PRESIDENTIAL SELF-MUZZLING IN FOREIGN AFFAIRS

Jide Nzelibe[+]

A standard view holds that American presidents are avaricious empire builders in foreign affairs; once Congress delegates authority in foreign affairs, it is seldom, if ever, reversed. This view must be revisited in light of various instances where presidents, often against Congress's wishes, have deliberately muzzled their delegated authority in foreign affairs. But why would presidents ever muzzle themselves and reject their delegated authority in foreign affairs, despite all the apparent benefits of maintaining policy discretion?

This Article argues that presidents recognize that increased flexibility in foreign affairs can sometimes be a curse in disguise. The problem is that when Congress delegates authority to the President in foreign affairs, it often focuses on distributive policies likely to attract the attention of interest groups. However, pronounced attention by interest groups in foreign affairs is hardly desirable for presidential control. It could, paradoxically, weaken the presidency in foreign affairs: the more interest groups and their congressional allies believe there is much to be gained by blurring the boundaries between foreign affairs and targeted economic or ideological policies, the more they might want to compete with the President in shaping foreign policy. Furthermore, in exercising their foreign affairs power in ways that selectively favor or hurt specific interest groups, presidents may inadvertently enlarge the pool of claimants who can overcome the standing barriers for bringing lawsuits.

Anticipating the interaction between expanded policy flexibility and the unwelcome attention of outside political forces and courts, presidents may opt to muzzle themselves in foreign affairs. By constraining their capacity to act on those parts of their foreign policy agenda that attract unwanted attention, presidents can free up their scarce resources and attention to direct their overall foreign policy to their liking. As an illustration of the theory, this Article examines a pattern of presidential self-muzzling that occurred during the postwar era, when, against Congress's wishes, presidents imposed procedural constraints on their delegated authority to dispense tariffs for industry groups on national security grounds. A similar pattern of self-muzzling also played out in non-economic issues, such as the scope of the treaty power and the use of force, where presidents also imposed constraints on their authority in foreign affairs to deflect unwanted attention or prevent the politics of blame. This argument has repercussions for contemporary debates about the motivations of presidents to use their delegated authority to blur the boundaries between national security and economic policy.

[+] Howard and Elizabeth Chapman Professor of Law, Northwestern University Pritzker School of Law. Thanks to Michael Abramowicz, Nicholas Almandares, Yonathan Arbel, Nate Atkinson, Netta Barrak-Corren, Curtis Bradley, Ingrid Brunk, Zachary Clopton, Ashley Deeks, Shahar Dilbary, Kristen Eichensehr, Jean Galbraith, Michael Gilbert, Tom Ginsburg, Oona Hathaway, John Harrison, J Benton Heath, Jonathan Koehler, Steven Koh, John McGinnis, Alan Miller, Zachary Price, Max Stearns, Paul Stephan, Matthew Waxman and other participants at the 2023 Chicago-Virginia Foreign Relations Roundtable and the 2024 University of Maryland Carey Law Constitutional Law and Economics Conference for comments.

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INTRODUCTION

The increasing flexibility of presidents in foreign affairs is double-edged. On the one hand, the more presidents venture into domains of concern to interest groups, the more they can harness the private ambitions of such groups to advance their foreign policy goals, especially in national security. On the other hand, the more presidents blur the boundary between national security and domestic economic or ideological issues, the more likely they are to attract the unwanted attention of interest groups, Congress, and the courts. In short, by expanding their flexibility into domains that promise targeted economic or ideological benefits to domestic interest groups, presidents risk ceding some control of their foreign policy agenda to groups who may have adverse goals. Under certain conditions, the costs to presidents of increased flexibility in foreign affairs may swamp its benefits.

In putting forth this first theme, this Article also puts forth a second: the strategic sources of presidential boundary blurring in foreign affairs are not completely appreciated. Many scholars appear to assume that Congress

passively acquiesces to the presidential usurpation of its authority in foreign affairs.[1] However, rather than being nonchalant, members of Congress may actively try to impose foreign affairs powers on presidents they may not even want. Take, for instance, the modern tendency of Congress to delegate to the President the extensive authority to impose economic sanctions, export controls, foreign investment controls, and trade barriers under the guise of promoting national security. But what happens when Congress's eagerness to have presidents use these tools for national security reasons exceeds the willingness and desire of presidents to use them? What happens when presidents prefer to focus their attention on foreign policies with diffuse effects that will help secure their legacy rather than narrow policies that benefit interest groups?

Here is the hitch. Members of Congress may benefit from presidential flexibility in foreign affairs, even when presidents are ambivalent about expanding the scope of their authority. First, members of Congress may embrace presidential flexibility as a means of disbursing targeted benefits to their favored groups, especially when national security justifications can circumvent other domestic obstacles to rewarding interest groups. Second, opposition members of Congress may also selectively wield the perception of presidential flexibility in foreign affairs as a weapon, using it to deflect blame for high-risk policy adventures they may have initially supported. In both cases, Congress and their interest group allies may be able to shape the direction of foreign policy in their preferred direction without internalizing the effects of policy instability or incoherence on foreign allies. Presidents do not have that luxury. Whenever there is foreign policy instability due to interest group pressures, presidents pay the price in the form of less cooperation from foreign allies for their key policy initiatives.

Anticipating the interaction between expanded policy flexibility and the unwelcome attention of outside political forces, presidents may strategically opt to muzzle themselves in foreign affairs under some conditions. This claim goes against the conventional wisdom that presidents are avaricious empire-builders in foreign affairs and that the only plausible counterweights to this tendency are the courts, voters, or Congress.[2] On the contrary, by imposing

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[1] *See* Neal Devins, *Presidential Unilateralism and Political Polarization: Why Today's Congress Lacks the Will and the Way to Stop Presidential Initiatives, 45* WILLAMETTE L. REV. 395, 399-401 (2009) ("Presidents are well positioned to advance their policy agenda and, in so doing, expand the power of the presidency"); Louis Fisher, *A Dose of Law and Realism for Presidential Studies*, 32 PRESIDENTIAL STUD. Q. 672, 673 (2002) ("On matters of war, we have what the framers thought they had put behind them: a monarchy. Checks and balances? Try to find them.") (citation omitted); Harold Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L J 1255 (1988); (explaining why the President usually wins out against other branches of the government on foreign affairs issues).

[2] See Koh, *Why the Presidents Almost Always Wins*, *supra* note 1 at 1326-38 (discussing a revitalized role of Congress and the courts as institutional bulwarks against presidential overreach in foreign affairs). The notion that presidents have a voracious appetite for empire-building is widespread in constitutional theory and political science. *See* William G. Howell & Terry Moe, *The strongman presidency and the two logics of presidential power*, 53 PRES. STUD. Q. 145, 146 (2023) ("But even for presidents with clear democratic commitments, there are strong incentives to push the bounds. The power is there, just waiting to be used. And by using it, they can achieve policy, political, and personal objectives that

constraints on their delegated authority to provide narrow and targeted benefits, presidents can free up their scarce attention and resources to focus on policies with more long-term and diffuse effects, which may be more beneficial for securing presidential legacies in foreign affairs. Such policies include long-term defense planning, the promotion of grand strategy, broad economic development projects, and the distribution of geopolitical aid. These policies are unlikely to appeal to interest groups and their congressional allies because they have no immediate tangible payoff. By contrast, Congress may prefer that presidents focus on short-term distributive policies, such as imposing tariffs and screening foreign investments that compete with American industries. However, these are the kinds of policies that attract the unwanted attention of interest groups and their congressional allies, who may then seek to compete with the President in shaping policy. In sum, such pronounced attention by interest groups, courts, or Congress is not desirable for presidential control in foreign affairs.

This argument has repercussions for recent debates about the motivations of presidents to use delegated authority from Congress to blur the boundaries between domestic economic policy and national security.[3] Sheltered from domestic procedural safeguards, critics fret that the Trump and Biden administrations have used the national security justification under their delegated powers to unleash a wide range of export and outward investment controls, targeted tariff barriers, and investment screening mechanisms targeting China.[4] For instance, President Trump invoked national security

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would otherwise go unmet"); Michael J. Gerhardt, *Constitutional Arrogance*, 164 U. PA. L. REV. 1649, 1650 (2016) ("My argument is that the presidency of the United States has the institutional disposition and capacity for constitutional arrogance—to take unilateral actions challenging its constitutional boundaries and extending its powers at other authority"); Daryl Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 956 (2005) ("[B]ecause individual presidents can consume a much greater share of the power of their institution than individual members of Congress, we should expect them to be willing to invest more in institutional aggrandizement.")

[3] *See, e.g.*, Timothy Meyer & Ganesh Sitaraman, *The National Security Consequences of the Major Questions Doctrine*, 122 MICH. L. REV. 55, 59-63 (2023) (describing the President's increasing use of economic warfare as a national security tool and the critical responses it has provoked); Kristen Eichensehr & Cathy Hwang, N*ational Security Creep in Corporate Transactions*, 123 COLUM. L REV. 549 (2023) (describing as national security creep the expansion of the President's authority to restrict inbound and outbound investment for national security reasons); Kathleen Claussen, *Trade's Security Exceptionalism*, 72 STAN. L. REV. 1097 (2020) (describing how Congress delegated to the President the authority to engage in security-based exceptions for raising trade barriers in an unbridled way that undermined the Framers' intentions); J. Benton Heath, *The New National Security Challenge to the Economic Order*, 129 YALE L.J. 1020, 1034 (2020) (describing how the new national security regime will "challenge the ordinary operation of trade and investment rules"); Harlan Grant Cohen, *Nations and Markets*, 23 J. INT'L ECON. L. 793, 806 (2020) ("Today, no one blinks when data and cyber security, terrorism, economic crisis, rug and human trafficking, infectious diseases, and even climate change are described as national security concerns."); Anthea Roberts, Henrique Choer Moraes & Victor Ferguson, *Toward a Geoeconomic Order in International Trade and Investment*, 22 J. INT'L ECON. L. 655, 665 (2019) (observing that "[t]reating economic security as national security may ... create a permanent state of exception justifying broad protection/protectionist measures.").

[4] *See* Eichensehr & Hwang, *supra* note 3 at 557 (chronicling the expansion of the of use of economic tools for national security reasons under the Biden and Trump administrations); Ana Swanson & Paul Mozur, *Trump Mixes Economic and National Security, Plunging the U.S. Into Multiple Fights*, N.Y. TIMES, June 8, 2019,

concerns in his quest to ban TikTok and other Chinese apps.[5] President Biden has extended the Trump-era ban on US investment in firms linked to Chinese military and surveillance companies.[6] Both the Trump and Biden administrations have also imposed trade-related restrictions on steel and aluminum imports for national security reasons.[7]

The critics have emphasized two concerns. First, they worry that the government's reliance on economic statecraft may spawn a spiral of ever-greater intrusion by presidents into the private economic sphere in ways that disrupt market competition and global economic cooperation.[8] Second, they worry that presidents may exploit their increased autonomy to impose targeted economic benefits (or costs) for national security reasons to achieve unrelated political goals in some other sphere.[9] Yet some are inclined to believe that the odds are stacked against reversing further presidential aggrandizement in foreign affairs.[10] Once Congress delegates to the President in foreign affairs,

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https://www.nytimes.com/2019/06/08/business/trump-economy-national- security.html (describing the tendency of the Trump Administration to invoke national security for economic actions); *see also* Stephen Kho & Yujin K. McNamara, 17 U. PA. ASIAN L. REV. 368, 383-84 (2022) ("[T]he United States' policies towards China have not shown a remarkable change under the Biden Administration, unfortunately. The Biden Administration has maintained much of the security-based trade measures enacted under the Trump Administration.").

[5] Kristen Eichensehr, *United States Pursues Regulatory Actions Against TikTok and WeChat Over Data Security Concerns*, in Contemporary Practice of the United States Relating to International Law, 115 AM. J. INT'L L. 124, 124-25 (2021).

[6] Jeanne Whalen & Ellen Nakashima, *Biden Expands Trump Order by Banning U.S. Investment in Chinese Companies Linked to the Military or Surveillance Technology*, WASH. POST, June 3, 2021, https://www.washingtonpost.com/technology/2021/06/03/investment-ban-chinese-surveillance-tech/

[7] The Editorial Board, *Call Them the Biden-Trump Tariffs Now,* Wall St J, Oct. 26, 2022, available at https://www.wsj.com/articles/call-them-the-biden-trump-tariffs-now-section-232-aluminum-steel-tariffs-beverage-manufacturers-11666721317.

[8] *See* Heath, *The New Security Challenge to the Economic Order, supra* note 3 at 1041-63.

[9] *See* Meyer & Sitaraman, *The National Security Consequences*, *supra* note 3 at 55 ("If the MQD [Major Questions Doctrine] is applied to domestic, but not foreign, delegations, then the executive branch will have an incentive to use broad foreign affairs delegations to accomplish domestic policy objectives in order to evade the safeguards and limits that attend domestic administrative action"); Scott Lincicome & Inu Manak, *Protectionism or National Security? The Use and Abuse of Section 232*; CATO INST., Mar. 9, 2021, https://www.cato.org/policy-analysis/protectionism-or-national-security-use-abuse-section-232 (arguing that the Trump "administration used "national security" to cover for rote protectionism, harming U.S. producers and consumers in the process."); see John Brinkley, *Trump's National Security Tariffs Have Nothing to Do with National Security*, FORBES, Mar. 12, 2018, https://www.forbes.com/sites/johnbrinkley/2018/03/12/trumps-national-security-tariffs-have-nothing-to-do-with-national-security/#4c4923ae706c [https://perma.cc/UV3D-SAF2] (suggesting that national security concerns underpinning use of Section 232 have no legal basis).

[10] *See, e.g.*, Klaussen, *Trade's Security Exceptionalism*, *supra* note 3 at 1153-60 (expressing skepticism as to whether the presidential tendency to invoke trade security exceptionalism can ever be corrected or changed). The notion that congressional delegation is sticky and hardly ever reversed has been made in the context of the end of the legislative veto, which Congress could have used to police the President's use of her delegated authority. *See* David B Froomkin, *The Nondelegation Doctrine and the Structure of the Executive*, 41 YALE J. ON REG. 60, 95 (2024) ("observing that "Chadha creates a one-way ratchet problem. Broad delegations of authority to the President change the balance of power between Congress and the President by shifting the location of the status quo, made particularly sticky because of the presidential veto.").

it is assumed that it rarely, if ever, reverses course. Thus, delegation presumably operates as a one-way ratchet, which, over time, encourages the President to further muddle the boundaries between foreign affairs and economic policy. Moreover, the prospects for meaningful judicial intervention are also considered to be slim.[11]

Such skepticism may be unwarranted. As suggested above, countervailing tendencies also cut in the opposite direction. When presidents exercise their authority in ways that blur the boundary between the domestic economy and national security, it often comes at the expense of presidential control in foreign affairs. Thus, episodes of systematic presidential intrusions into private markets for national security reasons tend to be scattered and temporary. An early surge in the presidential usage of a newfound authority to dispense benefits to industry groups on national security grounds may often be followed by a long period of presidential forbearance. At some stage, presidents may experience pressures from interest groups in foreign affairs more as a burden than an asset, especially when such pressures also invite greater scrutiny by courts. The reason is that the more presidents impose special benefits or costs on interest groups in foreign affairs, the more courts will have an opportunity to intervene because the relevant groups may be able to overcome standing barriers to bringing lawsuits. However, when presidents focus on foreign policies with diffuse and long-term effects, the courts and Congress usually leave them alone. Thus, the pushback against the executive branch's meddling in the private market for national security reasons may not come from outside forces, such as courts or Congress, but from the very institution it is meant to benefit: the presidency.

The remainder of this Article proceeds as follows. Part I suggests a typology of delegated powers in foreign affairs that may be especially susceptible to eliciting unwanted attention by interest groups, Congress, and the courts. Part II focuses on how interest groups may distort the presidential

[11] *See* Klaussen, *Trade's Security Exceptionalism*, *supra* note 3 at 1153-60. Recently, some commentators have observed that notwithstanding the willingness of certain Supreme Court Justices to revive the non-delegation doctrine, they might still allow an exception for foreign affairs. *See* Curtis Bradley & Jack Goldsmith, *Foreign Affairs, Nondelegation, and the Major Questions Doctrine*, U. PA. L. REV. (forthcoming 2024) (recognizing that certain Justices on the Supreme Court favor a foreign affairs exception to the non-delegation doctrine, but contending instead that the doctrine should be applied less strictly when a statutory authorization in foreign affairs relates to an area of independent presidential power); Kevin Arlyck, *Delegation, Administration, and Improvisation*, 97 NOTRE DAME L. REV. 243, 289 (2021) (criticizing the foreign affairs exception to the non-delegation doctrine); Note, *Nondelegation's Unprincipled Foreign Affairs Exceptionalism*, 134 HARV. L. REV. 1132, 1140 (2021) (same). Lower courts have also held that the President is due broader deference in foreign affairs. *See* United States v. Kuok, 671 F.3d 931, 939 (9th Cir. 2012) ("The '[d]elegation of foreign affairs authority is given even broader deference than in the domestic arena.'" (alteration in original) (quoting Freedom to Travel Campaign v. Newcomb, 82 F.3d 1431, 1438 (9th Cir. 1996))); United States v. Amirnazmi, 645 F.3d 564, 578-79 (3d Cir. 2011) ("Mindful of the heightened deference accorded the Executive in this field [i.e., foreign affairs], we decline to interpret the legislative grant of authority parsimoniously."). Finally, there is also an ongoing debate on whether courts can realistically draw clear distinctions between foreign and domestic affairs. Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1979 (2015) (suggesting that courts may be on the path of treating foreign affairs controversies like domestic ones), *but cf.* Carlos M. Vazquez, *The Abiding Exceptionalism of Foreign Relations Doctrine*, 128 HARV. L. REV. FORUM 305-321 (2015) (expressing skepticism as a descriptive matter as to whether courts are willing and able to stem executive branch overreach in foreign affairs).

agenda in foreign affairs, especially if greater presidential flexibility influences their expectation of special benefits (and costs). This Part also suggests why pressures by interest groups are likely to elicit the unwanted attention of courts in foreign affairs. There are two reasons. First, in exercising their foreign affairs power in ways that favor or hurt specific interest groups or individual parties, presidents may inadvertently enlarge the pool of claimants who can meet the standing threshold for bringing lawsuits. Second, courts may be less willing to defer to the President's authority in foreign affairs if they suspect the President is deploying such authority selectively to reward partisan allies or favored interest groups.

Part III isolates the conditions under which presidents may prefer to muzzle themselves in foreign affairs to deflect the risks of unwanted attention by outside political forces and the courts. More specifically, the likelihood that the President will consider the increased attention of interest groups and Congress more as a burden than an asset depends on certain key factors. These include whether the President prioritizes foreign policies with long-term and diffuse effects over distributive ones, whether she views the foreign affairs bureaucracy as an ally or an adversary, the existence of a national security crisis that overshadows the salience of distributive politics, and the sheer volume of interest groups seeking relief on national security grounds.

Part IV turns to some illustrations of presidential self-muzzling in foreign affairs that implicate economic issues.[12] It examines presidential responses to congressional initiatives to promote national security protectionism under both the Eisenhower and Reagan administrations. Even though Congress actively signaled to presidents through a series of legislative amendments that Section 232 of the Trade Expansion Act of 1962 (and its predecessor statutes) ought to be used more aggressively to protect domestic groups for national security reasons, presidents have routinely made it quite difficult for industry groups to avail themselves of this provision, often by placing stumbling blocks on their own authority to provide relief. More specifically, these presidents imposed additional procedural obstacles on their authority to respond to industry groups seeking relief under Section 232 that exceeded those required by Congress.

The Trump presidency's legacy of the aggressive interpretation of Section 232 is anomalous, and there is reason to think that there is less than meets the eye with that experience.[13] While the Trump and Biden administrations expanded the use of Section 232 by industry groups, the compromises and exceptions required to make this administrative scheme work hampered policy coherence and presidential control over policy. Today, the regime for administering Section 232 relief has devolved into an administrative quagmire that has attracted unwanted legislative and judicial attention in ways that threaten to undermine presidential control. There are significant problems in implementation, inconsistencies in treatment across various categories of industry groups, and a lack of clarity in the criteria for who qualifies for relief.

Part V explores two other illustrations of presidential self-muzzling in foreign affairs that involve non-economic issues.[14] The first involves the President's use of self-imposed constraints on the scope of the treaty power as

[12] *See infra* Part IV.
[13] *See infra* Part IV(C).
[14] *See infra* Part V.

a strategy to dodge highly controversial domestic social issues. This presidential convention started during the Eisenhower administration and continues until today. It was designed to remove from the treaty agenda the kinds of social issues likely to excite the attention of domestic ideological groups. The second involves instances where presidents embrace a congressional role in use-of-force decisions even when they insist that they have no legal obligation to do so, such as when President Obama sought and failed to obtain congressional approval for military interventions in Syria and Iraq.

