “domestic security interest.”²²⁴ In cases only involving the domestic aspects of national security, the Court concluded that the government must comply with “the customary Fourth Amendment requirement of judicial approval prior to initiation of a search or surveillance.”²²⁵

As mentioned in *Clapper v. Amnesty International USA*, *Keith* may implicitly permit “a special framework for foreign intelligence surveillance” under the Constitution.²²⁶ *Keith* then focused on the difference between ordinary crime surveillance and surveillance for national security, and avoided assessing the scope of the President’s surveillance power over foreign activities.²²⁷ Such a framework for foreign surveillance purposes has been established under FISA.²²⁸ Section 702 of FISA creates a new independent source of electronic surveillance of foreign intelligence activities, which does not require the government to show probable cause that the target of the electronic surveillance is a foreign power or the agent of a foreign power.²²⁹ The Court in *Clapper* stated that Section 702 involves a constitutional challenge, which led to the reconsideration of the concept of standing in courts.²³⁰ *Clapper* noted that the surveillance conducted under Section 702 is subject to being consistent with the Fourth Amendment and statutory requirements, judicial review, and congressional oversight.²³¹ The roles of the FISC were also considered, in particular, how it authorizes the government’s surveillance as “independent decisionmakers” and how the Court denied endorsing standing theories based on “speculation” about such independent decisionmakers’ decisions.²³²

Section 702 of FISA does not authorize intentionally targeting a United States person reasonably believed to be outside the United States.²³³ Still, respondents in *Clapper*, who were US persons, alleged that their sensitive international communications with non-US citizens, which were directly targeted by the surveillance authorized under this section, constituted injury in fact.²³⁴ They sought a declaratory judgment

224. *Id.* at 314.

225. *Id.* at 321.

226. *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 402 (citing *Keith* at 322-23).

227. *Id.* at 404.

228. *Id.*

229. *Id.*

230. *Id.* at 404-08.

231. *Id.* at 404-05.

232. *Id.* at 405-06, 414.

233. 50 U.S.C. § 1881a(b)(3) (2008).

234. *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 401-02 (2013).

for the provision in violation of the Fourth Amendment of the constitutional provisions, including the Fourth Amendment.²³⁵ This is referred to as “incidental collection,” which section 702 of FISA defines as restricting intelligence surveillance from targeting US persons’ information, but the government nonetheless accesses such communications through “constitutionally” targeting their source.²³⁶

Lower courts have suggested that US citizens’ privacy interests should be protected in their communications with foreign targets under Section 702 of FISA, though they also accepted that their warrant protections are removed since such foreign targets are not entitled to Fourth Amendment protections.²³⁷ However, these courts may have misread incidental overhear cases as “indirectly establishing an exception to the warrant requirement” on the basis that the communications in such cases fell within the warrants obtained by the government.²³⁸

Instead, it has been claimed that in such incidental overhear cases, the relevant communications fall within the warrants obtained by the US government under Section 702 for the collection of communications of US citizens.²³⁹ Read properly, therefore, the incidental overhearing cases still leave open the issue of the constitutionality of Section 702 surveillance. In particular, the courts may have to address whether there is a “foreign intelligence exception” to the warrant requirement under the Fourth Amendment and, if so, what the proper scope of the exception is.²⁴⁰ The government put forward a “victim exception” to justify using the US people’s communications, which were “incidentally” collected by its intelligence agencies.²⁴¹ The government explained its necessity “to identify victims targeted by foreign criminals and intelligence services,” while it has been argued that there is no such exception under the Fourth Amendment.²⁴²

235. *Id.* at 407-08.

236. *More Data, More Problems*, *supra* note 38, at 1743.

237. Goitein, *supra* note 204, at 125.

238. *Id.*

239. *Id.*

240. *Id.*

241. Chauvin, *supra* note 203, at 563.

242. *Id.* at 628.

*C. Inconsistencies of the Executive Power with Traditional
Private Rights Jurisprudence*

*1. Redress for the EU Data Subjects by the US Executive, Not the Judiciary,
Under the Data Flow Framework*

In *Clapper*, the Court dismissed the respondents' claim for lack of standing under Article III of the Constitution, asserting that the claim of "future injury" was "too speculative" to satisfy the injury-in-fact requirement and would not traceable to the provision.²⁴³ Additionally, the Court referred to the Article III standing function as preventing the judicial process from "usurp[ing] the powers of political branches" based on principles of the separation of powers.²⁴⁴ In line with this doctrine's purpose, the Court's standing requirement has been especially rigorous in cases related to the question of unconstitutionality of the branches of the Federal Government.²⁴⁵ The judiciary have often denied standing in cases where the political branches' actions in intelligence gathering and foreign affairs are challenged.²⁴⁶

Spokeo, Inc. v. Robins held that the injury-in-fact requirement under Article III remains necessary even when a person's statutory right under the Fair Credit Reporting Act has been violated; a bare procedural violation of a statutory right does not satisfy Article III.²⁴⁷ While *Clapper* makes it unclear how a person can challenge the constitutionality of the President's surveillance power if they cannot know what information has been subject to surveillance, *Spokeo* held that it is not enough to allege a violation of a statutory right without showing actual and concrete harm.²⁴⁸

It seems impossible to prove such harm when surveillance occurs secretly, without any notification to the targeted people. Section 702 of FISA or EO 12,333 authorizes the executive branch to conduct such secret surveillance over foreign intelligence activities,²⁴⁹ while access to

243. *Clapper*, 568 U.S. at 398, 401-02.

244. *Id.* at 408.

245. *Id.* (citing *Raines v. BYRD*, 521 U.S. 811, 819-820 (1997)) (quotation marks omitted).

246. *Id.* at 409.

247. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341-43 (2016).

248. H Jacqueline Brehmer, *Data Localization: The Unintended Consequences of Privacy Litigation*, 67 AM. U. L. REV. 927, 942-43 (2018).

249. *E.g.*, 50 U.S.C. §§ 1881a(a), (c)(2), (j)(3) (2024) (no notification requirement); EO 12333, *supra* note 37, § 3.5 (no substantive/procedural rights conferred); *also*, ANDREAS KUESTEN, CONG. RESCH. SERV., R48592, FISA SECTION 702 AND THE 2024 REFORMING INTELLIGENCE AND SECURING AMERICA ACT 1 (2025) (RISAA reauthorized § 702 in April 2024;

the courts is limited in the context of foreign intelligence surveillance. As mentioned above, the Supreme Court has never definitively argued about a foreign intelligence exception to the Fourth Amendment, and the government's "victim exception" is difficult to justify. Thus, it remains uncertain how the constitutionality of such presidential power can be legally examined and how the right to data protection and privacy for individuals, including non-US persons, can be protected.

Considering the European Commission's adequacy decision for the EU-US DPF, which means the US's data framework is considered an essential equivalent to that of the EU, these questions should be considered in the context of the legal requirement for effective remedies guaranteed under EU jurisprudence. This requires ensuring that access to the courts should be available to "any person who suspects that his or her communications are being or have been intercepted[.]"²⁵⁰ Since a national authority for an effective remedy is not necessarily a judicial authority,²⁵¹ the DPRC established by the US Attorney General would meet the EU requirement. Each DPRC panel decides to be "final and binding,"²⁵² which the European Commission understands binds other executive or administrative branches, including the US President.²⁵³ Also, a resort to judicial courts is subject to existing law—the AG Regulation does not change the availability or scope of judicial review of the DPRC.²⁵⁴ In sum, the US seems unwilling to make an effort to offer adequate assurance to foreigners that their personal data would be protected within the US by establishing federal privacy laws; instead, the US would rely on its negotiating power in relation to its economic interests.²⁵⁵

permits programmatic surveillance without individualized court authorization for each target); *About the Foreign Intelligence Surveillance Court*, U.S. Foreign Intel. Surv. Ct., <https://www.fisc.uscourts.gov/about-foreign-intelligence-surveillance-court#:~:text=The%20FISC%20considers%20these%20applications,an%20imminent%20surveillance%20or%20search> [https://perma.cc/3RJ5-ZB57] (last visited Dec. 9, 2025) (FISC proceedings are *ex parte* and non-public).

250. EDPB, *supra* note 7, ¶ 45 (noting that subsequent notification of surveillance activities after the termination would be effective for court access); *See also* Roman Zakharov v. Russia, App. No. 47143/06, ¶ 234 (Dec. 4, 2015), <https://hudoc.echr.coe.int/fre#%7B%22itemid%22%3A%22001-159324%22%7D> [https://perma.cc/LGA4-T2CG] (last visited Dec. 9, 2025) (noting limited individual court recourse absent notification of secret surveillance).

251. EDPB, *supra* note 7, ¶ 46.

252. AG Regulation, *supra* note 81, § 201.9(g).

253. 2023 U.S. Adequacy Decision, *supra* note 77, ¶ 191 n.383.

254. AG Regulation, *supra* note 81, § 201.12 (providing that "[t]his part is not intended to, and does not, modify the availability or scope of any judicial review of the decisions rendered through the redress mechanism, which is governed by existing law.").

