The Reliance Interest in Foreign Affairs

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Abstract

This Article argues that foreign affairs polarization in the United States is likely to result in increased judicial oversight in foreign affairs. The reasons are fivefold. First, increased polarization often leads to dramatic swings in foreign policy across electoral cycles, which is likely to disrupt the reliance interests of not only foreign states but also domestic private parties. Second, domestic private parties who can demonstrate that they have suffered concrete injuries to their reliance interests due to foreign policy instability may be more likely to overcome standing and other conventional obstacles to bringing claims. Third, in an era of polarization, government regimes may tend to encourage reliance by domestic private parties as a strategy to lock in policy and constrain the options of their successors. But when the government deliberately encourages reliance, it should bear the risks of foreign policy instability rather than domestic private parties. Fourth, courts are less likely to defer to presidential judgments in foreign affairs when they believe policy swings are motivated largely by partisan, rather than institutional, considerations. Fifth, on a more speculative note, there is a risk that the precedents and doctrines forged by courts in the resolution of low stakes private disputes involving reliance interests may then be deployed in cases where the stakes are much higher, such as controversies where parties are seeking injunctive and declaratory relief against the President.

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Introduction

The received wisdom among both political scientists and constitutional scholars assumes that presidents are empire builders who will seek to maximize their institutional flexibility in framing international law and foreign policy.[1] Correspondingly, there is a normative literature that suggests that presidents ought to have significant leeway in interpreting international law and fashioning foreign policy on behalf of the United States.[2] Much of the literature and judicial doctrine on this issue assumes that presidents—across the partisan divide—may have

1 *See* Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 Yale L.J. 1255, 1291 (1988) ("Th[e] simple three-part combination of executive initiative, congressional acquiescence, and judicial tolerance explains why the President almost invariably wins in foreign affairs."); *see also* Louis Henkin, *The President and International Law*, 80 Am. J. Int'l L. 930, 934–36 (1986) (describing the President's broad authority in the foreign affairs context). But there is a literature that suggests that, regardless of the realist and functional reasons for executive branch primacy in foreign affairs, certain aspects of that primacy are not justified on textual grounds. *See, e.g.*, Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 Yale L.J. 231, 253–55 (2001) (suggesting that a textual theory of foreign affairs provides the President with a far more limited set of constitutional powers).

2 *See, e.g.*, Elad Gil, *Rethinking Foreign Affairs Deference*, 63 B.C. L. Rev. 1603, 1615–20 (2022) (describing literature and doctrine recommending judicial deference or avoidance in foreign affairs controversies); Daniel Abebe & Eric A. Posner, *The Flaws of Foreign Affairs Legalism*, 51 Va. J. Int'l L. 507, 509, 547–48 (2011) (arguing against judicial intrusion into foreign affairs controversies); Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 Iowa L. Rev. 941, 999–1001 (2004) (defending judicial deference in foreign affairs on functional grounds).

a consistent institutional vision of foreign affairs or international law,[3] and that vision deserves significant deference from the courts and other institutional actors.[4]

But what happens when presidents (or their copartisans) engage in routine and dramatic reversals in their institutional positions on key international law or foreign policy issues across electoral cycles? More important, what happens when these policy reversals threaten the reliance interests of not only foreign countries but also domestic private parties subject to the jurisdiction of U.S. courts?

This Article argues that although such foreign policy swings are not pervasive, they are sufficiently common to be of theoretical and practical interest. Moreover, they are an artifact of growing foreign policy polarization in the United States and are likely to increase judicial intervention in foreign affairs. There are two distinct pathways through which such a transformation is likely to occur.

First, an increase in foreign policy volatility is likely to disrupt the reasonable reliance interests of domestic private parties, and these parties will be able to demonstrate the kinds of concrete and particularized injuries that are amenable to judicial relief. Parts I through III below examine the factors that are likely to shape the opportunities for judicial intervention when private parties suffer detrimental reliance in foreign affairs. To mitigate the risks of policy reversals, presidents may have an incentive to encourage, or at least not discourage, reliance by private parties on their foreign policy initiatives in order to narrow the discretion of successors who have different policy preferences.[5] But the more the government depends on private parties to achieve foreign policy objectives, the more compelling the rationale for judicial recovery of any reliance costs such private parties incur because of reversals in foreign policy.[6] Furthermore, for this category of cases, private parties

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3 Rachel Myriuck, *Do External Threats Unite or Divide? Security Crises, Rivalries, and Polarization in American Foreign Policy*, 75 Int'l. Org. 921, 925 (2021) ("What we know theoretically and practically about foreign policymaking in the United States leads scholars to expect minimal preference divergence in foreign policy between the Republican and Democratic Parties. . . . The narrative that foreign threats facilitate partisan unity is rooted in an extensive literature about external threat and internal cohesion.").

4 *See* El Al Isr. Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 168 (1999) ("Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty."); *see also* Robert M. Chesney, *Disaggregating Deference: The Judicial Power and Executive Treaty Interpretations*, 92 Iowa L. Rev. 1723, 1754–55 (2007) (showing that that in sixty-seven treaty interpretation cases the Executive's interpretation prevailed fifty-three times); Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 Va. L. Rev. 649, 673–75 (2000) (describing competing accounts of deference to the President in foreign affairs and suggesting that *Chevron* deference provides a useful perspective for thinking about the relationship between courts and the President in foreign affairs).

5 *See infra* Section III.A.

6 *See infra* Section III.B.

may be better able to overcome standing obstacles by demonstrating they have suffered injuries above and beyond those suffered by the general public. This Article uses recent controversies over the Keystone XL Pipeline Project,[7] the withdrawal of U.S. troops from Afghanistan,[8] the Iran Nuclear Deal,[9] and other disputes to illustrate these claims.

Second, dramatic swings in institutional or policy preferences by presidents across electoral cycles may encourage judges to be less deferential to the President in foreign affairs controversies. Part IV suggests that foreign policy volatility makes it harder for federal judges to sustain the pretense that presidential policy preferences on foreign affairs or international law reflect institutional expertise regarding the national interest rather than partisan or factional considerations. This Part also explores the possibility that an uptick in judicial review of low stakes cases in foreign affairs involving reliance damages may influence judicial willingness to intervene in foreign affairs disputes where the stakes are much higher, such as when parties are seeking injunctive or declaratory relief. In other words, courts may become more reluctant to abstain in such high-stakes cases on the grounds that judicially manageable standards are unavailable once they develop such standards in low stakes cases involving claims for money damages.

One significant contribution of Professors Sean D. Murphy and Edward T. Swaine's treatise is that they raise questions about the centrality of both presidential primacy and judicial deference in foreign affairs.[10] They demonstrate, for instance, that private parties who can demonstrate concrete threats to their individual rights (such as property rights) can sometimes overcome obstacles to justiciability in foreign affairs, especially when judicial remedies will not threaten the conduct of foreign policy.[11] But what are the factors likely to shape the ebb and flow of the kinds of foreign affairs controversies that are amenable to judicial relief? This Article suggests that in a political environment characterized by policy volatility, there are powerful incentives for courts to defer less to the President on foreign affairs. Furthermore, foreign policy volatility ensures that there will be a greater pool of claimants who are likely to suffer concrete reliance costs, and thus better able to demonstrate the kinds of injuries that can be redressed by judicial intervention.

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7 *See infra* notes 94–106 and accompanying text.

8 *See infra* notes 77–83 and accompanying text.

9 *See infra* notes 56–60 and accompanying text.

10 Sean D. Murphy & Edward T. Swaine, The Law of U.S. Foreign Relations (2023).

11 *See infra* notes 91–93 and accompanying text.

I. Recent Examples of Foreign Policy Instability

Consider these instances when presidents (and their copartisans) have completely reversed policies or institutional preferences on foreign relations across electoral cycles:

It was the Trump Administration in 2018 that withdrew from the nuclear deal that Obama signed with Iran in 2015.[12] In 2020, President-elect Biden announced his intention to reverse course and resuscitate the 2015 Iran Nuclear Deal.[13]

It was President Trump, an avowedly promarket Republican, who invoked the national security exceptions of section 232 of the Trade Expansion Act of 1962[14] to impose twenty-five percent and ten percent tariffs, respectively, on a range of steel and aluminum imports.[15] In doing so, President Trump departed from a relatively long-standing presidential norm in which section 232 was invoked sparingly.[16]

It was the Trump administration in 2017 that declared a partial rollback of the Obama Administration's diplomatic reengagement with Cuba.[17] Under the declared guidelines, the United States reinstated restrictions on travel and trade with Cuba without completely cutting diplomatic ties. President Biden announced that he was reversing some of Trump's rollback policies related to Cuba, making it easier for families to visit relatives in the country.[18]

It was the Trump administration in 2017 that ordered the U.S. Trade Representative to withdraw the United States from the Trans-Pacific Partnership ("TPP"), a twelve-country, Asia-focused trade agreement the United States had supported under the Obama Administration.[19] In signing the Agreement in 2016 after five years of negotiation, President

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12 Tessa Berenson, *President Trump Pulls U.S. out of 'Defective' Iran Nuclear Deal,* Time (May 8, 2018, 3:52 PM), https://time.com/5269746/donald-trump-iran-nuclear-deal-macron/ [https://perma.cc/LCT5-XMUM].

13 Steven Erlanger, *Biden Wants to Rejoin Iran Nuclear Deal, But It Won't Be Easy*, N.Y. Times (June 19, 2021), https://www.nytimes.com/2020/11/17/world/middleeast/iran-biden-trump-nuclear-sanctions.html [https://perma.cc/U3W2-JEP6].

14 19 U.S.C. § 1862(c)(1)(B) (2018).

15 Rachel F. Fefer, Cong. Rsch. Serv., IF10667, Section 232 of the Trade Expansion Act of 1962, at 2 (2020).

16 *See id.* ("Before the Trump Administration, a president last imposed tariffs or other trade restrictions under Section 232 in 1986.").

17 Jon Lee Anderson, *Donald Trump Reverses Barack Obama's Cuba Policy*, The New Yorker (June 16, 2017), https://www.newyorker.com/news/daily-comment/donald-trump-reverses-barack-obamas-cuba-policy [https://perma.cc/P7NF-SUNY].

18 Jennifer Hansler & Kevin Liptak, *Biden Reverses Some Trump Policies Related to Cuba, Making it Easier for Families to Visit Relatives in Country*, CNN (May 16, 2022, 7:32 PM), https://www.cnn.com/2022/05/16/politics/cuba-joe-biden/index.html [https://perma.cc/K42G-LMSQ].

19 Peter Baker, *Trump Abandons Trans-Pacific Partnership, Obama's Signature Trade Deal*, N.Y. Times (Jan. 23, 2017), https://www.nytimes.com/2017/01/23/us/politics/tpp-trump-trade-nafta.html [https://perma.cc/UZ6K-NLW4].

Obama heralded the TPP as a deal that "sets new, high standards for trade and investment in one of the world's fastest growing and most important regions."[20]

It was the Obama Administration in 2015 that denied a cross-border permit for the transnational Keystone pipeline for environmental and health reasons, only to have the Trump Administration reverse course in 2017 and grant the permit, which the Biden Administration immediately rescinded again upon stepping into office in 2021.[21]

A similar pattern of presidential passage and repeal across partisan lines prevailed on yet another international environmental issue, the Paris Accords. It was President Obama who formally entered the United States into the agreement under international law through his sole executive authority,[22] only to have President Trump pull the country out of the Paris Accords in 2020,[23] and then have President Biden rejoin the Paris Accords again in early 2021.[24]

It was the Obama and Carter Administrations that filed briefs before the Supreme Court arguing that federal courts should have leeway to adjudicate on human rights violations abroad under the Alien Tort Statute,[25] and it was the Bush II, Reagan, and Trump Administrations that reached an opposite conclusion due to separation of powers concerns.[26]

Finally, another example is the Mexico City policy, which blocks U.S. federal funding for nongovernmental organizations ("NGOs") that provide abortion counseling or referrals.[27] The policy was first put into place in 1984 under President Reagan's second term.[28] Since that time, the United States Agency for International Development ("USAID")

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20 Presidential Statement on the Signing of the Trans-Pacific Partnership, 1 Pub. Papers 93 (Feb. 3, 2016).