Part VI turns to the implications of presidential self-muzzling. My argument critiques conventional prescriptions for presidential overreach in foreign affairs and suggests an alternative approach. Conventional prescriptions emphasize the role of formal institutions—such as congressional oversight or the power of courts to enforce the balance of powers—to counteract the risks of presidential aggrandizement in foreign affairs. However, an uptick in congressional and judicial attentiveness in foreign affairs may exacerbate and not mitigate the problem of using foreign policy to sate the preferences of domestic groups. In contrast, the President is the institutional player most likely to recognize the dangers posed by an avalanche of interest groups making excessive demands on the foreign affairs bureaucracy. By limiting their capacity to act on those parts of their foreign policy agenda that attract unwanted attention, presidents can free up their scarce resources and attention to direct their overall foreign policy to their liking. In this picture, self-muzzling becomes, ironically, a strategy to strengthen presidential control in foreign affairs.

I. A TYPOLOGY OF FOREIGN AFFAIRS POWERS SUSCEPTIBLE TO UNWANTED ATTENTION

Three kinds of foreign powers are likely to attract significant attention from interest groups and Congress and are thus susceptible to having ambiguous effects on the President's ability to control foreign policy. I will classify them loosely as the singling out power, the domestic boundary blurring power, and the high salience but low return power.

First, the singling out of power is when the President exercises the kind of discretion in foreign affairs that allows him to single out individuals or corporations for favorable beneficial treatment or that allows him to impose direct economic costs on such groups.[15] In most cases, this authority is likely to be relevant when the President has been delegated authority by Congress to block corporate transactions or impose export controls, tariffs, or other barriers on certain foreign imports for national security reasons.[16] Modern examples include the increase in the presidential use of regulatory and statutory instruments such as Committee on Foreign Investment in the United States

[15] For an illustration of how the government's power to single out private parties for special treatment works in the takings context, see Saul Levmore, *Takings, Torts, and Special Interests*, 77 VA. L. REV. 1333, 1348 (1991).

[16] *See infra* Part II (B).

(CFIUS) reviews, the International Emergency Economic Powers Act (IEEPA), and tariff barriers under Section 232 of the Trade Agreement Act of 1962.[17]

From the perspective of presidential control, there are three problems with this power.[18] The first is that once interest groups are aware that the President can exercise this power without any congressional or judicial oversight, they will more likely mobilize and attempt to shape the direction of foreign policy to their liking. This tendency increases the chance that the President may lose exclusive control over the policy agenda. The second is that presidential efforts to deliver particularistic benefits will attract certain groups but provoke intense opposition from others. This dynamic enhances the risk of foreign policy instability across electoral cycles. The third is that the expansion of the President's singling out power is likely to attract the attention of courts because it is exercised under circumstances where private parties are likely to meet the standing threshold for bringing claims. Moreover, because the singling out power involves the dispersal of benefits (or imposition of costs) that are scarce, easy to measure, and valuable to interest groups, it will increase the chance that the President may be accused of exercising his discretion for spurious reasons.

Second, the domestic boundary-blurring powers involve the kind of foreign affairs powers that may permit the President to influence the direction of domestic issues that are highly salient and controversial, such as issues implicating the local administration of criminal justice, the powers of labor unions, abortion, and civil rights.[19] These powers are likely most relevant when the United States wants to shape social policy abroad and, in return, agrees to be bound by international commitments to circumscribe its own domestic social policy choices. In exercising these powers, the President may worry about the rationality of fear.[20] Suppose domestic groups believe that the President's foreign affairs powers can be deployed as a back door to circumvent other constraints on implementing hot-button domestic policy issues. In that case, such groups will likely seek more sway in shaping or blocking foreign policy. Simply put, using the President's foreign affairs powers in this manner will likely raise the stakes of foreign policymaking to intolerable levels. Indeed, one of the recurring controversies over the scope of the treaty power is the concern that the President and the Senate will use that power to accomplish social policy goals that may otherwise be unattainable

[17] For a brief discussion of these tools, see Eichensehr & Hwang, *supra* note 3 at 560-61(discussing various regulatory controls on investment and trade that had been delegated to the President); *see also* Claussen, *Trade's Security Exceptionalism*, *supra* note 3 at 1097 (discussing trade restrictions for national security reasons under Section 232); *but cf* David Zaring, *CFIUS As A Congressional Notification Service*, 83 S. CAL. L. REV. 81 (2009) (suggesting that CFIUS review has been turned into a congressional notification service where the executive branch's role has been largely passive.)

[18] For a more thorough analysis of these problems and the obstacles they impose on presidential control in foreign affairs, see discussion in text at *infra* notes 27-41.

[19] For a more thorough discussion of these ideological issues in the context of the treaty power, see discussion in *infra* Part IV(A).

[20] For a discussion of how constitutional designers and political actors can limit the stakes and politics and thus reduce the rationality of fear, see Rui J. P. de Figueiredo, Jr. & Barry R. Weingast, *Self-Enforcing Federalism*, 21 J.L. ECON. & ORG. 103 (2005); see also Dan Rodriguez, *Change that Matters: An Essay on State Constitutional Development*, 115 PA. ST. L. REV. 1073, 1081 (2011).

through ordinary legislation.[21] Thus, one way to deflate this concern is for presidents to self-muzzle and ensure that foreign affairs powers are not used in ways likely to spur the rationality of fear among domestic groups and voters.

Finally, the high salience but low return power involves situations where presidents embark on foreign policy initiatives that are likely to invite extra scrutiny by the public, but where the possibility of policy failure or stalemate is high. This aspect of policy flexibility is relevant when the political downside to the President from a failed foreign policy mission exceeds the political upside from policy success.[22] The political scientist Matthew Baum has characterized the dilemma presidents face in such circumstances as follows: "[such] scrutiny increases the potential political fallout in the event of a foreign policy failure. Therefore, when the United States has no significant national security interests at stake, presidents will be hesitant to seek the public spotlight unless they are fairly confident of success."[23]

But the ability of the President to shape how voters perceive a foreign policy crisis is not unbounded; in other words, even if the President wanted to avoid the public spotlight, it is not clear that she could easily do so. For instance, instead of relying on the President's cues to assess the gravity of a foreign policy crisis, some voters may instead rely on the views of their co-partisans in Congress.[24] The opposition in Congress may be motivated to highlight or exaggerate the scope of a deteriorating foreign policy situation that a president may prefer to keep secret or deemphasize, especially since it allows them to exploit presidential policy failure for political gain.[25] Foreshadowing this dynamic, the President may seek a greater congressional role in foreign policy decisions where there is a high risk of stalemate or policy failure to avoid giving the opposition an issue they can exploit in an upcoming election.[26]

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[21] *See* Jide Nzelibe, *Our Partisan Foreign Affairs Constitution*, 97 MINN. L. REV. 838, 900-904 (2013) (discussing ideological battles over the scope of the treaty power); Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1869-71 (2005) (suggesting that Supreme Court limits of what Congress can through its spending and commerce clause powers may make the treaty clause attractive as an alternative path for certain kinds of social policies); *see also* FLORENCE ELLINWOOD ALLEN, THE TREATY AS AN INSTRUMENT OF LEGISLATION (1952) (expressing concern that the treaty clause might be used as a constitutional vehicle for promoting social legislation that might be otherwise difficult to pass through domestic constitutional channels).

[22] Matthew A. Baum, *Going Private: Public Opinion, Presidential Rhetoric, and the Domestic Politics of Audience Costs in U.S. Foreign Policy Crises*, 48 J CONFLICT RES. 603, 607 (2004).

[23] *See id.* at 627

[24] Matthew S. Levendusky & Michael C Horowitz, *When Backing Down is the Right Decision: Partisanship, New Information, and Audience Cost*s, 74 J. POL. 323, 326 (2012) ("Because ordinary voters lack the information to make a careful assessment of the president's decision, they look to members of Congress . . . for cues about whether to approve or disapprove of the president's decision.").

[25] Baum, *supra* note 22 at 607 ("By the same token, although a President's political opponents will most likely exploit any foreign policy failure to help defeat him, or his party in the next election, the more attention the public pays to a crisis, the easier it will be for his opponents to exploit a poor outcome.").

[26] *See* Jide Nzelibe, *Are Congressionally Authorized Wars Perverse*?, 59 STAN. L. REV. 907 (2007); Tim Groseclose & Nolan McCarty, *The Politics of Blame: Bargaining before an Audience*, 45 Am. J Pol. Sc. 100 (2001).

Thus far, the typology developed here suggests that increased presidential flexibility in foreign affairs may not always be desirable from the perspective of presidential control; indeed, it may elicit unwanted attention from interest groups and their congressional allies that can weaken presidential governance in foreign affairs. The next Part argues that the costs imposed on the President from unwanted attention from interest groups will be quite high. Not only are interest groups likely to place tremendous strains on the foreign affairs bureaucracy, but they are also likely to cause presidents to be subject to greater judicial and legislative scrutiny over their foreign policy choices.

II. ACTIVATING UNWANTED ATTENTION IN FOREIGN AFFAIRS

The analysis in this Part builds on the observation that expanding the President's foreign affairs authority into certain arenas may not only attract the unwanted attention of interest groups but also have the dual effect of attracting the unwanted attention of Congress and courts. Congress may prefer to delegate certain functions to the executive branch that make the President's foreign policy agenda more valuable to interest groups. Such delegation shapes, over time, the structure of the foreign affairs agenda in ways that reproduce dependence on interest group influence, which may then expose the President to further competition from political forces who have different preferences. Moreover, when Congress delegates to the President the authority to impose targeted benefits and costs on narrow interest groups, exercising that authority is more likely to spur judicial intervention.

A. Unwanted Attention by Interest Groups: Incentives to Mobilize

According to Wildavsky's seminal work on the two presidencies, one of the key factors driving presidential dominance in foreign affairs is the relative apathy of interest groups.[27] However, once the choice is made to blur the boundaries between the President's authority in foreign policy and domestic economic or ideological affairs, interest groups will be motivated to organize along industry lines and shape the direction of foreign policy to their liking. With the intrusion of these new competitors for influence in foreign affairs, presidents face two kinds of corrosive effects on their policy agenda. First, I will label a crowd-out effect, and second, I will label the bureaucratic distortion effect. Both have significant implications that may undermine the President's ability to lead foreign affairs effectively.

First, the crowd-out effect is the risk that the President's scarce attention in foreign affairs will be diverted towards placating interest groups at the expense of more pressing policy priorities that may have more diffuse and

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[27] "[I]n foreign policy," he declared, "the interest group structure is weak, unstable, and thin rather than dense." Aaron Wildavsky, "*The Two Presidencies,* 4 TRANS-ACTION/SOCIETY 7, 8 (1966).

Another reason for why he thought interest groups were often uninterested in foreign affairs was because their vital and immediate economic concerns were often not at stake. *See id.* at 12-13.

national effects.[28] This tendency is likely exacerbated by procedural mechanisms that allow private parties to petition the President (or his agents) directly for relief on national security grounds. Take, for instance, Section 232 of the Trade Expansion Act of 1962.[29] That statutory scheme vests the President with significant discretion to impose import restrictions that may impair national security.[30] Not only does the President have considerable leeway to define what constitutes a threat to national security,[31] but he can also choose the level and duration of the retaliation, and his decisions are unlikely to be subject to judicial review.[32] At bottom, the power to retaliate endows the President to provide relief (in the form of tariff protection or quotas) to American corporations who allege that injuries to their economic livelihood merit protection on national security grounds.

Since the power to dispense (or withdraw) targeted economic benefits is now vested in one authority with largely unreviewable discretion, presidents may be overwhelmed by entreaties from interest groups claiming to be injured by foreign competition. In this picture, discretionary remedies available for national security reasons under Section 232 will likely be valuable to interest groups in ways that more standard forms of administrative relief are not.[33] First, because there are no requirements that the President's retaliation against foreign industries be proportional to the injuries suffered, the amount of relief up for grabs can be quite generous.[34] Second, because the criteria of what constitutes a threat to national security are often amorphous and hard to measure,[35] the relevant policymakers have more wiggle room to smuggle in considerations unrelated to policy success. Interest groups have significant leverage in exploiting this ambiguity to steer policy outcomes in their direction. In other words, the desire for reelection

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[28] See Christopher S Cotton & Arnaud Dellis, *Informational Lobbying and Agenda Distortion*, 32 J L. ECON. & ORG. 762 (2016) (arguing that interest groups can supply information in ways that can distort the policy agenda and lead to worse policy outcomes from the perspective of constituents).

[29] *See* Trade Expansion Act of 1962 § 232, 19 U.S.C. § 1862 (2018).

[30] *See id.*

[31] *See* Am. Inst. For Int'l Steel, 376 F. Supp. 3d at 1344–45 ("[I]dentifying the line between regulation of trade in furtherance of national security and an impermissible encroachment into the role of Congress could be elusive in some cases because judicial review would allow neither an inquiry into the President's motives nor a review of his fact-finding.").

[32] *See* U.S. Cane Sugar Refiners' Ass'n v. Block, 683 F.2d 399, 404 (C.C.P.A. 1982) ("[T]he President's] motives, his reasoning, his finding of facts requiring the action, and his judgment are immune from judicial scrutiny."); *see also* Severstal Exp. GmbH v. United States, No. 18-37, slip op. at 15-16 (U.S. Ct. Int'l Trade Apr. 5, 2018) ("To the extent the court may review the action of the President, it is unlikely that the President exceeded his statutory authority.").

[33] One reason is that Section 232 bypasses the procedural and review obstacles that exist in other tariff relief schemes. *See* Chad P. Bown and Douglas A. Irwin, *Trump's Assault on the Global Trading System*, 98 FOR. AFF. 125, 127 (2019) ("In order to avoid administrative review by independent agencies such as the nonpartisan, quasi-judicial U.S. International Trade Commission, the White House dusted off Section 232 of the Trade Expansion Act of 1962.").

[34] *See* Stuart Anderson, *The Lawsuit That Could Stop the Steel Tariffs*, FORBES (Oct. 9, 2018, 12:04 AM), https://www.forbes.com/sites/stuartanderson/2018/10/09/the-lawsuit-that-could-stop-the-steel-tariffs/#c4c7f074d599 [https://perma.cc/56AE-X2KN] (discussing President Trump's approach to Section 272 including the view that there are no limits to the amount of tariffs permitted under the statute).

[35] *See* Am. Inst. For Int'l Steel, 376 F. Supp. 3d at 1344–45 (describing what constitutes a national security rationale under the statute as ambiguous).

will not likely constrain policymakers since it will be difficult for the voter to verify whether the national security exception is invoked for high-minded or more spurious reasons.

The distinctive feature of this system is that available remedies are narrowly tailored to benefit individual groups or companies whose importance to the promotion of national security is assumed to be paramount. Thus, interest groups will be motivated to mobilize along industry or ideological lines and try to shape the executive branch agencies that oversee these relief arrangements in their favor. Such a scheme of administering relief may foster strong patron-client networks between private industries and public officials in ways that do not bode well for policy coherence.

A further concern is that such a scheme will likely exhibit bias towards heavy industry sectors plausibly linked to defense (such as steel and aluminum), at the expense of other sectors such as agriculture and textiles. In such a system, the temptation to shoehorn one's business into a desirable national security category is overwhelming. Groups who lose out initially in qualifying for relief will demand that the services or goods they provide be upgraded as essential to national security or that the services or goods provided by a competitor be downgraded. Vernon described the pathological implications of this dynamic many years ago:

> In the name of defense, the dairy lobby succeeded in restricting imports of foreign cheese. The lace manufacturers claimed defense status because they manufactured soldier's gloves; the cutlery producers because they manufactured machetes ; and the lead-pencil producers simply because pencils were 'in dispensable.'[36]

Another consequence of this mobilization process is that it is likely to create a feeling of dejection and peril in other groups harmed or excluded by the scheme. This resentment will be pronounced among domestic groups relying on foreign imports subject to high tariffs on national security grounds or seeking to export or invest in restricted markets. Once the executive branch imposes import or investment restrictions that hurt their economic fortunes, these companies will likely focus on trying to get around those restrictions.[37] In response to one recent ploy to skirt import restrictions to China by a U.S. chipmaker, the U.S. Secretary of Commerce Gina Raimondo issued a warning to U.S. firms who "engineer around the [regulatory] line" drawn by the U.S. government.[38] Of course, once political fortunes are reversed, the opposing groups (now in power) may seek to dismantle the offensive institutional arrangements and redirect them to their liking. *But this dynamic*

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[36] Raymond Vernon, *Foreign Trade and National Defense*, 34 FOR. AFFAIRS 77, 77-78 (1955).

[37] *See* Raffaele Huang & Asa Fitch, *Nvidia Develops New AI Chips, Again, to Keep Selling to China,* WALL ST J, Nov. 1, 2023, available at https://www.wsj.com/tech/nvidia-develops-new-ai-chips-again-to-keep-selling-to-china-d6977a03 (observing that the U.S. based manufacturer is responding to tightening U.S. regulations by making chips tailored for Chinese customers).

[38] Matt Hamblen, *Raimondo calls out Nvidia, others that sell AI chips to China*, FIERCE ELECTRONICS, Dec. 4, 2023, available at https://www.fierceelectronics.com/electronics/raimondo-calls-out-nvidia-others-sell-ai-chips-china.

points to another danger of interest groups' role in foreign affairs: they will likely spawn policy instability. Once the institutional prerogatives of the executive branch have become deeply enmeshed with those of interest groups, it will be much more difficult for the President to commit to a coherent and predictable course of foreign policy.

But these concerns regarding presidential leadership are only one piece of the story. A second concern is that boundary blurring in foreign affairs may also have bureaucratic distortion effects. Policymakers in the foreign affairs bureaucracy may feel enormous pressure to be responsive to the agendas of interest groups, even when they may not coincide with their larger organizational mission. Thus, policymakers may struggle to preserve their autonomy and mission focus in the face of ever-increasing demands by outside forces.

The Defense Department's lukewarm reception to the Trump administration's pressures to increase tariffs on steel and aluminum imports under Section 232 exemplifies such bureaucratic resistance.[39] Even though the tariff adjustments were supported by both the Commerce Department and President Trump, the Secretary of Defense suggested the adjustments were not necessary for national security reasons.[40] In the face of pressures from industry groups, tariffs were imposed despite the Defense Department's reservations that the tariffs might impair long-term relationships with foreign allies. This episode illustrates that aspects of the foreign affairs bureaucracy might resist the influence of outside forces when they threaten the bureaucracy's core mission. In so doing, these bureaucracies might preserve longstanding relationships with foreign allies against excessive responsiveness to transient forces.

In sum, the upshot is that presidential boundary blurring in foreign affairs may leave the foreign affairs bureaucracy susceptible to capture by interest groups. Of course, at some level, most bureaucracies are subject to cross-pressures from both internal and external influences. But from the President's perspective, what is distinctive about foreign affairs is that there is another crucial consideration at stake: the ability to shape ongoing

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[39] Jonathan Swan, *Commerce recommends major tariffs on steel and aluminum*, AXIOS, Feb. 16, 2018, available https://www.axios.com/2018/02/16/commerce-trade-section-232-tariffs-steel-aluminum (observing that the Secretary of Defense Mathis opposed the Commerce Department's recommendation to use Section 232 to impose tariffs on steel and aluminum on the grounds that it would harm relationships with allies and damage the global economy).