255. Anupam Chander, *The Trade Origins of Privacy Law*, 99 IND. L.J. 649, 669 (2024).

2. *Executive Discretionary Power Based on a Dichotomy Between Public and Private Rights*

Judicial power is vested in and limited to the cases and controversies of the jurisdictional provisions under Article III of the US Constitution.²⁵⁶ Although there is no concrete guidance on cases and controversies under the US Constitution, US courts have long recognized that the provisions impose various constraints on judicial power, known as the doctrines of justiciability.²⁵⁷ As one of most debated requirements under justiciability, the doctrine of standing may include three elements: an injury in fact, a causal connection between the cause and the result such that the injury is fairly traceable to, not independent from, the challenged action, and the likelihood, rather than a mere speculation, “that the injury will be ‘redressed by a favorable decision.’”²⁵⁸

The doctrines of justiciability may be supported by the view of the role of the federal courts in the US government system, which is often called a “private rights view,” in contrast to public rights or a special function view.²⁵⁹ Under the former view, the role of judicial power is mainly to resolve a concrete dispute, where the power of the courts to declare the law is regarded as incidental to judicial responsibility for dispute resolution, while under the latter view, courts have the special judicial function of enforcing the rule of law, aside from their role in dispute resolution.²⁶⁰ While the US Supreme Court has never explicitly rejected the federal courts’ dispute resolution model, it can be questioned whether such a simple dichotomy can capture the complexity fully in the context of the history or function of the role of the federal judiciary,²⁶¹ raising the question of the validity of the two-model approach regarding the role of the courts.²⁶²

The constraints of justiciability led to the dismissal of cases, limiting the scope in which “the judicial power may be exercised.”²⁶³ But this

256. U.S. CONST. art. III, § 2, cl. 1.

257. Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 76-78 (2007) (noting justiciability constraints beyond standing, including ripeness, mootness, and political question doctrine).

258. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

259. Siegel, *supra* note 257, at 77-78.

260. RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 73-75 (Robert C. Clark et al. eds., 7th ed. 2015) (noting the difference between the dispute resolution and law declaration model is not clear regarding the role of the federal courts).

261. *Id.* at 75.

262. Siegel, *supra* note 257, at 77-78.

263. *Id.* at 83.

does not necessarily mean “the end of the story.” Rather, it may be recognized as an “invitation for legislative action,” which can affect the separation of powers and change the Supreme Court’s jurisprudence of justiciability.²⁶⁴ Indeed, recent decades in the US have seen an emphasis on the use of presidential power to achieve particular policy goals through a variety of means, raising controversy over the legislative and adjudicative functions that the executive’s power can exercise.²⁶⁵

On the one hand, the executive’s power has changed to “enforcement lawmaking” in practice, and the line between law and policy has blurred.²⁶⁶ On the other hand, executive adjudication has been allowed under the public rights view in principle.²⁶⁷ Under the new EU-US Data Protection Framework, whether the US executive branches can deal with private rights cases properly can be questioned. What can be noted here is that requiring the executive branches to review and protect private rights, including those for personal information protection, is derogated from the role of the executive power based on the dichotomy between public and private rights. One can see the EU law’s influence on the US legal system in relation to the protection of foreign (EU) data subjects from US surveillance activities. The question should then be how the President may “legally” make a new rule in relation to foreign affairs.

III. US EXECUTIVE POWER IN FOREIGN RELATIONS UNDER DOUBLE SOVEREIGNTY

A. Justification of Executive Power for National Security Under the US Constitution and International Law

1. Executive Power to Make Rules in Cooperation with or Without Congress

The US Supreme Court’s case law distinguishes between domestic and foreign intelligence activities, especially in the context of national security under the Constitution. But the constitutional scope of the President’s power to regulate extraterritorial activities for national security is unclear. Regarding the function of the President mentioned in

264. Zachary D. Clopton, *Justiciability, Federalism, and the Administrative State*, 103 CORNELL L. REV. 1431, 1437, 1439, 1468 (2018).

265. John Harrison, *Public Rights, Private Privileges, and Article III*, 54 GA. L. REV. 143, 147 (2019).

266. Z. Payvand Ahdout, *Enforcement Lawmaking and Judicial Review*, 135 HARV. L. REV. 937, 950-52 (2022).

267. *Oil Statutes Energy Services, LLC v. Greene’s Energy Grp., LLC*, 584 U.S. 325, 334 (2018) (defining public-rights doctrine as matters between government and persons subject to its authority) (citing *Crowell v. Benson*, 285 U.S. 22, 50 (1932)).

Article II, the Constitution provides the executive power,²⁶⁸ the role as Commander in Chief,²⁶⁹ and the power to make treaties by and with the advice and consent of the Senate based on two-thirds of the present concurrent Senators.²⁷⁰

The Court's national security jurisprudence in the twentieth century—*United States v. Curtiss-Wright Export Corporation*²⁷¹ and *Youngstown Sheet & Tube Co. v. Sawyer*²⁷²—seems to regard congressional-executive relations as key, though how these two cases can be reconciled with each other has been questioned.²⁷³

On the one hand, the power of the president in relation to foreign surveillance activities may be considered with regard to the constitutional power of Congress, as some statutes, such as the National Security Act of 1947,²⁷⁴ the USA Patriot Act,²⁷⁵ the Intelligence Reform and Terrorism Prevention Act,²⁷⁶ and the National Security Intelligence Reform Act,²⁷⁷ may empower the President's authority. In this case, the ultimate source of the President's power should be grounded on the legislative power of Congress provided in Article I,²⁷⁸ since these statutes mentioned above are thought of as delegating the executive power to the President.

On the other hand, it has been argued that the US Department of Justice has supported "National Security Fundamentalism," which may allow the President to do whatever is necessary to protect the US when national security is at risk and "call for a highly deferential role for the

268. U.S. CONST. art. II, § 1, cl. 1.

269. U.S. CONST. art. II, § 2, cl. 1.

270. U.S. CONST. art. II, § 2, cl. 2.

271. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

272. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-55 (1952) (Jackson, J., concurring).

273. Roy E. Brownell II, *The Coexistence of United States v. Curtiss-Wright and Youngstown Sheet & Tube v. Sawyer in National Security Jurisprudence*, 16 J.L. & POL. 1, 7-9 (2001) (saying, "courts have yet to reconcile the two opinions adequately" and "no article has been devoted to synthesizing the two cases."); see also *Dames & Moore v. Regan*, 453 U.S. 654, 661-62 (1981) (finding the tension between the "plenary and exclusive power of the President" expressed in *Curtiss-Wright* case and "such unlimited executive power" mentioned in *Youngstown*, but not intending to solve it).

274. National Security Act of 1947, Pub. L. No. 80-253, 61 Stat. 495 (codified as amended at 50 U.S.C. §§ 3001-244).

275. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of the U.S. Code).

276. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (codified as amended in scattered sections of the U.S. Code).

277. National Security Intelligence Reform Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (codified as amended in scattered sections of the U.S. Code).

278. U.S. CONST. art. I, § 1.

judiciary.”²⁷⁹ For example, in 2006, the US Department of Justice referred to the “inherent constitutional authority as Commander in Chief and sole organ for the Nation in foreign affairs” to engage in warrantless surveillance of international communications regardless of the location of the person, within or outside of the US, if they relate to certain terrorist organizations, including al Qaeda.²⁸⁰ Additionally, some lower federal courts recognized the inherent constitutional power of the president to conduct foreign affairs and to protect national security, allowing the president to authorize warrantless wiretaps to gather foreign intelligence.²⁸¹

Regardless of national security considerations, the executive power in foreign affairs should be considered in light of international law and the US Constitution. The jurisdiction of such a power cannot be captured by reference to sovereignty based on US territory. It is covered by the foreign relations law of the US,²⁸² which is defined under the Restatement as consisting of “rules and principles of general application dealing with the conduct of states and of international organizations and with their relations *inter se*, as well as with some of their relations with persons, whether natural or juridical.”²⁸³ The US government’s extraterritorial activities may intervene in the legal interests or rights of such persons.

As the Constitution states, “all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land.”²⁸⁴ However, the legal status of treaties under the US domestic legal system is not self-evident—“an international law obligation on the part of the United States” does not necessarily mean that all such obligations “automatically

279. Cass R. Sunstein, *National Security, Liberty, and the D.C. Circuit*, 73 GEO. WASH. L. REV. 693, 693-94 (2005) (noting a tension between National Security Fundamentalism and the Constitution).

280. U.S. DEP’T OF JUST., LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT 1 (Jan. 19, 2006), <https://www.justice.gov/sites/default/files/opa/legacy/2006/02/02/whitepaperonnsalegalauthorities.pdf> [<https://perma.cc/8LUD-VJQ9>] (last visited Dec. 10, 2025).

281. *United States v. Brown*, 484 F.2d 418, 426 (1973) (citing *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948)).

282. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 1 (A.L.I. 1987) (“The foreign relations law of the United States, as dealt with in this Restatement, consists of (a) international law as it applies to the United States; and (b) domestic law that has substantial significance for the foreign relations of the United States or has other substantial international consequences.”).

283. *Id.* § 101.

284. U.S. CONST. art. VI, cl. 2; see, e.g., *Ware v. Hylton*, 3 U.S. 199, 281 (1796) (“When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement.”).

constitute binding federal law enforceable in United States courts.”²⁸⁵ The Supreme Court has long recognized “the distinction between treaties that automatically have effect as domestic law, and those that . . . do not by themselves function as binding federal law.”²⁸⁶ To sum up, according to the Supreme Court, while treaties “may comprise international commitments,” they are not domestic law “unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be ‘self-executing’ and is ratified on these terms.”²⁸⁷

Indeed, the Constitution requires the consent of two-thirds of the members of the Senate to make treaties, while the power to make treaties itself is vested in the President. However, international commitments concluded by the US include various forms—they have not always been made through this constitutionally provided process—and the President repeatedly concludes “executive agreements” and “non-binding instruments” without the advice and consent of the Senate.²⁸⁸

How this presidential power may be legitimized under the Constitution should be questioned. Article II provides “[t]he Executive Power shall be vested in a President,” while it leaves unclear whether this sentence affirmatively grants power or merely designates the office of the President.²⁸⁹ In contrast to a constitutionally provided “treaty,” unwritten executive agreements can be classified into three categories according to the source of the authority for the President to conclude them: congressional-executive agreements, executive agreements made pursuant to a treaty, and the sole executive agreement.²⁹⁰

285. *Medellin v. Texas*, 552 U.S. 491, 504 (2008) (noting the question as “whether the Avena judgment [the ICJ’s judgment] has automatic domestic legal effect such that the judgment of its own force applies in state and federal courts”).

286. *Id.* (a treaty is equivalent to federal legislation if it is self-executing; otherwise it requires an implementing statute).

287. *Id.* at 505 (citing *Igartua-De La Rosa v. United States*, 417 F.3d 145, 150 (C.A. 1 2005) (en banc) (Boudin, C.J.)).

288. STEPHEN P. MULLIGAN, CONG. RSCH. SERV., RL32528, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW I (2023).

289. U.S. CONST. art. II, § 2, cl. 1; *United States Participation in the General Agreement on Tariffs and Trade*, 61 COLUM. L. REV. 505, 513 (Mar. 1961) (noting that the former interpretation to grant the power affirmatively would admit that the power of the President is plenary in the context of foreign affairs, which means that the President has an authority to “bind the United States internationally on any subject without prior congressional authorization”) [hereinafter *U.S. Participation in GATT*].

290. MULLIGAN, *supra* note 288, at 5-9 (noting that some modern executive agreements exceed traditional categories); see, e.g., Harold Hongju Koh, *Triptych’s End: A Better Framework to Evaluate 21st Century International Lawmaking*, 126 YALE L. J. F. 338, 345 (2017) (proposing a new framework based on binding obligations, congressional approval, constitutional authority); Daniel Bodansky & Peter Spiro, *Executive Agreements*+, 49 VAND. J. TRANSNAT’L L. 885, 928-

Under the category of congressional-executive agreements, the President is given the domestic authority by legislation enacted through the bicameral process in Congress.²⁹¹ The difference is that both houses of Congress approve congressional-executive agreements, whereas the advice and consent of the Senate is required to make treaties.²⁹² The Supreme Court has given effect to the second category agreement,²⁹³ and it can arise in many contexts. However, there is controversy as to whether a certain treaty truly authorizes the President to conclude the agreement in question.²⁹⁴ The source of the last category, the sole executive agreement, is neither treaty nor congressional authority,²⁹⁵ but is to be derived from the presidential power under Article II. The Supreme Court has recognized the presidential power to conclude agreements on such a basis,²⁹⁶ but the question may be raised whether the President has the authority to conclude agreements in relation to certain subject matters where constitutional authority is unclear. In this case, it seems that the Court considers the relationship between Congress and the President regarding the validity of executive agreements; unless Congress expresses the opposite view of the President, courts may tend to find the agreement valid.²⁹⁷

2. *Expansion of Executive Power Under Constitutional Pragmatism*

The key issue under this classification should be the applicability or enforceability of the executive agreements in the domestic law, rather than the validity of the presidential power itself. For example, while international trade has been included in the form of the executive

29 (2016) (noting legislative activity bolstered executive agreements during the Obama Administration).

291. MULLIGAN, *supra* note 288, at 5-7.

292. *Id.* at 6.

293. *See, e.g.,* Wilson v. Girard, 354 U.S. 524 (1957) (recognizing the validity of the administrative agreement between the United States and Japan authorized by Article 3 of their 1952 Security Treaty).

294. MULLIGAN, *supra* note 288, at 7.

295. *See, e.g.,* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 415 (2003) (stating that "our cases have recognized that the President has authority to make 'executive agreement' with other countries, requiring no ratification by the Senate or approval by Congress" (citing *Dames & Moore v. Regan*, 453 U.S. 654 (1981)); *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937)).

296. *See, e.g.,* Garamendi, 539 U.S. at 396; *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937).

297. MULLIGAN, *supra* note 288, at 8; *see also* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-55 (1952) (Jackson, J., concurring) (articulating three categories of presidential power, with congressional acquiescence supporting validity in category two).

agreement, it has been suggested that the plenary power of the President in foreign affairs should be subject to his domestic authority because his domestic power to make or change domestic law is not plenary under the Constitution, which may produce gaps between international obligations and their domestic implementation.²⁹⁸

In that sense, the constitutional relationship between the statute-making power and the treaty-making power should be a matter for the enforceability of the executive agreements. Then, the problem should be examined as to whether a majority of both Houses could approve international agreements by exercising the statute-making powers.²⁹⁹ It has been pointed out that, for that matter, a constitutional transformation occurred during the Franklin D. Roosevelt Administration. After all, during and after the Second World War, "the President won the constitutional authority to substitute the agreement of both Houses for the traditional advice and consent of the Senate."³⁰⁰ This means that the treaty could be recognized as interchangeable with the "congressional-executive treaty" in constitutional law ("the doctrine of interchangeability").³⁰¹ Under the doctrine, the domestic enforceability of the treaty-making power may be affected by the relationship between the treaty-making power and the statute-making power.

In *State of Missouri v. Holland*,³⁰² the constitutionality of the treaty-making power was involved in the context of federalism. The Migratory Bird Treaty Act of 1918 was enacted to enforce a treaty between the US and Great Britain, proclaimed by the President, and aimed to protect migratory birds traveling through the US and Canada during a specified period.³⁰³ Regulations were also proclaimed.³⁰⁴ The State claimed the Act was unconstitutional under the Tenth Amendment.³⁰⁵ Before this

298. *US Participation in GATT*, *supra* note 289, at 513-16 (tariffs require congressional delegation as within legislative, not executive, constitutional authority).

299. See Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 808-09 (1995) (noting that the Senate's treaty role reflects federalism; Madison sought presidential involvement); THE FEDERALIST NO. 42, at 270 (James Madison) (Edward Mead Earle ed., 1937) (stating that "treaties might be substantially frustrated by the regulations of the States" under the Articles of Confederation).

300. Ackerman & Golove, *supra* note 299, at 802-03.

301. See *id.* at 896 (citing the Trade Act of 1974, WWII internationalists, 1945 congressional process as congressional-executive agreement background).

302. *Missouri v. Holland*, 252 U.S. 416 (1920) (The State of Missouri intended to make a bill to challenge the constitutionality of the Migratory Bird Treaty Act of 1918 and regulations made by the Secretary of Agriculture based on 10th Amendment, alleging that these intervened in a state's sovereign right to regulate).

303. *Id.* at 431; See The Migratory Bird Treaty Act of 1918, 16 U.S.C. §§ 703-712.

304. *Holland*, 252 U.S. at 431-32.

305. *Id.* at 430-31.

Act, it was difficult for lower federal court judges to interpret the free flight of migratory birds as “commerce” under the Commerce Clause.³⁰⁶ As a majority opinion in *State of Missouri v. Holland*, Justice Holmes raised the question whether the treaty and statute would interfere with the rights reserved to the States and void,³⁰⁷ while avoiding asking the question whether the lower courts were right about the Commerce Clause.³⁰⁸

The Court upheld the treaty and statute. For Justice Holmes, it seems that the treaty-making powers of the President and the Senate may not be limited to the statute-making powers which are “explicitly granted” by the Constitution.³⁰⁹ Congress would have the authority to pass implementing legislation under the Necessary and Proper Clause, once a treaty is concluded validly.³¹⁰ This presupposes a two-step process—“treaty first, statute second.”³¹¹

In *United States v. Curtiss-Wright Export Corp.*, the Supreme Court granted a wide range of presidential power for “external sovereignty” without affirmative grants from the Constitution, based on the difference between federal governmental powers with respect to foreign or external affairs and those with respect to domestic or internal affairs.³¹² It has been noted that *Curtiss-Wright* exemplified the triumph of a wide range of federal executive discretion within the constitutional regime of foreign relations.³¹³ This departed from the previous jurisprudence of foreign relations powers, which were distributed among the federal executive branch, the Senate, federal and state courts, and the people in the late nineteenth century.³¹⁴

306. Ackerman & Golove, *supra* note 299, at 843.

307. *Holland*, 252 U.S. at 431-32.

