FRICTIONLESS GOVERNMENT AND FOREIGN RELATIONS

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In an era defined by partisan rifts and government gridlock, many celebrate the rare issues that prompt bipartisan consensus. But extreme consensus should sometimes trigger concern, not celebration. We call these worrisome situations "frictionless government." Frictionless government occurs when there is overwhelming bipartisan and bicameral consensus about a particular set of policies, as well as consensus between Congress and the President. Frictionless situations have inherent weaknesses, including the loss of inter-branch checks and balances that the constitutional Framers envisioned, the loss of partisan checks that typically flow from a "separation of parties," the reduction of inter- and intra-agency checks within the executive branch, and an increased risk of cognitive biases, such as groupthink, that hamper wise policy-making.

Frictionless situations tend to involve foreign relations and commonly arise when the United States is attacked or otherwise finds itself in a conflict with external enemies. In such high-stakes moments, frictionless government has led to policy decisions taken with overwhelming consensus that go off the rails by sparking or escalating conflict, triggering actions by U.S. adversaries that undercut U.S. security goals, and unlawfully targeting domestic constituencies perceived to be linked to foreign adversaries. Such decisions eventually

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provoke substantial opposition and often repeal, but only after causing serious harms.

Celebration of unified, bipartisan action in frictionless government should not overwhelm appreciation of the risks that can result from a rush to act. This Article draws on historical examples, including the U.S. internment of Japanese Americans during World War II, the conduct of the Vietnam War, and the U.S. response to the September 11 attacks, and then considers more recent actions including the U.S. response to Russia's full-scale invasion of Ukraine and ongoing tensions with China. The Article ultimately argues that recognizing the perils of frictionless government early is the best way to avoid the excesses that have plagued past eras of "frictionlessness," and it proposes ways to reintroduce productive friction back into policy-making processes, including via self-imposed actions by Congress and the executive and via external actors, such as companies, foreign governments, and state and local governments.

INTRODUCTION

The phrase "frictionless government" may seem like an oxymoron to many observers of U.S. politics today. In 2023 alone, the House twice faced steep challenges in selecting its Speaker,[1] and both houses together have almost failed to raise the debt ceiling[2] and fund the government.[3] Research shows that Congress is more polarized now than it has been for the past fifty years.[4] Not surprisingly, referring to Congress as "broken" has become a common trope.[5] As a result, many are skeptical that Congress can do much at all.

[1] Lindsey McPherson, Laura Weiss & Caitlin Reilly, McCarthy Wins Speaker Election, Finally, Roll Call (Jan. 7, 2023, 1:38 AM), https://rollcall.com/2023/01/07/mccarthy-wins-speaker-election-finally/ [https://perma.cc/XCN4-RAPB]; Luke Broadwater, Republicans Tap Jordan for Speaker, but Delay Vote as Holdouts Balk, N.Y. Times (Oct. 17, 2023), https://www.nytimes.com/2023/10/13/us/politics/house-speaker-jordan-scalise.html.

[2] Christopher M. Tuttle, Out of the Debt Ceiling Fire, but Still in the Frying Pan, Council on Foreign Rels. (June 2, 2023, 9:46 AM), https://www.cfr.org/blog/out-debt-ceiling-fire-still-frying-pan [https://perma.cc/Q7SR-BTNE].

[3] David Wessel, What Is a Government Shutdown?, Brookings Inst. (Mar. 23, 2024), https://www.brookings.edu/articles/what-is-a-government-shutdown-and-why-are-we-likely-to-have-another-one/#:~:text=In%20a%20surprise%2C%20Congress%20avoided,year%27s%20levels%20for%2045%20days [https://perma.cc/8JBC-8LSZ].

[4] Drew Desilver, The Polarization in Today's Congress Has Roots That Go Back Decades, Pew Rsch. Ctr. (Mar. 10, 2022), https://www.pewresearch.org/short-reads/2022/03/10/the-polarization-in-todays-congress-has-roots-that-go-back-decades/ [https://perma.cc/6AYT-F36K].

[5] Betsey Stevenson, Congress Is Even More Dysfunctional Than It Looks, Bloomberg Tax (Oct. 13, 2023, 7:00 AM), https://news.bloombergtax.com/daily-tax-report/congress-is-more-dysfunctional-than-it-looks-betsey-stevenson; Peter King, I Served in the House for 28 Years. It's Now More Dysfunctional Than Ever., The Hill (Sept. 25, 2023, 3:00 PM), https://thehill.com/opinion/campaign/4221898-i-served-in-the-house-for-28-years-its-now-more-dysfunctional-than-ever/; Yuval Levin, What We Can Do to Make American Politics Less

Yet even as Congress has struggled with this increasing polarization, it continues to enact hundreds of bills every session, including National Defense Authorization Acts ("NDAAs"), producing approximately 4 to 6 million words of new law in each Congress.[6] In some cases, Congress enacts these laws with large majorities voting in favor of the bills.[7] This is often true when the legislation implicates foreign relations, and especially when the United States faces a perceived external threat.[8] Where Congress passes a bill with large majorities and the President strongly supports the law, we might see this as a cause to celebrate, not hesitate. But this Article takes the counterintuitive position that for as much attention as government dysfunction engenders, certain instances of overwhelming and bipartisan consensus should also prompt concern.