[40] President Trump's own Secretary of Defense, when consulted on the matter, concluded that steel and aluminum imports "do not impact the ability of DoD programs to acquire the steel·or aluminum necessary to meet national defense requirements." *See* Memorandum from the Sec'y of Defense with Response to Steel and Aluminum Policy Recommendations to the Sec'y of Commerce (2018), https://www.commerce.gov/sites/default/files/department_of_defense_memo_response_to_steel_and_aluminum_policy_recommendations.pdf [https://perma.cc/77UD-TAV3]. Admittedly, the Secretary of Defense did mention that the systematic use of unfair trade practices posed a risk to national security. *See id.* However, the Section 232 findings by the Department of Commerce did not focus on unfair trade practices by foreign steel and aluminum industries. Instead, these findings focused on whether steel and aluminum were being imported to the United States in such quantities as to threaten national security because domestic industries were over-relying on such foreign imports. *See* U.S. DEP'T OF COMMERCE, THE EFFECT OF IMPORTS OF STEEL ON THE NATIONAL SECURITY (2018); U.S. DEP'T OF COMMERCE, THE EFFECT OF IMPORTS OF ALUMINUM ON THE NATIONAL SECURITY (2018).

diplomatic relationships with foreign countries. At first glance, interest groups may appear as assets to some of the President's short-term policy goals, but in due course, the dynamics they unleash may impose an obstacle to coherent administration. When that occurs, the President will revert to a more traditional role of safeguarding the foreign affairs bureaucracy from the extravagant demands of interest groups. As discussed later, one way to do so is for the President to muzzle efforts to expand his foreign affairs authority in arenas likely to attract such groups' attention.[41]

B. Unwanted Attention by Congress: Cooption of Presidential Flexibility

According to a conventional strand of constitutional theory, congressional apathy is a primary cause of presidential empire-building in foreign affairs.[42] The assumption is that Congress tends to focus primarily on domestic issues because the domestic arena provides more opportunities for distributive policies.[43] If only Congress would be more engaged and attentive in foreign affairs, the conventional wisdom goes, it could be an antidote to Presidential overreach.[44]

This section presents a contrary perspective. Rather than fight to limit the reach of Presidential authority, an attentive Congress may have an incentive to foist the kinds of foreign affairs powers on a President that she may not necessarily desire. In this picture, the President's flexibility in foreign affairs is viewed by Congress as an underutilized resource, which can then be pressed into the service of Congress's domestic agenda or for sating the preferences of friendly interest groups.[45] However,

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[41] *See* discussion in *infra* Parts III & IV.

[42] *See* Koh, *Why the President (Almost) Always Wins in Foreign Affairs*, *supra* note 1 at 1304 (observing that Congress tends to acquiesce to the President because of "myopia, inadequate drafting, ineffective legislative tools, and an institutional absence of political will"); Wildavsky, *supra* note 27 at 7-14 (arguing that Congress tends to cede to the President a freer hand on foreign affairs matters as compared to domestic policy). This section focuses on the incentives Congress has for acting in foreign affairs and does not address the debates about the textual boundaries of the foreign affairs powers of Congress and the President in foreign affairs. Recent iterations of such debates have focused on the scope of the vesting clauses in Articles 1 and II. *See* Micheal D Ramsey, *The Vesting Clauses and Foreign Affairs,* 91 GEO. WASH. L. REV. 1513 (2023); Julian Davis Mortenson, *The Executive Power Clause*, 168 U. PA L.REV.1269, 1311-39 (2020); Ilan Wurman, *In Search of Prerogative*, 70 DUKE L J. 93 (2020); Saikrishna B Prakash & Michael D Ramsey, *The Executive Power over Foreign Affairs,* 111 YALE L. J. 231, 279-355 (2001).

[43] This notion of Congress's greater attentiveness in domestic policy is implicit in Wildavsky's " The Two Presidencies" thesis. *See* Wildavsky, *supra* note 27 at 26-27; *see also* Brandice Canes-Wrone et al., *Toward a Broader Understanding of Presidential Power: A Reevaluation of the Two Presidencies Thesis*, 70 J. POL. 1, 5 (2008) (arguing that interest groups and Congress are much more active in domestic as to compared to foreign affairs); Amy B. Zegart, *Blue Ribbons, Black Boxes: Toward a Better Understanding of Presidential Commissions*, 34 PRESIDENTIAL STUD. Q. 366, 378-79 (2004) ("Because members of Congress, interest groups, and voters are more attentive and vested in domestic policy issues, the president must work that much harder to set his domestic policy agenda").

[44] *See* Koh, *Why the President (Almost) Always Wins in Foreign Affairs*, *supra* note 1 at 1326-28 (recommending a variety of reforms that will revitalize Congress and build its capacity to be more assertive in foreign affairs).

[45] For a recent piece recognizing that even after delegating authority, Congress might use indirect tools to influence the direction of the President's foreign policy. *See*

because Congress's motivation in seeking greater presidential flexibility is primarily geared towards activating the attention of interest groups, it may not bode well for presidential control in foreign affairs.

There are three reasons why presidential flexibility in foreign affairs may sometimes be useful to Congress but not necessarily augur well for presidential control. The first is that presidential flexibility in foreign affairs can sometimes be wielded selectively by Congress as a weapon: it allows Congress to prod the President to adopt the high-risk foreign policies it prefers but then escape blame if there is a popular backlash from policy failure.[46] In this case, members of Congress may recognize that despite all the benefits one may obtain from the responsibility for foreign policy, there is one significant downside: as a practical matter, foreign policy outcomes may wreck the political careers of elected overseers more often than they bolster them.[47]

Thus, members of Congress may be motivated to choose the means of influencing foreign policy that exposes them the least to political accountability. Take, for instance, the case where the President delivers targeted benefits to industries on national security grounds due to congressional pressure. Members of Congress may reap the benefits in the form of unobstructed delivery of political spoils to their favored groups without having to internalize the costs of policy volatility to foreign allies or the effects on the long-term reputation of the United States. Presidents do not have this luxury. Suppose relationships with foreign countries sour due to national security protectionism, for instance. In that case, presidents are likely to pay a price in the form of less cooperation from allies for their key foreign policy initiatives. Therefore, there will likely be disagreements between the President and Congress on how the President's policy flexibility should be wielded in foreign affairs.

A similar dynamic may apply with respect to high-risk military ventures. Indeed, for opposition members of Congress, foreign policy failure during wartime may have an additional upside: it may supply an issue they can exploit against the President in an upcoming election.[48] Foreseeing this reaction, presidents may sometimes be wary of embarking on high-risk foreign policy initiatives without the political insurance afforded by congressional authorization.[49] For instance, in defending the need for formal congressional

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Rebecca Ingber, *Congressional Administration of Foreign Affairs*, 106 VA. L. REV. 395, 395-97 (2020).

[46] For a discussion of blame evasion and deflection tactics adopted by various political officials, see R. Kent Weaver, *The Politics of Blame Avoidance*, 6 J. PUB. POL'Y 371, 372, 387-88 (1986). For the susceptibility of foreign affairs to the politics of blame, see Baum, *supra* note 22 at 607 (describing how foreign policy decisions are more likely to hurt rather than enhance the President's electoral fortunes).

[47] *See id*.; *see also* Nzelibe, *Are Congressionally Authorized Wars Perverse*, *supra* note 26 at 934 ("[T]he electoral consequences of members of Congress voting for war are usually not symmetric; in other words, it is usually more electorally risky for a member of Congress to vote against a war than to vote for an unpopular war that results in a military failure or stalemate.").

[48] As commentators have observed, congressional deference to the President may actually also serve as an opportunity to concentrate the risks of policy failure on the executive branch. See Myunghoon Kang, *Let presidents fail: Congressional deference to presidents as gambling on failure*, RES. & POL. 1 (2022): *see also* Tim Groseclose & Nolan McCarty, *The Politics of Blame: Bargaining before an Audience*, 45 AM. J POL. SC. 100 (2001).

[49] *See* Nzelibe, *Are Congressionally Authorized Wars Perverse*?, *supra* note 26 at 907-911.

authorization for interventions in Syria and Iraq in 2015, President Obama alluded to the political insurance that such authorization affords.[50]

The second reason presidential flexibility in foreign affairs may be useful to Congress is that it recognizes that couching demands for targeted interest group benefits in terms of national security can be politically attractive.[51] Congress may often find it difficult to use available domestic processes to divert resources to groups they favor. Thus, the national security justification may be an expedient back-channel to help politically important groups.[52] From an institutional perspective, one advantage to Congress is that since responding to national security threats requires significant discretion by the President, such discretion can be harnessed to deliver benefits to favored groups without navigating the myriad institutional and procedural safeguards that mar other aspects of domestic policymaking.[53] Thus, by lowering decision-making costs in national security, Congress may seek to attract greater patronage by interest groups, who will then be vested in defending the policy outcome.

On a more psychological note, the voting public may also be more willing to tolerate a presidential policy decision in which specific industries or businesses are singled out for special treatment without extensive vetting if they perceive that it is undertaken in response to an external threat. The literature on war building and the state has emphasized how burdens or other policy choices that would be intolerable in peacetime are endured with equanimity by the public during wartime or for national security reasons.[54] Members of Congress may be keenly aware that framing requests in national security terms make it much easier to divert scarce resources toward their favored constituencies without provoking the ire of voters. As former Congresswoman Pat Schroeder observed many years ago in a different but somewhat analogous context, "if you want anything for your district . . . the

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[50] *See* discussion in text in *infra* Part IV B.

[51] *See* HELEN MILNER & DUSTING TINGLEY, SAILING THE WATER'S EDGE: THE DOMESTIC POLITICS OF AMERICAN FOREIGN 85-120 (2015) (describing how interest groups and their congressional allies have selective interests in foreign policy issues that implicate economic issues, such as trade, sanctions, economic aid, and immigration); *see also* Jide Nzelibe, *The Credibility Imperative: The Political Dynamics of Retaliation in the World Trade Organization's Dispute Resolution Mechanism*, 6 THEORETICAL INQUIRIES L. 215, 223 (2005) (discussing the role of interest groups in enhancing WTO enforcement); John O. McGinnis & Mark L. Movsesian, Commentary, *The World Trade Constitution*, 114 HARV. L. REV. 511, 546–48 (2000) (discussing the role of interest groups in hampering and encouraging international trade).

[52] *See* Robert Higgs, *Hard Coals Make Bad Law: Congressional Parochialism Versus National Defense*, INDEP. INSTITUTE, March 1, 1988, available at https://www.independent.org/publications/article.asp?id=110.

[53] As commentators have observed, there are fewer constraints on the President's authority to impose economic tariffs for economic reasons when compared to regular trade disciplines. *See* Klaussen, *Trade's Security Exceptionalism*, *supra* note 3 at 1115-31.

[54] This is the psychological underpinning of the so-called rally around the flag effects during a foreign policy crisis. *See* Yuval Feinstein, *Rallying around the President: When and Why Do Americans Close Ranks behind Their Presidents during International Crisis and War*, 40 Soc. SC. HIST. 305 (2016). Also, the state's ability to impose progressive taxation or make other demands on their citizens increases during wartime or an international crisis. *See* Kenneth Scheve & David Stasavage, *The Conscription of Wealth: Mass Warfare and the Demand for Progressive Taxation*, 64 INT'L ORG. 529, 530 (2010) ("It is a characteristic of modern mass warfare that large numbers of individuals make a sacrifice of time, foregone income, and potentially their lives for a collective cause.").

only place there is any money at all is in the Armed Services Committee bill."[55]

To be sure, the most direct route for Congress to ensure that the President does not ignore its policy preferences in foreign affairs is through establishing oversight measures and congressional hearings. But a less direct and more promising route may be to embrace the President's discretion but then narrow his policy options through a sunk-cost strategy.[56] In this case, Congress may encourage interest groups and private parties to adapt to a new institutional arrangement for providing relief on the grounds of national security, which may then constrain the ability of a future President to reverse course. Thus, in the case of national security protectionism, Congress may hope that by spurring the President to routinize and streamline the processes for dispensing relief, it will promote the emergence of a privileged clique of industry groups who will lobby to protect those processes from downstream threats.[57]

The third reason Congress may find presidential flexibility useful is that relative to the President, Congress has fewer tools and resources at its disposal to channel resources selectively to groups that can demonstrate harm on national security grounds. From a purely constitutional perspective, Congress has a significant say in how tariff and non-tariff relief is doled out to various interest groups.[58] In a previous era in American history, it played a much more active role in superintending such trade relief efforts.[59] But as various writers have observed, whatever benefits Congress gained from control over the system for administering trade and investment relief to industry groups in the past, they were often outweighed by the burdens to Congress of administering the system as the number of groups seeking relief expanded. The views expressed by Bauer and his coauthors are typical: "The demands [of Congress administering tariff relief] became such that even ordinary honesty and a modicum of independence became hard to maintain .

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[55] Former U.S Representative Patricia Schroeder (D. Col.) quoted in Higgs, *supra* note 52.

[56] *See, e.g.,* Jide Nzelibe, *The Reliance Interest in Foreign Affairs*, 91 GEO. WASH. L. REV. 1476, 1487-88 (2023) (suggesting that the political influence of interest groups in foreign affairs can help entrench political commitments); Jide Nzelibe, *Strategic Globalization: International Law as an Extension of Domestic Political Conflict*, 105 NW. U. L. REV. 635, 658-82 (2011) (same); Rachel Brewster, *The Domestic Origins of International Agreements*, 44 VA. J. INT'L L. 501, 511-24 (2004) (same).

[57] One option available to political actors to entrench policy is to deploy a sunk-cost strategy that relies on the dependence of interest groups. *See* Nzelibe, *The Reliance Interest*, *supra* note 56 at 1487-88. Other commentators have also pointed out other ways Congress may entrench the power and role of interest groups through structural innovations. *See* Randall S. Kroszner and Thomas Stratmann, *Interest-Group Competition and the Organization of Congress: Theory and Evidence from Financial Services' Political Action Committees*, 88 AMER. ECON. REV. 1163, 1164-65 (1998).

[58] Article I Section 8 Clause 3 of the Constitution grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, §8, cl.11.

[59] *See* Jide Nzelibe, *The Illusion of the Free Trade Constitution,* 19 N.Y.U. J. LEGIS. PUB. POL'Y 1, 6-10 (2016) (discussing the origins of the Congressional delegation of trade-making authority to the President in the 1930s); Karen E. Schnietz, *The Institutional Foundation of U.S. Trade Policy: Revisiting Explanations for the 1934 Reciprocal Trade Agreements Act*, 12 J. POL'Y HIST. 417, 422–29 (2000) (describing the historical and institutional context of trade policy before Congress delegated authority to the President in 1934).

. . To protect their own freedom, congressmen needed to reduce their power to be immediately helpful to their constituents."[60] But one hitherto underappreciated implication of this move to delegate responsibility to the President was that the burdens that members of Congress found so onerous and sought to avoid might also prove to be onerous to presidents.[61] But unlike Congress, presidents do not have the wherewithal to redelegate these responsibilities back.

At first blush, this account seems radically inconsistent with the conventional view that Congress is often inattentive or unengaged in foreign affairs. But this seeming incongruence can be reconciled if we view Congress as being driven by two contradictory yet powerful desires in foreign affairs: (1) the desire to remain aloof concerning those foreign policy issues in which interest groups or its constituents do not have a direct and substantial stake, and (2) the desire to steer the President's focus in foreign affairs towards those kinds of policies most likely to activate the attention of its favored interest groups and constituents. In the first case, the role of Congress is likely to be restrained, and presidential policy flexibility may be an artifact of legislative indifference. In the second case, Congress's approach to presidential policy flexibility will be different and more instrumental. Its approach is more likely to be animated by a desire to make the President's choices more politically relevant to Congress's core constituencies. It may delegate foreign affairs authority to the President but then seek ways behind the scenes to push its preferred policies while also escaping the risks of electoral backlash.

The notion that Congress may choose informal or unorthodox means to influence the President's conduct of foreign policy behind the scenes in ways that favor its constituencies has support in the literature. For instance, Ingber has argued that even though Congress may tend to defer to the President in substantive foreign policy, it will usually try to shape the direction of those policies by manipulating internal decision-making processes in the executive branch.[62] She notes that one common tool that Congress deploys in its effort to shape trade policy is to reassign decision-making to officials within the executive branch who are more sympathetic to Congress's preferences.[63] In an article written decades ago, Huntington argued that instead of limiting the President's discretion by cutting back on costly military projects, Congress often used its leverage to prod the President to spend more on projects that would benefit Congress's core constituencies.[64] Such a dynamic, he observed, turned Congress's intended constitutional role on its head: "[i]n these cases, Congress attempts to use its ancient powers of authorization and appropriation for the positive purpose of establishing floors, whereas these powers were designed originally for the negative purpose of establishing ceilings to prevent a tyrannical executive from maintaining military forces

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[60] RAYMOND A BAUER AT AL., AMERICAN BUSINESS AND TRADE POLICY 37 (2017) (first published 1963).

[61] The author is grateful to Professor Oona Hathaway for sharing this observation.

[62] Ingber, *Congressional Administration of Foreign Affairs*, *supra* note 45 at 395-97.

[63] *See id.* at 415-418.

[64] Samuel P. Huntington, *Strategic Planning and the Political Process*, 38 FOR. AFF. 285, 288 (1960).

without the consent of the people."[65] Thus, consistent with the account given here, he suggests that a bigger concern from Congress's perspective was not that presidents were doing too much with their increased flexibility in foreign affairs but that they were doing too little.

Finally, key differences exist between the claim and other approaches emphasizing congressional control over foreign affairs. Conventional approaches discuss how Congress can sometimes gain control over foreign policy through the backdoor using procedural devices. By contrast, in this case, Congress may prefer to exercise some influence over foreign policy direction without the attendant risks of control. It does so by trying to steer the President towards the kinds of policies that are likely to activate the attention of interest groups. However, rather than focus on delegation to agencies, which are often subject to judicial and other administrative constraints, this section focuses on why presidential policy flexibility may be useful to Congress, even in circumstances where opportunities for congressional oversight may still be quite limited.

C. Unwanted Attention by the Courts: Effects on Deference and Standing

When presidents single out interest groups or individuals for special treatment in foreign affairs, they also risk attracting the unwelcome attention of courts. The reasons are two-fold. First, in exercising their singling out power in favor of specific interest groups or individual parties, presidents may expand the pool of claimants who can meet the standing threshold for bringing viable lawsuits. Second, deference by the courts is a stock that is rarely fixed, even in foreign affairs. Judicial deference to the executive branch can also be depleted or increased. In this case, courts may be wary if they have reason to believe that the President is deploying the foreign affairs powers opportunistically and selectively to benefit partisan allies or favored interest groups.[66] Thus, in singling out interest groups for special treatment, presidents may inadvertently increase courts' opportunities and willingness to intervene in foreign affairs controversies.

Consider, first, the usual role of standing in foreign affairs controversies. The conventional wisdom is that parties often lack standing to bring claims against the government in foreign affairs, especially when a party alleges a generalized grievance "common to all members of the public."[67] However, where the President selectively targets specific industries for special economic benefits, she is also likely to impose concentrated costs or injuries on others. If that occurs, the aggrieved parties in a foreign affairs controversy may be able to demonstrate that they suffered concrete (and not abstract)

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[65] *Id.* at 288

[66] *See* Nzelibe, *The Reliance Interest in Foreign Affairs*, *supra* note 56 at 1503 ("To the extent the goal of deference is to prevent courts from second-guessing the President's expertise or judgment in foreign policy, less deference may be due if courts have reason to believe that the President is acting in a partisan rather than an institutional capacity.")

[67] Ex Parte Lévitt, 302 U.S. 633, 634 (1937) (per curiam) (holding that to demonstrate standing the private individual has to show "that he has sustained or is immediately in danger of sustaining a direct injury as the result of [executive or legislative] action," concluding that "it is not sufficient that he has merely a general interest common to all members of the public.").

economic injuries different from those suffered by ordinary citizens.[68] More importantly, courts may be able to redress these grievances to prevent them from interfering unduly with the President's conduct in foreign affairs, especially if the private party is only seeking monetary relief.[69] At bottom, the irony is that the condition that makes the President's exercise of policy flexibility particularly attractive to interest groups also makes it vulnerable to judicial oversight.

Consider now the second issue of judicial willingness to defer to the President in these kinds of controversies. Beyond the impediment of standing, courts may also be more inclined to intervene in singling out controversies in foreign affairs as a matter of principle. The rationale is simple: imposing a special burden on private entities to promote a public goal will likely offend the judicial norm of impartiality, especially when the burdened party is politically unorganized. And the more the underlying policy serves partisan goals or satisfies the needs of special interest groups at the expense of the politically unorganized, the more likely courts may be willing to intervene. Levmore has expressed the case for judicial compensation in takings cases, for instance, in similar terms: "[t]akings law thus forces the actual payment of compensation to unprotected individuals or groups that do not regularly participate in political bargains because it is with respect to these citizens that the government must be made to internalize costs . . ."[70] More broadly, the Supreme Court has also suggested that singling out individuals for special burdens offends the principle of equal protection: "[N]othing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus escape the political retribution that might be visited if larger numbers were affected."[71] Finally, excessive usage by the President of the singling out power in favor of specific industries or groups might engender judicial skepticism as to whether the national security rationale is being used as a cloak to justify partisan or self-interested goals.

Is there empirical support that courts are more likely to intervene in these kinds of singling out controversies in foreign affairs? It is hard to answer this question in the abstract. However, the preliminary evidence suggests

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[68] *See* Nzelibe, *The Reliance Interest in Foreign Affairs*, *supra* note 56 at 1501 ("[T[here are a set of norms or rules implicating foreign affairs that are more appropriately enforced by the prospect of litigation, especially when they allege violations that are likely to impose a disproportionate burden on a discrete subset of citizens.")