308. Ackerman & Golove, *supra* note 299, at 843.

309. *Id.* (mentioning that “[i]t is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could . . .” in *Missouri v. Holland*, 252 U.S., at 433).

310. *Id.* at 843-44.

311. *Id.* at 844 (noting a remaining question: “how could congressional-executive agreements overcome the powers reserved to the states by the Tenth Amendment?”); *see also Holland*, 252 U.S. at 434 (stating that “[n]o doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power.”).

312. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-18 (1936).

313. Congress supported the dichotomy to mention that “Congress may vest in the President far greater discretion than would be permissible in the case of enactments which relate solely to domestic matters.” *Extending Reciprocal Trade Agreement Act: Hearings Before the Senate Finance Comm.*, 75th Cong. 71 (1937).

314. *E.g.*, G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 3 (1999).

3. *Double Sovereignty Based on the Dichotomy Between External and Internal Affairs Under the Constitution*

Recognizing the transformation of development in constitutional jurisprudence during the period from the 1880s to 1930s (the “*Lochner* era”) should be significant.³¹⁵ The transformation reflects new insight into the expansive power of the federal executive branch in light of federalism³¹⁶ and the principle of separation of powers.³¹⁷ The orthodox constitutional foreign relations jurisprudence in the late nineteenth century presumed that the text of the Constitution should capture the exercise of foreign relations powers, while also acknowledging that it reserved powers to the states under the structure of sovereignty created by the Constitution.³¹⁸ Under this orthodox theory, the foreign relations powers were to be allocated based on the text of the Constitution, which generally limited them to tariff³¹⁹ or treaty powers,³²⁰ without raising vexatious constitutional problems despite gaps or overlaps in the constitutional enumeration of foreign relations powers.³²¹

Firstly, the President began to conclude “executive agreements,” a new category distinct from treaties, to conduct a broader range of foreign policy without the consent of the Senate during World War I. This led to deviations from the orthodox theory in the late nineteenth century.³²² In 1892, on the one hand, *Field v. Clark* upheld the constitutionality of a series of customs laws, including the proclamation provisions of the

315. *Lochner v. New York*, 198 U.S. 45 (1905). It may be common to mention the *Lochner* era as the period from 1905, when *Lochner* was decided. However, this paper designates the *Lochner* era as the period from the late nineteenth century when the background to the *Lochner* case developed in Supreme Court cases.

316. Examination of constitutional legitimacy of the presidential powers in foreign relations during the New Deal is often limited to the relationship between the federal executive branch and Congress. See Ackerman & Glove, *supra* note 299, at 804-08; LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 149-50 (2d ed. 1996) (noting, regarding “international sovereignty” or “international statehood,” the states “have none under the Constitution” in foreign affairs and “do not exist” at the end of the eighteenth and twentieth centuries).

317. White, *supra* note 314, at 3.

318. *Id.* at 9 (mentioning that the Constitution allocates treaty-making power to the President and Senate, and prohibits allocation of it to the states, but that the states nevertheless should retain powers in light of sovereignty).

319. U.S. CONST. art. I, § 8, cl. 3 (stating that the power “[t]o regulate Commerce with foreign Nations” shall be distributed to Congress). However, it could be argued whether and to what extent states remain the power for foreign commerce in the context of digital economy, considering the traditional argument of the “dormant interstate commerce clause” and the U.S.’s federalism.

320. U.S. CONST. art. II, § 2, cl. 2 (stating that the power “to make Treaties” shall be distributed to the President, with the advice and consent of the Senate).

321. White, *supra* note 314, at 13-14.

322. *Id.* at 18.

Tariff Act of 1890,³²³ authorizing the President to restrict free imports from the countries that the President found imposed duties on US export goods in a “reciprocally unequal and unreasonable” way.³²⁴ The Court then mentioned the delegation of the legislative power allocated to Congress—it was not allowed to delegate the legislative power itself to the President,³²⁵ but did have discretion to delegate a power to decide to the President to some degree, with reference to trade and commerce precedent cases.³²⁶ In 1936, on the other hand, Justice Sutherland in *Curtiss-Wright* endorsed the extensive powers of the President in foreign relations policymaking based on constitutional enumeration and the “inherent powers of sovereignty,” which were not subject to constitutional limits.³²⁷

There are arguable differences in approach during the *Lochner* era regarding the delegation doctrine. Justice Sutherland referred to the “extraconstitutional” basis of the external foreign relations powers, based on the dichotomy between the external and internal affairs. He did not use the nondelegation doctrine supported by separation of powers among the federal government, in line with constitutional enumeration in the constitutional jurisprudence in the late nineteenth century.³²⁸ Instead, Justice Sutherland drew attention to “the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations,” which “must be exercised in subordination to the applicable provisions of the Constitution.”³²⁹ If one takes this sentence seriously, the distinction between the origin and the nature of foreign relations powers of the federal government should be of significance, since “[t]he sovereignty of the United States as a nation in the international community is not the equivalent of the sovereignty of the federal government under the United

323. Tariff Act of 1890, ch. 1244, § 3, 26 Stat. 567, 612 (1890) (repealed 1894).

324. *Marshall Field & Co. v. Clark*, 143 U.S. 649, 680-81 (1892).

325. *Id.* at 691-94.

326. *Field*, 143 U.S. at 683; *see also* White, *supra* note 314, at 20-21 (noting that by World War I, the Court could not deal with cases only by asking if the exercise of the power was related to a tariff, a treaty, or something else, in light of the increasing number of executive agreements).

327. White, *supra* note 314, at 104.

328. *See id.* at 104. In discussing *U.S. v. Curtiss-Wright Export Corp.*, Justice Sutherland stated, “[w]hether, if the Joint Resolution had related solely to internal affairs, it would be open to the challenge that it constituted an unlawful delegation of legislative power to the Executive, we find it unnecessary to determine.”

329. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

States Constitution.”³³⁰ This means that the sovereign powers originating from international status as a nation do not provide the federal organizations of the government with corresponding powers to exercise plenary control over the states and the people without constitutional limitations.³³¹

Secondly, indeed, there should be some room for the potential exercise of state reserved powers in the areas, including foreign affairs, where the plenary power was distributed to the federal government under the late nineteenth-century orthodox constitutional jurisprudence.³³² It has been pointed out that there was no convenient analytical category for the exercise of foreign relations powers under constitutional jurisprudence, which could be permitted only within the enumeration of the Constitution, partly due to the respect for reserved state powers.³³³

Here, the discretionary and regulatory powers of the federal executive branch should be distinguished. The principle of federal discretion in foreign affairs was established in *Curtiss-Wright*, justified by the extraconstitutional concept of international sovereignty, which was accompanied by constitutional limitations, while the broader scope of federal autonomy emerged after *Curtiss-Wright*.³³⁴ In *United States v. Belmont*, Justice Sutherland admitted the validity of the executive agreement between the US and the Soviet governments to release private property within the state of New York.³³⁵ While the conventional account classified Justice Sutherland into opponents to the extension of regulatory powers of federal government, this only applied to a domestic realm.³³⁶ However, when *Curtiss Wright* and *Belmont* were captured in the constitutional transformation of foreign relations in the early twentieth century, Justice Sutherland was completely satisfied with the extension

330. White, *supra* note 314, at 108 (referring to Quincy Wright’s idea that the nation’s activity can be governed simultaneously by constitutional and international law, with one providing power and the other imposing responsibility, which may create conflicts between them, especially in the application of both laws; under the dual position of foreign relations power, a state may not be allowed to exercise all its powers originating from its concluded treaties due to constitutional restriction on such powers, which is why Senate consent is necessary for the President to conclude treaties under the U.S. Constitution).

331. *Id.* at 49-51 (noting Sutherland followed federalism maxim that sovereign powers are allocated among federal government, states, and people; *see* Van Housen v. Kanouse, 13 Mich. 303, 313-14 (1865) (Campbell J.) (as cited in *White*), though White points out that it is unclear if the maxim directly concerns with foreign relations).

332. *Id.* at 21-22.

333. *Id.* at 25.

334. *See id.* at 4-5.

335. *United States v. Belmont*, 301 U.S. 324, 330 (1937); *see also* *United States v. Pink*, 315 U.S. 203, 203 (1942).