This Article focuses on a particular subset of foreign policy decision-making that we term "frictionless government." By this term, we mean to capture situations in which there is overwhelming bipartisan and bicameral consensus about a particular set of policies, as well as consensus between Congress and the executive. In such cases, the normal checks and balances that typically arise during policy-making weaken and, in some cases, disappear entirely, creating a risk of policy going off the rails. The usual tensions between congressional and executive desires disappear; the rough-and-tumble partisan interactions between Republicans and Democrats fade; and the often-contentious inter-agency negotiations inside the executive branch are streamlined. These conditions can amplify the cognitive biases that often arise in decision-making, including optimism bias, confirmation bias, and groupthink, and often result in governmental actions that spark or escalate conflict, trigger actions by U.S. adversaries that undercut U.S. security goals, and unlawfully target domestic constituencies perceived to be linked to foreign adversaries. Such policy decisions eventually come to be viewed

Dysfunctional, N.Y. Times (Oct. 9, 2023), https://www.nytimes.com/2023/10/09/opinion/american-politics-congress-reform.html.

[6] Statistics and Historical Comparison, GovTrack.us, https://www.govtrack.us/congress/bills/statistics [https://perma.cc/VP6N-CK2T] (last visited Oct. 4, 2024).

[7] For example, the 2024 NDAA passed the House of Representatives and the Senate with 310 and 87 yeas, respectively. Roll Call 723 | Bill Number: H.R. 2670, U.S. House of Representatives: Clerk (Dec. 14, 2023, 10:40 AM), https://clerk.house.gov/Votes/2023723 [https://perma.cc/4ASF-2KJU]; Roll Call Vote 118th Congress—1st Session, U.S. Senate (Dec. 13, 2023, 6:46 PM), https://www.senate.gov/legislative/LIS/roll_call_votes/vote1181/vote_118_1_00343.htm [https://perma.cc/ERZ5-Z3LR].

[8] See infra note 173 and accompanying text (discussing adoption of the 2001 Authorization for Use of Military Force).

as problematic, both legally and from a policy perspective, but only too late to avoid their costs.

Historical examples illustrate that frictionless situations tend to arise when the United States is attacked or otherwise finds itself in conflict with external enemies. Common across the historical frictionless examples that this Article identifies are laws and policies adopted with overwhelming bipartisan support from across the U.S. government that eventually come to provoke substantial opposition and often repeal. The U.S. internment of Japanese Americans during World War II, the conduct of the Vietnam War, and the use of renditions and torture as part of the U.S. response to the September 11 attacks are among the most serious U.S. foreign policy mistakes of the twentieth and twenty-first centuries. Yet all were based on or supported by statutes that passed Congress by very wide, bipartisan margins and with the encouragement of the White House.

Not all situations of frictionless government necessarily produce poor policies. The Article highlights the response to Russia's full-scale invasion of Ukraine as a recent example of frictionless government that, to date, has not produced the same pathologies as past examples. But there are enough examples of serious foreign policy errors made under frictionless government that it is worth reconsidering the virtues of—and highlighting the vices of—frictionlessness. This analysis is crucial in light of current tensions between the United States and China, which are producing elements of frictionlessness in U.S. policy-making that raise cause for concern.

This Article's goal in identifying the existence of frictionless situations is to ensure that, going forward, celebration of unified, bipartisan action in frictionless government will not overwhelm the appreciation of the risks that can result from a rush to act against perceived threats. Recognizing the perils of frictionless government is the best way to ensure that actors inside and outside government take steps to avoid replicating the excesses of past frictionless situations. Instead of being able to rely on inter-branch or inter-party checks, we will need to look elsewhere for supplemental checks on U.S. policy in these situations, to avoid groupthink and ensure that the United States is striking the right balance in national security or foreign policy settings that often have generational impacts. In some cases, Congress and the executive could choose to deliberately reintroduce some level of friction into their decision-making, to ensure that the President is presented with a wider range of options and that there are requirements to revisit policy decisions periodically.

External actors may also provide useful friction in the form of litigation by affected parties, resisting or slow-rolling policy implementation, and lobbying governmental actors.

To be clear, there are sound reasons to want the United States to be able to respond quickly and effectively to very real threats to its current and future security. But even—and maybe particularly—in the face of these threats, it is to the long-term advantage of U.S. national security to ensure ongoing, iterative checks and balances on U.S. policies in this space.