[69] In that case, the President may still implement the policy that injures the party and pay damages. By contrast, equitable remedies like injunctive relief implicate higher stakes in foreign affairs and are thus less likely to be available. As Pamela Karlan has suggested elsewhere, "[i]njunctions are often more intrusive than damages remedies because they make it impossible for the state to decide that it is willing to pay for violating particular statutory rights in order to pursue goals it considers more important." Pamela Karlan, *The Irony of Immunity: The Eleventh Amendment, Irreparable Injury, and Section 1983*, 53 STAN. L REV. 1311, 1329 (1990).

[70] Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285, 311 (1990). The Supreme Court has also appealed explicitly to the norm of impartiality or equal burdens in its takings jurisprudence. *See* Armstrong v. United States, 364 U.S. 40, 49 (1960) (holding that the takings clause is designed "to bar the Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.")

[71] Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring).

that this tendency is plausible. Recent scholarship by Eichensehr and Hwang argues that with the expansion of national security review by the U.S. Committee on Foreign Investment in the United States (CFIUS), there is suggestive evidence that the courts may be deferring less to the executive branch in controversies where the President selectively blocks transaction by foreign investors for national security reasons.[72] They argue that one consequence of having the executive branch blur the boundaries between national and economic security too aggressively may spur judicial skepticism about how strongly and deeply presidents believe in the concerns they espouse.[73] They conclude that "although there is limited case law to date, some evidence suggests that judges are pushing back against the government's economically focused national security claims."[74] To be sure, Eichensehr and Hwang focus their attention on judicial decisions where the government blocked certain foreign investment transactions on national security grounds,[75] but their insights may appear more broadly whenever discrete private parties bear a disproportionate brunt of the impact of foreign policy decisions.

Summing up the commonalities of the foreign policy controversies where judicial intervention is likely, one may argue that distinguishing features include whether the plaintiff will suffer a loss that is particular and not common to the public, the presence of foreign policy polarization, and whether the executive branch decision breaks with longstanding policy without adequate explanation. Indeed, abrupt foreign policy swings by the executive branch across electoral cycles are likely the hallmark of contemporary foreign policy polarization,[76] especially when the groups singled out for special treatment are aligned with specific partisan goals.

Let us examine the relationship between judicial intervention and foreign policy inconsistency more closely. If the executive branch reverses course on its predecessor's foreign policy initiatives without adequate justification, it will arouse suspicion by the courts. Such suspicion is likely to be magnified during periods of foreign policy polarization, where courts may have reason to believe that the President is acting for partisan rather than institutional reasons.[77] For a recent example, consider the following case, characterized by the court's willingness to second guess the executive branch's foreign policy judgment when there was an unexplained policy reversal, and the remedy sought was injunctive relief. In *Indigenous Environmental Network v. United States Dept. of State*,[78] the district court adjudicated a dispute between the Department of

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[72] Eichensehr & Hwang, *supra* note 3 at 590-93.

[73] *See id*. at 590 ("[S]eeing the executive branch make more frequent claims of national security risk could lead to more skepticism among judges about whether the risks are as real or as significant as the executive claims.").

[74] *See id.* at 591.

[75] *See id.* at 591-93 (discussing cases).

[76] *See* Gyung-Ho Jeong1 & Paul J. Quirk, *Division at the Water's Edge: The Polarization of Foreign Policy*, 47 AMER. POL. RES. 58 (2019) (describing severe patterns of partisan conflict in contemporary foreign policy).

[77] *See* Nzelibe, *The Reliance Interest in Foreign Affairs*, *supra* note 56 at 1503- 08 (describing how foreign policy volatility and polarization are likely to lead to less judicial deference in foreign affairs). For a discussion of the relationship between policy polarization and interest group politics, see Jesse M. Crosson et al., *Polarized Pluralism: Organizational Preferences and Biases in the American Pressure System*, 114 AMER. POL. SC. REV. 1117 (2020).

[78] 347 F.Supp.3d 561 (D. Mont. 2019).

State and environmental advocacy organizations regarding the Trump administration's decision to reverse a decision from the Obama era and issue a presidential permit to allow the construction of a cross-border oil pipeline, known as the Keystone pipeline project.[79] Although granting the plaintiff injunctive relief and remanding the case to the State Department for further consideration, the district court had no scruples about offering its own judgment about the State Department's reversal of the position it adopted under the prior administration:

> The Department possesses the authority to give more weight to energy security in 2017 than it had in 2015. . . Kake and State Farm make clear, however, that "even when reversing a policy after an election, an agency may not simply discard prior factual findings without a reasoned explanation." The Department did not merely make a policy shift in its stance on the United States's role on climate change. It simultaneously ignored the 2015 ROD's Section 6.3 titled "Climate Change-Related Foreign Policy Considerations."[80]

It would be a mistake, however, to assume that the greater attention of courts will necessarily result in greater checks against presidential overreach in foreign affairs. On the contrary, it is plausible that a moderate uptick in judicial attention in the foreign policy arenas where judicial deference is recommended (but not required) may cause the President to channel policymaking into other arenas with fewer opportunities for judicial oversight. Take, for instance, the cases where a court sets aside an agency change in position in foreign affairs because the record does not adequately justify it. In response, the President may try to circumvent judicial review altogether by implementing the policy change directly in his institutional capacity rather than channeling it through an administrative agency.

This tendency is plausible because the President's direct policy directives are not subject to review under the Administrative Procedures Act (APA).[81] As a recent illustration, let us revert to the case of the Trump administration's response to the adverse judicial decision in the transborder Keystone pipeline controversy. When the federal district court ruled against the State Department's approval of a permit for the Keystone pipeline for flouting the

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[79] *See* Indigenous Environmental Network, 347 F. Supp. At 561. For background on the Keystone Pipeline controversy, see *Keystone XL Pipeline: Why Is It So Disputed?,* BBC (Jan. 21, 2021), https://www.bbc.com/news/world-us-canada-30103078 [https://perma.cc/47R3-WPR2].

[80] Indigenous Environmental Network , 347 F.Supp.3d at 583. Similarly, in a more recent decision, Xiamo v Dept. of Defense, No. 21-280, 2021 WL 950144, at *2 (D.D.C. Mar. 12, 2021), the district court issued a preliminary injunction against the Department of Defense (DOD) due to its inadequate explanation of its decision to include the plaintiff on a list of companies linked to China's military in which U.S. persons are prohibited from investing. In reaching its decision, the court observed that the statutory designation authority used by the DOD "*went unused for almost twenty years until a flurry of designations were made in the final days of the Trump Administration*," and "[t[his lack of use also undermines the notion that the CCMC designation process is critical to maintaining this nation's security." Id. at *10 (italics added).

[81] Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified in scattered sections of 5 U.S.C); see Franklin v. Massachusetts, 505 U.S. 788, 800–01 (1992) (interpreting the APA to exclude review of presidential action "[o]ut of respect for the separation of powers").

National Environmental Protection Act (NEPA), President Trump revoked that permit and issued one under his own authority instead.[82] By issuing the permit directly, rather than relying on the State Department, the President could insulate his decision from judicial review. In this case, the very mechanism the district court sought to enhance more transparency and accountability by the administrative state might have had the opposite effect: it caused the President to replace one form of bureaucratic policymaking subject to judicial review with one that might be even less transparent.[83]

There may also be analogous concerns of presidential evasion of judicial review in other foreign affairs contexts. Take, for instance, standing doctrines that require that parties demonstrate concrete and particularized harm to bring claims in foreign affairs.[84] But one might worry that the President might easily manipulate these doctrines. Perhaps the desire to evade standing might deflect the President from adopting more transparent policies that harm fewer people (where damages will be narrow and easy to calculate) to more complex policies that might harm even more people (where damages will be ill-defined and hard to calculate). The irony is that where the harm is more widespread and thus more likely to impinge upon the public interest, courts are less likely to conclude that the aggrieved party meets standing.[85] One often touted solution to this problem is relying on electoral sanctions when presidential policies impose harms that are too diffuse to be amenable to judicial resolution.[86] But suppose there is a significant gap between the voters' ability to sanction the President when he imposes diffuse harms and the ability of courts to intervene when he imposes narrow harms on private parties. In that case, the doctrine of standing combined with the President's incentives to evade judicial review might spur more inefficient and socially harmful foreign policies.[87] In any

[82]Brady Dennis & Juliet Eilperin, *Trump signs permit for construction of controversial Keystone XL pipeline*, WASH. POST, March 29, 2019, available at https://www.washingtonpost.com/climate-environment/2019/03/29/trump-signs-permit-construction-controversial-keystone-xl-pipeline/.

[83] See Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy,* 107 MICH. L. REV. 53 (2008) (arguing that a moderate degree of bureaucratic insulation from political control alleviates rather than exacerbates the countermajoritarian problems inherent in bureaucratic policymaking).

[84]*See* SEAN D. MURPHY & EDWARD T. SWAINE, THE LAW OF U.S. FOREIGN RELATIONS 193-95 (2023) (discussing various standing obstacles to bringing civil claims in foreign affairs.

[85] To be clear, there are also prudential considerations why courts are reluctant to allow standing in cases where the plaintiff is alleging a diffuse and subtract harm. See Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 222 (1974) ("To permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would...open the Judiciary to an arguable charge of providing 'government by injunction."').

[86] *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 227 (1974) ("Our system of government leaves many crucial decisions to the political processes. The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.")) (internal quotation marks omitted); *see also* Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 477-79 (2008) (discussing the role that standing plays in screening out cases of generalized grievances that are better handled through the political process).

[87] For a discussion of the risks of voter blind spots in electoral politics that interest groups can exploit, please see Kathleen Bawn et al., *A Theory of Political Parties: Groups, Policy Demands and Nominations in American Politi cs*, 10 PERSP. POL. 571 (2012).

event, other observers have recognized this potentially perverse effect of standing doctrines in other contexts.[88]

Finally, Edward Swaine has also argued that the murky boundaries of Justice Jackson's famous three-category framework for foreign affairs disputes in the Youngstown case might be especially vulnerable to presidential manipulation.[89] Since the possibility of judicial review under Justice Jackson's framework is highest when the President seeks legislative approval for a foreign policy initiative and is rejected,[90] Swaine conjectures that presidents might react to the Youngstown framework by seeking to evade Congressional approval altogether or by only seeking it indirectly.[91] Unlike previous criticisms of the Youngstown framework, Swaine suggests that its effects might not be futile but perverse: "The framework is not just an empty vessel; to the contrary, it affects the behavior of relevant institutions--namely, the president, Congress, and the courts--in ways that may undermine its supposed objectives."[92]

The bottom line is that there are situations in which the President's ability to evade judicial review in foreign affairs controversies might outstrip the judicial ability to police the boundaries of the President's foreign affairs powers. In such situations, the main effect of more intrusive judicial review in foreign affairs might not be to constrain presidential behavior constructively but to channel more policymaking into arenas where judicial and bureaucratic checks on presidential behavior are even less likely.

III. CONDITIONS THAT MAKE PRESIDENTIAL SELF-MUZZLING LIKELY

Presidential empire-building in foreign affairs is hardly an unmitigated curse. Indeed, the received wisdom assumes that presidents usually profit from expanding the reach of their foreign affairs powers into new policy

[88]To be sure, criticisms of standing often focus on the claim that it provides courts leeway to manipulate outcomes for policy or ideological reasons. *See* Dru Stevenson & Sonny Eckhart, *Standing as Channeling in the Administrative State,* 53 B.C. L. REV. 1357, 1414 (2012) ("The current regime, in contrast, gives courts a perverse incentive to use standing to screen out the biggest cases--those that would impose the greatest cost on agency resources if successful . . . At the same time, the current standing rules may encourage courts to allow more picayune claims against the agency, as these claims will seem more concrete and particularized, even though they are less representative and less concerned about the public interest."); Heather Elliott, *Congress's Inability to Solve Standing Problems*, 91 B.U. L. REV. 159, 171 (2011) ("A standard critique of standing doctrine holds that the doctrine is so malleable that courts have unseemly opportunities to implement their policy preferences under the guise of a jurisdictional dismissal."); *but see* Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CALIF. L. REV. 1309, 1329-84 (1995) (arguing that standing doctrines actually operate to prevent the manipulation of precedent by plaintiffs). Elliott has suggested, however, that another downside of standing doctrines is that they may empower the executive branch at the expense of Congress. *See* Elliott, *Congress's Inability*, *supra* note 88 at 174-75.

[89] See Edward T. Swaine, *The Political Economy of Youngstown*, 83 S. CAL. L. REV. 263, 316-24 (2010).

[90] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring). For an outstanding analytic taxonomy of gloss and its rationales, see Curtis A. Bradley, *Doing Gloss,* 84 U. CHI. L. REV. 59 (2016).

[91] *See* Swaine, *supra* note 89 at 272-74.

[92] *Id.* at 272.

domains,[93] such as domestic economic policy or investment regulation.[94] This tendency is likely to prevail when it provides presidents more leeway to harness private economic actors' ambitions (and fears) in the service of broader national security goals.[95] The terminology deployed when the President harnesses the interests of domestic economic actors for national security goals is geoeconomics or economic statecraft.[96]

While conceding that the received wisdom about presidential empire-building in foreign affairs is sometimes true, this Part identifies a range of conditions where the received wisdom may not hold. In discerning whether the costs of expanded policy flexibility to the President will outweigh the benefits, the dangers of losing presidential control will be crucial. In turn, the extent of presidential control over the foreign policy agenda will vary with at least four conditions: (1) the extent to which the President prioritizes foreign policies with long-term and diffuse effects over distributive policies; (2) the existence of a national security crisis and the presence of a super-power adversary; (3) the relationship of the President to the foreign affairs bureaucracy; and (4) the sheer volume of interest groups seeking relief on national security grounds.

When none of these conditions hold, then delegation by Congress to the President is likely to operate as a one-way ratchet, which may lead to a spiral of further presidential encroachments in foreign affairs. In such circumstances, delegation may operate in ways feared by its detractors, prodding the President to blur the boundaries between national security and economic policy. Such a dynamic could lock presidents into an unhealthy cycle of policy vacillations in foreign affairs, where each administration seeks to undo the policy choices of its predecessor in order to pacify a different set of interest groups. To turn around such a dynamic, a new presidential administration must first rebuild confidence, which they may attempt to demonstrate by reinvigorating a new self-muzzling strategy in foreign affairs.

The first condition conducive to presidential self-muzzling is when the President prioritizes foreign policy issues with long-term and diffuse effects over short-term and distributive ones. Issues that fit into the earlier category are unlikely to be the source of targeted political spoils and thus may have no

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[93] *See* Harold Koh, *Why the President (Almost) Always Wins in Foreign Affairs*, *supra* note 1 at 1255-58; Levinson, *supra* note 2 at 956.

[94] *See* Eichensehr & Hwang, *supra* note 3 at 583-85 (describing national security creep in corporate deals but observing that this development comes from a combined effort of Congress and the President to invest more discretion in the President); Kathleen Claussen, *Tax Intelligence,* 72 DUKE L.J. ONLINE 155 (2023) ("In recent years, the United States has increasingly relied on unilateral economic tools rather than military pressure to achieve foreign policy outcomes. This geoeconomic toolkit is diverse. It includes financial sanctions, export controls, and investment review mechanisms among others."); Kathleen Claussen, *Trade's Security Exceptionalism*, *supra* note 3 at 1115-25 (2020) (describing the President's delegated powers to raise tariffs for national security reasons as exceptional).

[95] *See* Victor A. Ferguson, *Economic Lawfare: The Logic and Dynamics of Using Law to Exercise Economic Power*, 24 INT'L STUD. REV. 3 (2022); Abraham Newman & Henry Farrell, *Weaponized Interdependence: How Global Economic Networks Shape State Coercion*, 44 INT'L SEC. 42 (2019).

[96] *See* Elizabeth Rosenberg, Peter Harrell, Paula J. Dobriansky & Adam Szubin, *America's Use of Coercive Economic Statecraft*, CTR. FOR A NEW AM. SEC. (Dec. 17, 2020), https://www.cnas.org/publications/reports/americas-use-of-coercive-economic-statecraft [https://perma.cc/8QH8-37JM]

built-in constituency on their behalf.[97] Examples include long-term defense planning, the deployment of troops abroad, and the distribution of geopolitical aid to specific countries.[98] Interest groups and members of Congress usually ignore these sorts of policies because, unlike trade tariffs, they offer no obvious material advantages.[99] But such policies may be particularly valuable to presidents seeking to secure their long-term legacy in foreign affairs and leave their historical mark on the US's grand strategy.[100] In contrast, Congress may prefer that presidents devote more attention to distributive foreign policies that favor targeted constituencies.

Presidents who care about preserving their long-term legacy in foreign affairs may be motivated to circumscribe their authority to implement distributive policies if it fends off interest groups whose policy preferences may differ.[101] In other words, by restricting their authority to engage in targeted policies that benefit narrow groups, presidents can free up their scarce resources and attention to focus on more diffuse foreign policies that can have broader national implications and long-lasting effects.[102] As Milner and Tingley put it, "[w]hen distributive politics is less at play and ideological divisions are small, presidents will have maximum influence and be able to use the policy instrument with less domestic political cost."[103]

The point is not that targeted benefits or sanctions are irrelevant to the long-term strategic efforts of presidents in foreign affairs. But if presidents want to take advantage of such policy tools, it pays if they do so sparingly.

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[97] *See* MILNER & TINGLEY, SAILING THE WATER'S EDGE, *supra* note 51 at 69 ("When distributive politics is not significant and ideological divisions are small, the president will have the most control over foreign policy. In this setting, Congress will be least likely to intervene . . ."); *see also id.* at 70 ("[W]e expect distributive politics to be very significant for international trade, immigration, domestic military spending, and somewhat less for military aid.").

[98] *See id*. at 79.

[99] *See id.* at 96 (observing that issues like troop deployment and geopolitical aid tend to be of less interest to special interest groups).

[100] The notion that presidents are motivated differently in foreign affairs than members of Congress has strong support in the literature, especially when one focuses on the desire for fame or glory--a motivation that does not necessarily resonate with members of Congress. *See* Adrian Vermeule, *The Glorious Commander-in-Chief*, in THE LIMITS OF CONSTITUTIONAL DEMOCRACY 157 (Jeffrey K. Tulis & Stephen Macedo eds., 2010); David Gray Adler, Presidential Greatness as an Attribute of Warmaking William M. Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695 (1997). For commentary analyzing the importance of grand strategy by contemporary American presidents, see IONUT POPESCO, EMERGENT STRATEGY AND GRAND STRATEGY: HOW AMERICAN PRESIDENTS SUCCEED IN FOREIGN POLICY (2017).

[101] Moe suggests that presidents care less for distributive policies that favor interest groups than members of Congress because "[t]o be judged successful in the eyes of history—arguably the most important motivator for presidents—they must appear to be strong leaders. They need to achieve their policy initiatives, their initiatives must be regarded as socially valuable, and the structures for attaining them must appear to work." Terry M. Moe, *The Politics of Bureaucratic Structure*, in CAN THE GOVERNMENT GOVERN? 267, 279 (John E. Chubb & Paul E. Peterson eds., 1989).

[102] The President's discretion to prioritize certain policy issues and deemphasize others that Congress may prefer to prioritize may have support in Supreme Court doctrine. *See* United States v. Texas, 143 S. Ct. 1964, 1971 (2023) (observing that "[u]nder Article II, the Executive Branch possesses authority to decide 'how to prioritize and how aggressively to pursue legal actions against defendants who violate the law'") (quoting TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2207 (2021)).

[103] MILNER AND TINGLEY, SAILING THE WATER'S EDGE, *supra* note 51 at 66.

Otherwise, they will unleash more demands from interest groups and their congressional allies. Moreover, a cautious approach may also help preserve the status quo, where judges tend to defer to the President's judgment in foreign affairs.[104] When presidential decisions in foreign affairs have mostly diffuse or long-term effects, judges will likely balk at second-guessing the President's judgment. But when presidents shift from policies with little latitude for targeted benefits to policies that predominantly favor specific interest groups, they will likely invite greater judicial scrutiny.[105]

The next condition likely to shape presidential control over the foreign policy agenda and the demand for self-muzzling is the existence of an external crisis. The greater the external threat to the country, such as an escalation from a super-power adversary, the lesser the wiggle room available to interest groups to manipulate or shape policy in ways that do not coincide with the President's foreign policy agenda.[106] In this picture, the existence of an external crisis performs a crucial role: it focuses the public's attention and allows the President to fend off extravagant demands from interest groups when those demands detract from issues of national concern.[107] Presidents can then exercise their authority to target specific groups for select economic benefits or sanctions without worrying about losing control over policy direction.