21 For a detailed discussion of this episode, see *infra* text accompanying notes 94–106.

22 Remarks Announcing the Formal Entry of the United States Into the United Nations Framework Convention on Climate Change Paris Agreement in Hangzhou, China, 2 Pub. Papers 1122 (Sept. 3, 2016).

23 Matt McGrath, *Climate Change: US Formally Withdraws from Paris Agreement,* BBC News (Nov. 4, 2020), https://www.bbc.com/news/science-environment-54797743 [https://perma.cc/9BJL-MUZJ].

24 Presidential Statement on Acceptance of Paris Agreement on Climate Change on Behalf of the United States, 2021 Daily Comp. Pres. Doc. 49 (Jan. 20, 2021).

25 28 U.S.C. § 1350.

26 For a detailed discussion of these changes in the President's litigation position on the ATS, see Jide Nzelibe, *Contesting Adjudication: The Partisan Divide Over Alien Tort Statute Litigation*, 33 Nw. J. Int'l L. & Bus. 475, 476–79 (2013).

27 *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), https://time.com/5933870/joe-biden-abortion-mexico-city-policy/ [https://perma.cc/LY5N-PB4K].

28 *Id.*; *see also* Samantha Lalisan, *Policing the Wombs of the World's Women: The Mexico City Policy*, 95 Ind. L.J. 977, 978 (2020) (describing Reagan's 1984 announcement of the Mexico City Policy and the subsequent rescissions and reinstatements following party lines).

has enforced the policy during all subsequent Republican administrations and has rescinded the policy at the direction of all Democratic administrations.[29]

These examples suggest that dramatic foreign policy swings across electoral periods are hardly uncommon in the modern era. To be sure, some measure of foreign policy change is to be expected whenever there is a turnover in the White House. But a sustained pattern of dramatic policy reversals across electoral cycles is likely to have a corrosive effect on long-term commitments to both foreign allies and private businesses. If private businesses can establish that they have suffered concrete economic injuries due to their reasonable reliance on a foreign policy commitment, they may have greater leeway to overcome standing and other jurisdictional obstacles to bringing claims in U.S. courts. And as more private business become enlisted in the service of foreign relations objectives of the United States, or become more vulnerable to swings in foreign policy, the pool of available claimants is likely to grow.

II. The Source of the Volatility: When Partisan Judgments Trump Institutional Preferences

The source of the contemporary swings in foreign policy across electoral cycles likely lies in the breakdown in the post-WWII bipartisan consensus in foreign affairs—an era that was once captured by the catchphrase: "politics stops at the water's edge."[30] There is already an extensive literature that explores the plausible reasons for this breakdown and the concomitant increase in foreign policy polarization in the United States.[31] A defining characteristic of this polarization has been foreign policy volatility.[32] For the purposes of the analysis here, two key aspects of this development are relevant. The first, which is developed later in this Article, is that it is harder to maintain the posture that presidents have special institutional expertise in foreign affairs that warrants deference once there are wide swings in policy across electoral cycles.[33] To be sure, when commentators and judges describe in laudatory terms the value of policy expertise and the need for deference in foreign

29 Lalisan, *supra* note 28, at 978–79.

30 Gyung-Ho Jeong & Paul J. Quirk, *Division at the Water's Edge: The Polarization of Foreign Policy*, 47 Am. Pol. Rsch. 58, 61 (2019); *see also* Joanne Gowa, *Politics at the Water's Edge: Parties, Voters, and the Use of Force Abroad*, 52 Int'l Org. 307, 307 (1998) (finding no effect of the partisan composition of government on the propensity of the United States to use force from 1870 to 1992).

31 *See, e.g.*, Jeong & Quirk, *supra* note 30, at 81–83 (describing severe patterns of partisan conflict in contemporary foreign policy); Charles A. Kupchan & Peter L. Trubowitz, *Dead Center: The Demise of Liberal Internationalism in the United States*, 32 Int'l Security 7, 9 (2007) (chronicling the rise of partisan polarization in American foreign policy).

32 *See* Jeong & Quirk, *supra* note 30, at 81–83.

33 *See infra* Section IV.A.

affairs,[34] they may be referring to the administrative bureaucracy and not necessarily to elected officials. But whether foreign policy swings are the result of presidential overrides of the administrative bureaucracy in foreign affairs, or the politicization of the bureaucracies themselves, it is hard to deny the appearance that partisan judgments are trumping institutional preferences. In the domestic arena, courts have sometimes reacted to these developments by resorting to "expertise-forcing" modes of statutory interpretation to rein in the excessive politization of agencies by elected officials.[35] But the President has arguably more leeway to sidestep the role of bureaucracies altogether in foreign affairs.[36]

The second point is that there is also an increasing tendency toward institutional polarization in foreign affairs.[37] Thus, rather than view institutional structures as neutral tools, elected officials may instead view them as bundles of policy options and then stake out positions depending on what structures they believe get them the most "bang for the buck" for their preferred outcomes.[38] Initially, when groups are uncertain about the likely effects of a specific interpretation of a foreign affairs power or international law, they may all converge on favoring presidential flexibility. However, as soon as they learn how different interpretations may constrain new and salient policy goals, such as the domestic implementation of human rights treaties, they may revise their previous preferences.

Thus, when security issues become salient and seem to benefit politicians of the right, it may not be farfetched to witness left-leaning Democrats seeking to constrain the war powers authority of their copartisan in the White House, especially if their downstream goal is to constrain the national security flexibility of future Republican presidents.[39] Similarly, Republicans may seek to increase constraints on the domestic effects of human rights treaties, regardless of the occupant of the White House.[40] The threat posed by institutional polarization is that it increases the risks that representations in litigation made by

34 *See* Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 Harv. L. Rev. 1897, 1936 (2015).

35 *See* Jody Freeman & Adrian Vermeule, Massachusetts v. EPA*: From Politics to Expertise*, 2007 Sup. Ct. Rev. 51, 52 ("Expertise-forcing is the attempt by courts to ensure that agencies exercise expert judgment free from outside political pressures, even or especially political pressures emanating from the White House or political appointees in the agencies.").

36 *See id.* at 80 (distinguishing between "scientific and causal" factors which can be delegated to agency expertise and "broader considerations of foreign affairs and public policy" which cannot).

37 Jeong & Quirk, *supra* note 30, at 60.

38 *Id.*; *see also* Jide Nzelibe, *Our Partisan Foreign Affairs Constitution*, 97 Minn. L. Rev. 838, 847–50, 874–75 (2013).

39 *See* Nzelibe, *supra* note 38, at 840–42 ("[T]he ultimate objective of advocating or disavowing constitutional constraints in foreign affairs can be self-serving and strategic.").

40 *See id.*

government attorneys about the institutional position of the President are likely to change over electoral cycles. As discussed below, inconsistent litigation positions adopted by the President over electoral cycles are likely to further weaken the deference that courts are willing to accord the President in foreign affairs.[41]

The point of this speculative exercise is not to suggest that these partisan preferences over foreign policy or institutional preferences are hardwired or are due entirely to strategic considerations. On the contrary, there are going to be deviations from expected policy or institutional positions that are genuinely ad hoc or random. Rather, the narrower claim is that some of these deviations are systematic enough to warrant revisiting some aspects of the conventional account, including the possible role of judicial deference to the President in foreign affairs.

The remainder of this Article discusses some of the institutional implications of having polarized preferences over foreign affairs and international law. But in addition to those implications, polarization can increase uncertainty about the direction of future international law or foreign policy. Faced with this possibility, commercial actors and other citizens who depend on a stable policy or legal environment may shy away from making long-term commitments or investments. In other words, presidential polarization over international law may make it harder for the United States to commit credibly to a course of action in international law.

III. Opportunities for Judicial Intervention: The Role of Reliance Interests

This Part argues that the greater the risks of foreign policy volatility, the greater the likelihood that domestic private parties may incur the kinds of reliance costs that are judicially recoverable. In developing this thesis, it advances three claims. The first is that presidents, who face a recalcitrant opposition, may have an incentive to induce reliance by private parties and foreign allies when they embark on unilateral foreign policy initiatives. By creating sunk costs and encouraging foreign countries and private actors to adapt to the policy change, the President may hope to narrow the discretion of a successor who may have different policy preferences. The second is that given the increased vulnerability of domestic private parties to dramatic swings in foreign policy, there is likely to be a larger pool of claimants willing and able to bring viable lawsuits in domestic courts. The third is that these claimants are likely to allege the kinds of injuries that overcome conventional limitations on standing in foreign affairs controversies.

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41 *See infra* Part IV.

A. Presidential Incentives to Encourage Reliance and Lock in Policy

In an era of greater polarization, presidents have reason to worry that their unilateral policy initiatives in foreign affairs may face a short political shelf life. Indeed, the very condition that drives the demand for unilateral executive action in foreign affairs—the presence of an uncooperative political opposition in Congress—often tends to produce counteracting tendencies that undermine policy durability. At bottom, unilateral foreign policy initiatives by one administration may tend to provoke unilateral policy reversals by a successor whenever there is a turnover in the White House. Moreover, the higher the expressive stakes of the unilateral initiative for the President's core supporters, the more the opposition might be vested in reversing course once it assumes power.

One way the President may hedge against the risks of policy reversal is to encourage private and foreign parties to make the kinds of reliance investments that create sunk costs. In this picture, the expectation is that if parties make asset specific investments in reliance on the President's initiative, they will narrow the options of a successor who may seek to reverse policy.[42] In this case, it may also be a preferable strategy for locking in policy when compared with other institutional arrangements which impose significant hurdles,[43] such as a treaty or a congressional executive agreement.[44]

42 This point has also been made elsewhere by Bradley and Goldsmith, but their emphasis is on the reliance interests created by executive agreements more broadly. *See* Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control over International Law*, 131 Harv. L. Rev. 1201, 1253–54 (2018) ("In practice . . . the actions of an earlier President affect and narrow the options of a later President."). The argument here is slightly different, which is that presidents may deliberately attempt to induce reliance by third parties to create sunk costs and constrain the discretion of their successors.

43 Outside of foreign policy, commentators have observed there may be other alternative mechanisms for an administration that seeks to increase its chances for locking in policy, such as the use of binding agency rules. *See* Cass R. Sunstein & Adrian Vermeule, Auer, *Now and Forever*, Yale J. on Reg.: Notice & Comment (Sept. 19, 2016), http://yalejreg.com/nc/auer-now-and-forever-by-cass-r-sunstein-adrian-vermeule/ [https://perma.cc/FGW6-2579] ("And there is a cross-cutting incentive as well: agencies who want to bind their own successors, perhaps because a change of administration looms, are better off creating a binding rule, repealable only through the same relatively costly process.").