336. White, *supra* note 314, at 117-18.

of the federal regulatory power “without any concern for potentially competing state interests.”³³⁷

B. The Law-Making Power Under the US’s Sovereignty from Isolationist to Internationalist Approach

1. Sovereignty Not Based on Territory or Nationality?

The driving force of the constitutional change in the President’s power during that period may have been a fundamental shift in public opinion, as well as considerations of principles in the 1940s.³³⁸ Additionally, considering that the US Supreme Court during the *Lochner*-era dramatically expanded federal powers in foreign policy, covering immigration and foreign trade fields,³³⁹ it has been suggested that the US’s foreign economic policy affected the *Lochner*-era Court (*i.e.* protectionist policy) in the previous era, from the Civil War to the Great Depression, which the idea of economic nationalism supported, leading to the greater discretion of the federal government and authority dealing with foreign, rather than domestic, policies.³⁴⁰ A new perspective has been proposed regarding the presidential administration as the sponsor of an agenda for fundamental legal and constitutional change³⁴¹, given that the President’s foreign policies influenced the *Lochner*-era Court’s judgments.

What is more, as the US emerged as a world leader post-World War II, the constitutional link between the New Deal and the new American internationalism becomes clear: the former aimed to overcome the Great Depression, while the latter sought to build a new world order.³⁴² The international economic order with respect to the US and Europe during the postwar era has been described as “embedded liberalism,” which maintained liberalist trade rules while also allowing regulatory powers of state governments to ensure domestic economic stability.³⁴³ It should not be overlooked that the expansion of presidential power over foreign policy,

337. *Id.* at 118.

338. See Ackerman & Golove, *supra* note 299, at 814-15.

339. Mila Sohoni, *The Trump Administration and the Law of the Lochner Era*, 107 GEO. L.J. 1323, 1323 (2019).

340. *Id.* at 1340-42.

341. See *id.* at 1327.

342. Ackerman & Golove, *supra* note 299, at 909.

343. John Gerald Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT’L ORG. 379, 388 (1982) (describing the postwar international economic order as balancing liberal trade rules with domestic regulatory powers).

underpinned by the dichotomy between the domestic and foreign realms of constitutional law and between the internal and external powers of the federal government, has led to stronger powers allocated to the President even in the domestic socioeconomic policies culminating in the New Deal regulatory framework.³⁴⁴ The constitutionality of such domestic regulatory policies by the presidency should not be considered without regard to its roots in the foreign policy context during the *Lochner* era, reflecting the dramatic change in the scope of international politics.³⁴⁵

The constitutional change could affect the concept of the US's sovereignty. The notable example of the isolationist approach is the US's official abstention from the League of Nations. The US did not participate in the Treaty of Versailles after World War I, which could result in distrust of the people in the Senate. The Treaty of Versailles was seen as a compromise to the US's sovereignty under the isolationist approach.³⁴⁶ This must be understood in light of the shift towards the new US internationalism, which can be classified as embedded liberalism. At the same time, the international economic order was transformed into "neoliberalism."

After the *Lochner* era, the mainstream constitutionalists have tended to recognize the expansive legislative power of Congress under Article I,³⁴⁷ rejecting the traditional interpretation strictly limited to the constitutionally enumerated matters.³⁴⁸ This can be regarded as the reaffirmation of Marshall's interpretation of the Necessary and Proper Clause in *McCulloch v. Maryland*, in which he stated "[l]et the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, . . . are constitutional."³⁴⁹ A fully adequate basis for congressional action in the aid of congressional-executive agreements can be provided by this "Marshallian reading" of the Foreign Commerce

344. See White, *supra* note 314, at 3-5.

345. See *id.* at 5.

346. Ackerman & Golove, *supra* note 299, at 803.

347. Regarding Congress's power under U.S. CONST. art. I, § 8, cl. 3 (interstate commerce clause), see, e.g., *Wickard v. Filburn*, 317 U.S. 111, 128 (1942) (finding that commerce power "includes the power to regulate the prices at which commodities in that commerce are dealt in and practices affecting such prices"); *U.S. v. Darby*, 312 U.S. 100, 115 (1941) (stating that "[t]he motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise" which the Constitution and the courts do not have control over, and that the commerce clause confers on Congress the plenary power as long as it does not infringe some constitutional prohibition).

348. Ackerman & Golove, *supra* note 299, at 913.

349. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

Clause.³⁵⁰

Such an understanding of Justice Marshall's "expansion" of congressional power based on the Necessary and Proper Clause of Article I is criticized as wrong. For example, in *Marbury v. Madison*,³⁵¹ Justice Marshall strictly limited the congressional power under Article III, lacking the power to expand the original jurisdiction.³⁵² According to this criticism, Justice Marshall aimed to avoid an interpretation that the lack of the word "only" in certain constitutional provisions, such as Article II or Article III, licensed plenary authority to Congress under Article I.³⁵³ Indeed, this criticism rejects the basic concept of "higher lawmaking," which would be justified by the lack of the word "only" in the constitutional amendment process under Article V.³⁵⁴ This basic concept can be supported by the fundamental principles of "popular sovereignty,"³⁵⁵ which is the "true and sovereign source of all lawful power."³⁵⁶

The constitutional transformation during the New Deal could be legitimized under the system of higher lawmaking, which gave the President constitutional authority to speak in the voice of the people due to its electoral victories, parallel to the authentic voice expressed through the federalist rules of Article V.³⁵⁷ It should be necessary to go through the amendment process for a congressional-executive agreement if deficiencies in the constitutional texts or structure that legitimize such presidential authority have been practically realized. In fact, the New Deal and *Lochner* era observed the dramatic change in the presidency's economic policy, including diplomacy and expansion of the President's power to make domestic and international policies. Nevertheless, it should still be asked whether it has shifted constitutional rules and whether certain constitutional amendments would be required under constitutional law. It can be questioned whether this practical change

350. Ackerman & Golove, *supra* note 299, at 914.

351. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

352. Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1275-76 (1995).

353. *Id.*

354. *Id.* at 1240-41.

355. BRUCE ACKERMAN, *Higher Lawmaking*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT*, 63, 73 (Sanford Levinson ed., 1995) [hereinafter *RESPONDING TO IMPERFECTION*].

356. AKHIL REED AMAR, *Popular Sovereignty and Constitutional Amendment*, in *RESPONDING TO IMPERFECTION*, at 89, 90; *see also* ACKERMAN, *supra* note 355 (suggesting that monopolizing Article V as the exclusive way to amend would be inconsistent with the concept of popular sovereignty).

357. ACKERMAN, *supra* note 355, at 81 (noting that such transformation of the separation of powers originally dated back to the Reconstruction era).

fundamentally transformed the constitutional presidential power to make international agreements.

Based on the precedents, the presidential regulatory power for the tariff policy was constitutionally recognized with congressional delegation in *Field v. Clark*, maintaining the validity of the nondelegation doctrine in the domestic context. The turning point lay in the court's shift in attitude toward the dichotomy between domestic and international spheres, which would result in a declaration of a new category of executive agreements. The decisive question is whether the President exercises the power without violating the Constitution in concluding international agreements. The criticism above would say congressional-executive agreements are unconstitutional, but it should depend on the limits imposed on the President under constitutional and international laws.

2. International Sovereignty as Political Legitimacy Under the Constitution

The treaty-making power includes the law-making function in the US domestic legal system. As any treaty should not be inconsistent with the US Constitution, the treaty-making power should be subject to constitutional limitations.³⁵⁸ Then, it should be questioned whether the law-making function allocated to the President and the Senate, through the treaty-making power, can include an "essentially legislative" function that, under the constitutional principle of separation of powers, properly belongs to Congress. In *INS v. Chadha*, the Court described essentially legislative action as one with "the purpose and effect of altering the legal rights, duties and relations of persons, including . . . all outside the legislative branch" as essentially legislative in purpose and effect.³⁵⁹

If the President and the Senate are not allowed to exercise such essentially legislative power, how could the US conclude international agreements such as international human rights law? The US has concluded human rights treaties in the form of treaties, rather than

358. *E.g.*, *Reid v. Covert*, 354 U.S. 1, 17 (1957) ("It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions."); *The Cherokee Tobacco*, 78 U.S. 616, 620 (1870) ("[A] treaty cannot change the Constitution or be held valid if it be in violation of that instrument."); *see also* *De Geofroy v. Riggs*, 133 U.S. 258, 267 (1890) ("The treaty power, as expressed in the constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself, and of that of the states.").

359. *Immigr. & Naturalization Serv. v. Chadha*, 462 U.S. 919, 952 (1983).

congressional-executive agreements, showing that the US political branches intentionally chose the former.³⁶⁰ For example, the International Covenant on Civil and Political Rights (“ICCPR”) is regarded as non-self-executing by the US.³⁶¹ Since it is the responsibility of Congress, not the Executive, to “[transform] an international obligation arising from a non-self-executing treaty into domestic law,”³⁶² choosing a form of congressional-executive agreement is more consistent with the constitutional principle and the US’s new internationalism.³⁶³

The presidential power to conclude executive agreements is subject to the same Constitutional limits as the other law-making functions of the federal government, including provisions of the Bill of Rights.³⁶⁴ Once the US concludes an international commitment, whether it is a treaty or an executive agreement, how it is implemented in the domestic legal system must be considered.