But here is the catch. Once the perception of an external threat recedes and public attention fades, the President may rely more on political bargains with interest groups and their congressional allies to advance his policies. Take, for instance, the regime of national security protectionism under Section 232.[108] Without a clear external threat that focuses public attention, interest groups will have more room to maneuver as they try to convince policymakers that any threat to their economic livelihood is also a threat to the nation's long-term security.[109] Moreover, these interest groups realize that not only are the amounts of tariff relief and subsidies at stake likely to be quite large, but they are also usually disseminated in a context of almost no judicial constraints and weak administrative oversight.[110] Whether or not the foreign countries adversely affected by this discriminatory scheme are close allies will not usually matter.

At bottom, the absence of a prominent external threat may have unintended effects on the mobilization of interest groups. It creates the most

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[104] *See* discussion in Part II (C) *supra.*

[105] *See id.*

[106] *See* MILNER & TINGLEY, SAILING THE WATER'S EDGE, *supra* note 51 at 48 (describing how interest groups have less influence over the political process in issues like military deployments); Wildavsky, *supra* note 27 at 8-13 (describing the weakness of interest groups in national security and foreign affairs).

[107] Yuval Feinstein, *Rallying around the President: When and Why Do Americans Close Ranks behind Their Presidents during International Crisis and War?*, 40 SOC. SC. HIST. 305 (2016); John R. Oneal & Anna Lillian, *The Rally 'Round the Flag Effect in US Foreign Policy Crises*, 1950–1985, 17 POL. BEH. 17 (1995).

[108] See discussion in text in *infra* Part III.

[109] *See* Lincicome & Manak, *supra* note 9 at 6 (The conflation of economic security and national security also makes Section 232 ripe for abuse, and by

equating a single U.S. industry's financial prospects with the overall national security, imports of almost anything can be said to threaten national security (and thus be restricted)").

[110] *See id*. at 6-7.

favorable conditions for interest groups seeking targeted benefits unconnected to any immediate threat. Yet these are precisely the conditions under which national security protectionism is most likely to alarm foreign allies of the United States.[111] Put differently, foreign allies are likely to be particularly wary when the President embarks on an aggressive course of national security protectionism targeting their home corporations when there are no obvious existential threats to the United States. Thus, in being responsive to the demands of domestic interest groups to intervene selectively in global markets, the President risks alienating the foreign allies whose cooperation he may need to rely upon in the event of a genuine geopolitical crisis. Under these circumstances, the President may eventually view his expanded authority to engage in national security protectionism as less of an asset and more of a liability to his foreign policy agenda.

Another condition that affects the likelihood that the costs of policy flexibility to provide targeted benefits to interest groups will outweigh the benefits is the attitude of the President to the foreign affairs bureaucracy.[112] To the extent a President considers the foreign affairs bureaucracy an essential ally in pursuing her policy agenda, she may seek to safeguard it from the unwelcome attention of outside forces and interest groups.[113] Presidents may worry that too much coziness between the foreign affairs bureaucracy and interest groups may cause the bureaucracy to prioritize responsiveness to group demands over the President's core initiatives in foreign affairs. In such circumstances, the President may prefer to muzzle the bureaucracy's authority to dispense targeted benefits as a strategy to divert the attention of interest groups. However, to the extent that a president prefers to neutralize a hostile foreign affairs bureaucracy, she may instead welcome the disruptive role and attention imposed by new and outside forces.[114]

The attitudes of presidents to the foreign affairs bureaucracy may vary depending on whether they are seeking policy continuity or are seeking to undo long-standing policies or norms. Writing a couple of decades ago, Huntington suggested that cold-war presidents often tried hard to shield the decision-making process within the national security bureaucracy from the influence of interest groups and their congressional allies, especially during the strategic planning process.[115] He attributed the cautionary approach of presidents to the need to preserve the delicate compromise achieved from bargaining among the various units of the defense bureaucracy from unraveling due to the intrusion of outside forces. In such circumstances, Huntington concluded, "the primary role of the Administration has to be

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[111] *See id.* at 7 (discussing how President Trump's Section 232 tariffs on aluminum rattled foreign allies like Canada).

[112] *See* MILNER & TINGLEY, SAILING THE WATER'S EDGE, *supra* note 51 at 69-71 (discussing how Congress is reluctant to give up control to the President when policies significantly affect interest groups.).

[113] *See* Moe, *The Politics of Bureaucratic Structure*, *supra* note 101 at 281-82 (explaining why presidents who want an effective bureaucracy may find the excessive influence of Congress and interest groups a hindrance).

[114] David Noll explores instances where presidents may seek to undermine an agency or federal programs that do not align with their policy preferences or goals. *See* David Noll, *Administrative Sabotage*, 120 MICH. L. REV. 753, 784-86 (2022).

[115] *See* Huntington, *supra* note 64 at 296-98.

defensive: to protect the balance of interests, the policy equilibrium which has been laboriously reached within the Executive, against the impact of profane forces and interests outside the Executive."[116]

Huntington's forcefully stated thesis might be better viewed as contingent, as the recent experience with the Trump administration tells a different story. In that case, the administration's populist stance and skepticism of the deep state made it more receptive to the weakening of the foreign affairs bureaucracy, especially with regard to the State Department.[117] Perhaps the Trump administration might have viewed the role of nationalist interest groups in shaping foreign policy with less trepidation, believing they could act as a hedge against a "run-away" bureaucracy.[118] In this picture, it is plausible that the Trump administration might have intended to tame the State Department and infuse it with more populist values. But a less sanguine interpretation might be that rather than refocus the State Department on a new and different set of policy goals, the Trump administration undermined it.[119] In any event, the probability that a president will view the foreign affairs bureaucracy's responsiveness to interest groups as desirable will vary depending on whether the goal is to disperse rather than enhance the influence of a particular bureaucracy.

Finally, the notion that certain conditions may prompt the executive branch to constrain itself on certain policy issues has antecedents in the literature. For instance, Ingber has argued that certain self-constraining mechanisms in national security are rooted in the diffuse nature of the administrative state.[120] However, she argues that advocates of internal constraints within the administrative state tend to exaggerate their effectiveness in reigning in executive branch overreach.[121] Closely related is an argument by Michaels, who argues that presidents may sometimes cede control over national security policy to independent agencies or third parties

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[116] *Id*. at 298.

[117] *See* Daniel W. Drezner, *Present at the Destruction: The Trump Administration and the Foreign Policy Bureaucracy*, 81 J. POL. 723 (2019); Elliot Abrams, *Trump vs the Government*, 98 FOR. AFFAIRS. 129 (2019). For a broader discussion of resistance by the foreign affairs bureaucracy to the President in foreign affairs. *See* Rebecca Ingber, *Bureaucratic Resistance and the National Security State*, 104 IOWA L. REV. 139 (2018).

[118] For a discussion of the role of populist rhetoric under the Trump administration in shaping domestic support for his foreign policy, see Jean-Christophe Boucher & Cameron G. Thies, *"I Am a Tariff Man": The Power of Populist Foreign Policy Rhetoric under President Trump*, 81 J. POL. 712 (2019).

[119] See Drezner, *Present at the Destruction*, *supra* note 117 at 723-24 (arguing that the Trump administration largely failed in embedding its foreign policy ideas into new or existing foreign policy institutions). Harold Koh has also argued that policy analysts and transnational norm entrepreneurs might have blunted the impact of many of President Trump's initiatives to shape international law and foreign affairs. *See* Harold J Koh, *The Trump Administration and International Law*, 56 WASHBURN L.J. 413 (2017).

[120] *See* Ingber, *Bureaucratic Resistance*, *supra* note 117 at 139-41; For other commentators who have discussed internal bureaucratic restraints within the executive branch, see Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2318 (2006); Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 7 (2017); Jon D. Michaels, *An Enduring, Evolving Separation of Power*s, 115 COLUM. L. REV. 515, 520 (2015); Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1716-20 (2011).

[121] *See* Ingber, *Bureaucratic Resistance*, *supra* note 117 at 220.

to improve effective administrative governance.[122] Michaels focuses on how presidents use the sub-delegation of authority within the executive branch and self-constraints as tools to further their policy goals.[123] By contrast, in the framework espoused here, presidents muzzle themselves on foreign policy to avoid the issues likely to mobilize interest groups and stave off unwanted interference from courts and Congress. Presidents are motivated more by fear of the harms that interest groups can inflict on their agenda than by enthusiasm for promoting their policy objectives. In this picture, presidents are likely to be selective in the kinds of foreign policy issues they choose to invest their resources and attention. They may be wary of those issues that impose concentrated rather than diffuse costs on interest groups.

IV. ILLUSTRATION OF THE THEORY: PRESIDENTIAL SELF-MUZZLING IN NATIONAL SECURITY PROTECTIONISM

To recapitulate, one solution to the problem of excessive influence of interest groups in foreign affairs is for presidents to muzzle themselves and screen out portions of their foreign policy agenda likely to excite the public imagination and attract unwanted attention from interest groups and Congress. In trying to muzzle themselves, Presidents may employ three different techniques. First, they may announce publicly and openly that they do not intend to use the authority delegated to them by Congress in a specific way; second, they may impose obstacles, delays, or additional processes on parties seeking relief, which are above and beyond what Congress requires; and third, they may demand that Congress explicitly bear some of the responsibility for a foreign policy initiative, even in circumstances where Congress may prefer not to do so.

The first extended illustration is based on President Eisenhower's self-muzzling strategy in dealing with petitions for national security protectionism in the 1950s. But another case also fits the framework: President Reagan's response to similar petitions for relief in the 1980s. Both presidents faced significant pressures due to economic downturns to use their expanded policy flexibility to provide relief to injured industries on national security grounds. But rather than respond to the barrage of requests from industry groups, they imposed obstacles on their powers with the goal of deflecting unwanted attention. Some recent examples cut against the theory: the Trump and the Biden administrations' experience with Section 232 petitions from industry groups. But there is less than meets the eye in that situation because it may prove to be a cautionary tale of presidents who failed to muzzle themselves but then lost control of the agenda to industry groups.

A. President Eisenhower's Reaction to National Security Protectionism

[122] *See Jon D. Michaels, The (Willingly) Fettered Executive: Presidential Spinoffs in National Security Domains and Beyond*, 97 VA L. REV. 801, 808-09 (2011).

[123] *See id*.

The first illustration of presidential self-muzzling in foreign affairs comes from the escape clause of the 1954 Trade Act,[124] which became the precursor of the modern Section 232. The relevant provision in that statute was quite terse: it cautioned the President not to reduce the tariff on any article "if the President finds that such reduction would threaten domestic production needed for projected national defense requirements."[125] In the immediate post-war era, the growth of the Soviet threat and growing import competition made the moment ripe for entreaties by private groups seeking relief on national security grounds.[126]

One powerful source of agitation in the United States came from the domestic jeweled watch industry. Swamped by competition from Swiss imports, the industry claimed it suffered serious injury and sought tariff protection because it was indispensable to national security.[127] President Truman had already turned down an earlier request by the industry in 1952.[128] But the pressure for relief did not ebb. Two years later in 1954, the industry renewed its petition for tariff protection under the Eisenhower administration.[129] Facing a plausible threat of tariff legislation from Congress,[130] President Eisenhower relented and agreed to raise tariffs on Swiss jeweled watches on the grounds that domestic watchmaking was crucial for military readiness.

Though it might seem innocuous today, the Swiss watch tariff dispute was polarizing and mired in controversy. "No other tariff question involving a single commodity," one commentator observed, "had attracted as much attention in postwar years as the watch case."[131] First, the decision elicited serious diplomatic denunciation from the Swiss government and other European allies, and domestically, the reaction in the public and press was also overwhelmingly negative.[132] Second, whatever bureaucratic coordination the

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[124] Trade Agreements Extension Act of 1954, ch. 445, § 2, 68 Stat. 360, 360 (1954).

[125] *Id.*

[126] *See* RACHEL F. FEFER ET AL., CONG. RESEARCH SERV., R45249, SECTION 232 INVESTIGATIONS OVERVIEW AND ISSUES FOR CONGRESS 36-37 (2019) ("Concern over national security, trade, and domestic industry was first raised by the Trade Agreements Extension Act of 1954.").

[127] For a detailed overview of the Swiss watch tariff controversy, see PERCY WELLS BIDWELL, WHAT THE TARIFF MEANS TO AMERICAN INDUSTRIES 88 (1956).

[128] *President Rejects Watch Tarriff as Harmful to the US*, NY TIMES, Aug. 15, 1952 available at https://www.nytimes.com/1952/08/15/archives/president-rejects-watch-tariff-rise-as-harmful-to-u-s-he-stresses.html

[129] Charles Egan, *President Raises Duty on Watches, Swiss Indignant,* NY TIMES, July 18, 1954, https://www.nytimes.com/1954/07/28/archives/president-raises-duty-on-watches-swiss-indignant-decision-linked-to.html

[130] *See* James Minifie, *American Fiscal Policy: Freet Trade or Self-Sufficiency*, 11 INT'L J., 25, 30 (1956) ("The word was passed that, if the White House continued to ignore the Tariff Commission's recommendations, legislation could be introduced and would be passed, removing the President's discretion and making the Commission's recommendations mandatory. The threat was sufficient to make the Administration seek about for scapegoats . . . .").

[131] BIDWELL, *supra* note 127 at 88.

[132] *See id*. at 90 ("A country-wide survey of editorial opinion, financed by the importers' association, showed that 79 percent of the U.S, daily newspapers which commented on the watch decision were opposed to it."); *see also id* at 91 ("With one blow the President proved, to the satisfaction of everyone in Europe who cares about such things, that all the Socialists, Communists, neutralists and home grown anti-Americans say about the United States is right…") (quotations omitted).

President had hoped for was undermined by the embarrassing revelation of a declassified Defense Department document that appeared to show that the Department did not support the watch industry's request for relief.[133] But President Eisenhower had been misled into thinking that all the relevant government agencies had been in coordination and supported the request.[134] Third, and finally, there was considerable concern that the Swiss Watch dispute could establish a precedence for using the national security escape clause as a primary avenue for protection and lead to an onslaught of industry petitions for relief.

Was there any indication that President Eisenhower became ambivalent towards his newly acquired discretion to grant protectionist relief based on national security? An important one is suggested by Friedberg: "From 1954 onwards the [Eisenhower] administration sought actively to discourage national security protectionism. Industry petitions were repeatedly rejected, often after long and frustrating delays. Government officials advised business executives and members of Congress that they had no intention of treating the national security provisions in the trade law as a substitute for routine procedures for requesting protection."[135]

By rarely exercising an authority invested in him by Congress after the resolution of the Swiss watch dispute, President Eisenhower engaged in self-muzzling in foreign affairs. He understood that maintaining complete policy flexibility on national security protectionism could jeopardize his ability to conduct a coherent and stable foreign policy. First, flexibility could render the defense bureaucracy vulnerable to pressures from interest groups that could thwart less particularistic foreign policy objectives.[136] Second, such flexibility could heighten uncertainty about the US's global commitments since foreign allies would expect constant political struggles between interest groups to result in wild swings in policy. In response to these potential threats, Eisenhower adopted a posture of tactical deflection: he resolutely declined to entertain future claims of tariff protection by manufacturing groups on national security grounds. He did agree to use the authority to provide relief to the oil industry largely because of concerns about volatility in the Middle East.[137] Still, he balked at providing such relief to the manufacturing sector. By constraining himself, he sought to neutralize national security protectionism as

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[133] *See id.* at 120-21 (discussing inconsistencies between declassified Department of Defense report and the recommendations made to President Eisenhower by an Interdepartmental Committee"); *see also* Minifie, *supra* note 130 at 30 ("Defense Department correspondence, later made public, showed that the Department did not in fact consider that the number of men involved was significant from the defense viewpoint. In other words an invalid argument had been allowed to go right up to the President, and had been a deciding factor in his decision. This is a very grievous matter.").

[134] *See* BIDWELL, *supra* note 127 at 119-21.

[135] AARON FRIEDBERG, IN THE SHADOW OF THE GARRISON STATE: AMERICA'S ANTI STATISM AND ITS COLD WAR GRAND STRATEGY 230 (2000).

[136] *See id.* at 229 ("This trend [of industries seeking protection] alarmed executive branch officials, who warned that any further surrender of ground would result in "a wave of applications to the President [from manufacturers] for classification as products needed for projected national defense.") (quotations omitted).

[137] *See id*. at 230.

a major issue over which future political battles over foreign policy would be conducted.[138]

To appreciate the motivation behind the effort to fend off unwelcome attention by interest groups in foreign affairs, it is useful to look closely at President Eisenhower's own rhetoric. For instance, during a meeting with the National Security Council in 1959, he suggested that increases in tariffs to protect local industries on national security grounds might have the opposite effect of undermining national security. According to a Memorandum that reported on the meeting:

> The President then referred to the National Security Amendment designations in the Trade Agreements Act. He was sure that in this connection, there was one consideration which, while it could not be accurately weighed, was nevertheless of very great importance. . . To illustrate his point, the President cited what he described as the near hysteria occasioned in the U.K. by our decisions against importing British electrical equipment. *The President believed that trade restrictions which tend to drive away an ally as dependable as Great Britain would do much more harm in the long run to our security than would be done by permitting a U.S. industry to suffer from British competition*.[139]

In a separate address before Republican congressional leaders, President Eisenhower reiterated the same sentiment, emphasizing again the priority of maintaining good relationships with foreign countries over injuries to domestic business interests: "all problems of local industry pale into insignificance in relation to the world crisis."[140] Eckes documents numerous other instances where, in the context of dealing with requests for tariff relief, Eisenhower and various officials in his administration expressed concerns that protecting domestic industries would, on balance, do more to threaten national security than protect it.[141] For a while, the strategy adopted by the Eisenhower administration worked. With all the denials of relief, the 1954 Trade Act ceased to be a credible outlet for industries seeking protection under the guise of promoting national security.

But presidential self-muzzling could not completely quell the pressures for protectionist relief. Interest groups eventually turned to Congress to get help in overcoming presidential resistance. Indeed, between 1954 and 1962, a curious pattern of institutional politics emerged: Congress would pass legislation expanding the President's authority to offer industry relief on

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[138] *See id*. ("By the end of the decade, an internal review could point with pride to "a consistent pattern of denials" of industry petitions and to the fact that "the OCDM... has been exemplary in upholding the President's liberal world trade policy.") (quotations omitted).

[139] Memorandum of Discussion at the 409th Meeting of the National Security Council, June 4, 1959, available at https://history.state.gov/historicaldocuments/frus1958-60v04/d101.

[140] Quoted in Alfred Eckes, *Trading American Interests*, 4 FOREIGN. AFF. 135, 140 (1992).

[141] *See id.* at 145-46.

national security grounds.[142] The President would then respond by efforts to discourage or ignore pressures by interest groups. As long as the President activated one strategy to deflate vested interest group pressures, it would be undercut by another, initiated by members of Congress who stood to lose when their favorite vested interest groups were ignored.

In 1955, for instance, Congress amended the Trade Act to explicitly empower the President to take necessary actions to "adjust imports of such article [deemed to be imported in such quantities as to threaten national security."[143] Then in 1958 Congress enlarged the scope of the 1955 Trade Act by requiring that the Director of the Office of Defense and Civilian Mobilization launch an investigation upon the "request of the Department of Agency, *upon the application of an interested party,* or upon his own motion."[144] One commentator observed that "this broad language raised concerns that virtually every industry could qualify for relief under the auspices of having national security importance."[145] Despite all these legislative initiatives to increase access to protection,[146] however, President Eisenhower did not relent in denying requests for tariff relief on national security grounds.

Eventually, the basic outline of the modern legal regime for national security protectionism was established in 1962 after Eisenhower left office. Section 232 of the Trade Expansion Act of 1962 provides the President (in coordination with the Department of Commerce) with significant discretion to retaliate against foreigners on imports that may impair national security. The 1962 Act retained the basic provisions of the 1958 amendment but also provided that in defining the scope of "national security" the government "shall take into consideration the impact of foreign competition on the economic welfare of individual domestic industries."[147] Furthermore, the legislation also required that the President consider any "loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports."[148] However, the reluctance of presidents to use this power to assuage interest groups over the next few decades did not abate. Until the Trump administration, there were 26 different investigations launched under Section 232, and only in 6 of those investigations (most of which involved petroleum and oil products) did a

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[142] Edward E. Groves, *A Brief History of the 1988 National Security Amendments*, 20 L POLICY IN INTER. BUS. 589, 589-92 (1989) (chronicling all the legislative changes that took place between 1954 and 1962).

[143] Trade Agreements Extension Act of 1955, ch. 169, sec. 7, § 2(b), 69 Stat. 162 (1955).

[144] Trade Agreements Extension Act of 1958, Pub. L. No. 85-686, sec. 8, § 2(b), 72 Stat. 673 (1958).

[145] Groves, *supra* note 142 at 591.