The Article proceeds as follows. Part I defines "frictionless government" and explains the inherent weaknesses of such situations, including the loss of inter-branch checks and balances that the constitutional Framers relied upon, the loss of partisan checks that typically flow from a "separation of parties," the limiting of inter- and intra-agency checks within the executive branch, and the risk of fostering groupthink and other cognitive biases that hamper wise policy-making. Part I concludes by discussing the lifecycle of frictionless situations, especially when they arise and how they ultimately fade away, and by considering possible counterarguments to our concerns about frictionless situations. Moving from the theoretical to the practical, Part II addresses frictionless government in practice, identifying and analyzing several historical and more recent examples of frictionless situations to derive categories of pathologies that frictionlessness produces. Part III then proposes ways to reintroduce checks and balances into frictionless government situations, drawing on both friction that can be self-imposed by the political branches and friction introduced by external actors, including regulated companies, foreign governments, and state and local governments.

I. THE WORLD OF FRICTIONLESS GOVERNMENT

In the contemporary political environment, we are used to seeing headlines expressing concern that Congress is broken, unable to pass appropriations bills to keep the government open or enact laws that would advance important U.S. domestic or foreign policy goals.[9] This is

[9] See, e.g., Jacob Bronsther & Guha Krishnamurthi, Congress Is Dysfunctional. History Shows It Won't Change Anytime Soon., Wash. Post (Feb. 9, 2023, 7:00 AM), https://www.washingtonpost.com/made-by-history/2023/02/09/congress-dysfunction-polarization-gridlock/; Derek Willis & Paul Kane, How Congress Stopped Working, ProPublica (Nov. 5, 2018, 10:00 AM), https://www.propublica.org/article/how-congress-stopped-working [https://perma.cc/4HU3-D32L].

undoubtedly a serious problem, not only for the U.S. political system but also for U.S. standing in the world.[10] But even as Congress suffers from self-inflicted wounds, its work marches on: its members continue to negotiate, and Congress continues to enact bills, especially in response to foreign policy problems and national security concerns. This Article is concerned with a paradigm that exists on the opposite end of the spectrum from a frozen Congress: the cases in which Congress and the executive operate in robust consensus, with little to no dissent about a particular foreign policy. We term this "frictionless government."

This Part defines frictionless government and then discusses how decision-making in frictionless government situations suffers from particular weaknesses, including reduced inter-branch, inter-party, and inter- and intra-agency checks, which can lead to qualitatively inferior decisions. It also considers how and why frictionless government scenarios arise and recede, and it addresses potential counterarguments to our concerns about frictionlessness.

A. Defining Frictionless Government

When lawyers evaluate the exercise of governmental power, they often refer to Justice Robert Jackson's iconic concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*.[11] In *Youngstown*, the Supreme Court rejected President Truman's attempt to seize domestic steel mills in order to keep production running during the Korean War.[12] Justice Jackson's concurrence famously identified a three-category framework by which to assess exercises of executive power, based on how much congressional support the President has for his actions.[13] In Category 1, the President acts pursuant to congressional authorization; in Category 2, he acts in the face of congressional silence; and in Category 3, he acts contrary to Congress's wishes.[14] In contrast to Truman's actions, which Justice Jackson considered to fall into Category 3,[15] he described broad latitude for actions in Category 1: "When the President acts pursuant to

[10] Peter Baker, To the World, McCarthy's Exit Is Just Another Example of U.S. Disarray, N.Y. Times (Oct. 5, 2023), https://www.nytimes.com/2023/10/05/us/politics/speaker-mccarthy-biden-democracy.html.

[11] 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

[12] Id. at 582–83, 589 (majority opinion).

[13] Id. at 635–38 (Jackson, J., concurring).

[14] Id.

[15] Id. at 640.

an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."[16] In Category 1, Presidential actions are "supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it."[17]

Youngstown Category 1 cases thus tend to be legally easy ones.[18] Where Congress authorizes an activity by statute and the President acts consistent with that statute, courts will strike down the government's act only where the federal government as a whole lacks the authority to undertake that action.[19] The President generally prefers to act in Category 1 as a legal matter—and by most accounts, we prefer that he act in that category as well, as it demonstrates that he is acting with Congress's support, rather than on his own authority in the face of Congress's silence or, worse, against its will. For these reasons, courts, lawyers, and legal scholars often effectively give Category 1 cases a pass, focusing their concern instead on instances where the executive acts without congressional authorization or pursuant to only dubious claims of such authorization.[20]

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[16] Id. at 635.

[17] Id. at 637.

[18] Edward T. Swaine, The Political Economy of *Youngstown*, 83 S. Cal. L. Rev. 263, 311 (2010) (noting that presidential action that falls within Category 1 "verges on immunity from judicial challenge").