As Justice Marshall noticed in *Foster v. Neilson*,³⁶⁵ there is a difference between self-executing and non-self-executing treaties.³⁶⁶ Non-self-executing treaties require legislation to make them applicable to domestic courts,³⁶⁷ whereas self-executing treaties become part of US law upon ratification, without special legislation to make them

360. John C. Yoo, *Law as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757, 806-07 (2001).

361. U.S. Reservations, *Declarations, and Understandings, International Covenant on Civil and Political Rights*, 138 Cong. Rec. S4781-01 (daily ed. Apr. 2, 1992).

362. *Medellin v. Texas*, 552 U.S. 491, 525-26 (2008).

363. Under the new U.S. internationalism, which admits the dramatic extension of the presidential power in domestic and international society, the expansion of the scope of the congressional legislative power can function to expand the presidential power, including domestic legislative power in foreign affairs through the conclusion and enforcement of congressional-executive agreements. *See, e.g., Zivotofsky v. Kerry*, 576 U.S. 1 (2015) (declaring unconstitutional the provisions of the Foreign Relations Authorization Act allowing U.S. citizens born in Jerusalem to list “Israel” as their place of birth on their passport).

364. 3 WILLIAM J. RICH, *MODERN CONSTITUTIONAL LAW* § 38:56 (3rd ed., updated Nov. 2023); *see also* Jonathan I. Charney, *The Power of the Executive Branch of the United States Government to Violate Customary International Law*, 80 AM. J. INT’L L. 913, 917 (1986) (stating that while some writers assert that congressional approval would be required in each case where a violation of customary international law is proposed (since the Executive is obliged by domestic law to comply with the same), this would be too inflexible an approach)(“[T]he President must have the unilateral power to enter into the international lawmaking process”).

365. *Foster v. Neilson*, 27 U.S. 253, 314 (1829) (noting that when the stipulations of treaties cover a contract, it is classified as a non-executive treaty which addresses the political, not judicial, branch) *overruled in part on other grounds by* *U.S. v. Percheman*, 32 U.S. 51 (1833).

366. RICH, *supra* note 364, § 38:51.

367. *Foster*, 27 U.S. at 314.

effective.³⁶⁸ Whether a treaty provision is self-executing relies on how to implement it domestically and whether to “affect the obligation of the United States to comply with it under international law.”³⁶⁹ The duties imposed on the US under treaties may be achieved through judicial application of preexisting or new law, or through political actions by legislative or executive organizations—but not through the courts, even for non-self-executing treaties.³⁷⁰ However, the distinction between self-executing and non-self-executing treaties may lead to a misunderstanding of the legal effect and applicability of treaties.

Regardless of this distinction, the legal effect of a treaty would be the supreme law of the land. “The treaties were of no greater legal obligation than the act of congress,” and “no paramount authority is given to one over the other.”³⁷¹ Whether a treaty requires legislation to carry into effect its stipulations due to its character as a merely promissory or operates by its own force, if the treaty stipulations conflict with an act of Congress, “the last expression of the sovereign will must control.”³⁷² The sovereign will can be expressed in the international agreements as well as domestic law, but cannot change the Constitution. The confusion derived from the distinction between self-executing and non-self-executing treaties may overlook the domestic legal effect of treaties as a legally binding power on the government, including the presidential power.

C. Common Approach to Foreign Economic Policies Between the Lochner Era and the Presidency of Trump Under Different International Economic Rules

1. Development of a Concept of the Government's Property Based on Sovereignty

Furthermore, the constitutional jurisprudence of the US Supreme Court during the *Lochner* era, based on the difference between internal and external matters, is remarkably similar to the constitutional doctrine including the conceptions of individual rights, federal government power and sovereignty adopted by the modern US presidency, especially the

368. See *Bacardi Corp. of Am. v. Domenech*, 311 U.S. 150, 161 (1940); see also, *Asakura v. Seattle*, 265 U.S. 332, 341 (1924) (arguing whether the local ordinance regulating engagement in the business of a pawnbroker is inconsistent with a treaty with Japan and concluding it violates the treaty).

369. RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 310(1) (A. L. I. 2018).

370. *Id.*

371. *Ping v. United States*, 130 U.S. 581, 600 (1889).

372. *Id.*

Trump administration, alongside its agenda for the federal government particularly regarding immigration and foreign trade.³⁷³ For example, the Trump presidency exercised its expansive executive branch authority, imposing tariffs on goods, including steel and aluminum, costing hundreds of billions of dollars.³⁷⁴ These regulatory measures that the US adopted brought the commencement of the WTO disputes by numerous countries, while the US also initiated disputes against some of these countries.³⁷⁵

It seems that some US Presidents, such as Donald Trump and Franklin Roosevelt, advanced a constitutional vision reflected in a political agenda as to how constitutional powers should be exercised and how constitutional rights should be protected.³⁷⁶ Especially, it is noticeable that the Trump administration has a unique vision and that a set of ideas regarding government power, individual rights, and sovereignty can be recognized as linked to those of the *Lochner* era Court.³⁷⁷ In such foreign relations areas, the Court recognized stronger governmental powers as legitimate, and did not hesitate to limit individual rights—foreigners’ privileges—while it imposed limits on state powers and shielded individual liberty in the domestic economic domain in the *Lochner* era.³⁷⁸

In the *Lochner* era, individual economic liberty as “private ordering” under the federal Constitution promoted state governments’ policy of deregulation in domestic spheres, while the business or property relating to “public interest” may be controlled or regulated by the government.³⁷⁹ These regulatory policies may not be founded on the *laissez-faire* doctrine, but rather national protectionism, since the *Lochner*-era Court permitted some types of governmental intervention in the market.³⁸⁰ The *Lochner*-era Court declared that regulatory intervention in relation to the market and workers in the domestic economy was constitutionally permissible, reducing the federal and state regulatory power over the domestic market and workers.³⁸¹

373. Sohoni, *supra* note 339, at 1325.

374. *Id.* at 1354.

375. Voon, *supra* note 28, at 47.

376. Sohoni, *supra* note 339, at 1327.

377. *Id.* at 1327-28.

378. *Id.* at 1343, 1348.

379. *Id.* at 1332, 1339-40 (suggesting that the state’s right to property prevailed over the alleged right to property by the alien where the state has a “special public interest”).

380. *Id.* at 1332-33, 1342-43.

381. *Id.* at 1334. The Supreme Court recognized the regulatory power over foreigners within the territory of the U.S., which should be left to the political departments of the government since it may affect international relations. *See Fong Yue Ting v. United States*, 149 U.S. 698 (1893)

It has also been pointed out that these public policies in such areas restrict the entry of foreign labor and impose tariffs on foreign goods to safeguard US workers and industries from market competition with foreigners, reflecting the US's economic protectionism rather than free trade.³⁸² These federal regulatory policies limiting immigrants' access to public resources or funds include "public charges"³⁸³ and go as far back as those first proposed by the federal government during the *Lochner* era, which the *Lochner*-era Court initially supported as constitutional.³⁸⁴

The reason behind the *Lochner*-era Court was the government's own property rights, which were recognized in relation to the concept of sovereignty—the government as the sovereign is entitled to exercise freely the right to property, including its core element of "the right to exclude."³⁸⁵ This can now be put forward as the basis of the constitutionality of the social-economic policy preferring American citizens or workers under the Trump administration in the context of foreign relations.³⁸⁶

However, the legitimacy of the idea of such property rights based on economic nationalism should now be questioned under the economic liberalization of international economic law. The idea of the government's property rights supported by protectionism may legally deny foreigners property interests without compensation within the territory of the US, which can be supported by the concept of sovereignty, while the disfavored treatment to foreigners (e.g., foreign investors) may conflict with liberalization under WTO agreements.

(referring to "an inherent and inalienable right" essential to its safety, its independence and its welfare, the Court mentioned that every sovereign and independent nation has such a right as to exclude aliens from its territory, which can affect international relations."). The plenary power to regulate foreign commerce constitutionally conferred upon Congress would include its power to make law to delegate a power to the President to determine something relating to its action, not the law-making power itself. Such a power to regulate foreign commerce by political branches of the government can be justified for the purpose of national prosperity and safety. *See also* *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692-96 (1892); *Buttfield v. Stranahan*, 192 U.S. 470, 496 (1904).

382. Sohoni, *supra* note 339, at 1340-44, 1354-55, 1367-70.

383. *Id.* at 1339 (it has been pointed out that the U.S.'s immigration policy in the *Lochner* era may be shaped by the right of property, which the Court confirmed gives the government power to avoid spending public resources on immigrants and foreigners; indeed, Congress established the Immigration Act of 1891 following the Court decision in *Ping v. United States*, 130 U.S. 581 (1889), upholding the exclusion of the Chinese immigrants as likely becoming a public charge).

384. *Id.* at 1326.