[146] As one commentator observed, the amendments by Congress were often designed in mind to encourage greater usage by industry of the relief provisions. *See* David D. Knoll, *Section 232 of the Trade Expansion Act of 1962:Industrial Fasteners, Machine Tools and Beyond,* 10 MD. J. INT'L L. 55, 58 (1986). ("Senator Byrd urged adoption of these amendments because they "further strengthened [the national security clause] so that sound results may be expected from it.").

[147] Trade Expansion Act of 1962, P.L. 87-794, §232(b)-(c), 76 Stat. 877 (codified as amended at 19 U.S.C. §1862(b)-(c)).

[148] *Id*.

President make a finding in favor of industry.[149] The last time before the Trump administration that a President made a positive finding under Section 232 was in 1986.[150]

The fundamental dilemma faced by Congress over national security protectionism in the postwar decades was how to thwart a presidency that was stubbornly resistant to exercising the national security powers thrust upon it. In addition to those mentioned above, one approach was to delegate specific fact-finding authority over establishing injury to a different agency that might be more sympathetic to concerns of local industry. This latter approach would counteract the influence of the President and the rest of the national security bureaucracy, who might be more vested in maintaining good relationships with foreign states. As Rebecca Ingber has recently observed, such strategic delegation in foreign affairs has long been one of tools "that [Congress] may deploy to influence the nation's foreign policy, short of mandating the substance itself."[151]

President Eisenhower's preferred tactic to deflect national security protectionism was a precommitment approach; in other words, he used public pronouncements to communicate that he did not intend to use his increased flexibility to protect local industry from foreign competition. But the question remains whether this was a credible strategy to deflect the attention of interest groups and Congress, especially over the long run. Even if President Eisenhower was normatively committed to his position, how could one be sure his successors would share similar commitments? How could interest groups be sure that future presidents would not eventually succumb to industry and congressional entreaties and reverse course? As Elster has observed elsewhere in a different context, "the problem [of such self-binding strategies] is whether the bureaucracy is able and willing to make itself unable to interfere, since the temptation to do so will always be there."[152] In this case, it is plausible that interest groups might bide their time and wait for more propitious circumstances, such as the election of a president who might be more receptive to their preferences.

B. President Reagan's Further Procedural Restrictions

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[149] *See* CONG. RES. SERV., R45249, SECTION 232 INVESTIGATIONS: OVERVIEW AND ISSUES FOR CONGRESS (Aug. 24, 2020), https://fas.org/sgp/crs/misc/R45249.pdf [https://perma.cc/L3N6-UYXB] ("Prior to the Trump Administration, there were 26 Section 232 investigations, resulting in nine affirmative findings by Commerce. In six of those cases the President imposed a trade action."). However, it appears that no prior President had used Section 232 to impose tariffs; in other words, they imposed other trade actions such as embargoes. *See* Glenn Thrush, *Trump's Use of National Security to Impose Tariffs Faces Court Test*, N.Y. TIMES, Dec. 19, 2018, https://www.nytimes.com/2018/12/19/us/politics/trump-national-security-tariffs.html [https://perma.cc/E2V5-H3WF] ("But, according to Ms. Hogan, no president had used Section 232 to impose tariffs before Mr. Trump placed tariffs of 25 percent and 10 percent on steel and aluminum imports this past spring.").

[150] *See* CONG. RES. SERV., SECTION 232 INVESTIGATIONS: OVERVIEW AND ISSUES FOR CONGRESS, *supra* note 149 at 3.

[151] Ingber, *Congressional Administration of Foreign Affairs*, *supra* note 45 at 401.

[152] JON ELSTER. SOLOMONIC JUDGMENTS: STUDIES IN THE LIMITATION OF RATIONALITY 197 (1989).

From the Eisenhower administration through the 1970s, a discernible pattern in national security protectionism controversies emerged: when private parties initiated claims under Section 232, they were rejected.[153] But requests initiated by government agencies under Section 232 fared better.[154] Thus, the private petition mechanism through which industries could initiate investigations was hardly ever deployed successfully. Yet these developments pale when compared to what happened under the Reagan administration. By the early 1980s, the political context had shifted: there was mounting pressure from Congress to protect American industry in the wake of a perceived US decline in global competitiveness. Faced with the prospect of an onslaught of industry petitions under Section 232,[155] the Reagan administration responded by imposing intricate and cumbersome procedures on its authority to grant relief to industry groups.

More specifically, these procedures included centralizing oversight authority over Section 232 relief within the National Security Council (NSC), requiring extensive consultative requirements across multiple agencies, and establishing more stringent criteria for private parties seeking relief.[156] The administration also required that the NSC coordinate an extensive inter-agency study considering various security scenarios for Section 232 relief.[157] A former NSC staffer analogized this tedious and elaborate inter-agency process as an effort "to study the problem to death."[158] Imposing all these extensive consultative and study requirements inhibited or significantly delayed the review of Section 232 relief petitions.[159]

An example illustrates the extent of the Reagan administration's discomfort with national security protectionism. In 1983, the National Machine Tool Industry sought Section 232 relief from foreign competition on the basis that the machine tool industry was vital to national security.[160] This controversy dragged on for three years before a final resolution was reached.

The stalling and delay tactics undertaken by the Reagan White House in response to the request by the machine tool industry have already been the subject of critical commentary.[161] But a brief outline of these tactics is worth recounting. Initially, after a year of investigation, the Commerce Department concluded that imports of a class of machine tools threatened to impair

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[153] *See* Groves, *supra* note 142 at 592-94.

[154] *See id*.

[155] Aaron Friedberg, *The End of Autonomy: The United States after Five Decades*, 20 DAEDALUS 69, 73 (1991).

[156] Richard Levine, *Trade vs. National Security: Section 232 Cases*, 7 COMP. STRATEGY 134, 135-38 (1988) (describing detailed procedures set up by Reagan administration to handle Section 232 disputes).

[157] *See id*. at 135

[158] Friedberg, *The End of Autonomy, supra* note 155 at 73.

[159] *See* Levine, *supra* note 156 at 135 ("The administration did attempt to buttress itself from domestic political pressures on 232 cases by creating and adopting an extremely detailed and comprehen-sive methodology to determine if a given good would be in short supply in a war.").

[160] For a detailed description of the machine tool controversy, see Groves, *supra* note 142 at 594-97; *see also* Levine, *supra* note 156 at 138-40.

[161] See CLYDE PRESTOWITZ, TRADING PLACES: HOW WE ARE GIVING OUR FUTURE TO JAPAN & HOW TO RECLAIM IT 381-90 (1990) (criticizing the protracted decision-making on the machine tool dispute and the Reagan administration's reluctance to impose tariffs on national security grounds).

national security.[162] Dissatisfied with this outcome, the White House ordered the Department to rerun its investigation using different, updated data.[163] The Department complied and then produced another report two years later, in 1986, recommending relief. Considerable efforts were then made to solicit input from the NSC, the Office of Management and Budget, and other agencies, some of which were skeptical of the Commerce Department's approach.[164] At first, the Reagan administration seemed reluctant to act on the recommendation to grant relief. Eventually, to ward off congressional intervention, the administration agreed in 1986 to negotiate voluntary restraint agreements (VRAs) with certain leading exporters of machine tools.[165] But even at this stage, the administration's use of VRAs (rather than the remedies authorized under Section 232) confirmed its reluctance to establish precedence for using Section 232. Notably, the administration did not reach a formal finding that the import of machine tools endangered national security. [166]

If President Reagan was diligent in his efforts to mount roadblocks on his own authority to dispense protectionist benefits under Section 232, Congress was equally diligent in its willingness to dismantle them. When the 1962 Trade Agreements Act was amended in 1988, it included a provision that required the President to take action on a Section 232 report within 90 days and to announce the action no longer than 15 days after that.[167] It also shortened the period in which the Department of Commerce had to investigate Section 232 claims from one year to 270 days.[168] As one commentator observed, "the amendments . . . were motivated by the three-year delay suffered by the [machine tool] industry . ."[169] During Senate hearings on an earlier version of the amendments in 1985, Senator Byrd of West Virginia highlighted presidential timidity in enforcing Section 232 as grounds for congressional intervention:

> Despite a consistent effort to strengthen the statute, congressional intent remains frustrated by inaction on the part of successive administrations. For a confusing and sometimes elusive litany of reasons, presidents have not granted relief to any industries filing petitions under Section 232, with the sole exception of petroleum products. Why? Have all other petitions been groundless?[170]

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[162] *See* Levine*, supra* note 156 at 138-39; Groves, *supra* note 142 at 596-97.

[163] *See* Levine, *supra* note 156 at 138-39.

[164] *See id*. at 139-40.

[165] *See id*. at 140 ("It is very clear, however, that a predominant factor in the President's decision was to avert the far more pernicious Omnibus Trade Bill that was then pending in Congress.").

[166] *See* Levine, *supra* note 156 at 140 ("This [VRA] decision, like the ferroalloys case that preceded it, was made without a finding that imports threatened the national security. Again, there was concern regarding the precedent-setting nature of such a declaration as well as the diplomatic ramifications of calling into question the wartime reliability of key allies . . .")

[167] Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988).

[168] *Id.*

[169] Groves, *supra* note 142 at 602.

[170] S. 1533, 99th Cong., 1st Scss., 131 Cong. Rec. 21,658-60 (1985).

Overall, the Reagan administration deliberately tried to avoid setting any precedent that Section 232 could be a reliable source of relief for industry groups seeking protection on national security grounds. But it was not merely the tendency to deny petitions for relief that marked the administration's approach. It was also an effort to institutionalize constraints on the executive branch's discretion in ways that would protect the national security bureaucracy from being inundated by requests for relief from private industry. At bottom, the imposition by the executive branch of extensive consultative requirements among multiple agencies and the establishment of stringent and burdensome criteria for relief introduced powerful biases against using national security as a justification for protectionism.

C. President Trump's Revival of National Security Protectionism

These precommitment strategies by the White House against national security protectionism proved to be fragile, however. The conditions that rendered such strategies favorable under the Eisenhower and Reagan administrations proved contingent. Both presidents benefited from having the foreign affairs bureaucracy shielded from the unwanted influence of interest groups and their allies in Congress. But what happens when a populist President is not particularly enamored of the foreign affairs bureaucracy and seeks to subvert it or reorient towards different objectives, such as protecting American industry?[171] Would he prefer to activate interest groups and use them as a shield against a potentially hostile foreign affairs bureaucracy?

An example from early in Trump's presidency illustrates the point. In the context of Section 232, President Trump decided to buck the longstanding consensus on presidential restraint and embrace an "America First" approach that prioritized protectionist relief to domestic industry over relationships with foreign allies.[172] Among other things, he quickly invoked the statute's broad provisions in 2018 to impose 25% and 10% tariffs, respectively, on particular steel and aluminum imports, concluding that threats to the economic welfare of domestic industry were matters of national security.[173] Altogether, the Commerce Department under the Trump administration completed and made affirmative findings in six Section 232 investigations, which accounts for a significant percentage of all positive Section 232

[171] For a discussion of President Trump's antipathy towards the foreign affairs bureaucracy, see Drezner, *Present at the Destruction*, *supra* note 117 at 723-24; *see also* Jon D. Michaels, *Trump and the deep state: The government strikes back,* 96 FOREIGN AFF. 52 (2017) (same).

[172] For an analysis of the unusual nature of President Trump's use of this authority, see Timothy Meyer & Ganesh Sitaraman, *Trade and the Separation of Powers,* 107 CALIF. L. REV. 583, 648-50 (2019); *see also* Glenn Thrush, *Trump's Use of National Security to Impose Tariffs Faces Court Test*, NY TIMES, Dec. 19, 2018, available at https://www.nytimes.com/2018/12/19/us/politics/trump-national-security-tariffs.html ("But, according to Ms. Hogan, no president had used Section 232 to impose tariffs before Mr. Trump placed tariffs of 25 percent and 10 percent on steel and aluminum imports this past spring.")

[173] Proclamation No. 9740, 83 Fed. Reg. 20,683 (May 7, 2018); Proclamation No. 9739, 83 Fed. Reg. 25, 20,677 (May 7, 2018).

findings since the statute was passed in 1962.[174] President Trump's unorthodox approach towards Section 232 prompted lawsuits from adversely affected industry groups, who insisted that his administration departed from longstanding executive branch practice on trade policy.[175]

Much ink has been spilled on analyzing the structure of incentives unleashed by President Trump's populist approach to Section 232 and the problems it has created for both relationships with our foreign allies and the US's broader commitment to free trade and economic growth.[176] However, I want to bracket those concerns and focus on another: the possibility that it led to policy incoherence and the weakening of presidential control over certain aspects of foreign economic policy.

A central concern for the populist revival of the Section 232 relief process under the Trump administration was that the compromises necessary to make it work have weakened presidential control over the policy agenda and spawned policy unpredictability. Here, three kinds of problems will be discussed: (1) bureaucratic unpredictability in administering Section 232 tariffs as well as the relevant exclusions under the statute; (2) the unpredictability of policy spurred by interest group rivalries; (3) the unpredictability as to whether future presidents will stick to a common approach regarding the use of Section 232.

First, policy predictability was undermined because the criteria used by the government to determine which industries qualify for relief (or exclusions) under Section 273 often seemed unclear or arbitrary. The clearest example was how the Commerce Department administered the tariff exclusion and objection process for Section 232 aluminum and steel tariffs. The tariff exclusion process allows domestic importers to request exclusion from tariffs on individual products, especially if the imported

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[174] *See* Lincicome & Manak, *supra* note 9 at 6 ("In all six completed Section 232 investigations, Trump's Commerce Department found a national security threat (though it only released official reports in two of them"); *see also id.* at 4 ("In less than four years of Section 232's 58-year existence, however, the Trump administration was responsible for 24 percent of all investigations, 40 percent of all affirmative national security findings, and 25 percent of all actions.").

[175] *See* Transpacific Steel LLC v. United States, 466 F.Supp.3d 1246 (CIT, 2020), reversed and remanded by Transpacific Steel LLC v. United States, 4. F.4th 1306 (Fed.Cir. 2021); PrimeSource Building Products, Inc. v. United States, 497 F.Supp.3d 133 (CIT, 2021), reversed and remanded by PrimeSource Building Products, Inc. v. United States, 59 F.4th 1255 (Fed.Cir 2023); see also Patrick Corcoran, *Trade and Wars: Checking the President's Overbroad Trade Sanctions Authority*, 23 N.Y.U. J. LEGIS. & PUB. POL'Y 687, 701-05 (2022) (describing litigation challenging President Trump's authority to use Section 232 to impose trade sanctions).

[176] *See* Lincicome & Manak, *supra* note 9 at 9-11 (describing negative economic effects of President Trump's Section 232 tariffs); Sitaraman & Meyer, *The National Security Consequences, supra* note 3 at 74-75 ("Those tariffs have increased prices within the United States, hurting U.S. producers of products that use steel as an import, and led to the loss of at least 75,000 jobs in those downstream sectors") (citations omitted); *see* Chad P. Bown, *Trump's Steel and Aluminum Tariffs Are Cascading Out of Control, Peterson Institute for International Economics*, Feb. 4, 2020, available at https://www.piie.com/blogs/trade-and-investment-policy-watch/trumps-steel-and-aluminum-tariffs-are-cascading-out-control (arguing that President Trump's new Section 232 tariffs raise concerns about corruption and the sustainability of international trade commitments).

products are not, or cannot be, manufactured in the United States.[177] Parties could also submit objections to any exclusion within 30 days after posting the exclusion request.[178] Eventually, a mounting backlog of requests for exclusion and objections accrued as domestic manufacturers sought to fit their import claims into the vague criteria released by the Commerce Department. According to the Congressional Research Service, "as of February 7, 2021, Commerce received 288,021 exclusion requests, 260,450 for steel and 27,571 for aluminum."[179]

Accusations of arbitrariness and lack of transparency were soon leveled—often with significant justification—against the Commerce Department officials responsible for processing and adjudicating these exclusion and objection requests.[180] Various instances of unexplained rejections lend credibility to this assertion.[181] Some industry groups successfully challenged the Department's tariff exclusion determinations as arbitrary and capricious under the Administrative Procedures Act.[182] Even the Commerce Department's Inspector General, in its audit of the agency's procedures for reviewing exclusion requests, warned of "a lack of transparency that contributes to the appearance of improper influence in decision-making for tariff exclusion requests."[183]

The problems associated with this rapid expansion of the Department of Commerce's responsibility to process exclusion requests were, in some

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[177] As relevant here, the exclusion process also allowed producers to object to an exclusion request if they can meet the manufacturer's needs in a timely manner. *See* Requirements for Submissions Requesting Exclusions from the Remedies Instituted in Presidential Proclamations Adjusting Imports of Steel into the United States and Adjusting Imports of Aluminum into the United States; and the Filing of Objections to Submitted Exclusion Requests for Steel and Aluminum, 83 FED. REG. 12106 (Mar. 19, 2018).

[178] *See id*; *see also* Dep't Commerce Bureau of Industry and Security, 232 Exclusion Process Frequently Asked Questions (FAQS), 11 (2019), https://www.bis.doc.gov/index.php/component/docman/?task=doc_download&gid=2409.

[179] *See* FEFER ET AL, CONG. RES. SERV., SECTION 232 INVESTIGATIONS: OVERVIEW AND ISSUES FOR CONGRESS, *supra* note 126 at 12.

[180] *See id*. at 13 ("Multiple companies raised strong concerns about the intensive, time-consuming process to submit exclusion requests; the lengthy waiting period to hear back from Commerce, which has exceeded 90 days in some cases; what some view as an arbitrary nature of acceptances and denials; and that all exclusion requests to date have been rejected when a U.S. steel or aluminum producer has objected.").

[181] *See id;* s*ee also* Lincicome & Manak, *supra* note 9 at 8 ("The process was no less arbitrary, erratic, and lacking in transparency than the reinstatement of tariffs and the opaque manner by which "negotiations" were conducted."); Ana Swanson, *Disarray Plagues U.S. Companies' Efforts to Win Tariff Exemptions,* NY TIMES, May, 13, 2018, available at https://www.nytimes.com/2018/05/13/business/tariff-exemptions.html ("The imposition of tariffs was supposed to help protect American companies from foreign competition. But they have also created a chaotic, time-consuming process and provoked deep uncertainty among executives, who are delaying investment, expansion and hiring as a result.").

[182] *See* Seneca Foods Corp. v. United States, 663 F.Supp.3d 1325 (CIT 2023) (holding that the Commerce Department's denial of canner's request for exclusion from Section 232 steel tariff was impermissibly conclusory, and, thus, was arbitrary and capricious); NLMK Pennsylvania, LLC v. United States, 617 F.Supp.3d 1316 (CIT 2023) (holding that the Commerce Department acted arbitrarily and capriciously when it denied NLMK's requests for tariff exclusion without sufficient explanation in light of record evidence).

[183] Letter from Carol Rice, Assistant Inspector General for Audit and Evaluation, to Secretary Ross, Management Alert: Certain Communications by Department Officials Suggest Improper Influence in the Section 232 Exclusion Request Review Process, Final Memorandum No. OIG-20-003-M, October 28, 2019.

sense, to be expected. The Department was under unrealistic tight time pressures to wrap up investigations as the volume of requests expanded. And the Department's new mandate was also unclear and vague. For instance, the Department was tasked with determining whether an import was also produced in the United States "in a sufficient and reasonably available amount or of a satisfactory quality."[184] Langevin makes the point that oversight of the exclusion process stressed the capacity of the Commerce Department to manage on its own, especially as its resources and staff capacity could not keep pace with the rapid expansion of requests.[185] Ultimately, the Department was burdened with an awkward mandate, insufficient resources, and a dramatic increase in its caseload.[186] None of these developments augured well for predictable or coherent governance.

Second, intense interest group rivalry was an equally important impetus for policy instability. While the revival of the Section 273 tariff scheme on steel proved to be a boon to many business groups,[187] Others passionately opposed it, especially those dependent on steel imports for inputs.[188] These rivals for control over tariff policy were less vested in finding a stable platform for resolving their differences than concentrating authority in their preferred agency.

The revival of Section 232 relief meant that the Commerce Department was exposed to congressional and interest group attacks from both sides of the spectrum. On the one hand, the congressional allies of protectionist groups criticized the Commerce Department for not being sufficiently forceful in its Section 232 investigations and for being reticent in expanding the list of industries eligible for national security relief.[189] On the other hand, the congressional allies of business groups that relied on imported steel inputs sought to eliminate the investigatory role of the Commerce Department altogether.[190]

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[184] Proclamation No. 9704, 83 Fed. Reg. 11619, 11621 (Mar. 8, 2018).

[185] Mark S. Langevin, *Troubling Relief: The Evolution of the Section 232 Steel and Aluminum Tariff Exclusion Process*, MERCATUS CENTER POLICY BRIEF SERIES, May 2021, available at https://www.mercatus.org/publications/trade/troubling-relief.