[19] See, e.g., KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner, 647 F. Supp. 2d 857, 877–78 (N.D. Ohio 2009) (quoting *Youngstown*, 343 U.S. at 636–37 (Jackson, J., concurring)).

[20] An exception to this is David Moore, who has written:

> Checks and balances problems may arise in each of [Justice Jackson's three] categories. Surprisingly, however, Justice Jackson's first category—where the outcome is generally perceived as least controversial—is the most troubling. In the clearest category-one case, Congress has affirmatively authorized the President's conduct. . . . However, . . . authorization may also involve a failure of checks and balances. Regardless, congressional authorization is treated as conclusive.

David H. Moore, Taking Cues from Congress: Judicial Review, Congressional Authorization, and the Expansion of Presidential Power, 90 Notre Dame L. Rev. 1019, 1022 (2015). However, Moore is focused on cases in which Congress "authorizes foreign affairs actions by the President against institutional interest" and the concomitant problem that the courts will approve problematic transfers of power from Congress to the executive. Id. at 1030. Although we agree that undue accretions of power are problematic, we are particularly concerned with the effect on the quality of decision-making that these types of authorizations may produce. See also Christopher M. Tuttle, Foreign Policy Bipartisanship's Mixed Blessings, Council on Foreign Rels. (May 31, 2022, 4:01 PM), https://www.cfr.org/blog/foreign-policy-bipartisanships-mixed-blessings [https://perma.cc/P672-WR2R] ("Partisan criticism often provides an

But this focus misses an important and often problematic part of the story. In a subset of Category 1 cases that we identify as "frictionless government," the legal clarity about presidential authority masks other fundamental concerns. We define "frictionless government" as a situation in which: (1) both houses of Congress simultaneously evidence very strong support for a particular policy, which they demonstrate either by enacting a new statute delegating authority to the President or by invoking an existing statute that authorizes him to act; (2) both Democrats and Republicans simultaneously evidence very strong support for that policy; and (3) the President and his administration manifest very strong support for the policy. This overwhelming agreement fosters an absence of friction in the policy-making process that comes at a cost to checks and balances and to sound policy decisions born of those checks.

Frictionless government is particularly likely to arise in situations related to foreign relations and national security, especially when the actions of an external adversary spark broad U.S. consensus around policy responses.[21] Many frictionless government situations arise as the result of an armed attack on the United States that quickly leads to an armed conflict or at least the possibility of such a conflict.[22] The existence of a perceived acute threat to the United States generally unifies the country.[23] As Professor Robert Lieber notes, "[W]hen it comes to military intervention, both the urgency of events and rally-round-the-flag effects are often conducive to wider support within Congress and among the general public."[24] Partisanship often subsides during such times, an idea captured by Senator Arthur Vandenberg's admonishment in 1947 that

important check on ambition, and when that check is absent, oversteering becomes harder to resist.").

[21] See, e.g., Jordan Tama, Bipartisanship and US Foreign Policy: Cooperation in a Polarized Age 13–14 (2023); Tuttle, supra note 20.

[22] As we discuss in Part I, a frictionless situation can arise even in the absence of a kinetic attack or armed conflict, but it usually will require some type of potent external military, economic, or other geopolitical threat.

[23] See Yuval Feinstein, Rallying Around the President: When and Why Do Americans Close Ranks Behind Their Presidents During International Crisis and War?, 40 Soc. Sci. Hist. 305, 305–06, 320 (2016).

[24] Robert J. Lieber, Politics Stops at the Water's Edge? Not Recently., Wash. Post (Feb. 10, 2014, 8:00 AM), https://www.washingtonpost.com/news/monkey-cage/wp/2014/02/10/politics-stops-at-the-waters-edge-not-recently/ [hereinafter Lieber, Politics Stops]; see also Robert J. Lieber, Power and Willpower in the American Future: Why the United States Is Not Destined to Decline 4 (2012) ("[T]he worse the crisis, the greater the sense of urgency and the more likely that policy makers, regardless of their prior inhibitions and beliefs, will find themselves having to respond effectively.").