385. *Id.*

386. *Id.*

2. Constitutional Limitations Based on Double Sovereignty

The distinction between the concept of sovereignty under international and constitutional law should not be ignored. However, how both laws should be intertwined must be considered under a new internationalist approach in the US. The concept of “external sovereignty” mentioned by Justice Sutherland in *Curtiss-Wright* may require examination of how such unwritten-constitutional but international-originated foreign relations powers belonging to the President can be incorporated into the Constitution, since it is not clear how these powers can be regarded as constitutional; though, such “extraconstitutional” powers do not necessarily mean unconstitutional.³⁸⁷

The question of how international law should be incorporated into the Constitution in the foreign relations context may be understood by Justice Sutherland to mean that powers based on international relations must be exercised in line with applicable provisions of the Constitution.³⁸⁸ Under Articles I and II, the President is allocated a wide range of discretionary and regulatory policymaking powers in the public domain, including foreign relations. This is in contrast to private rights with which the Court is inclined to recognize justiciability. The Court in *The Paquete Habana* held that “[customary] [i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction,” including cases “where there is no treaty and no controlling executive or legislative act or judicial decision.”³⁸⁹

Justice Sutherland implied in *Curtiss-Wright*, which was issued around the end of the *Lochner* period, that the federal government possessed an “inherent,” “plenary,” and “exclusive” character in relation to foreign relations powers.³⁹⁰ This meant that the Court, as well as the Senate and the states, should defer to such executive policy decisions.³⁹¹ It has been suggested that Justice Sutherland found foreign affairs to be so basic to “the sovereignty” of the US, which Justice Sutherland thought

387. See White, *supra* note 314, at 57 (pointing out that “the basis of inherent foreign relations powers was extraconstitutional rather than unconstitutional” in *U.S. v. Curtis-Wright Export Corp.*, 299 U.S. 304 (1936)).

388. *Curtiss-Wright Export Corp.*, 299 U.S. at 318-20 (noting that “the power to make such international agreements as do not constitute treaties in the constitutional sense”, but “exists as inherently inseparable from the conception of nationality”); see also EXTENDING RECIPROCAL TRADE AGREEMENT ACT: HEARINGS BEFORE THE SENATE FINANCE COMM., 75th Cong., 1st Sess. 75 (1937) (mentioning the power to make international agreements referred to in the *Curtiss-Wright* case as “essential to make the United States ‘completely sovereign’”).

389. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

390. White, *supra* note 314, at 60.

391. *Id.* at 60-61.

of as political policies and nonjusticiable issues.³⁹²

Under the plenary power doctrine, the distinction between law and politics would be blurred, leading to blurred boundaries among the federal government's branches. In fact, it has been pointed out that the US Supreme Court premised that the determination and application of international law is the responsibility of the federal government, which is "integral to the conduct of foreign relations," and that the federal courts determine and make international law if there is no federal statute, treaty, or authoritative executive action.³⁹³ The doctrine should be supported by the government's property rights concept based on "sovereignty" in the *Lochner* era, but it should include sovereignty under constitutional and international laws, which led to the vagueness between federal organizations and the emphasis on the presidential plenary power without recognizing the gaps between the concepts of sovereignty under both laws. However, under the Supreme Court jurisprudence, it should be noted that the constitutional limitations on presidential power relating to foreign relations would be considered in light of international law through incorporating it.

The international economic order under the WTO system was developed based on neoliberalism, which could force state governments to adopt more limited regulatory powers on markets and domestic industries compared to embedded liberalism. The US should have adjusted its domestic and foreign policies in line with neoliberalism since this would have influenced the concept of property in constitutional law, realizing the development of "individual private rights" in relation to the government's property, which should be subject to judicial review.

In 2024, the US Supreme Court endorsed the Major Questions Doctrine ("MQD") in *West Virginia v. EPA*,³⁹⁴ which firmly includes the idea of "presumption against novelty," which requires clear congressional authorization for the agency assertions of "highly consequential power."³⁹⁵ This presumably reflects the need to address constitutional nondelegation concerns following the *Lochner* era.³⁹⁶

392. *Id.* at 61-62 (implying that Justice Sutherland might have extended the scope of inherent federal powers to informal executive agreements which might also be included in "international" political questions).

393. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 223 (1st ed., 1972) (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964)).

394. *West Virginia v. EPA*, 597 U.S. 697, 700 (2024).

395. Thomas Nielsen, *The Presumption Against Novelty in the Roberts Court's Separation-of-Powers Case Law*, 137 HARV. L. REV. 2034, 2045 (2024) [hereinafter *Presumption against Novelty*].

396. Thomas B. Griffith & Haley N. Proctor, *Deference, Delegation, and Divination: Justice Breyer and the Future of the Major Questions Doctrine*, 132 YALE L. J. F. 693, 702 (2022).

While the MQD may reconstruct administrative law and restrict a wide range of presidential power, this is not “lawless” or “senseless.”³⁹⁷ The Court seemed to invoke a “Burkean minimalist” approach as its conservatism, quoting the phrase of Justice Frankfurter’s opinion to say that “the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred.”³⁹⁸ Based on the conventional private-public rights distinction, the Burkean approach considers Congress as a proper branch to define “injury in fact,” which is needed to bring suit, rather than focusing on common law and history.³⁹⁹ Additionally, the Court finally overturned *Chevron USA v. National Resources Defense Council*,⁴⁰⁰ overruling the Court doctrine requiring the courts to “defer to ‘permissible’ agency interpretations of the statutes those agencies administer—even when a reviewing court reads the statute differently.”⁴⁰¹

If the justiciability of Section 702 of FISA is not denied, the communications of US citizens with foreign targets, even for national security, may be subject to judicial review, and Congress should determine Article III standing in such a case, independent from presidential power. Considering the state governments’ role as global economic actors and that more states have established their own privacy statutes, Congress should consider uniformity in establishing federal privacy legislation,⁴⁰² and Congress and the Courts need to reconsider the wide range of presidential power and the power balance between federal organizations in the context of foreign affairs in light of international law. Additionally, Congress and the Courts should consider constitutional limitations for the private rights cases regarding the right to privacy under Fourth Amendment jurisprudence.

397. Oren Tamir, *Getting Right What’s Wrong with the Major Questions Doctrine*, 62 COLUM. J. TRANSNAT’L L. 543 (2024).

398. Nielsen, *supra* note 395, at 2047; *see also* W. Va. v. EPA, 597 U.S. at 725 (quoting *FTC v. Bunte Bros.*, 312 U.S. 349, 352 (1941)).

399. *See* Nielsen, *supra* note 395, at 2053-54.

400. *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 412-13 (2024); *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984).

401. *Loper Bright*, 603 U.S. at 378.

402. Carol E. Head, *The Dormant Foreign Affairs Power: Constitutional Implications for State and Local Investment Restrictions Impacting Foreign Countries*, 42 B.C. L. REV. 123 (2001) (arguing the significance of the actions of states as global economic actors, especially from the perspective of foreign relations and examining the Dormant Foreign Affairs Power).

3. Possible Influence of Personal Data Rules on the US Digital Economic Policy

While the EU and the US reached an agreement on the cross-border transfer framework of personal data for promoting their economic interests after *Schrems II*, both economies failed to conclude the Transatlantic Trade and Investment Partnership (“T-TIP”). Here, Japan can be an example to consider the influence of the EU’s personal data rules on the US executive power since the European Commission recognized it as providing an adequate level of personal data,⁴⁰³ and it concluded trade agreements with the US.

The US and Japan signed the Agreement concerning Digital Trade (“US-Japan DTA”),⁴⁰⁴ which entered into force in January 2020, when the trade Agreement between both countries (“US-Japan TA”)⁴⁰⁵ also entered into force. Both agreements aim to liberalize trade between the countries.⁴⁰⁶ After the entry into force of the Japan-EU EPA in 2019 and the Trans-Pacific Partnership 11 (“TPP-11” or “CPTPP”) in 2018,⁴⁰⁷ from which the US Trump presidency withdrew, the US was expected to have a competitive disadvantage in the Japanese market in some fields, including agricultural and industrial goods. The Trump Administration intended to overcome these hardships, including the deficiencies, by concluding bilateral trade agreements.⁴⁰⁸

403. Commission Implementing Decision (EU) 2019/419 of 23 January 2019 pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate protection of personal data by Japan under the Act on the Protection of Personal Information, 2019 O.J. (L 76) 1; *Report from the Commission to the European Parliament and the Council on the first review of the functioning of the adequacy decision for Japan*, COM (2023) 275 final (Apr. 3, 2023).

404. Agreement Between the United States of America and Japan Concerning Digital Trade, U.S.-Japan, Oct. 7, 2019, T.I.A.S. No. 20-101.1 (*entered into force Jan. 1, 2020*) [hereinafter U.S.-Japan DTA].

405. *Id.*

406. Brock R. Williams, Cathleen D. Cimino-Isaacs & Anita Regmi, Cong. Rsch. Serv., R46140, “*Stage One*” *U.S.-Japan Trade Agreements* 1 (Dec. 20, 2019).