[186] *See id*.

[187] Robert E. Scott, *Aluminum Tariffs Have Led to a Strong Recovery in Employment, Production, and Investment in Primary Aluminum and Downstream Industries*, ECONOMIC POLICY INSTITUTE, Dec. 11, 2018, available at https://www.epi.org/publication/aluminum-tariffs-have-led-to-a-strong-recovery-in-employment-production-and-investment-in-primary-aluminum-and-downstream-industries.

[188] Mark Burgess, *Coalition calls for immediate end to US Section 232 tariffs*, FASTMARKETS, May 7, 2021, available at https://www.fastmarkets.com/insights/coalition-calls-for-immediate-end-to-us-section-232-tariffs/.

[189] *See, e.g.*, *Brown, Casey Urge Administration to Add Grain-Oriented Electrical Steel Derivative Products to Section 232 Steel Tariffs*, available at https://www.brown.senate.gov/newsroom/press/release/sherrod-brown-casey-urge-administration-add-grain-oriented-electrical-steel-derivative-products-section-232-steel-tariffs (urging the Secretary of Commerce to address the improper imports of downstream grain-oriented electrical steel (GOES) products by adding them to Section 232 tariffs.").

[190] *See* Ingber, *Congressional Administration*, *supra* note 45 at 399-400 (describing how certain members of Congress from both sides of the aisle criticized President Trump's protectionist turn and sought to introduce measures that would curb the Secretary of Commerce's powers to recommend Section 232 tariffs).

These latter groups favored legislative proposals that would stiffen the criteria for protectionist relief on national security grounds and weaken the Department of Commerce's authority to oversee Section 232 investigations.[191] In 2018 and 2019, the House and Senate reported bipartisan bills that would give Congress the authority to issue a disapproval resolution on any Section 232 tariffs imposed by the President.[192] The proposed legislation, if passed, would also strip the Commerce Department of the authority to initiate Section 232 investigations and lodge it instead in the Department of Defense—an agency that would presumably be less sympathetic to protectionist industry groups. The Commerce Department would then only be responsible for the remedial phase of an investigation. As one commentator has observed, such legislative proposals to fragment policymaking are tools that Congress can deploy to prevent policy entrenchment, weaken agency autonomy, and create the groundwork for future legislative interference.[193]

In the end, President Trump's aggressive use of Section 232 neither quelled the risks of legislative and judicial interference nor did it mollify interest groups. Instead, it transformed and expanded the form and direction in which such groups could mobilize and seek legislative interference. Prior to the expansive use of Section 232, for instance, legislative pressures on the executive branch consisted exclusively of sporadic and often unsuccessful efforts to raise tariffs on behalf of groups seeking protection. However, the executive branch's revival of Section 232 relief mobilized interest groups and legislative reactions from both ends of the spectrum.

Another institutional consequence of the revival of Section 232 under the Trump and Biden administrations was that it encouraged greater judicial intervention into national security controversies where courts have normally abstained or deferred to the executive branch.[194] For instance, in the Section 232 exclusion cases alluded to above, the Court of International Trade took the unusual step of setting aside the national security determinations of the Department of Commerce on the grounds they were arbitrary and capricious.[195] The reason for this weakening in

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[191] *See e.g.,* MEMA Applauds Introduction of Bipartisan Congressional Legislation on Section 232 Tariffs, Feb.7, 2019, available at https://www.mema.org/news/mema-applauds-introduction-bipartisan-congressional-legislation-section-232-tariffs (automobile group applauding proposed reforms that would require the Department of Defense rather than the Department of Commerce justify Section 232 tariffs based on national security reasons and that would allow Congress to vote on a disapproval of the President's tariff decisions).

[192] Trade Security Act of 2019, S. 365, 116th Cong. (2019); Bicameral Congressional Trade Authority Act of 2019, S. 287, 116th Cong. (2019); H.R. 6923, 115th Cong. § 4 (2018); S. 3329, 115th Cong. § 2 (2018).

[193] *See* Ingber, *Congressional Administration*, *supra* note 45 at 399-400; 437-43.

[194] *See* Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1405-11 (2009) (discussing functional justifications for national security fact deference to the executive branch); Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941, 943 (2004) (describing and defending judicial abstention doctrines in foreign affairs on institutional competence grounds); Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 549 (2000) (defending a Chevron type deference for executive branch decisions in foreign affairs).

[195] *See* Seneca Foods Corp, 663 F.Supp.3d at 1325; NLMK Pennsylvania, LLC, 617 F.Supp.3d at 1316.

judicial deference was understandable. As the sheer volume of the exclusion requests being processed increased propitiously, the scope for exercising agency discretion without sufficient reasoning widened, which prompted the demand for hedging such discretion. Moreover, the high incidence of petitions for relief by private parties likely bred judicial skepticism that the national security stakes in a dispute were sufficiently grave to warrant deference.[196]

The third and final downside of the revival of Section 232 is that the relative ease of imposing or easing tariffs will likely spur policy instability and selectivity by the executive branch across countries and electoral cycles. One way to counteract the appearance of policy instability or arbitrariness would be to impose uniform tariffs on specified imports from all countries. Had the government staked out such a narrow policy position, it would have been easier to fend off the demands from foreign governments that could lead to tariff inconsistency. However, once the selection of countries subject to tariffs proved easily revisable or subject to renegotiation, foreign countries had strong incentives to demand that their products be exempted from tariffs or be accorded special treatment.

Take, for instance, the uneven approaches adopted by recent administrations in implementing Section 232 steel tariffs. In the first tariff proclamation in 2018, the Trump administration initially imposed a uniform tariff against all countries and only allowed exemptions for Mexico and Canada.[197] But then the administration subsequently struck side deals later that year with Argentina, Brazil, and South Korea that subjected them to special quotas as an alternative to Section 232 tariffs on steel imports.[198] The Trump administration also exempted Australia from both steel and aluminum tariffs under Section 232.[199] The Biden administration, concluding that steel imports from the EU, Japan, and the UK no longer constituted a security threat, rescinded the tariffs on steel imports from those three jurisdictions and replaced them with tariff-rate quota systems.[200] A similar agreement on aluminum imports from the EU was reached in late 2023.[201] But then the Biden administration also reimposed Section 232 tariffs on aluminum imported from the United

[196] *See* Eichensehr & Hwang, *supra* note 3 at 590 ("'[f]requency leads to normalcy," and so the more frequent and less exceptional national security issues become, the more comfortable judges become adjudicating claims.") (citations omitted).

[197] Adjusting Imports of Steel into the United States, Proclamation 9705, 83 FED. REG. 11625 (Mar. 15, 2018).

[198] Adjusting Imports of Steel into the United States, Proclamation 9759, 83 FED. REG. 25857 (May 31, 2018).

[199] *See id.; see also* FEFER ET AL., CONG. RES. SERV., SECTION 232 INVESTIGATIONS: OVERVIEW AND ISSUES FOR CONGRESS, *supra* note 126 at 9.

[200] Adjusting Imports of Steel into the United States, Proclamation 10328, 87 FED. REG. 11 (Jan 3, 2022) (Proclamation establishing tariff agreement with the EU); Adjusting Imports of Steel into the United States, Proclamation 10356, 87 FED. REG. 63 (May 31, 2018) (Proclamation establishing tariff agreement with Japan); Adjusting Imports of Steel into the United States, Proclamation 10406, 87 FED. REG. 33591 (June 3, 2022) (Proclamation establishing tariff agreement with the United Kingdom).

[201] Adjusting Imports of Aluminum into the United States, Proclamation 10690, 89 FED. REG. 223 (Dec. 28, 2023).

Arab Emirates,[202] which reversed a decision the Trump Administration had made less than a month earlier to rescind such tariffs on the basis that "the United States has an important security relationship with the United Arab Emirates." [203]

What has occurred is that there is now a hodgepodge of Section 232 tariff schedules on imported steel, where certain countries are exempt from the tariffs altogether, others have negotiated special quota arrangements that are dissimilar to each other,[204] and others are still subject to the full tariffs. Ultimately, these developments will likely expose the executive branch to even further pressures to make special exemptions for certain countries or to rescind those already made.[205] None of this will likely restore confidence that the government can maintain a consistent tariff policy. Moreover, the intricate nature of these special tariff side deals will likely create an administrative quagmire, producing complications and inconsistencies in implementing the steel tariffs.

V: Other Illustrations of the Theory: Presidential Self-Muzzling in the Treaty and the Use of Force Contexts

This Part focuses on two very different kinds of presidential self-muzzling in foreign affairs: (A) the President's use of self-imposed limits on the scope of the treaty power as a strategy to dodge highly controversial domestic social issues; (B) the President's embrace of a congressional role in high stakes military interventions as a tool to spread some of the risks of potential military failure or stalemate to the political opposition. The first kind deflects the concern that presidents might use the treaty power to circumvent other constitutional constraints on implementing hot-button domestic policy issues. Thus, when the President self-muzzles in the treaty context, it is usually to avoid the kinds of social issues likely to excite the intense attention of domestic ideological interest groups and their congressional allies. The second kind recognizes that sometimes presidents may favor sharing responsibility with Congress during a foreign policy crisis to weaken the ability of the opposition to exploit the fallout of a stalemate or military failure.

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[202] Adjusting Imports of Aluminum into the United States, Proclamation 10144, 86 Fed. Reg. 8,265 (Feb. 4, 2021).

[203] Adjusting Imports of Aluminum into the United States, Proclamation 10139, 86 Fed. Reg. 6825 (Jan. 19, 2021.

[204] See John B. Brew and Walter (Sam) Boone, *United States: Section 232—Not all Quotas are Created Equal*, Mondaq, Feb. 1, 2023, available at https://www.mondaq.com/unitedstates/international-trade-amp-investment/1277488/section-232--not-all-quotas-are-created-equal

[205] For instance, one industry has been lobbying to rescind the Section 232 exemptions accorded to Mexico. *See* Michael Stumo, *Mexico Is Violating Section 232 Steel Tariffs. The Biden Administration Must Act*, Nov. 22, 2022, available at https://www.industryweek.com/the-economy/regulations/article/21255229/mexico-is-violating-section-232-steel-tariffs-the-biden-administration-must-act

A. President Eisenhower and Self-Imposed Limits on the Scope of the Treaty Clause

No doubt that presidential self-muzzling in foreign affairs might not be the ideal way to circumscribe policy discretion. But it might often be the only politically available way. President Eisenhower once again deployed a self-muzzling strategy to defuse fears in the 1950s that the executive branch might use the treaty power to circumvent domestic constitutional constraints on social and economic policy. The Supreme Court's 1920 decision in *Missouri v Holland* had ruled that the substantive scope of the President's treaty power was quite broad, perhaps even broader than Congress's powers to pass social and economic policy under the Commerce clause.[206] Conservative legislators—led by Senator Bricker of Ohio (R)—feared that the President might use his enhanced authority under the treaty power to enter into human rights commitments that would impose civil rights and social policy obligations on US citizens—obligations that would be otherwise unattainable under domestic legislation.[207] To safeguard against this risk, Senator Bricker championed a proposed constitutional amendment that would require that a treaty could only be effective in the United States only through legislation "which would be valid in the absence of the treaty."[208]

To deflate Senator Bricker's concerns, President Eisenhower pledged that he would not use his powers to sign or ratify any human rights agreement during his presidency.[209] The President's goal was to allay fears that the treaty power could be used to circumvent other domestic constitutional constraints on social and civil rights policy. In this case, self-muzzling as a tool of preemptive self-restraint: to prevent the prospect of harsher limitations by the Senate on the scope of the treaty power, the President committed against using the treaty power to address highly contentious domestic social issues. This presidential self-muzzling scheme became entrenched as part of contemporary executive branch practice in foreign affairs. In the wake of the Bricker controversy, the State Department

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[206] 252 U.S. 416, 434-35 (1920).

[207] For a discussion of the partisan politics behind the Bricker Amendment, see Nzelibe, *Strategic Globalization*, *supra* note 56 at 658-73; *see also* DUANE TANANBAUM, THE BRICKER AMENDMENT CONTROVERSY: A TEST OF EISENHOWER'S POLITICAL LEADERSHIP (1988) (describing the Bricker Amendment controversy).

[208] FRANK E. HOLMAN, STORY OF THE "BRICKER" AMENDMENT 27 (1954).

[209] Eisenhower's Secretary of State Dulles also testified during congressional hearings:

> [W]hile we shall not withhold our counsel from those who seek to draft a treaty or covenant on human rights, we do not ourselves look upon a treaty as the means which we would now select as the proper and most effective way to spread throughout the world the goals of human liberty to which this Nation has been dedicated since its inception. We therefore do not intend to become a party to any such covenant or present it as a treaty for consideration by the Senate.

Treaties and Executive Agreements: Hearings on S.J. Res. 1 and S.J. Res. 43 Before a Subcomm. of the S. Comm. on the Judiciary, 83d Cong. 825 (1953) [hereinafter 1953 Hearings]; *see also* Editorial Comment, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 348-49 (1995) ("To help defeat the [Bricker] amendment, the Eisenhower administration promised that the United States would not accede to international human rights covenants or conventions.").

produced guidelines in 1955—known as the State Department's Circular 175—which continue to guide US treaty practice.[210] More specifically, Circular 175 provided in the relevant part: "[i]n determining whether any international agreement should be brought into force as a treaty or as an international agreement other than a treaty, the utmost care is to be exercised to avoid any invasion or compromise of the constitutional powers of the President, the Senate, and the Congress as a whole."[211]

One way to understand President Eisenhower's self-muzzling strategy was that he sought to safeguard the scope of the treaty clause from the intrusion of high stakes and salient domestic issues, such as abortion and civil rights.[212] Modern-day treaty reservations, declarations, and the various doctrinal presumptions against treaty-self-execution could all be understood as tools to narrow the range of issues covered under international agreements.[213] To be clear, these avoidance devices may reflect the treaty-making process's fragility and not necessarily presidential timidity about staking out firm positions on socially contentious issues in foreign affairs. As Mary Duzkiak reminds us, President Eisenhower had no qualms about linking foreign affairs with civil rights issues when the institutional context involved domestic legislation or federal court decisions.[214] She observes, for instance, that President Eisenhower supported the Court's desegregation decisions partly on foreign policy grounds to deflect Soviet criticism of U.S. democracy.[215]

The question remains whether such self-muzzling comes at too high a price. One plausible cost is that the fixation on avoiding deep-seated social conflict in treaty coverage may prematurely close off certain kinds of policy innovation. Understandably, self-muzzling conventions that attempt to

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[210] U.S. Dep't of State, Circular 175 Procedure, http://www.state.gov/s/l/treaty/c175. For a background discussion of Circular 175, and how its modern incarnation under 22 C.F.R. § 181.4 (1999) guide the State Department's policy, *see* Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1249-1250 (2009).

[211] Office of the Legal Adviser, Treaty Affairs, Circular 175 Procedure, available at http://www.state.gov/s/l/treaty/c175/.

[212] There is a literature that explores how courts often dodge the resolution of highly controversial issues through avoidance devices like ripeness or abstention doctrines. *See* Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 DUKE L.J. 1 (2016) (arguing that delay practices, such as the disposition of cases at the certiorari stage, standing, and ripeness, can be partly explained as judicial coping mechanisms to dodge politically contentious controversies in divided societies). However, insufficient attention has been paid to the possibility that elected political officials, such as presidents, might also profit from avoiding the resolution of highly controversial social issues.

[213] *See* Hathaway, *Treaties' End*, *supra* note 210 at 1240-41 ("The [Bricker] controversy ended in a "compromise" in which the amendment was defeated at the cost of future human rights agreements, which would henceforth be concluded only as treaties that had been rendered almost entirely unenforceable through reservations, understandings, and declarations."). Of course, some scholars have argued that the availability of these devices may actually facilitate the kinds of compromises that make international agreements feasible. *See* Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 402 (2000) (arguing that reservations "reflect a sensible accommodation of competing domestic and international considerations"); Ryan Goodman, *Human Rights Treaties, Invalid Reservations, and State Consen*t, 96 AM. J. INT'L L. 531, 531 (2002) (arguing that reservations to human rights treaties should be presumed to be severable).

[214] Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988)

[215] *See id.*

freeze certain issues out of consideration within a treaty framework tend to exhibit a conservative bias toward the policy status quo. To Henkin, a prominent foreign relations scholar, the State Department's cautionary approach to the substance of treaties was too stifling. It undermined the US's capacity to be a global leader on human rights issues.[216] Moreover, if avoiding difficult or highly contentious issues becomes an overriding objective that trumps every other consideration, political leaders may risk rendering themselves vulnerable to groups willing to threaten political trouble.

Yet another cost to self-muzzling is that suppressing certain issues from consideration within the treaty clause may not always quell the willingness and ability of groups to advance their passionately felt objectives through other means. Instead, these groups may funnel their policy preferences through different institutional pathways in foreign affairs. But even beyond the setting of international agreements, the intrusion of salient domestic social issues into foreign affairs can still weaken presidential control over the foreign affairs bureaucracy.

A brief example illustrates the precariousness of linking presidential foreign policy with highly salient domestic social issues outside the treaty context. Under pressure from conservative members of Congress in 1984, President Reagan implemented by executive order the so-called Mexico-City Policy, which blocks U.S. foreign assistance for non-governmental organizations (NGOs) or programs that provide abortion counseling or referrals.[217] In any event, the choice to use executive orders to implement (and later rescind) such a highly charged social policy issue likely had significant effects. First, it likely contributed to a pattern of wild policy swings across electoral cycles since future presidents (subject to different congressional and constituency constraints) could reverse course unilaterally.[218] Indeed, since 1984, the United States Agency for International Development (USAID) has enforced the policy during all subsequent Republican administrations and has rescinded the policy at the direction of all Democratic administrations.[219] Of course, in all this back and forth, there is likely to be considerable ambiguity about the US's ability to commit to a certain course of action on a sensitive foreign policy issue.

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[216] *See* Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L. L. 341 (1995); Natalie Hevener Kaufman & David Whiteman, *Opposition to Human Rights Treaties in the United States Senate: The Legacy of the Bricker Amendment*, 10 HUM. RTS. Q. 309 (1988). Other scholars worry that the political caution spurred by the Bricker Amendment as well as the high procedural threshold for ratifying treaties make the treaty pathway too cumbersome an institutional process for making international commitments. *See* Oona A. Hathaway, *Treaties' End, supra* note 210 at 1241 (2008) (discussing why the treaty pathway is particularly cumbersome in the modern era).

[217] *See* Abigail Abrams, *Biden is Rescinding the 'Global Gag Rule' on Abortions Abroad. But Undoing Trump's Effects Will Take Time*, TIME (Jan. 28, 2021, 2:44 PM), available at https://time.com/5933870/joe-biden-abortion-mexico-city-policy/.

[218] In this picture, one may assume that unilateral executive orders are likely to be more vulnerable to reversal than legislation or treaties. See Sharece Thrower, "*To Revoke or Not Revoke? The Political Determinants of Executive Order Longevity*, 61 AM J. POL. SC. 642 (2017).

[219] *See* Abrams, *Biden is Rescinding the 'Global Gag Rule' on Abortions Abroad. But Undoing Trump's Effects Will Take Time*, *supra* note 217.

Second, and less obviously, this development likely weakened presidential control and strengthened congressional influence over USAID, the agency that administers the Mexico City policy.[220] The agency's foray into issues of family planning and abortion played a key role in activating the attention of Congress and ideological interest groups.[221] As various commentators have observed, USAID is currently subject to some of the most strenuous reporting and oversight requirements of any federal agency by Congress, second only to the Department of Defense.[222] According to Milner and Tingley, "these reporting requirements cover a broad range of behaviors, from communicating the goals of certain aid programs to notifications of shifts from one program to another."[223]

Moreover, since the 1990s, USAID has consistently faced the threat of defunding by Congress and greater legislative stalemate over spending priorities for foreign aid.[224] By contrast, in the 1960s, USAID and its predecessor aid agencies were more firmly under presidential control and were usually left alone by Congress.[225] During that period, the politics of foreign aid was not particularly susceptible to interest group pressures and, hence, not likely to antagonize any important legislative constituency.[226] Thus, in an earlier era when the policy mission of USAID was largely viewed as technical and devoid of hot-button social issues such as family planning, it was better protected from political interference from Congress, and the agency had greater latitude in how it deployed appropriated funds.[227]

To summarize, the vulnerability of presidential foreign policymaking to congressional interference depends on the extent to which policy touches on certain hot-button domestic issues, such as abortion, gun control, racial conflict, or family planning. Thus, to avoid attracting the attention of ideological interest groups and their congressional allies, presidents have often attempted to avoid including such hot-button social issues within the coverage of treaties. But this presidential self-muzzling strategy has proven to be fragile. As the case of USAID and the Mexico City Policy illustrate, sometimes highly charged issues might still get smuggled back into the foreign policy arena through different institutional pathways, such as executive orders. In this case, the price of implementing policy over foreign assistance to family planning through unilateral executive orders has been

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[220] MILNER & TINGLEY, SAILING THE WATER'S EDGE, *supra* note 51 at 172-74 (2015).