"partisan politics" must end "at the water's edge.'"[25] Emergencies often lead the government to overinflate the threat that the country is facing, an overinflation that can amplify the effects that Lieber describes.[26]

In addition, the usual domestic political pressures that often lead to sharp partisanship are less salient with respect to activities occurring outside the country.[27] When leaders are focused on threats that manifest externally, those leaders often then search for perceived manifestations of that same threat inside the United States. Historically, this elevates the risk of racist or nationalist responses against people in the United States who are perceived—often incorrectly—as being linked to the external threat.[28]

To be clear, frictionless government need not mean that there is literally *no* opposition to policies or *no* dissent. What we mean is that there is overwhelming bipartisan and inter-branch support for a policy. One way to assess the existence of such support from Congress is by reference to the vote count on the legislation that sets forth the policy, such as where each house of Congress passes a bill with very few "no" votes or, at a minimum, a veto-proof majority. In other circumstances, Congress may believe that existing statutory delegations empower the President to take sufficient actions and may push the President to use those existing authorities. Even if Congress did not enact the existing statute with overwhelming support, contemporary pressure from Congress to use those authorities may render the current policy setting frictionless.[29] In the strongest frictionless government scenarios,

[25] Arthur Vandenberg: A Featured Biography, U.S. Senate, https://www.senate.gov/senators/FeaturedBios/Featured_Bio_Vandenberg.htm [https://perma.cc/6UC3-PR6A] (last visited Oct. 4, 2024).

[26] Curtis A. Bradley, Ashley S. Deeks & Jack L. Goldsmith, Foreign Relations Law 735 (7th ed. 2020) (noting that "most claims of emergency or necessity turn out, after the fact, to have been exaggerated").

[27] See Andrew Daniller, Americans See Little Bipartisan Common Ground, but More on Foreign Policy than on Abortion, Guns, Pew Rsch. Ctr. (June 25, 2024), https://www.pewresearch.org/short-reads/2024/06/25/americans-see-little-bipartisan-common-ground-but-more-on-foreign-policy-than-on-abortion-guns/ [https://perma.cc/H3Q7-ZQ8X].

[28] See Mark Jia, American Law in the New Global Conflict, 99 N.Y.U. L. Rev. 636, 697–701 (2024); see also Matiangai V.S. Sirleaf, Confronting the Color Line in National Security, *in* Race and National Security 9, 9 (Matiangai V.S. Sirleaf ed., 2023) ("[O]ne of the persistent ways that race manifests in national security law is in the determination of who and what counts as a 'threat.'").

[29] The clarity of a statute may also reduce friction: if the President is acting consistent with the statute, there will be little debate (both inside the executive branch and outside it) about what the President is legally authorized to do. If a statute is unclear and the executive attempts

Congress may not only ensure that the President has robust authorization to act, but also urge him to act to the outer limits of the existing or newly enacted authority. And because moments of crisis create a real or perceived need to act quickly, the press for speed often strips away the friction that would typically arise from extended hearings, political debates, or robust public discourse.

Frictionless government simultaneously reflects an absence of inter-branch checks—fostered by the separation of powers—and an absence of political checks—fostered by the separation of parties.[30] In such circumstances, the combination of broad delegations of authority to the executive and bipartisan pressure from Congress to use those authorities can result in policies that are less rigorously vetted ex ante or thoroughly overseen ex post than is typical and, we believe, necessary to ensure optimal outcomes.[31] The next Section discusses in greater detail the concerns that frictionless government situations present.

B. The Weaknesses of Frictionless Government

On its face, frictionless government may seem like an ideal place to be. The executive is acting at the pinnacle of its legal and political power, with the full backing of Congress, and for a moment in time or on a particular issue, the bitter partisan divisions that so often roil the U.S. polity fade away. After further consideration, however, the costs and risks of frictionless government become clear. The remainder of this Section identifies and explains these costs and risks.

1. The Virtues of Checks and Balances

Checks and balances are fundamental to the U.S. constitutional system. The Framers deliberately designed the Constitution to ensure significant checks on governmental power. As James Madison explained in Federalist 51, the Framers understood the need to "contriv[e] the interior structure of the [federal] government [so] . . . that its several constituent parts may, by their mutual relations, be the means of keeping each other

to take an action that is not patently authorized under that ambiguous statute, there is a greater likelihood that some in Congress will object or that litigation may occur.

[30] See infra Section I.B.

[31] Cf. Kristen E. Eichensehr & Cathy Hwang, National Security Creep in Corporate Transactions, 123 Colum. L. Rev. 549, 583 (2023) (noting that "the unity of effort across the executive and legislative branches raises some caution flags").

in their proper places."[32] As he memorably asserted, in order to protect against "a gradual concentration of the several powers in the same department[,] . . . [a]mbition must be made to counteract ambition."[33]

In addition to the horizontal separation of powers between branches of the federal government, the Framers embraced the vertical division of governmental authority between the federal and state governments as another crucial restraint on the power of both types of government. Madison described federalism as providing "a double security . . . to the rights of the people" because "[t]he different governments will control each other, at the same time that each will be controlled by itself."[34] As the Supreme Court has noted, "Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government . . . ."[35]

Avoiding excessive concentrations of power is not the only reason to embrace checks and balances. Checks and balances can also improve the quality of decision-making itself. After all, implicit in concerns about tyranny[36] and the loss of personal rights that flow from excessive consolidation of power[37] are concerns about normatively poor decisions. As Professor Stephen Holmes noted in the context of post-September 11 executive branch policy-making, "[W]e need to look beneath formal compliance with checks and balances to the arrangement's underlying rationale—namely the idea that the duty of the president to report to Congress will prevent at least some ill-conceived policies from being adopted. This is a hope or expectation shared by the Framers . . . ."[38] Policy-makers who bring together a range of interests and perspectives are less likely to produce the kind of tyrannical (or otherwise poorly considered) policies that the Framers feared. When it comes to war-initiation in particular, the Framers intentionally sought to lodge that

[32] The Federalist No. 51, at 288 (James Madison) (Clinton Rossiter ed., 1999).