44 In the following discussion, the Author assumes there is a distinction between arrangements that may otherwise meet the threshold of constitutional legality and those that may facilitate policy sustainability. Although sometimes there may be an overlap between the two kinds of arrangements, it is hardly necessary. For instance, an executive agreement that is signed by a president pursuant to a prior congressional delegation of authority may very well meet a threshold of legality but be fairly susceptible to reversal by a successor. On the other hand, some commentators have argued that certain constitutional arrangements such as treaties may facilitate policy durability because they require a supermajority threshold of two-thirds of the Senate. *See* Julian Nyarko, *Giving the Treaty a Purpose: Comparing the Durability of Treaties and Executive Agreements*, 113

Before proceeding, some clarifications about the mechanisms for locking in foreign policy are in order. There are two plausible ways in which an executive can unilaterally try to bind their successor through reliance by third parties. The first, which is somewhat unpredictable, is to depend on the sheer political influence of domestic interest groups or foreign allies. In this case, the key is to harness the leverage of narrow groups or foreign states who benefit disproportionately from the policy change and hope they are able to fend off downstream threats to their newly established rents.[45] But the efficacy of this approach hinges crucially on the enduring political power of the favored groups or foreign states.[46] The second is for one administration to try to endow a third party with legal rights that it can assert against its successor. The most direct route for an incumbent regime to achieve this form of precommitment is by entering into binding contracts or treaties that provide enforceable rights to third parties.[47] But a less direct route is through the creation of vested property interests, where the government grants a concession that causes a private party to incur the kind of reliance interests that eventually mature into an enforceable vested right.[48] As Professor Christopher Serkin has observed in the context of land use,

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Am J. Int'l L. 54, 57 (2019) (arguing that treaties have a lower probability of breaking down than executive agreements); John K. Setear, *The President's Rational Choice of a Treaty's Preratification Pathway: Article II, Congressional-Executive Agreement, or Executive Agreement?*, 31 J. Legal Stud. S5, S8 (2002) ("The president's general willingness to seek legislative approval is consistent with an effort to generate a credible signal of durable U.S. commitment."). Others have argued that meeting treaty ratification threshold helps the government reveal valuable information. *See* John Yoo, *Rational Treaties: Article II, Congressional-Executive Agreements, and International Bargaining*, 97 Cornell L. Rev. 1, 4 (2011) (contending that "[t]reaties convey more credible information about the expected value of a good or territory" than congressional-executive agreements). But meeting that threshold in the modern era of political polarization is often very difficult, if not insurmountable. *See* Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 Yale L.J. 1236, 1241 (2008) (discussing why the treaty pathway is particularly cumbersome in the modern era). Commentators have also observed that other international law instruments can serve the check and balances function of treaties and congressional executive agreements. *See, e.g.*, Jean Galbraith, *From Treaties to International Commitments: The Changing Landscape of Foreign Relations Law*, 84 U. Chi L. Rev. 1675, 1728–31 (2017) (discussing other mechanisms for checks on executive unilateralism in the contexts of negotiation and implementation); Harold Hongju Koh, *Triptych's End: A Better Framework to Evaluate 21st Century International Lawmaking*, 126 Yale L.J. F. 338, 339 (2017) (discussing "how a diverse group of stakeholders in an ongoing transnational legal process use tools available to them to hold America to its commitments").

45 *See, e.g.*, Jide Nzelibe, *Strategic Globalization: International Law as an Extension of Domestic Political Conflict*, 105 Nw. U. L. Rev. 635, 658–82 (2011) (suggesting that the political influence of interest groups can help entrench political commitments); Rachel Brewster, *The Domestic Origins of International Agreements*, 44 Va. J. Int'l L. 501, 511–24 (2004) (same).

46 *See* Nzelibe, *supra* note 45.

47 *See infra* notes 63–83.

48 Christopher Serkin, *Public Entrenchment Through Private Law: Binding Local Governments*, 78 U. Chi. L. Rev. 879, 898 (2011).

"one government can therefore entrench a development agenda vis-à-vis specific property by allowing development rights to vest, either by issuing permits or forgoing some new regulation until after development has begun, depending on the law of the jurisdiction."[49] Commentators have also suggested that a global legal regime of international trade also serves a similar function: it allows proliberal regimes to entrench their economic policy preferences by providing export groups an opportunity to enforce their rights to market access against a future regime that may have different policy preferences.[50]

A historical example serves to illustrate the role played by sunk costs or adaptive expectations in locking in a president's unilateral foreign policy initiative. In the wake of the Senate's refusal to approve the International Trade Organization after WWII, President Truman signed an executive agreement in 1947 bringing the United States in compliance with the General Agreement for Trade and Tariffs ("GATT").[51] Thus, the United States joined the GATT not as the result of Senate ratified treaty or even a congressional-executive agreement, but because of a sole executive agreement.[52] Even though it was supposed to be a temporary measure, Truman's agreement stimulated a significant shift in the behavior of foreign trade partners and domestic economic actors in ways that would have made exit from the GATT very costly.[53] In the end, Truman's temporary arrangement became locked in.[54] To be clear, in the years after Truman signed the agreement, Congress's reluctance

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49 *Id.*

50 *See* 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); *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). Of course, it is states that bring litigation claims before the WTO's dispute resolution mechanism. But as some commentators have observed, interest groups play a key role in government decisions to initiate such litigation. *See generally* Gregory C. Shaffer, Defending Interests: Public–Private Partnerships in WTO Litigation (2003).

51 Proclamation No. 2761A, 12 Fed. Reg. 8863, 8866 (Dec. 30, 1947); *see also* Ronald A. Brand, *The Status of the General Agreement on Tariffs and Trade in United States Domestic Law*, 26 Stan. J. Int'l L. 479, 482–83 (1990) (discussing the origins of the GATT and Truman's role in implementing it through executive agreement).

52 *See* Brand, *supra* note 51, at 482–83, 502.

53 Kimberly Chapman, Note, *Separation of Powers and Unilateral Executive Action: The Constitutionality of President Clinton's Mexical Loan Initiative*, 26 Ga. J. Int'l & Compar. L. 163, 181 (1996) ("This shift cannot practically be altered today because 'to disown the GATT at this point would be a jolt to this nation's foreign policy, and, indeed, to the stability of international economic relations throughout most of the world.'" (quoting John H. Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 Mich. L. Rev. 249, 260 (1967))).

54 *See United States of America and the WTO*, World Trade Org., https://www.wto.org/english/thewto_e/countries_e/usa_e.htm [https://perma.cc/7BD3-KVA2] ("The United States of America has been a WTO member since 1 January 1995 and a member of GATT since 1 January 1948.").

to embrace the GATT remained. Specifically, when Congress extended the authority of the President to negotiate trade agreements from 1951 through 1958, it included language that refused to acknowledge its approval of the GATT agreement: "The enactment of this Act shall not be construed to determine or indicate the approval or disapproval by the Congress of the Executive Agreement known as the General Agreement on Tariffs and Trade."[55]

A significant wrinkle with this argument is that the political opposition might have an incentive to adopt a strategy of obfuscation, reminding risk averse private actors and foreign partners of the fragility of unilateral presidential action in foreign affairs. Put differently, the political opposition has an incentive to discourage reliance by third parties and forestall sunk costs.

A recent illustration of such an obfuscation strategy is the Republican response to the 2015 Iran Nuclear Deal. The deal was in the form of an executive agreement signed by President Obama with other world powers in 2015 that would curb Iran's nuclear program in exchange for sanctions relief.[56] While the details of the Deal were still being ironed out, Arkansas Republican Senator Tom Cotton authored an open letter to the President of Iran on behalf of himself and 46 of his Republican colleagues, cautioning: "The next president could revoke [the agreement] with the stroke of a pen and future Congresses could modify the terms of the agreement at any time."[57] The letter seemed like a deliberate effort to stave off the kinds of reliance interests by both foreign countries and private actors that might narrow the options of a future Republican president. In 2018, President Trump seemed to vindicate Senator Cotton's prognostication by unilaterally withdrawing from

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55 *See, e.g.*, Trade Agreements Extension Act of 1951, Pub. L. No. 82-50, 65 Stat. 72, 75 (1951); Trade Agreements Extension Act of 1953, Pub. L. No. 83-215, 67 Stat. 472, 472 (1953); Trade Agreements Extension Act of 1954, Pub. L. No. 83-464, 68 Stat. 360, 360 (1954); Trade Agreements Extension Act of 1955, Pub. L. No. 84-86, 69 Stat. 162, 163 (1955); Trade Agreements Extension Act of 1958, Pub. L. No. 85-686, 72 Stat. 673, 680 (1958). *See generally* Timothy Meyer & Ganesh Sitaraman, *Trade and the Separation of Powers*, 107 Calif. L. Rev. 583, 604–05 (2019) (discussing Congress's refusal to "bless the GATT").

56 Statement on the Adoption of the Joint Comprehensive Plan of Action to Prevent Iran from Obtaining a Nuclear Weapon, 2 Pub. Papers 1326 (Oct. 18, 2015). For the proposition that the 2015 Iran Nuclear Deal was a nonbinding executive agreement that could be revoked unilaterally by future presidents, see Michael D. Ramsey, *Evading the Treaty Power?: The Constitutionality of Nonbinding Agreements*, 11 FIU L. Rev. 371, 377–81 (2016).

57 Tom Cotton et al., *An Open Letter to the Leaders of the Islamic Republic of Iran* (Mar. 9, 2015), www.cotton.senate.gov/sites/default/files/150309%20Cotton%C20Open%-C20Letter%C20to%C20Iranian%Leaders.pdf [https://perma.cc/M5HR-BQJP]; *see also* Tom Cotton, Opinion, *Why We Wrote the Letter to Iran*, USA TODAY (Mar. 10, 2015, 5:18 PM), www.usatoday.com/story/opinion/2015/03/10/iran-nuclear-talks-letter-47-senators-sen-tom-cotton-editorials-debates/24721971 [https://perma.cc/PVX6-YJXJ] ("If the president won't share our role in the process with his negotiating partner, we won't hesitate to do it ourselves.").

the Iran Deal.[58] President Biden, convinced that the unilateral withdrawal by the Trump administration was a mistake, vowed to rejoin the Iran Deal.[59] In all this back and forth, there is bound to be considerable uncertainty among private investors and foreign partners as to whether the United States can commit credibly to a long-term course of action on a sensitive foreign policy issue. Various commentators have suggested that one way to avoid these wild gyrations across electoral periods is for a President to secure ex post congressional approval for these agreements, either through a treaty or a congressional executive agreement.[60]

These illustrations are compatible with a certain view of foreign policy entrenchment (and retrenchment): in an era of polarization, presidents may seek to encourage the reliance of third parties on their unilateral foreign policies to facilitate policy lock-in, while the opposition will try to discourage reliance by emphasizing the likely unpredictability of future policy, especially when policies can be easily reversed by unilateral presidential orders. Thus, the prorevision politician has an incentive to appeal to the sociological factors that enable policy entrenchment, while the antirevision politician has an incentive to appeal to the institutional factors that undermine it.

The next Section considers the implications of the presidential tendency to induce reliance for the prospect of judicial review, especially when domestic private parties suffer concrete material injuries from dramatic foreign policy swings. In what follows, the Article will set aside the issue of foreign states acting as plausible claimants in disputes over foreign policy instability in U.S. courts. It is not because foreign countries cannot bring such claims; on the contrary, they may,[61] but because of

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58 *Trump Withdrew from the Iran Deal. Here's How Republicans, Democrats and the World Reacted*, N.Y. Times (May 8, 2018), https://www.nytimes.com/2018/05/08/world/middleeast/trump-iran-deal-republicans-democrats-world-reactions/html [https://perma.cc/6RZQ-RZ56].

59 John Bowden, *Biden Signals That the US Is Prepared to Rejoin the Iran Nuclear Deal*, Indep. (Sept. 22, 2021, 5:51 AM), https://www.independent.co.uk/news/world/americas/us-politics/biden-unga-iran-deal-speech-b1924448.html [https://perma.cc/5JGK-DXW5]; *see also* Sarah Elbeshbishi, *US, Iran Close Restoring an Agreement to (Sort Of) Replace Nuclear Deal*, USA Today (June 29, 2023, 3:07 PM), https://www.usatoday.com/story/news/politics/2023/06/29/biden-could-be-close-to-informal-agreement-on-iran-nuclear-deal/70369772007/ [https://perma.cc/XTK7-FKCY] (discussing U.S. government denial that a new deal is being negotiated with Iran but reports of a potential informal agreement).

60 *See, e.g.*, Jamil N. Jaffer, *Elements of Its Own Demise: Key Flaws in the Obama Administration's Domestic Approach to the Iran Nuclear Agreement*, 51 Case W. Rsrv. J. Int'l L. 77, 87, 99 (2019) (suggesting that interbranch cooperation is likely to lead to more permanent results). *But see* Harold Hongju Koh, *Presidential Power to Terminate International Agreements*, 128 Yale L.J. F. 432, 450 (2018) (questioning the constitutionality of a unilateral withdrawal by President from Iran Nuclear Deal because this invokes plenary powers delegated to President by Congress).