[221] See Barbara B Crane & Jennifer Dusenberry, *Power and Politics in International Funding for Reproductive Health: the US Global Gag Rule*, 12 REPRODUCTIVE HEALTH MATTERS 128 (2004) ("Year after year, an intensely committed anti-abortion minority in the House of Representatives sought to re-impose the policy. Their goal was not only to establish more abortion-related restrictions in foreign aid legislation, but also to limit the resources and influence of USAID's international family planning program").

[222] MILNER & TINGLEY, SAILING THE WATER'S EDGE, *supra* note 51 at 172-74 (2015).

[223] *Id.* at 172.

[224] *See id.* at 173-74.

[225] *See id.* at 172 (observing that contemporary "congressional involvement [in USAID} is in stark contrast to earlier detachment.").

[226] *See* William L. Morrow, *Legislative Control of Administrative Discretion: The Case of Congress and Foreign Aid*, 30 J POL. 985, 985-86 (1968) (observing that foreign aid lacks a well-structured constituency).

[227] *See id.* at 990 ("AID and its predecessor agencies have always been allowed broad authority in the use of appropriated funds.").

chronic policy instability and the weakening of presidential control over the foreign aid bureaucracy.

B. President Obama and Self-Imposed Limits on the Use of Force

At first glance, it may seem that the more flexibility the President has in initiating a foreign military intervention without congressional interference, the more he can control or shape the public perception of how the intervention unfolds. However, such increased flexibility also has a downside: it provides the opposition in Congress with greater leeway to exploit the risks of foreign policy failure or stalemate, especially if the political downside from military failure exceeds the political upside from success. The political opposition might recognize that an attentive public activated by a foreign policy crisis could be particularly susceptible to the politics of blame, especially if the public happens to believe that no essential national security interest is at stake.[228] Thus, to ensure that the political opposition has some skin in the game, presidents may sometimes embrace a greater role for Congress in initiating military interventions to spread the risks of potential military failure or stalemate to other elected officials.

A well-known example of presidential self-limitation in the use of force was President Obama's 2015 decision to seek a broader congressional role on a proposed military strike against the Islamic State (ISIS) in Syria and Iraq, even though he claimed he already had the legal authority to do so under prior legislation.[229] The White House's proposed request for fresh congressional authorization also included other significant restrictions on the President's flexibility to conduct war: it would prohibit the "use of enduring ground troop operations" and limit any military engagement to three years.[230] From a procedural perspective, the request for authorization was unusual because it appeared to generously reallocate some responsibility to Congress and to limit presidential discretion. As the New York Times put it: "Mr. Obama's effort to define boundaries to war power, even with escape hatches, turns presidential history on its head. Presidents typically resist congressional

[228] *See* Baum, *Going Private*, *supra* note 22 at 609 ("Unless the public perceives a crisis to involve an important national security interest, the potential political costs to a president of either backing down or losing a fight typically exceed the potential benefits he can expect to derive from a policy success.").

[229] More specifically, President Obama had argued that he already possessed legal authority to engage in such a military strike based upon a prior 2001 Authorization to Use Military Force. *See Letter from the President -- Authorization for the Use of United States Armed Forces in connection with the Islamic State of Iraq and the Levant*, https://obamawhitehouse.archives.gov/the-press-office/2015/02/11/letter-president-authorization-use-united-states-armed-forces-connection. __ ("Although existing statutes provide me with the authority I need to take these actions, I have repeatedly expressed my commitment to working with the Congress to pass a bipartisan authorization for the use of military force (AUMF) against ISIL.").

[230] *See Joint Resolution to authorize the limited use of the United States Armed Forces against the Islamic State of Iraq and the Levan*t, https://obamawhitehouse.archives.gov/sites/default/files/docs/aumf_02112015.pdf.

encroachment and assert the broadest possible interpretation of their ability to order the military into combat."[231]

Nonetheless, when the limited authorization request was introduced before Congress, Republican members of Congress criticized it for not giving President Obama sufficient flexibility to conduct military operations effectively and for including too many procedural restrictions.[232] Congressional Democrats, on the other hand, criticized the President's authorization request for being too open-ended and insufficiently restrictive, claiming that it gave the President too much leeway to expand combat operations against ISIS in the Middle East.[233] Thus, the conventional wisdom that members of Congress favor flexibility for their co-partisan in the White House while the opposition members favor constraints was turned on its head.

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[231] Peter Baker, *Obama's Dual View of War Power Seeks Limits and Leeway*, NY TIMES, Feb. 11, 2015, available at https://www.nytimes.com/2015/02/12/us/obama-war-authorization-congress.html

[232] Press Release, Speaker Ryan's Press Office, Speaker Boehner on the President's Request for an Authorization for the Use of Military Force (Feb. 11, 2015) http://www.speaker.gov/press-release/speaker-boehner-president-s-request-authorization-use-military-force#sthash.KnciRMfh.dpuf (quoting John A. Boehner, Republican of Ohio: "Any authorization for the use of military force must give our military commanders the flexibility and authorities they need to succeed and protect our people. While I believe an AUMF against ISIL is important, I have concerns that the president's request does not meet this standard."); Susan Davis, *Congress Prepares to Weigh in on Battle Against Islamic State,* USA TODAY (Feb. 11, 2015), http://www.usatoday.com/story/news/politics/2015/02/11/obama-aumf-military-force-islamic-state/23224951/ (quoting Kevin McCarthy, Republican of California: "I will not support efforts that impose undue restrictions on the U.S. military and make it harder to win."); David Weigel, *What Are 'Enduring' Combat Operations Against ISIS? Congress Has No Idea*, BLOOMBERG (Feb. 11, 2015, 10:55 AM), http://www.bloomberg.com/politics/articles/2015-02-11/what-are-enduring-combat-operations-against-isis-congress-has-no-idea (quoting John McCain, Republican of Arizona: "In my view, it should not constrain the president of the United States, and it should not be specific to ISIS.").

[233] Carol E. Lee & Michael R. Crittenden, *Obama Asks Congress to Authorize Military Action Against Islamic State; Proposal Opens National Debate Over Scope of President's Wartime Powers*, WALL ST. J. (Feb. 11, 2015), http://www.wsj.com/articles/obama-asks-congress-to-authorize-military-action-against-islamic-state-1423666095 (quoting Adam B. Schiff, Democrat of California: "A new authorization should place more specific limits on the use of ground troops to ensure we do not authorize another major ground war without the president coming to Congress to make the case for one."); George Zornick, *Key Democrats Worry Obama Proposal Might Lead to Open-Ended War*, NATION (Feb. 11, 2015), http://www.thenation.com/article/democrats-push-back-obamas-vague-ineffectual-war-request/ (quoting Senator Chris Murphy: "I worry that the vague limitations on ground troops in today's draft may turn out to be no limitations at all."); Press Release, Senator Bernie Sander's Office, Sanders Statement on War Powers Resolution (Feb 11, 2015), http://www.sanders.senate.gov/newsroom/press-releases/sanders-statement-on-war-powers-resolution (quoting Bernie Sanders, Democrat of Vermont: "I oppose sending U.S. ground troops into combat in another bloody war in the Middle East. I therefore cannot support the resolution in its current form without clearer limitations on the role of U.S. combat troops."); Press Release, Senator Richard Blumenthal's Office, Blumenthal Statement on President's Proposed Resolution to Authorize Military Force Against ISIL (Feb. 11, 2015), http://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-statement-on-presidents-proposed-resolution-to-authorize-military-force-against-isil (quoting Richard Blumenthal, Democrat of Connecticut: "There remain grave issues still to be resolved—such as clarifying restrictions against use of American combat ground troops, establishing the scope and scale of U.S. military operations, and sunsetting obsolete authorities.")

But why would such a reversal of partisan preferences on presidential flexibility in foreign affairs make sense? One likely answer was that President Obama and his co-partisans in Congress recognized that initiating a high-stakes military intervention in the Middle East without a Republican congressional role might expose them to political risks that would overshadow any political upside. Indeed, both President Obama and Secretary of State Kerry alluded to prudential political considerations and not legal ones in justifying the decision to seek congressional authorization.[234] In any event, unable to muster sufficient support from either side of the aisle, the White House proposal for authorization eventually failed.

This was not the first time President Obama had sought out a self-imposed limitation concerning the use of force. In 2013, the President also proposed that Congress authorize a military intervention against the Syrian regime of Bashir Assad for its use of chemical weapons against its own people.[235] Again, President Obama insisted that he was under no legal obligation to seek such new legislative authorization but thought it important that Congress shoulder some of the political responsibility for embarking on a new military intervention.[236] Indeed, some of the President's advisers considered his effort to seek congressional authorization too politically risky and likely to fail, but he "overruled the advice of many of his aides who worried about just such a defeat." [237] President Obama acknowledged that one of his motivations for seeking congressional authorization was to spread some of the political risks for a high-stakes foreign policy decision. He argued that it was important that Congress have some skin in the game: "Congress will sit on the sidelines, snipe. If it works, the sniping will be a little less; if it doesn't, a little more. But either way, the American people and their representatives are not fully invested in what are tough choices.'" [238]

Both these examples are consistent with the notion that sometimes presidents will constrain their freedom of action in foreign affairs when doing so may help defuse the risks of a high-stakes issue on which they may be politically vulnerable. Such vulnerability is likely to be pronounced where the national security issues at stake in the intervention do not seem significant.[239] Hence, President Obama understood he would face the short-

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[234] *See* Testimony by Secretary of State John Kerry, *The President's Request for Authorization to Use Force Against ISIS: Military and Diplomatic Efforts*, March 11, 2015, available at https://2009-2017.state.gov/secretary/remarks/2015/03/238769.htm ("The president already has statutory authority to act against ISIL, but a clear and formal expression of this Congress's backing at this moment in time would dispel doubts that might exist anywhere that Americans are united in this effort").

[235] *See* Statement by the President on Syria, Aug. 13, 2013, https://obamawhitehouse.archives.gov/the-press-office/2013/08/31/statement-president-syria.

[236] *See id*. ("[W]hile I believe I have the authority to carry out this military action without specific congressional authorization, I know that the country will be stronger if we take this course, and our actions will be even more effective.").

[237] *See* Peter Baker & Jonathan Weisman, *Obama Seeks Approval by Congress for Strike in Syria*, NY TIMES, August 31, 2013, available at https://www.nytimes.com/2013/09/01/world/middleeast/syria.html

[238] *The President's News Conference With Prime Minister John Fredrik Reinfeldt of Sweden in Stockholm, Sweden*, Sep. 4, 2013, https://www.presidency.ucsb.edu/documents/the-presidents-news-conference-with-prime-minister-john-fredrik-reinfeldt-sweden-stockholm.

[239] *See* Baum, *Going Private, supra* note 22 at 605.

term costs of rejection in deciding whether to seek congressional authorization. Still, the upshot was that he could remove from the agenda a high-profile foreign policy quandary that the political opposition could have exploited.[240] There was, however, another benefit to President Obama of seeking congressional authorization: it allowed him to weed out the kinds of military interventions that did not command intense and broad support from Congressional Republicans. It thereby spared the President the burden of embarking on a drawn-out intervention in Syria where the opposition's resolve was weak, and the President himself might not be strongly committed.[241] In the absence of such formal authorization, some opposition members of Congress could offer tepid support for an intervention behind the scenes but then change their tune once immediate success seems unlikely, and the public becomes more attentive.

VI. IMPLICATIONS FOR PRESIDENTIAL CONTROL IN FOREIGN AFFAIRS

The argument in this paper has three significant implications for separation of powers debates in foreign affairs. First and most importantly, the argument critiques one standard prescription for presidential overreach in foreign affairs and suggests an alternative approach. Constitutional scholars and political scientists often claim that congressional apathy in foreign affairs emboldens presidents to blur the boundaries of their authority in foreign affairs. The problem of presidential expansionism in foreign affairs is often cast in terms of a lack of congressional will rather than of institutional capacity. Thus, many reform proposals focus on initiatives that encourage congressional attentiveness in foreign affairs.[242] But here is the hitch. The policy domain is replete with examples of various foreign affairs agencies that are particularly attuned to congressional preferences. In other words, far from being inattentive and uninvolved, members of Congress often work

[240] *See* Nzelibe, *Are Congressionally Authorized Wars Perverse*, supra note 26 at 917 ("Should the President foresee that the conflict is likely to be a high-risk engagement, it is in his interest to make sure that his political opponents will not be able to exploit fully the potential political fallout of military failure or stalemate. In such a scenario, it makes sense for the President to secure as much political support as possible from members of Congress, especially those members from the opposition party.").

[241] See Ashley Parker, *Impasse With Congress Imperils Authorization to Combat ISIS*, NY Times, March 11, 2015, available at https://www.nytimes.com/2015/03/12/us/politics/a-rift-imperils-authorization-to-combat-isis.html ("[A]fter the proposal went to Congress, there is little evidence that the administration has lobbied members to win support for its request, and few suggestions that Democratic and Republican lawmakers are successfully working toward an alternative.").

[242] *See* JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 115-31 (1993) (proposing reforms that will strengthen Congress's role in initiating war and counteracting presidential aggrandizement); Harold Koh, *The 21st Century National Security Constitution*, 91 GEO. WASH. L. REV. 1391, 1430 (2023) ("To level the playing field with the Executive, Congress should channel its reform efforts in three directions--(1) creating a counter-arena of centralized foreign-affairs expertise within Congress that empowers it to check the President, (2) building a central repository within Congress of legal advice regarding international and foreign relations law, and (3) developing better tools to counter executive overreach"); Koh, *Why the Presidents Almost Always Wins*, *supra* note 1 at 1326-38 (discussing ways to empower Congress to be more active in checking presidential overreach in foreign affairs).

behind the scenes to ensure that the foreign affairs bureaucracy is responsive to the demands of their key constituencies.

Yet, ironically, this form of congressional attentiveness in foreign affairs may give rise to the most worrisome kinds of unbridled presidential flexibility. Rather than seek to constrain the President or the foreign affairs bureaucracy, attentive members of Congress may hope to coopt presidential flexibility in foreign affairs for their own narrow policy objectives. Members of Congress may conclude that expanding presidential flexibility in foreign affairs increases opportunities to distribute targeted rents to their favored constituencies in ways that offset any costs it imposes regarding the loss of formal institutional authority. Thus, members of Congress may respond to the problem of institutional inattentiveness not by becoming more informed about foreign policy issues that have diffuse effects but by attempting to steer the President's attention toward policies that promise more targeted benefits to their favorite constituencies.

An alternative and more constructive approach may be to embrace institutional mechanisms that remove the issues of targeted rent-seeking or domestic ideological battles from the President's core foreign policy agenda as much as possible. But which institutional actor would have the motive to impose such constraints on presidential authority and narrow the institutional opportunities to dispense discretionary rents to special interest groups? Ironically, the answer will often be the President. The reason is simple: the President bears much of the costs of instability and policy incoherence when the foreign policy agenda happens to be inundated with conflicting demands by interest groups to impose targeted economic or ideological benefits. When presidents cannot commit to a coherent course of foreign policy towards foreign allies because of conflicting interest groups' pressures, they bear the brunt of losing their reputation for reliability. Thus, while presidents have initially adopted an expansive vision of their foreign authority to provide targeted benefits, their approach to their authority has often moderated over time.

A second, narrower implication is that if the President seeks to avoid the unwanted attention of interest groups in foreign affairs, then greater judicial intervention may lead not to greater democratic responsiveness but to even more convoluted policies that will make it difficult for private groups to demonstrate standing in foreign affairs controversies. Presidents may appreciate the reality that courts are not roving institutional actors that stand ready to correct separation of power deficiencies; on the contrary, they can only intervene in a foreign affairs dispute when an administrative agency renders a decision and/or where a party (usually a private entity) can demonstrate concrete and individualized harm. Thus, to evade judicial review, presidents may act in their institutional capacity in foreign affairs (to avoid being subject to the APA) and implement policies that impose diffuse rather than particularized costs on the public. But these latter kinds of policies will not likely be necessarily efficient or more democratically responsive. Hence, to the extent that judicial intervention may promote more complex foreign policies that impose diffuse rather targeted costs, it may not necessarily ameliorate the democratic accountability problems associated with presidential unilateralism in foreign affairs.

A final implication is that increased attentiveness to foreign affairs by interest groups and the public may not be conducive to presidential control of the foreign affairs bureaucracy. While the mobilization of interest groups in foreign affairs may occasionally help presidents and the foreign affairs bureaucracy achieve narrow and targeted objectives in particular cases, its long-run effects may encourage further political pressures for particularized relief. A further danger is that when the foreign affairs bureaucracy becomes overly responsive to the entreaties of conflicting interest groups, it may lose sight of its core mission of helping the President commit to stable relationships with foreign countries. Thus, in certain circumstances, presidents may try to shield the foreign affairs bureaucracy from the incessant and unpredictable attention of interest groups.

The numerous obstacles that Presidents Reagan and Eisenhower imposed on the bureaucracies responsible for national security protectionism at the Defense and Commerce Departments reflect such a self-muzzling strategy. At some level, the analysis here extends the insight by Baum, who claims "that the range of circumstances [in foreign affairs] under which democratic leaders seek audience costs is limited. In at least some and perhaps many situations, leaders are likely to do their best to avoid them."[243] In Baum's framework, the emphasis is on how presidents evade the problem of unwanted public attention by attempting to conduct foreign policy outside the public spotlight.[244] Baum is primarily concerned with the unwanted attention of voters. By contrast, in this framework, the emphasis is on the unwanted attention of interest groups, and the way the President avoids such attention is by muzzling his own authority and that of the bureaucracy to impose selective benefits and costs in foreign affairs.

CONCLUSION

The Article has argued that the historical record is replete with instances where presidents have willingly, sometimes against Congress's wishes, decided to impose constraints on their foreign affairs authority. The key to understanding these puzzling episodes is that presidents recognize that increased presidential flexibility in foreign affairs can sometimes be a curse in disguise, especially when the new flexibility includes the authority to dispense or withhold selective benefits to interest groups. The problem is that while increased attention by interest groups in foreign affairs may initially prove useful for advancing the agenda of presidents in the short run, the downstream forces unleashed by such groups may eventually erode presidential control of the foreign affairs bureaucracy. Moreover, increased interest group attention in foreign affairs may also spur greater policy volatility across electoral cycles and thus undermine the President's ability to commit to a course of policy. Thus, presidents may be motivated to avoid the kinds of foreign policy projects likely to arouse the appetites of economic and ideological interest groups. By contrast, Congress often seeks to delegate

[243] Baum, *Gong Private, supra* note 22 at 628.
[244] *See id.* at 605.

to the President the kinds of foreign policy functions likely to get presidents entangled in interest group conflicts over targeted benefits and burdens.

One significant implication of this approach is that an increase in congressional attentiveness in foreign affairs may lead not to more constraints on presidential authority but to more unilateral policies that favor specific interest groups. Instead of fighting to limit the reach of the President's discretion in foreign affairs, for instance, members of Congress may fight to expand it on issues that promise targeted benefits to their key constituents at the expense of issues with more diffuse and long-term benefits. In other words, Congress may prefer that presidents spend their scarce attention and resources on tariff issues favoring industry groups at the expense of long-term national security plans. Thus, proposed reforms focusing on using the courts to spur Congress to be more active in foreign affairs may be self-defeating. The claim is not that congressional and judicial interventions to circumscribe presidential authority in foreign affairs are necessarily counterproductive. Occasionally, such interventions may achieve their intended goal of forestalling presidential overreach and encouraging greater democratic deliberation over policy choices. However, this Article has highlighted conditions under which such interventions are likely to misfire and tilt the balance of policy-making further in favor of dominant groups that are already well-organized.

Finally, a hitherto unnoticed solution to the problem of excessive presidential meddling in the economy for national security reasons may not come from the courts or Congress but rather from an unlikely source: the presidency itself. Indeed, the case studies in this Article illustrate the thrust of the theory: presidential self-muzzling in foreign affairs can be the byproduct of intense interest group conflicts over the spoils of power. In this framework, one of the only ways presidents may learn of the downsides of excessive interest group attention in foreign affairs is to experience the drudgery of catering to constant requests from such groups and their congressional allies. In response, presidents may sometimes impose constraints on their foreign affairs authority to deliver targeted benefits to interest groups and stave off further interference from Congress and the courts. In doing so, they may remove one source of policy instability in foreign affairs, which, to their benefit, allows them to commit to the kinds of long-term policies in foreign affairs that will secure their legacy.