[33] Id. at 289–90; see also Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) ("The purpose [of the separation of powers] was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.").

[34] The Federalist No. 51, supra note 32, at 291; see also Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) ("[A] healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse on either front.").

[35] INS v. Chadha, 462 U.S. 919, 944 (1983).

[36] See The Federalist No. 47, supra note 32, at 269 (James Madison).

[37] The Federalist No. 51, supra note 32, at 291.

[38] Stephen Holmes, In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror, 97 Calif. L. Rev. 301, 328 (2009).

decision in Congress because it is a less agile and more deliberative body than the executive. As one scholar put it, "When it comes to initiating war, the Constitution counts on Congress's relative disarray."[39] These checks can help prevent systemic policy mistakes, including by reducing executive miscalculations about a threat (which can lead to economic, political, and military escalation and crises), and the executive's tendency to focus on one near-term threat to the exclusion of other, equally important (but less temporally urgent) challenges.

The following Subsections identify three specific phenomena that accompany frictionless government situations, each of which can undercut the quality of decision-making by enhancing the tendency toward groupthink or other dangerous cognitive biases.

2. The Loss of Inter-Branch Checks

By definition, when the executive finds itself operating in a frictionless government scenario, it is acting with the support of Congress. When Congress is satisfied with the underlying authorities that it has provided to the executive and with how the executive is implementing those authorities, congressional committees are less likely to convene hearings, demand briefings, or open investigations into executive action. When congressional oversight does occur, that oversight is more likely to be credulous, taking the form of a box-checking exercise or serving as an opportunity to push the executive to do more, faster. When the executive develops policy in the shadow of likely congressional criticism, it has strong incentives to carefully test that policy for flaws and subject it to a cost-benefit analysis.[40] Absent that shadow, the executive may be less careful about doing so.[41] In addition, courts are unlikely to play a significant role at the beginning of a frictionless scenario, not least because litigation about national security policies tends to unfold slowly.

[39] Recent Signing Statements, 131 Harv. L. Rev. 674, 679 (2017) (citing James Wilson, Speech at the Pennsylvania Ratifying Convention (Dec. 11, 1787), *in* 2 The Documentary History of the Ratification of the Constitution 550, 583 (Merrill Jensen ed., 1976)).

[40] See Jack Goldsmith, Power and Constraint: The Accountable Presidency After 9/11, at 207 (2012) (arguing that there is a "vibrant presidential synopticon" in which "the 'many'—in the form of courts, members of Congress and their staff, human rights activists, journalists, and their collaborators, and lawyers and watchdogs inside and outside the executive branch—constantly gaze on the 'one,' the presidency" and that the "presidential synopticon . . . promote[s] responsible executive action" because "officials are much more careful merely by virtue of being watched").

[41] Eichensehr & Hwang, supra note 31, at 583.

3. The Loss of Partisan Checks

The governmental checks that the Framers implemented have not worked as they envisioned, largely because of changes to the political party system.[42] While the Framers worried about an overly powerful Congress,[43] in practice Congress is famously weak at defending its institutional prerogatives against executive encroachment, at least in part because doing so rarely helps its members win reelection.[44] The rise of political parties also created loyalties that transcend branches of the federal government and the division between the federal and state governments. Jackson's *Youngstown* concurrence is clear-eyed about how party unity across branches can provide "a significant extraconstitutional supplement to real executive power."[45] Jackson warned that "[p]arty loyalties and interests, sometimes more binding than law, extend [the President's] effective control into branches of government other than his own and he often may win, as a political leader, what he cannot command under the Constitution."[46]

Political loyalties, however, can be a double-edged sword. Politics can sometimes undermine the Madisonian separation of powers ideal in the ways that Jackson warned of, particularly in periods of unified government, when the presidency and Congress are controlled by the same party and political loyalties undermine incentives for the legislature to check the President.[47] But politics can also reinforce competition between the branches in eras of divided government when Congress (or at least one house of Congress) is controlled by the political party that does not hold the presidency.[48] For this reason, Professors Daryl Levinson and Richard Pildes have argued that "the United States has not one system of separation of powers but (at least) two,"[49] and that "[t]he practical

[42] Daryl J. Levinson & Richard H. Pildes, Separation of Parties, Not Powers, 119 Harv. L. Rev. 2311, 2313 (2006).