61 For an incisive analysis of foreign states as plaintiffs in U.S. domestic courts, see Hannah L. Buxbaum, *Foreign Governments as Plaintiffs in U.S. Courts and the Case Against "Judicial Imperialism*,*"* 73 Wash. & Lee L. Rev. 653, 705–06 (2016).

standing and other obstacles, they are unlikely to be the main source of these kinds of lawsuits.[62] Moreover, any analysis of the kinds of injuries that foreign states are likely to suffer will be subsumed by the analysis of injuries to private parties.

B. Categories of Recoverable Reliance Interest

The discussion thus far has emphasized the tendency of presidents to encourage reliance by third parties to lock in policy. But that does not tell us whether courts will have the opportunity to vindicate this kind of reliance interest. There are three plausible categories of reliance harms from foreign policy swings that may be amenable to judicial relief. In the first, which is the paradigm case, the government generates reliance through an explicit contract with a private party to perform certain foreign policy functions abroad. In that case, the government will usually compensate the private party when a policy reversal or the abandonment of a foreign mission makes contractual performance impracticable. The second category involves situations where a regulatory or policy decision is intended to induce reliance, and a private party incurs significant damages because of a policy reversal. The third category is when a foreign policy decision by the President is not intended to induce reliance by a third party but incidentally causes harm when it is reversed. In the latter case, judicial relief is not usually available. The following Sections explore these three categories and the implications they have for judicial intervention in foreign affairs.

1. When the Government Induces Reliance Through Contract

The most obvious device for inducing reliance is the government contract, where the promise of the government to protect the reliance, or expectation, interests of private parties is explicit and put in writing.[63] In the context of foreign affairs, the contract with the government also serves an underappreciated function: it is a mechanism through which private parties may protect themselves against the risks of

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62 *See* David H. Moore, Response, *United States Courts and Imperialism*, 73 Wash. & Lee L. Rev. Online 338, 340–41 (2016) (observing the relative infrequency of foreign states as plaintiffs in U.S. courts); *see also* Buxbaum, *supra* note 61, at 659 (same).

63 According to the Congressional Research Service, some of the benefits in using private contractors in foreign military missions such as in Afghanistan "include freeing up uniformed personnel to focus on military-specific activities; providing supplemental expertise in specialized fields, such as linguistics or weapon systems maintenance; and, providing a surge capability to quickly deliver critical support tailored to specific military needs." Clayton Thomas, Cong. Rsch. Serv., R46879, U.S. Military Withdrawal and Taliban Takeover in Afghanistan: Frequently Asked Questions 61 (2021).

foreign policy fluctuations.[64] In an era where the United States depends more on private contractors for sensitive military and foreign policy functions,[65] the government commits to pay the private contractor if it abandons or exits a foreign policy mission abroad and makes contractual performance impracticable.[66] The motivation of the government for reversing policy in foreign affairs need not be relevant.[67] It does not matter whether the policy reversal may be due to partisan rather than institutional reasons, or whether it is sudden or planned.[68] If for any reason the government ends the contract or abandons a foreign policy mission for its own convenience, it is obligated to pay the private contractor for any costs that it has incurred plus a reasonable profit.[69]

In any event, the increased use of private contractors in United States foreign policy missions has significant implications for the judicial role in foreign affairs. First, by outsourcing sensitive foreign policy services to private contractors, the government has created a pool of possible claimants who would ordinarily not exist if government actors performed the services themselves.[70] In other words, the government's increasing dependence on private actors means more opportunities for threats to economic rights to be clearly demonstrated and therefore more ability for plaintiffs to overcome jurisdictional obstacles.[71] Take, for instance, the case of private contractors who have been employed to perform highly sensitive security services in a foreign military mission. If they are disappointed in their reliance interests by a sudden government withdrawal of forces from the foreign mission, they are likely to overcome standing and other jurisdictional obstacles based on sovereign immunity. By contrast, if government agents performed these same services, they would likely lack standing to bring any claims.[72] Second,

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64 *See id.* at 62 (describing "[s]tandard federal procurement contract provisions . . . for modifying, changing, or terminating contracts").

65 *See, e.g.*, Bruce E. Stanley, Outsourcing Security: Private Military Contractors and U.S. Foreign Policy 15 (2015); Laura Dickinson, Outsourcing War and Peace: Protecting Public Values in an Era of Privatized Foreign Affairs 3 (2011); Laura Dickinson, *Outsourcing Covert Activities*, 5 J. Nat'l Security L. & Pol'y 521, 521 (2012).

66 *See* FAR 52.249-2 (2012) (providing that the government must pay the contractor for costs incurred plus a reasonable profit).

67 *Id.* (providing that the government may terminate the contract at any time "if the *Contracting Officer* determines that a termination is in the Government's interest" (emphasis added)).

68 *Id.*

69 *Id.*

70 For a discussion of outsourcing sensitive foreign policy services to private contractors, see *supra* note 65 and accompanying text.

71 *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2221 (2021) (describing the elements of standing, including a cognizable injury).

72 *See* Mottola v. Nixon, 464 F.2d 178 (9th Cir. 1972) (holding that three servicemen did not have standing to challenge the constitutionality of the use of military personnel in Cambodia).

and more importantly, courts that adjudicate such contract claims may have to consider the kinds of diplomatically fraught issues that they tend to avoid in typical separation of powers controversies. Thus, courts resolving such contract disputes may have to review written, often sensitive, evidence from a wide range of political stakeholders, including representations made by the U.S. government to foreign allies, whistleblower allegations of foreign corrupt practices, or threats to the lives of foreign subcontractors because of the risks of contract default.[73]

Take, for instance, the question of possible litigation stemming from the withdrawal of U.S. forces from Afghanistan in 2021. As the U.S. military wound down its operations, it was inevitable that some would face disproportionate harm from the withdrawal and reversal of policy, including local Afghans whom the United States depended upon during the war and vowed to protect.[74] The bleak circumstances faced by these local Afghan partners who relied on U.S. government assurances has been the source of ample media and political coverage.[75] Whether these local Afghans would have any standing to bring claims is questionable.[76] But there was one pool of disappointed actors in Afghanistan whose chances of recovery through litigation were not very much in doubt: the private American contractor.[77] Following the withdrawal announcement by the Biden Administration, media reports announced that the Department of Defense ("DoD") had awarded contracts worth $931 million related to projects in Afghanistan that would not be completed

73 *See* Triple Canopy, Inc. v. Sec'y of Air Force, 14 F.4th 1332, 1336–37 (Fed. Cir. 2021) (relying upon representations made by the U.S. Department of Defense to the Afghanistan government in determining whether plaintiff could seek reimbursement under the Foreign Tax Clause for penalties it had to pay the Afghan under various contracts); Ctr. Khurasan Constr. Co., v. JS Int'l, Inc., No. 20-cv-01358, 2021 WL 5882342, at *1–2 (D. Md. 2021) (reviewing contract dispute in which Afghan contractor claimed nonpayment resulted in their inability to pay vendors and also in threats to the owners of the company).

74 *See* Eliza Griswold, *The Afghans America Left Behind*, The New Yorker (Dec. 20, 2021), https://www.newyorker.com/magazine/2021/12/27/the-afghans-america-left-behind [https://perma.cc/YE99-LKTD].

75 *See, e.g.*, *id.* (describing American withdrawal as an abandonment of local Afghans to the Taliban).

76 As foreigners alleging injuries that occurred abroad, local Afghans would be unlikely to have standing to sue in the United States. *See* Johnson v. Eisentrager, 339 U.S. 763, 776 (1950) (holding that claims against the United States for harms alleged to have taken place extraterritorially are not cognizable under the U.S. Constitution).

77 *See* Oren Liebermann, *Pentagon Could Open Itself to Costly Litigation from Contractors If U.S. Pulls Out of Afghanistan This Year*, CNN (Mar. 29, 2021, 6:45 AM), https://www.cnn.com/2021/03/29/politics/pentagon-contractors-afghanistan/index.html [https://perma.cc/PM7T-9CTQ]. For a discussion of the American contractor's experience during the U.S. withdrawal from Afghanistan, see Lynzy Billing, *The U.S. Is Leaving Afghanistan? Tell That to the Contractors*, N.Y. Mag. (May 12, 2021), https://nymag.com/intelligencer/2021/05/u-s-contractors-in-afghanistan-are-hiring-amid-withdrawal.html [https://perma.cc/5QU2-CFWY].

past the withdrawal deadline on May 1, 2021.[78] The same report suggested that the DoD would likely be exposed be significant litigation unless it was willing to settle for whatever amount the contractors might seek.[79] To be clear, U.S. government regulations provide a mechanism to settle claims after a contract has been terminated for the convenience of the government, which might help stave off the risks of contentious litigation.[80] The Federal Acquisition Regulation states that such a settlement "should compensate the contractor fairly for the work done and the preparations made for the terminated portions of the contract, including a reasonable allowance for profit."[81] According to media reports, most of these private contracts have been settled.[82] But a recent report by the Special Inspector General for Afghanistan Reconstruction acknowledged that the process of closing out and settling these remaining private contracts may prompt years of litigation.[83]

2. *When the Government Induces Reliance Through Agency or Presidential Policy Decisions*

International law scholars have suggested that nonlegal policy commitments between heads of state may induce reliance by foreign states.[84] It is also the case that noncontractual government policies may also induce reliance by private parties. The kinds of foreign policy actions that may lead to reliance costs include sudden changes in longstanding practices, promises made in official proceedings, grants or revocations of permits, and public pronouncements that stake out clear policy positions.

There are three broad categories of judicial claims to which government foreign policy reversals may be vulnerable: (1) claims that the policy reversal constitutes a regulatory taking because it undermines the investment-backed expectations of private parties,[85] (2) claims that a regulatory agency's reversal of its prior foreign policy decision is arbitrary and capricious because it was done without a reasoned

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78 Liebermann, *supra* note 77.

79 *See id.*

80 *See* FAR 49.201(a) (describing termination for convenience process).

81 *Id.*

82 J.P. Lawrence, *Pentagon Pushes to Sever Afghan War Contracts Paid from $80 Billion Fund*, Stars & Stripes, (May 4, 2022), https://www.stripes.com/theaters/middle_east/2022-05-04/pentagon-contract-afghanistan-qatar-5890943.html [https://perma.cc/42FW-VESY].

83 *See* Special Inspector Gen. for Afg. Reconstruction, Quarterly Report to the United States Congress 75 (Apr. 30, 2022), https://www.sigar.mil/pdf/quarterlyreports/2022-04-30qr.pdf [https://perma.cc/RD7D-UGBX]; *see also* Lawrence, *supra* note 82 (discussing the potential for a lengthy settlement and close-out process).

84 *See* Duncan B. Hollis & Joshua J. Newcomer, *"Political" Commitments and the Constitution*, 49 Va. J. Int'l L. 507, 511–12 (2009).

85 *See infra* notes 91–93 and accompanying text.

explanation,[86] and (3) structural constitutional claims where the party alleges a close nexus between the constitutional violation and a concrete and particularized injury.[87] Although courts do not explicitly distinguish among these categories, they probably capture the key situations where parties allege injuries to their reliance interests due to foreign policy reversals. Indeed, as suggested below, the common thread connecting these disparate categories might be whether the government induced reliance or whether it was indifferent to the significant reliance costs that its policy reversal would likely impose.

When private parties are the intended targets of a foreign policy initiative, they can usually demonstrate that they have incurred reliance costs due to a policy reversal. The only question is whether this reliance interest should be judicially cognizable. The argument here is that one key consideration in deciding whether a private party's reliance claim is actionable is whether the government either actively encouraged reliance by the private party or whether it largely disregarded the likelihood that the private party would incur significant reliance costs because of a policy change. This rationale might explain why courts have permitted recovery in claims challenging an agency's unexplained repudiation of prior policy on arbitrary and capricious grounds. In the recent case of *Department of Homeland Security v. Regents of the University of California*,[88] for instance, Justice Roberts concluded: "When an agency changes course . . . it must 'be cognizant that longstanding policies may have "engendered serious reliance interests that must be taken into account."' 'It would be arbitrary and capricious to ignore such matters.'"[89] Similarly, although courts do not overtly emphasize reliance interests in constitutional structure controversies, one may surmise that such considerations are implicit when courts analyze the presence—or absence—of longstanding practices in the executive branch.[90]

Finally, in regulatory takings claims, courts have emphasized that a party's investment-backed expectations might be undermined when they acquire property "in reliance on a state of affairs that did not

86 *See infra* notes 87–89 and accompanying text.