407. Afterwards, the UK joined the CPTPP, which entered into force in December 2024; *E.g.*, NEW ZEALAND FOREIGN AFFAIRS & TRADE, *United Kingdom Accession to the CPTPP*, <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/cptpp/cptpp-information/seventh-commission-meeting-of-the-cptpp/united-kingdom-accession-to-the-cptpp> [<https://perma.cc/HME3-8A8S>].

408. *E.g.*, Williams, Cimino-Isaacs & Regmi, *supra* note 406, at 2; Anita Regmi et al., Cong. Rsch. Serv., R46653, *Major Agricultural Trade Issues in the 117th Congress* 38 (Jan. 8, 2021). The OECD analyzes the United States as the sole OECD member state to take “a decentralized, market-driven approach to its digital strategy”, and does not have a national digital strategy. Rather, the US chooses “a portfolio strategy” which is referred to as “a collection of policies, regulations and laws that are associated with specific issues and/or sectors that together support

With such a short formal negotiation period of around six months, the different agreements were concluded in the area of trade in goods and digital trade, both of which are commonly provided in the modern FTAs. Compared to general FTAs, the coverage of the goods in the US-Japan TA is limited to certain areas covering agricultural and industrial goods and it has been noted that such a limited scope of the US-Japan TA would not meet the requirement of “substantially all trade” under Article XXIV of the GATT and that, in practice, the question of whether it is inconsistent with the WTO rules would likely depend on the timeline and scope of the next negotiations.⁴⁰⁹ Indeed, these agreements were seen as “Stage One”—a part of broader trade liberalization plans by the administrations in Japan (Prime Minister Shinzo Abe) and the US (President Donald Trump),⁴¹⁰ though the US-Japan DTA was seen as parallel to the “comprehensive and high-standard” digital trade agreement such as United States-Mexico-Canada Agreement (“USMCA”) with some differences,⁴¹¹ which was concluded with the US leading the negotiations. The US President is supposed to put pressure on its like-minded partners to protect its own industry.

Complying with existing WTO rules based on economic liberalization and market competition itself is significant. In addition, it should affect the US constitutional limitations on presidential power and be incorporated into constitutional law through the concept of double sovereignty. Moreover, the influence of personal data rules on economic treaties should not be ignored. Under the US-Japan DTA, the liberalization principles such as “Non-Discriminatory Treatment of Digital Products”⁴¹² are provided, and the general exceptions are provided in a way of *mutatis mutandis* with Article XIV of the GATS and Article XX of the GATT.⁴¹³ The US-Japan DTA provides that the making of regulatory measures on the cross-border transfer of information (including personal information) by electronic means is, in principle, prohibited if the activity is conducted for business purposes.⁴¹⁴ While the

the evolution and enhancement of the digital economy”. OECD Digital Economy Outlook 2017, 34, 38 n.1 (2017), https://www.oecd.org/content/dam/oecd/en/publications/reports/2017/10/oecd-digital-economy-outlook-2017_g1g7aa8d/9789264276284-en.pdf [https://perma.cc/T3M9-PPLG].

409. Williams, Cimino-Isaacs & Regmi, *supra* note 406, at 20-21.

410. *Id.* at 1.

411. Office of the U.S. Trade Representative, *Factsheet on U.S.-Japan Digital Trade Agreement* (Oct. 2019), <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2019/october/fact-sheet-us-japan-digital-trade-agreement> [https://perma.cc/BUN7-H7S3].

412. US-Japan DTA, *supra* note 404, art. 8.

413. *Id.* art. 3.

414. *Id.* art. 11(1).

GATS includes a privacy exception in the general exceptions clause,⁴¹⁵ the US-Japan DTA also provides that any restrictions on cross-border transfer of personal information will be expected to be limited to “necessary and proportionate to the risks presented.”⁴¹⁶

Whether the regulatory measures on free data flows will be justified should be considered in the context of the privacy exception under the GATS, considering that such restrictions should be limited to necessary and proportionate to the risks presented. If such a regulatory measure satisfies the requirements under the privacy exception clause under the GATS, it would be justified. However, it would still be questionable whether the US-Japan DTA incorporates WTO jurisprudence as well as the texts. The necessary and proportionate clause should be considered in light of this perspective. In the context of cross-border transfer, the basic rule under Japan’s personal information law, the Act on the Protection of Personal Information (“APPI”), seems to be the restriction on the free cross-border transfer of personal data, while the free cross-border transfer seems to be a basic rule under the US-Japan DTA. The Japanese data protection law, APPI, restricts transfers of personal data to third parties in foreign countries without the data subjects’ consent, except in certain cases.⁴¹⁷ The gap between the APPI and the bilateral digital trade agreement raises the question of whether and how the requirement to obtain the consent of data subjects before transferring data to third countries is consistent with the necessary and proportionate clause. Partly due to the substantial difference between the US and Japan’s data protection approaches, “the risks presented” is also unclear, while the US-Japan DTA imposes an obligation on both parties to adopt or maintain a legal framework for the protection of personal data, and both parties “should encourage” to promote interoperability between the different regimes for the protection of personal information.⁴¹⁸

Furthermore, when US companies transfer personal data originating from the EU based on the EU-US Data Privacy Framework to third countries, including Japan, they are required to comply with the rules in

415. GATS, *supra* note 4, art. XIV(c)(ii).

416. US-Japan DTA, *supra* note 404, art. 15(4) (“The Parties recognize the importance of ensuring compliance with measures to protect personal information and ensuring that any restrictions on cross border flows of personal information are necessary and proportionate to the risks presented.”). Such a necessary and proportionate limitation on the derogation of free cross-border flows is not mentioned in the Japan-EU Economic Partnership Agreement.

417. Act on the Protection of Personal Information, art. 28, (Act No. 57 of May 30, 2003); *see also* Personal Information Protection Commission Order No. 3, *Enforcement Rules for the Act on the Protection of Personal Information*, arts. 15-18 (2016).

418. US-Japan DTA, *supra* note 404, art. 15(1) & (3).

line with the EU-US DPF.⁴¹⁹ Whether the restrictions on such onward transfers by US businesses based on the EU-US DPF may comply with the necessary and proportionate clause should also be considered. While the US and Japan shall not be precluded from taking measures that they consider necessary for the protection of their own essential security interests and the maintenance of international security under the US-Japan DTA,⁴²⁰ the US seems to face a problem of whether it can invoke the security exception clause to allege its presidential broad discretionary power when US companies receive the personal data from the jurisdiction of the EU based on the EU-US DPF. Now, the US needs to accept that the executive agreement legally binds the presidential power for foreign policies.

CONCLUSION

Donald Trump again won the presidential election in November 2024. It can be expected that the Trump Administration will disregard market-based policies and accelerate its protectionist policies to indiscriminately guard the US domestic industry and businesses, while the US's consistency with the economic liberalization rules developed under the WTO framework has been questioned. Moreover, given the close relationship between personal data rules and the economy, it should be questioned whether the US can invoke the essential security exception clause under the WTO agreements, given the EU's strict approach to a national security exception in its personal data protection principles. After all, the US will now face the need to address the ambiguous separation of powers in foreign relations among federal organizations following the *Lochner* era.

This paper considers the legality of the extraterritorial presidential power in light of constitutional and international law. During the *Lochner* era, the presidential power to make domestic economic policies was strengthened by a transformation in constitutional jurisprudence, followed by the emergence of the US President as a world leader in shaping international economic law and order after the Second World

419. 2023 U.S. Adequacy Decision, *supra* note 77, Annex I, Section II.3 & Annex I, Section III.10 ("Obligatory contracts for Onward Transfers" in Supplemental Principles); *see also* Supplementary Rules under the Act on the Protection of Personal Information for the Handling of Personal Data Transferred from the EU and the United Kingdom based on an Adequacy Decision (3), https://www.ppc.go.jp/files/pdf/Supplementary_Rules_en.pdf [<https://perma.cc/D86L-9864>] (providing restrictions on Japanese businesses regarding onward transfers of personal data received from the EU or the UK to third countries).

420. US-Japan DTA, *supra* note 404, art. 4(b).

War. The legality of the president's power over foreign policy was supposed to be based on the US's sovereignty under constitutional and international law, though the understanding of the domestic legal effect of treaties under US Supreme Court case law is unclear regarding self-executing and non-self-executing treaties.

Moreover, the concept of sovereignty during the *Lochner* era would presuppose the concept of property based on US nationality and territory. This allowed for its protection as a private sphere for US citizens and/or those within a US territory. Such a concept of property cannot deal with government access to personal data in the digital economy. However, Fourth Amendment jurisprudence has developed alongside digitalization. This would change the conventional dichotomy between public and private rights, which were also based on the two factors of nationality and territory. The *Lochner* era's concept of sovereignty would blur the distinction, thereby limiting the Court's review in private rights cases. The influence of the EU's personal data rules on US presidential power should not be overlooked, as they can substantially constrain it, even for national security.