[43] See The Federalist No. 51, supra note 32, at 291.

[44] See, e.g., Curtis A. Bradley & Trevor W. Morrison, Historical Gloss and the Separation of Powers, 126 Harv. L. Rev. 411, 440–47 (2012); Kristen E. Eichensehr, Courts, Congress, and the Conduct of Foreign Relations, 85 U. Chi. L. Rev. 609, 652–63 (2018); Terry M. Moe & William G. Howell, The Presidential Power of Unilateral Action, 15 J.L. Econ. & Org. 132, 144 (1999).

[45] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 654 (1952) (Jackson, J., concurring).

[46] Id.

[47] See Levinson & Pildes, supra note 42, at 2323.

[48] See id. at 2329.

[49] Id.

distinction between party-divided and party-unified government rivals in significance, and often dominates, the constitutional distinction between the branches in predicting and explaining inter-branch political dynamics."[50]

Our study of frictionless government, however, leads us to be considerably less sanguine than Levinson and Pildes about the ability of even divided government to serve as an effective check in all circumstances. They recognize that, from a "Madisonian perspective" that is concerned with checks and balances, "the primary threat posed by political parties to the separation of powers comes . . . from party unification," and that "Madisonians will view the prospect of unchecked and unbalanced governance by a cohesive majority party as cause for constitutional alarm."[51] We share their concerns about the pathologies of unified government but go further in emphasizing that the disappearance of political checks is not necessarily limited to periods of unified government.[52] Frictionless government examples occur not just when government is unified, but also when it is divided. Frictionless government situations in eras of divided government are particularly concerning because they sharply highlight the weakness not just of structural constitutional checks and balances, but also of the partisan political checks that Levinson and Pildes theorize.

Levinson and Pildes recognize that "[t]he greatest threat to constitutional law's conventional understanding of, and normative goals for, separation of powers comes when government is unified and inter-branch political dynamics shift from competitive to cooperative."[53] But as this Article shows, that cooperative dynamic can arise even when government is formally divided.

4. Limited Inter- and Intra-Agency Checks

Another important source of checks on the executive normally comes from processes internal to the executive branch. Agencies are not

[50] Id. at 2315.

[51] Id. at 2329.

[52] Cf. id. at 2348. Their emphasis on the concerns with unified government leads them to focus, for example, on bolstering "[m]inority [o]pposition [r]ights." Id. at 2368–75. While potentially helpful in some circumstances, such a move is less likely to be useful in response to a frictionless government scenario, where the legislative minority largely supports the majority's approach.

[53] Id. at 2316.

monolithic.[54] Within agencies, lawyers, policy-makers, economists, human rights advocates, and free-trade supporters all contribute to intra-agency deliberations that drive stand-alone agency operations or merge into the broader inter-agency policy-making process that occurs within the executive branch.[55] Different agencies have different mission statements, constituencies, and cultures. These agencies feed their views into an inter-agency process led by the White House and the National Security Council ("NSC"), the goal of which is to develop the best possible policy on a particular issue and to ensure consistency across different policy areas.

Scholars have described structures and processes within the executive branch as an "internal separation of powers," supplementing the constitutional separation of powers.[56] According to Professor Gillian Metzger, "[t]he defining characteristic of internal separation of powers measures is that they seek to" both check and maintain accountability for exercises of power, even though they operate "within the confines of a single branch," usually the executive.[57] The internal separation of powers may include, as relevant here, "the division of functions within agencies,"[58] civil service protections,[59] and the existence of agencies with differing information sources and somewhat overlapping areas of expertise.[60]

Although the internal separation of powers can serve as a real check on executive branch policy-making in many circumstances,[61] in frictionless government situations, the internal separation of powers breaks down too, just as the constitutional separation of powers and separation of parties

[54] Cf. Elizabeth Magill & Adrian Vermeule, Allocating Power Within Agencies, 120 Yale L.J. 1032, 1036–37 (2011) (noting that administrative agencies "are not unitary actors" and are instead "fractured internally," with different categories of stakeholders).

[55] See, e.g., Ashley S. Deeks, Secret Reason-Giving, 129 Yale L.J. 612, 668 (2020) (discussing how a range of offices within the State Department contribute to the formation of a foreign policy decision).

[56] See, e.g., Neal Kumar Katyal, Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within, 115 Yale L.J. 2314, 2316–17 (2006); Gillian E. Metzger, The Interdependent Relationship Between Internal and External Separation of Powers, 59 Emory L.J. 423, 428–31 (2009); Jon D. Michaels, An Enduring, Evolving Separation of Powers, 115 Colum. L. Rev. 515, 534–51 (2015).