87 *See infra* Section III.C.

88 140 S. Ct. 1891 (2020).

89 *Id.* at 1913 (citations omitted) (first quoting Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 221 (2016); and then quoting Fed. Commc'ns Comm'n v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009)).

90 As Justice Frankfurter wrote in *Youngstown*, "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive Power' vested in the President by [Section] 1 of Art[icle] II." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring).

include the challenged regulatory regime."[91] In this picture, greater foreign policy volatility across electoral cycles may make courts even more solicitous of the reliance concerns of investors because it suggests that the political process is not sufficiently internalizing the costs that policy disruption is imposing on third parties.[92] Moreover, the government's use of its foreign affairs authority to grant permits or to make selective concessions that may mature into vested property rights is also rife with opportunities for a regime that is seeking to entrench its policies.[93]

An illustration of a partisan reversal of foreign policy that implicated all three categories is the Keystone XL pipeline dispute.[94] One might expect major foreign policy reversals to trigger lawsuits from one end of the spectrum, usually the spectrum that favors the private investor. But the policy flipflops over the Keystone XL pipeline managed to trigger lawsuits from both ends of the spectrum.[95] All the lawsuits involved executive branch decisions to approve a permit for a proposed cross-border pipeline, which would move massive quantities of oil from Canada to the Gulf Coast of Texas.[96] When the State Department under

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91 Bass Enters. Prod. Co. v. United States, 35 Fed. Cl. 615, 620 (1996) (emphasis omitted) (quoting Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1177 (Fed. Cir. 1994)), *rev'd*, 133 F.3d 893 (Fed. Cir. 1998). Similarly, in international investment disputes, claims of indirect expropriation (the international analogue of regulatory takings) often turn on whether the government has taken actions to induce reliance by foreign investors. *See* Jan Paulsson & Zachary Douglas, *Indirect Expropriations in Investment Treaty Arbitrations*, *in* Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects 145, 158 (N. Horn & S. Kröll eds., 2004) ("[O]ne possible basis for distinguishing between compensable and uncompensable takings in a regulatory context [is] the frustration of the investor's legitimate expectations built on a reasonable reliance upon representations and undertakings by the Host State."); *see also* Steven J. Eagle, *Substantive Due Process and Regulatory Takings: A Reappraisal*, 51 Ala. L. Rev. 977, 1018 (2000) ("In essence, however, 'investment-backed expectations' is not really concerned with 'investment' at all; it is concerned with fairness and reliance.").

92 As one commentator has suggested in the context of land use disputes, courts appear to display solicitude for developers in circumstances where developers would be especially susceptible to majoritarian exploitation—such as, where they have expended substantial resources in reliance on regulatory assurances. *See* Kenneth A. Stahl, *Reliance in Land Use Law*, 2013 BYU L. Rev. 949, 980.

93 *See* Serkin, *supra* note 48, at 898–99 ("Expanding the vested rights doctrine in this way creates increased opportunities for entrenchment. The decisions by one government—to grant a permit, to wait to act, or to otherwise allow private rights to vest—create property rights that run against subsequent governments.").

94 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].

95 *Compare* Complaint, TransCanada Keystone Pipeline LP v. Kerry, No. 16-cv-00036 (S.D. Tex. Jan. 6, 2016), 2016 WL 74831 (industry challenging decision to revoke permit), *with* Indigenous Env't Network v. U.S. Dep't of State, 347 F. Supp. 3d 561 (D. Mont. 2019) (environmentalists challenging decision to allow pipeline).

96 *See, e.g.*, *Indigenous Env't Network*, 347 F. Supp. 3d at 570 (challenging issuance of presidential permit).

the Obama Administration initially rejected the cross-border permit on environmental and health grounds in 2015, its decision unleashed two lawsuits by TC Energy (then TransCanada), the Canadian corporation slated to build the Keystone pipeline.[97] The first lawsuit, which TC Energy brought before a federal court in Texas, alleged violations of the constitutional separation of powers.[98] The second lawsuit, brought before a North American Free Trade Agreement ("NAFTA") tribunal, focused on indirect expropriation and other miscellaneous claims.[99] The federal complaint emphasized how TC Energy's reliance interest was likely to be thwarted by the Obama Administration's alleged departure from longstanding executive branch practice.[100] And when the State Department under the Trump Administration overturned that decision and granted the cross-border permit in 2017, its decision also prompted a series of lawsuits by a variety of environmental and indigenous rights groups.[101] A federal court faulted Trump's State Department for reversing course without a detailed justification and disregarding "prior factual findings [from the Department's earlier decision] related to climate change."[102] In 2021, the Biden Administration revoked the cross-border permit on its first day in office.[103] That decision, in turn, triggered a lawsuit by Republican governors of several states alleging that President Biden had violated the separation of powers and deprived the states of an important source of revenue.[104] That lawsuit

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97 The lawsuits were subsequently suspended after the Trump Administration decided to grant the permit. Melissa Daniels, *Trump Order Prompts Judge to Halt Keystone Denial Suit*, Law360 (Jan. 30, 2017, 11:01 PM), https://www.law360.com/articles/886577 [https://perma.cc/JHX5-QMZ9]; Ethan Lou, *TransCanada's $15 Billion U.S. Keystone XL NAFTA Suit Suspended*, Reuters (Feb. 28, 2017, 10:44 AM), https://www.reuters.com/article/us-canada-pipeline-lawsuit/transcanadas-15-billion-u-s-keystone-xl-nafta-suit-suspended-idUSKBN1671W1 [https://perma.cc/3GVV-7W8K].

98 Complaint, *supra* note 96, at 1.

99 Elise LeGros, Update, *Report: TransCanada Seeks $15 Billion from U.S. for Breach of NAFTA Obligations*, 22 Law & Bus. Rev. Americas 51, 54–55 (2016).

100 Portions of the originally proposed Keystone XL Pipeline . . . have been completed or are nearing completion and are or soon will be in operation. . . . As a result, . . . TransCanada will be unable to recover a significant portion of the expenses associated with constructing and operating those facilities.

Complaint, *supra* note 96, at 46; *see also id.* at 41 ("Upon information and belief, the permit applications submitted by TransCanada for the Keystone XL Pipeline are the only applications for a major infrastructure project addressed pursuant to Executive Order 13337 that any President has ever denied.").

101 *See, e.g.*, *Indigenous Env't Network*, 347 F. Supp. 3d.

102 *Id.* at 584.

103 *See* Rod Nickel & Nia Williams, *Biden Revokes KXL Permit in Blow to Canada's Oil Sector, Ottawa Disappointed*, Reuters (Jan. 20, 2021, 11:24 PM), https://www.reuters.com/article/uk-usa-biden-keystone-idUKKBN29Q0EZ [https://perma.cc/CAH7-KDNN].

104 Josh Lederman, *21 Republican-Led States Sue Biden over Keystone XL Rejection*, NBC News (Mar. 17, 2021, 7:57 PM), https://www.nbcnews.com/politics/

was eventually dismissed as moot when TC Energy announced that it was abandoning the pipeline project.[105]

But what was particularly intriguing about the Keystone XL controversy was suggestive evidence of a government effort during the Trump Administration to lock in policy by inducing reliance. Simply put, there was reason to believe that both President Trump and the Premier of the Canadian province of Alberta (where TC Energy is headquartered) would have gained from the accelerated construction of the pipeline to the extent that it would make the project difficult to reverse. They were both likely aware that a future Democratic administration in the United States would have different policy preferences regarding the wisdom of the Keystone XL project. Nonetheless, in 2020, the Alberta government made a 1.5 billion Canadian dollar equity investment in the Keystone XL project, and also provided a six billion Canadian dollar loan guarantee for TC Energy to continue building the pipeline.[106] Media accounts at the time suggested that this was a sunk cost strategy by the Alberta government to speed up the construction of the pipeline and create a fait accompli that would constrain future U.S. administrations.[107] But what made that maneuver particularly daring was that it took place in the middle of the U.S. presidential election season.[108]

The Trump Administration also adopted various legal stratagems to expedite the construction of the pipeline and avoid court challenges

joe-biden/21-republican-led-states-sue-biden-over-keystone-xl-rejection-n1261356 [https://perma.cc/8SNZ-WH84]. *See generally* First Amended Complaint, Texas v. Biden, 578 F. Supp. 3d 849 (S.D. Tex. 2022) (No. 21-cv-00065).

105 Maya Earls, *Keystone XL Pipeline Cancellation Makes Suit Against Biden Moot*, Bloomberg L. (Jan. 6, 2020, 4:40 PM), https://news.bloomberglaw.com/environment-and-energy/keystone-xl-pipeline-cancellation-makes-suit-against-biden-moot [https://perma.cc/H2LZ-MFWC]; *see also* Texas v. Biden, 578 F. Supp. 3d at 857 ("[B]ecause [TC Energy] is dead, any ruling this court makes on whether President Biden had the authority to revoke the permit would be advisory. . . . [T]he case must be dismissed as moot.").

106 Lisa Johnson, *Keystone XL Project Officially Terminated, Alberta Ends Partnership with TC Energy*, Edmonton J. (June 9, 2021), https://edmontonjournal.com/news/politics/keystone-xl-project-officially-terminated-alberta-ends-partnership-with-tc-energy [https://perma.cc/W52S-8YM8].

107 *See, e.g.*, Jon Greenberg. *Keystone XL Pipeline: Unbuilt, Opposed by Biden, Mired in Lawsuits*, PolitiFact (Jan. 15, 2021), https://www.politifact.com/truth-o-meter/promises/trumpometer/promise/1358/approve-keystone-xl-project-and-reap-profits/ [https://perma.cc/DMJ8-DBQW] ("The government of Alberta has invested over $1 billion in the project and hopes that the faster work proceeds on its side of the border, the harder it will be to stop it on the American side."); Ron Johnson, *Canada Pushes Keystone XL Before Biden Takes Office*, Sierra Mag. (Nov. 17, 2020), https://www.sierraclub.org/sierra/canada-pushes-keystone-xl-biden-takes-office [https://perma.cc/AC3Z-TBC3] ("The sunk cost strategy that Alberta is employing is an attempt to make it as difficult as possible, financially and politically, to quash the Keystone XL project.").

108 Johnson, *supra* note 107.

from nonprofit groups.[109] For instance, when a federal court ruled against the State Department's issuance of a permit for flouting the National Environmental Protection Act,[110] President Trump simply revoked that permit and issued one under his own authority instead.[111] By issuing the permit directly, rather than relying on the State Department, the President was able to insulate his decision from judicial review. The rationale is that although final agency decisions are subject to judicial review, presidential action is nonreviewable under the Administrative Procedure Act ("APA").[112] In any event, had TC Energy managed to complete construction of the pipeline during the Trump Administration, it would have likely made it more difficult for a future administration to rescind the permit and block the project.[113] Indeed, above a certain threshold of reliance, TC Energy could have a acquired a vested property right that could be legally enforceable against future administrations.

3. *When the Government Does Not Deliberately Induce Reliance*

Some foreign policy reversals may involve cases where the government does not intend to induce reliance, but the policy reversals nonetheless harm private parties. This scenario is most likely to occur when the following factors are at play: (1) the government does not benefit directly from the reliance costs incurred by the private party, (2) the private party is not the intended target of the foreign policy reversal, or (3) the government does not encourage the private party to incur the reliance costs. In such circumstances, it is likely that courts will conclude that the private party bears the risks of the policy change and will disallow any recovery of damages or equitable relief. This more general

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109 In addition to the foregoing, there were other measures that President Trump adopted to expedite the permit process and construction of the pipeline. On his fourth day on the job, President Trump signed an executive order inviting TC Energy to apply for a permit. *See generally* Memorandum on Construction of the Keystone XL Pipeline, 2017 DAILY COMP. PRES. DOC. 68 (Jan. 24, 2017). The order also required the State Department to make a determination within sixty days. The State Department subsequently issued a permit in April. *See generally* Notice of Issuance of a Presidential Permit to TransCanada Keystone Pipeline, L.P., 82 Fed. Reg. 16,467 (Apr. 4, 2017).

110 42 U.S.C. §§ 4321–4370m.

111 Brady Dennis & Juliet Eilperin, *Trump Signs Permit for Construction of Controversial Keystone XL Pipeline*, WASH. POST (Mar. 29, 2019, 5:55 PM), https://www.washingtonpost.com/climate-environment/2019/03/29/trump-signs-permit-construction-controversial-keystone-xl-pipeline/ [https://perma.cc/XLP6-3PZP].

112 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").

113 The conjecture here is that complete construction of the pipeline would have likely increased the political costs to a future administration of backing out. But whether it would have increased the legal risks as well is less clear. *Cf.* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 127 (1985) ("Only when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred.").

claim is, however, subject to one important qualification: the executive branch actor responsible for the policy reversal is not an administrative agency subject to the APA. In the latter case, the agency may still be required to demonstrate that its policy reversal is not arbitrary or capricious, especially if there are private parties that have incurred significant reliance costs as a result.

One case that illustrates this trend is *Chang v. United States*,[114] which involved a swing in foreign policy during the Reagan administration that resulted in the termination of contracts between the plaintiff and a Libyan corporation.[115] The Federal Circuit ruled the President's executive order imposing sanctions against Libya did not constitute a regulatory taking under the Fifth Amendment.[116] In evaluating whether the investment-backed expectations of the plaintiff were reasonable, the court observed that the plaintiff ought to have been aware of the likelihood of sanctions, given public knowledge of the deteriorating relationship between Libya and the United States.[117] But the court also seemed to imply that any change in the relationship with a foreign country might be the kind of foreseeable risk that a private investor ought to bear.[118] "When dealing in foreign commerce," the court reasoned, "the possibility of changing world circumstances and a corresponding response by the United States government can never be completely discounted."[119] Finally, and most significantly, the court also emphasized that there was no evidence that the government tried to appropriate the plaintiffs' employment contracts in Libya for public use.[120] In other words, the government would not have benefited directly from any reliance costs that the plaintiffs might incur; on the contrary, any financial harm incurred by the plaintiffs would be largely incidental to the government's larger purpose of sanctioning the Libyan regime.

Given these considerations, one might wonder whether there are circumstances where an executive branch's imposition of sanctions against a foreign state could ever result in a viable claim by a United States investor. It is presumably always foreseeable that the United States might get embroiled in a volatile or strained relationship with a foreign state. Nonetheless, there might be circumstances where investors

114 859 F.2d 893 (Fed. Cir. 1988).

115 *Id.* at 893–94.

116 *Id.* at 898.

117 *See id.* at 897–98.

118 *See id.* at 897.

119 *Id.*; *see also* Paradissiotis v. United States, 49 Fed. Cl. 16, 22 (2001) ("In the foreign relations sphere, a claimant need only have knowledge of a general possibility that its contracts may be affected by the United States government in order for the court to find that no reasonable expectation of non-interference existed.").

120 *See Chang*, 859 F.2d at 896 ("[T]he government did not appropriate to the public use, i.e., 'take' either the plaintiffs' employment contracts or the plaintiffs' services.").

should not bear the risks of a policy change on sanctions, especially if they relied on statements or commitments by a prior administration. Consider, for instance, a hypothetical situation that may not be too far-fetched: let us assume that the Biden Administration is able to renegotiate and finalize a new Iran Nuclear Deal without support from the Republican opposition in Congress.[121] What if the Biden Administration attempts to reassure American investors that if they meet specific guidelines or criteria they will not be subject to prosecution by the Justice Department for engaging in certain kinds of commercial transactions in Iran? Presumably, the purpose of such a reassurance would be to encourage American businesses to make the kinds of investments that would allay any outstanding doubts of the Iranian government regarding the resolve of the United States to commit to a new agreement.[122] In the absence of such reassurance, investors might be reluctant to make significant capital outlays in Iran that could be stranded or abandoned because of the whims of a future administration. Should those investors who relied on reassurance from the Biden Administration have a claim of equitable estoppel or compensation against a future administration that threatens to change course?[123] Since the U.S. government likely induced reliance by the private investors in this example, the case for some form of judicial relief seems more compelling.[124]

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121 *See* Kylie Atwood & Jeremy Herb, *US Getting Closer to Reviving Iran Nuclear Deal But Officials Warn Efforts Could Still Fail*, CNN (Mar. 3, 2022, 5:19 PM), https://www.cnn.com/2022/03/03/politics/iran-nuclear-deal-us/index.html [https://perma.cc/GG5K-GDBM] (discussing the Biden Administration's efforts to secure a deal with Iran).

122 Indeed, some commentators have suggested that the unpredictability of the U.S. government might be a factor in the negotiations or any new agreement with Iran. *See, e.g.*, Jonathan Guyer, *What's the Deal with the Iran Nuclear Deal?*, Vox (Apr. 6, 2022, 12:10 PM), https://www.vox.com/23002229/return-iran-nuclear-deal-vienna-explained [https://perma.cc/PR4N-56CT] ("For all of the incentives that Iran has to rejoin the deal, there are risks of another US president's withdrawal. 'If I was sitting in Tehran, watching polarized American politics and seeing how popular Trump remains, I would be very worried about signing back onto a deal only to go through this entire exercise once again.'" (quoting Interview with Nader Hashemi, Middle East Scholar, Univ. of Denv.)).

123 Although some courts have held that equitable estoppel claims against the government should be sparingly granted, it may still be available when a contractor detrimentally relied on the conduct or assertions of officers or agents of the United States acting within the scope of their authority. *See* Rumsfeld v. United Techs. Corp., 315 F.3d 1361, 1376–77 (Fed. Cir. 2003) (analyzing the applicability of the doctrine of equitable estoppel in the context of government contracts); Gibson v. West, 201 F.3d 990, 994 (7th Cir. 2000) (explaining that "equitable estoppel against the government is disfavored and is rarely successful" and providing a list of the elements required to invoke estoppel against a government entity, including "affirmative misconduct").

124 Indeed, one may argue that in circumstances where the government induces reliance by a private party, the need for the government to internalize the costs of its decision is quite strong. This accords with the efficiency rationale of takings, which emphasizes the risks that the government will not internalize the costs of takings unless it is forced to make allocations from the treasury. *See, e.g.*, Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. Chi. L. Rev. 345, 349 (2000) ("This efficiency argument rests on the

C. The Role of Standing

In their treatise, Professors Murphy and Swaine examine and distill the various approaches to standing and other conventional obstacles to bringing claims implicating foreign affairs.[125] Their treatment accurately summarizes what might be viewed as a conventional realist vision of foreign affairs jurisprudence: a vision where courts have routinely relinquished oversight over structural constitutional controversies by embracing restrictions on standing, justiciability, as well as the political question doctrine.[126] But their analysis of standing usefully distinguishes two contexts that one may array along a spectrum of reviewability: (1) where a party is alleging a generalized grievance "common to all members of the public"[127] and (2) where a private party has "personal stakes different from those of ordinary citizens."[128] The closer one gets to the latter end of the spectrum, they observe, the more the courts are likely to find standing.[129] As relevant to this analysis, private investors alleging detrimental reliance due to foreign policy inconsistency may fall more closely to the latter end of this spectrum, especially when the government deliberately induces reliance to achieve foreign policy goals.

It follows that courts may limit standing in certain foreign affairs controversies if they perceive that the alleged violation involves a generalized grievance that may be more appropriately redressed by the electoral process or by the force of public opinion. Thus, in highly politically charged foreign affairs controversies, such as those involving alleged violations of war powers, courts may balk at granting standing if the plaintiff cannot demonstrate an injury above and beyond that suffered by ordinary citizens. But there 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. The conventional requirements of standing are meant to capture such circumstances: they require parties to demonstrate an injury in fact, linked causally to an alleged violation, and that can be remedied by judicial intervention.[130] The cases analyzed above implicating

premise that, just as a private actor will not weigh externalized public costs as private costs, government will not take full account of the costs of takings unless it is forced to pay money from the treasury.").

125 *See* MURPHY & SWAINE, *supra* note 10, at 193–95.

126 *See id.*

127 *Id.* at 193.

128 *Id.* at 195.

129 *See id.* at 193–95.

130 Bank of Am. Corp. v. City of Miami, 581 U.S. 189, 196 (2017) (citing Spokeo, Inc. v. Robins, 578 U.S. 330, 338 (2016)).

reliance interests by private parties subject to policy volatility largely fit this description: they involve claims where the plaintiffs allege concrete (and not abstract) economic injuries different from those suffered by ordinary citizens, which can be redressed by the award of damages or other judicial remedies.[131] Finally, as discussed earlier, the government may sometimes stand to benefit from inducing reliance by a select group of private parties in foreign affairs.[132] If it does so, there is even greater reason to grant standing to those private parties to seek relief for the disproportionate costs they have incurred. From a normative perspective, the concerns implicated here resonate with an oft-cited justification by the Court for compensation in takings cases: it "prevents the public from loading upon one individual more than his just share of the burdens of government."[133]

IV. The Implications for Judicial Deference and Abstention

Thus far, this Article has focused on opportunities for judicial intervention in legal disputes when reversals of foreign policy cause detrimental reliance by private parties. But putting aside the question of the feasibility of judicial intervention, are there other factors likely to shape the willingness of courts to defer to the President in foreign affairs?[134] This Part makes two arguments. First, it claims that courts may be less willing to defer to the executive branch in legal controversies if they perceive reversals of foreign policy are motivated by partisan rather than institutional considerations. Second, it suggests that doctrines or judicial standards forged in low-stakes cases involving claims for damages by private parties in foreign affairs can be deployed in more high-stakes disputes where declaratory or injunctive relief might be at stake. Thus, courts may find it more difficult to abstain in such high-stakes cases on the grounds that judicially manageable standards are unavailable under the political question doctrine once they develop such standards in low stakes cases involving claims for money damages.

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131 *See, e.g.*, Chang v. United States, 859 F.2d 893 (Fed. Cir. 1988) (plaintiffs alleged that termination of contracts with Libyan oil companies resulting from American sanctions against Libya constituted a Fifth Amendment taking).

132 *See supra* notes 43–62 and accompanying text.

133 Monongahela Nav. Co. v. United States, 148 U.S. 312, 325 (1893).

134 The analysis below brackets consideration of another possible tool for judicial avoidance in foreign affairs, the doctrine of forum non conveniens. The doctrine may not be as relevant in the cases being discussed because they mostly involve parties who have been injured in the United States and not abroad. For a critical take on this doctrine, see Maggie Gardner, *Designing Transnational Litigation: The Case Against Forum Non Conveniens*, 111 Am. Soc'y Int'l L. Proc. 321 (2017).

A. *How Presidential Inconsistency in Foreign Affairs May Affect Judicial Deference*

The traditional argument for deference is that presidents are more accountable than Congress in foreign affairs because of their national orientation and their perceived superior expertise regarding diplomacy and the interests of foreign states.[135] To be clear, some commentators have suggested that the justifications for exceptional judicial deference to the executive branch in foreign affairs are often overstated.[136] Nonetheless, courts still seem to carve out disputes implicating foreign affairs for special treatment.[137]

To the extent the goal of deference is to prevent courts from second-guessing the President's expertise or judgment in foreign policy,[138] less deference may be due if courts have reason to believe that the President is acting in a partisan rather than an institutional capacity.[139] When presidents across the political aisle stake out similar—or the same—institutional preferences on foreign policy across electoral cycles, claims of deference seem somewhat justifiable. Thus, if both Republican and Democratic presidents adopt similar views about the interpretation of a treaty or embrace similar foreign policy positions, such institutional preferences may warrant special judicial consideration. However, once this consensus breaks down, and partisan factions believe that adopting conflicting positions on foreign policy will further or undermine their interests, the rationale for judicial deference starts to weaken.

There is a simple reason why the executive branch's inconsistency in foreign policy positions may be particularly conducive to judicial intervention. A norm of consistency may serve as a surrogate for the judicial norm of impartiality in the sense that it demands that similar

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135 There is an extensive literature discussing functional rationales for judicial deference to the executive branch in foreign affairs. *See supra* note 2 and accompanying text.

136 *See* Sitaraman & Wuerth, *supra* note 34, at 1901 (defending the "normalization" of foreign affairs law and suggesting that courts ought not to treat foreign affairs disputes differently from domestic ones).

137 *See* Carlos M. Vázquez, *The Abiding Exceptionalism of Foreign Relations Doctrine*, 128 Harv. L. Rev. F. 305, 305 (2015) (agreeing with the normative claim by Wuerth and Sitaraman that foreign relations ought to be normalized but expressing skepticism to the degree that it has already occurred).

138 *See* Sitaraman & Wuerth, *supra* note 34, at 1936 ("Perhaps the strongest justification for executive power, vis-à-vis Congress and the courts, is that the executive branch has greater expertise on foreign affairs issues than the other branches.").

139 Some commentators have suggested that courts have declined to accord *Chevron* deference to agencies in circumstances where there were clear reasons to suggest that considerations of partisan politics had trumped agency expertise. *See* Freeman & Vermeule, *supra* note 35, at 51–52 (discussing "the Court majority's increasing worries about the politicization of administrative expertise").

classes of cases be treated alike.[140] Of course, not all policy or interpretive inconsistencies will raise judicial eyebrows. But sudden and dramatic vacillations in presidential policy or institutional positions that remain unexplained, or that do not take into account significant reliance interests, may nonetheless increase the risks of judicial intervention.[141] This is especially likely when the policy is supposedly rooted in the President's institutional expertise,[142] which should not flip every electoral cycle. Justice Gorsuch, a skeptic of deference in the administrative state, couches the conventional concern about inconsistencies in rule interpretation in similar terms:

> [T]hese days it sometimes seems agencies change their statutory interpretations almost as often as elections change administrations. How, in all this, can ordinary citizens be expected to keep up—required not only to conform their conduct to the fairest reading of the law they might expect from a neutral judge . . . . And why should courts, charged with the independent and neutral interpretation of the laws Congress has enacted, defer to such bureaucratic pirouetting?[143]

So, when are courts likely to pay less deference to the President when there are swings in foreign policy positions? The Author suspects that less judicial deference is likely when the following conditions hold: (1) there is a significant foreign policy change or institutional preference reversal without any reasoned explanation (i.e., an implied partisan motivation), (2) a plausible claim that the President ignored

140 Consistency may also accord with a norm of executive branch accountability. *See* Heidi Kitrosser, *Accountability and Administrative Structure*, 45 WILLAMETTE L. REV. 607, 610 (2009) ("Underlying all forms of accountability is the need for transparency and procedural regularity sufficient to enable public and inter-branch assessment of—and responses to—government actions."); Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 65–67 (1995) (justifying normative claims for a unitary executive on the benefits of increased accountability).

141 *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) (holding that although interpretive inconsistency is not required under *Chevron*, if an inconsistency is not adequately explained it might render the agency's interpretation arbitrary and capricious); BankAmerica Corp. v. United States, 462 U.S. 122, 130–32 (1983) (refusing to defer to agencies' interpretation of a statute that reversed, without adequate explanation, the interpretation employed by these agencies for sixty years). For a sustained discussion of the role of deference and agency consistency in the administrative state, see Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 64–66 (2017).

142 Courts have held in other contexts that when an agency is not exercising its institutional expertise in interpreting a regulation, less deference may be appropriate. *See* Fast v. Applebee's Int'l, Inc., 638 F.3d 872, 878 (8th Cir. 2011) ("Less deference is due an agency when, 'instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language . . . .'").

143 Guedes v. Bur. of Alcohol, Tobacco, Firearms & Explosives, 140 S. Ct. 789, 790–91 (2020) (statement of Gorsuch, J.).

statutory or constitutional requirements, (3) prior justifiable reliance by domestic actors on the original policy position such that a sudden change may constitute an unfair surprise, and (4) the ability of such actors to demonstrate concrete economic (and not merely expressive) injury as a result of the policy change.

How empirically plausible are these risks of judicial intervention? There are some recent examples. Take, for instance, the inconsistent positions by various presidential administrations over the merits of adjudication under the Alien Tort Statute.[144] During one such position reversal in *Kiobel v. Royal Dutch Petroleum Co.*,[145] President Obama's Solicitor General Donald Verilli was pressed by a skeptical Justice Scalia during oral argument: "[W]hy should we listen to you rather than the solicitors general who took the opposite position and the position taken by Respondents here in other cases, not only in several courts of appeals, but even up here?"[146] Following up Justice Scalia's questioning, Chief Justice Roberts focused squarely on the deference issue: "Your successors may adopt a different view. And I think—I don't want to put words in his mouth, but Justice Scalia's point means whatever deference you are entitled to is compromised by the fact that your predecessors took a different position."[147] As a general matter, however, one might anticipate that any pattern of reversal of litigation positions by government attorneys across electoral periods should be risky. As one commentator put it, "Once lawyers from the Departments of Justice and State take a position before the courts, they, to a certain extent, lock in their successors. While it is not unheard of for lawyers from one administration to repudiate positions taken in prior judicial filings, such reversals come at a considerable cost."[148]

Yet another even more recent example was when former President Trump abandoned the longstanding practice of presidential restraint on the use of section 232 of the Trade Expansion Act of 1962, which permits the imposition of tariffs on national security grounds.[149] That

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144 *See* Nzelibe, *supra* note 26, at 479.

145 569 U.S. 108 (2013).

146 Transcript of Oral Argument at 43, *Kiobel*, 133 S. Ct. 1659 (2013) (No. 10-1491).

147 *Id.* at 44–45.

148 Paul B. Stephan, Essay, *The Limits of Change: International Human Rights Under the Obama Administration*, 35 Fordham Int'l L.J. 488, 502 (2012).

149 *Id.* For a discussion 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). This presidential use of section 232 prompted the introduction of legislative bills that would provide greater congressional say in the invocation of this national security provision. *See* Kathleen Claussen, *Trade War Battles: Congress Reconsiders Its Role*, Lawfare (Aug. 5, 2018, 11:00 AM), http://www.lawfareblog.com/trade-war-battles-congress-reconsiders-its-role [https://perma.cc/54KN-RATB] (describing pending legislation in Congress to impose fast-track procedures on trade provisions, such as section 232 of the Trade Expansion Act).

decision led to a series of lawsuits in which some courts proved willing to abandon traditional judicial restraint on foreign affairs and rule against the President on procedural and constitutional grounds.[150] For instance, in a Court of International Trade ("CIT") decision that was later reversed on appeal, the court held that a presidential proclamation, increasing section 232 duties on steel imports from Turkey to fifty percent from twenty-five percent, was both invalid as untimely and a violation of the Equal Protection Clause.[151] Regarding the latter, the CIT concluded that the proclamation violated the Fifth Amendment's equal protection guarantee because the President singled out Turkey for special treatment, even though other countries export more.[152] In reaching this conclusion, the CIT focused on the proclamation's inconsistency with long-standing government practice in trade policy: "The status quo under normal trade relations is equal tariff treatment of similar products irrespective of country of origin. Although deviation from this general principle is allowable, such deviation cannot be arbitrarily and irrationally enforced in a way that treats similarly situated classes differently without permissible justification."[153]

The Federal Circuit reversed the CIT's decision and held that there was "no authority or sound basis for treating equal-protection analysis under the rational-basis standard as requiring judicial inquiry into differences among particular countries' relations with the United States."[154] Despite this pushback from the Federal Circuit, however, it was notable that the CIT was willing to interrogate the rationale of a presidential foreign policy decision when it appeared to be inconsistent with long-standing government practice. Perhaps in an earlier period, norms of presidential cooperation across electoral cycles on foreign policy would have averted the kinds of legal controversies that would lead courts to reach such decisions on the merits.

Two caveats are appropriate. First, the claim here is not that any inconsistency in presidential foreign policy ought to invite greater judicial scrutiny. Indeed, in the face of the unpredictable global risks, it will often be detrimental to reduce the President's flexibility and prevent future administrations from responding to unanticipated developments at their discretion. In any event, the claim here is much narrower: it is that the rationale for deference is shakier when there is a consistent pattern of foreign policy reversals across multiple electoral cycles in a

150 *See* Patrick Corcoran, Note, *Trade and Wars: Checking the President's Overbroad Trade Sanction Authority*, 23 N.Y.U. J. Legis. & Pub. Pol'y 687, 700–05 (2021) (describing litigation challenging President Trump's authority to use section 232 to impose trade sanctions).

151 Transpacific Steel LLC v. United States, 466 F. Supp. 3d 1246 (Ct. Int'l Trade 2020) (citation omitted), *rev'd*, 4 F.4th 1306 (Fed. Cir. 2021).

152 *Id.* at 1258.

153 *Id.*

154 Transpacific Steel LLC v. United States, 4 F.4th 1306, 1334 (Fed. Cir. 2021).

manner that suggests an obviously partisan motivation. The intuition that underpins this insight accords with conventions about the role of partisan justifications in the administrative state, especially where the institutional expertise of the executive branch has been invoked as the grounds for judicial deference.[155] As Professor Adrian Vermeule has argued elsewhere, "There is no general norm against partisan behavior in the administrative state, nor could there be. Such behavior is everywhere. *However, there is certainly a separate and independent norm against partisan justifications for partisan behavior*."[156]

Second, when courts are concerned about presidential agency slack in foreign affairs, they may have alternative mechanisms for checking the President's powers. One stems from the *Youngstown* framework, where the expression of opposition by Congress places the President's foreign affairs authority at its "lowest ebb," which presumably makes it less deserving of judicial deference.[157] There is, however, one shortcoming with the *Youngstown* approach as a strategy for constraining presidential overreach in foreign affairs.[158] The expression of hostility by the partisan opposition in Congress to a presidential foreign policy initiative or institutional position may sometimes be strategic and not necessarily reflect either genuine partisan or ideological differences.[159] In other words, if there is a turnover in the White House, the former opposition may quickly revert to championing the same foreign policy or institutional priorities they might have condemned in a previous era.[160] Media accounts are replete with stories of freshly elected presidents espousing the same foreign policies of their predecessors they

155 *See* Freeman & Vermeule, *supra* note 35, at 52; *see also* David C. Weiss, *In Defense of the Post-Partisan President: Toward the Boundary Between "Partisan" Advantage and "Political Choice*,*"* 24 BYU J. PUB. L. 259, 311 (2010) ("[D]ecision making that looks *partisan* has led the Court to suggest that deference may not be afforded for these party-based decisions and has instead required a decision grounded in administrative expertise." (emphasis added)).

156 Adrian Vermeule, *The Third Bound*, 164 U. PA. L. REV. 1949, 1960 (2016) (emphasis added) ("justification" emphasized in original).

157 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring).

158 Professor Swaine offers an even more detailed and critical analysis of the *Youngstown* framework by demonstrating that it is likely to have a perverse effect on the presidential decision to seek congressional authorization. Simply put, in over to avoid being exposed to *Youngstown*'s framework, presidents may avoid seeking congressional authorization altogether or by seeking it only indirectly. *See* Edward T. Swaine, *The Political Economy of* Youngstown, 83 S. CAL. L. REV. 263, 307–15 (2010).

159 *See* FRANCES E. LEE, BEYOND IDEOLOGY: POLITICS, PRINCIPLES, AND PARTISANSHIP IN THE U.S. SENATE 181 (2009) (arguing that many partisan battles in the Senate are rooted in competition for power rather than disagreement over ideology or over the rightful role of government).

160 For an illustration of this dynamic with respect to war powers, see Michael D. Ramsey, *Meet the New Boss: Continuity in Presidential War Powers?*, 35 HARV. J.L. & PUB. POL'Y 863, 870–71 (2012).

might have once criticized.[161] In any event, what this kind of flip flop on policy positions illustrates is not the lack of coherent or consistent presidential preferences on foreign policy; on the contrary, it simply suggests that one should discount a partisan coalition's statement of their foreign policy positions once they are out of power. At bottom, a clearer picture of the dangers of extreme partisanship in foreign affairs can be discerned by looking at actual patterns of policy volatility across electoral cycles, rather than the positions adopted by the congressional opposition.

B. *Spill Over Effects from Low Stakes to High Stakes Disputes*

Is it plausible that judicial doctrines forged in low stakes disputes involving private parties seeking reliance damages may be deployed in more politically charged disputes where injunctive or declaratory remedies against the President are at stake?[162] Let us return to the question of justiciability of foreign relations disputes. The political question doctrine often makes it quite difficult for plaintiffs harmed by policy inconsistencies to seek declaratory or injunctive relief against the executive branch in foreign affairs.[163] But one plausible effect of this occurs in private damages disputes.[164] Since the remedy sought by the plaintiff

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161 *See, e.g.*, Michael Barone, *Obama's Foreign Policy Is Very Much a Continuation of the Bush Policies*, CBS News (Apr. 9, 2009, 3:59 PM), https://www.cbsnews.com/news/obamas-foreign-policy-is-very-much-a-continuation-of-the-bush-policies/ [https://perma.cc/JUU7-P4L2]; Jan Crawford, *Obama Effectively Continues Bush's Gitmo Policy*, CBS News (Mar. 7, 2011, 7:16 PM), https://www.cbsnews.com/news/obama-effectively-continues-bushs-gitmo-policy/ [https://perma.cc/Z9A2-5749]; Al Kamen, *A Newfound Continuity of Policy*, Wash. Post (Jan. 19, 2004), https://www.washingtonpost.com/archive/politics/2004/01/19/a-newfound-continuity-of-policy/ [https://perma.cc/72F9-WTAK] (emphasizing Bush's continuity with Clinton's key foreign policies despite the fact that "[w]hen the Bush administration took over, it had one clear axiom: Anything, foreign or domestic, done by the Clinton administration was, by definition, wrongheaded, deplorable, bad and so on."); Edward Wong, *On U.S. Foreign Policy, the New Boss Acts a Lot Like the Old One*, N.Y. Times (July 25, 2022), https://www.nytimes.com/2022/07/24/us/politics/biden-trump-foreign-policy.html [https://perma.cc/U6YJ-HTQ8] ("More than a year and a half into the tenure of President Biden, his administration's approach to strategic priorities is surprisingly consistent with the policies of the Trump administration.").

162 The debate as to whether standards developed in private rights disputes should be relevant to public law disputes has a long historical pedigree. In a recent piece, Farah Peterson demonstrates debates as to whether provisions of the Constitution ought to be understood though the lens of private or public law were commonplace during the founding era. *See* Farah Peterson, *Expounding the Constitution*, 130 Yale L.J. 2, 12–14 (2020).

163 *See infra* notes 164–67 and accompanying text.

164 *See, e.g.*, Aviation & Gen. Ins. v. United States, 882 F.3d 1088, 1095 (Fed. Cir. 2018) (finding that a takings claim seeking just compensation is a "legal question for which we have judicially discoverable and manageable standards for resolution"); Alperin v. Vatican Bank, 410 F.3d 532, 562 (9th Cir. 2005) (finding no political question where property claims touched on foreign relations issues); Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 49 (2d Cir. 1991) ("[B]ecause the common law of tort provides clear and well-settled rules on which the district court can easily rely, this case

in these latter claims tends to be monetary damages, courts may be less concerned that any relief provided will interfere with the President's conduct of foreign affairs. Here is the hitch. An increase in low-stakes claims involving damages may contribute to the basis for overcoming the political question doctrine in high stakes claims seeking injunctive or declaratory relief in foreign affairs.

Take, for instance, the branch of the political question doctrine that involves an absence of judicially manageable standards.[165] Courts have sometimes suggested that the application of this aspect of the doctrine is inapt in private damages suits because courts can easily fashion standards for resolving such disputes without intruding on the President's administration of foreign policy.[166] By contrast, lawsuits seeking injunctive relief in foreign affairs controversies tend to be disfavored.[167] However, even in high stakes cases involving claims for equitable relief, the determination as to whether courts lack judicially manageable standards may still depend on whether courts have resolved similar issues in past disputes. One may well imagine, after a series of foreign policy flip flops, that a new set of lawsuits involving disappointed private investors seeking damages may emerge.

In this picture, an uptick in private lawsuits seeking damages in foreign affairs may then allow courts to craft the very standards that may be subsequently adopted in high stakes disputes where parties are seeking remedies that are more intrusive, such as injunctive relief. Objections to justiciability based on the lack of manageable standards are likely to be less compelling once courts have established a track

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does not require the court to render a decision in the absence of 'judicially discoverable and manageable standards.'") (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).

165 *See, e.g.*, *Aviation & Gen Ins.*, 882 F.3d at 1094–95 (rejecting defendants' argument that the court lacked judicially manageable standards for resolving a takings claim).

166 *See, e.g.*, Gordon v. Texas, 153 F.3d 190, 193 (5th Cir. 1998) ("[M]oney damages are less prone to political question problems, for typically they are judicially manageable and are not intrusive into the business of the other branches of government."). To be clear, courts sometimes rule that private damages claims implicating foreign affairs are nonjusticiable under the political question doctrine, especially in *Bivens* actions against government officials. *See* Stephen I. Vladek, Response, *The Exceptionalism of Foreign Affairs Normalization*, 128 Harv. L. Rev. F. 322, 325 (2015). The more limited claim being made here is that the political question doctrine is more likely to be invoked by courts in disputes involving claims for declaratory or injunctive relief.

167 *See, e.g.*, *Gordon*, 153 F.3d at 194 ("[R]equests for injunctive relief can be particularly susceptible to justiciability problems, for they have the potential to force one branch of government—the judiciary—to intrude into the decisionmaking properly the domain of another branch—the executive."); Koohi v. United States, 976 F.2d 1328, 1332 (9th Cir.1992) ("[B]ecause the framing of injunctive relief may require the courts to engage in the type of operational decision-making beyond their competence and constitutionally committed to other branches, such suits are far more likely to implicate political questions."). The judicial reluctance to intervene in these cases may accord with recent commentary that suggests that it is the irregularity of a plaintiff's grievance that warrants a court's equitable jurisdiction. *See* Samuel L. Bray & Paul B. Miller, *Getting into Equity*, 97 Notre Dame L. Rev. 1763, 1778 (2022).

record of evaluating fairly sensitive materials in private damages claims, such as the nature of communications between a foreign government and the United States, the definition of war, or whether a private contractor failed to exercise reasonable care to protect employees from danger in a combat zone.[168]

One plausible example that illustrates this point is the 2000 War Powers dispute, *Campbell v. Clinton*,[169] where certain members of Congress brought a lawsuit seeking a declaration that President Clinton's use of airstrikes in the NATO campaign against Yugoslavia was unconstitutional.[170] The D.C. Circuit ultimately concluded that the members of Congress lacked standing to bring the lawsuit.[171] In his concurring opinion, however, Judge Tatel concluded that the claims brought by members of Congress challenging the constitutionality of the use of force did not present a nonjusticiable political question.[172] To buttress his claim that judicially manageable standards were available for determining the meaning of war, Judge Tatel relied on *Bas v. Tingy*,[173] an 1800 Supreme Court decision which involved a private party seeking financial compensation for a captured ship during the 1799 hostilities between France and the United States.[174] He also alluded to numerous other instances where courts had resolved whether hostilities amounted to war in insurance and contract disputes.[175] In his concurring response to Judge Tatel, Judge Silberman contended that judicial standards developed in private damages disputes were inappropriate in constitutional separation of powers controversies seeking equitable relief.[176] "None of these cases," he declared, "asked whether there was a war as the Constitution uses that word, but only whether a particular statutory or contractual provision was triggered by some instance of fighting."[177]

In any event, Judge Tatel's concurrence does suggest that the justiciability of private damages suits in one context may shape how the courts view the justiciability of suits seeking equitable relief in similar contexts. Indeed, there may be analogous arguments in cases where the plaintiff is seeking both money damages and injunctive relief in the

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168 *See* Lane v. Halliburton, 529 F.3d 548, 563 (5th Cir. 2008) (political question not implicated in tort claim where employees alleged that a private contractor falsely guaranteed safety in a war zone in Iraq when it knew there was no such safety).

169 203 F.3d 19 (D.C. Cir. 2000).

170 *Id.*

171 *Id.* at 24.

172 *Id.* at 37–39 (Tatel, J., concurring) (opining as to why courts would be competent to decide the meaning of war).

173 4 U.S. (4 Dall.) 37 (1800).

174 *See Campbell*, 203 F.3d at 37 (Tatel, J., concurring) (citing *Bas*, 4 U.S. at 37).

175 *See id.* at 39.

176 *See id.* at 26 (Silberman, J., concurring).

177 *Id.*

same lawsuit. Should the justiciability of the claims for damages in the same dispute affect the claims for injunctive relief, and vice versa? Take, for instance, *Gordon v. Texas*,[178] a Fifth Circuit decision involving beachfront owners who sued state and private parties for erosion problems on their land caused by the government's installation of a fish pass.[179] The plaintiffs sought both injunctive and monetary relief.[180] In dismissing the plaintiffs' claims based on the political question doctrine, the district court held that because "the plaintiffs' claims for damages were 'inextricably intertwined with their request for injunctive relief,' . . . the justiciability barriers to injunctive relief foreclosed monetary relief as well."[181] In reversing the trial court, the Fifth Circuit acknowledged that while claims for injunctive relief might be susceptible to justiciability problems, the political question did not bar the plaintiff's request for either damages or injunctive relief because neither form of relief would require a court to repeal or obstruct federal policy.[182] In this case, the relevant inquiry turned on the extent a judicial remedy might require a court to interfere with the actual conduct of government policy.[183] That insight may apply to foreign affairs controversies as well. In their treatise, for instance, Professors Murphy and Swaine allude to a case where a court held that a claim seeking injunctive relief for a taking abroad was justiciable, where the plaintiffs' claim focused narrowly on the legality of the U.S. government's occupation of the plaintiff's land in Honduras, and not on the merits of the government's overall foreign policy in that country.[184]

Conclusion

The central theme of this Article has been on the interaction among foreign policy polarization, the reliance interests of private parties, and the prospect of judicial review. A growing literature bemoans the burdens that foreign policy polarization imposes on foreign states and private parties who can no longer rely on the United States to commit to a certain course of policy in foreign affairs. This Article suggests that there are also effects that foreign policy polarization may have on the prospects of judicial intervention in foreign affairs. First, since polarization causes foreign policy volatility, it is likely to increase

178 153 F.3d 190 (5th Cir. 1998).

179 *Id.* at 190–92.

180 *Id.* at 190.

181 *Id.* at 195 (quoting Gordon v. Texas, 965 F. Supp. 913, 917 (S.D. Tex. 1997)).

182 *Id.* at 195–96.

183 *See id.* at 194 (holding that plaintiffs' claims for injunctive relief would not require district court "to abrogate any significant federal policies").

184 *See* Murphy & Swaine, *supra* note 10, at 921–22 (2023) (discussing Ramirez de Arellano v. Weinberger, 745 F.2d 1500 (D.C. Cir. 1984) (en banc)).

the pool of claimants who can demonstrate the kinds of detrimental reliance susceptible to judicial relief. Second, dramatic swings in foreign policy across electoral cycles are likely to make courts less willing to defer to presidential judgments in foreign affairs. This does not necessarily imply that such an increase in judicial intervention in foreign affairs will be desirable from a social welfare or democracy enhancing perspective; indeed, it may or may not be. But there may be some other normative considerations that are less ambiguous. One inescapable inference is, for instance, that if polarization and policy volatility in foreign policy become commonplace, certain private citizens will bear a disproportionate burden of its effects by way of threats to their reliance interests. And when this is the case, considerations of fairness may weigh in favor of compensating those parties for the injuries they have suffered as result of policy instability in pursuit of either the public or partisan interest.