[57] Metzger, supra note 56, at 428–29.

[58] Id. at 429.

[59] See, e.g., Katyal, supra note 56, at 2331–35; Metzger, supra note 56, at 429; Michaels, supra note 56, at 540–47.

[60] See, e.g., Metzger, supra note 56, at 430.

[61] See id. at 439–41.

do. The breakdown can manifest in a lack of robust disagreements among various constituencies within agencies, as well as a lack of vigorous contestation among agencies in the inter-agency process.

That intra-executive checks break down when external checks from Congress and partisan competition fade away is perhaps not surprising. Scholars have emphasized that internal and external checks are mutually reinforcing.[62] For example, if the presence of skeptical overseers in Congress normally bolsters portions of the bureaucracy, whether particular agencies or civil servants,[63] then the perception that there is bipartisan support in Congress for a certain executive policy—and no congressional allies for potential dissenters—may stifle disagreement within the executive branch. Or consider the continuity of particular policies across changes in administration from one party to the other. The ability of executive branch civil servants to resist the policy preferences of political appointees has drawn considerable attention in recent years, celebrated by some and decried by others.[64] But whatever one thinks of such resistance as a normative matter, the endorsement of a particular policy by presidential administrations of different political parties may decrease the incentive for career civil servants to push back against apparent consensus positions.

If the characteristic feature of the breakdown of internal separation of powers in frictionless government situations is unity within the executive branch, one might expect proponents of the unitary executive theory to embrace such a situation.[65] As Professors Steven Calabresi and Christopher Yoo have explained, unitary executive theory understands the Vesting Clause in Article II as "a grant to the President of all of the executive power, which includes the power to remove and direct all lower-level executive officials."[66] They explain that the "three

[62] See Rebecca Ingber, Bureaucratic Resistance and the National Security State, 104 Iowa L. Rev. 139, 145 (2018); Metzger, supra note 56, at 444–46.

[63] See, e.g., Metzger, supra note 56, at 443.

[64] See, e.g., Ingber, supra note 62, at 142–43.

[65] Unitary executive proponents have argued that some features of the internal separation of powers are unconstitutional. See, e.g., Steven G. Calabresi & Christopher S. Yoo, The Unitary Executive: Presidential Power from Washington to Bush 4 (2008) ("[C]ongressional efforts to insulate executive branch subordinates from presidential control by creating independent agencies and counsels are in essence unconstitutional."); see also Metzger, supra note 56, at 435 (noting that "to unitary executive theorists . . . internal constraints such as independent agencies, the civil service, and assertions of independent agency policy-setting authority actually violate constitutional separation of powers principles").

[66] Calabresi & Yoo, supra note 65, at 3–4.

mechanisms essential to the classic theory of the unitary executive . . . include the president's power of removal, the president's power to direct subordinate executive officials, and the president's power to nullify or veto subordinate executive officials' exercise of discretionary executive power."[67] In their view, "the Constitution creates a unitary executive to ensure energetic enforcement of the law and to promote accountability by making it crystal clear who is to blame for maladministration."[68]

However, unitary executive proponents should not cheer the unity that is characteristic of frictionless government. An underlying presumption of much unitary executive theory scholarship—indeed, its frequent bête noire—is that Congress often tries to restrain the President and interfere with presidential control over the executive branch.[69] In other words, the unitary executive theory assumes a non-unitary government, with Congress checking (sometimes unconstitutionally, in the view of these theorists) the executive branch. But in frictionless government, such external checking has fallen away, opening the door to unchecked claims of executive power that at least some unitary executive proponents have disclaimed.[70]

Moreover, the intra- and inter-agency policy contestation with which we are most concerned is perfectly consistent with unitary executive theorists' primary aim of presidential control over policy-making. Disagreements within agencies and within the inter-agency process affect the options presented to the President for decision and how well informed the President is in choosing among them.[71] In this way, internal disagreements can *empower* the President by expanding the decision set and strengthening the options that agency officials present to him. The absence of at least these features of the internal separation of powers in

[67] Id. at 14.

[68] Id. at 3.

[69] See, e.g., id. at 16; see also Aditya Bamzai & Saikrishna Bangalore Prakash, The Executive Power of Removal, 136 Harv. L. Rev. 1756, 1782 (2023) (noting that "Congress does not possess a generic power to 'diminish or modify' presidential authority"); Steven G. Calabresi & Saikrishna B. Prakash, The President's Power to Execute the Laws, 104 Yale L.J. 541, 593 (1994) ("[T]he text of the Constitution confers on the President the exclusive power to superintend the execution of all federal laws, and Congress can neither add to nor diminish the scope of this power.").

[70] See, e.g., Calabresi & Yoo, supra note 65, at 419.

[71] Cf. Katyal, supra note 56, at 2324–25 (arguing for "positive redundancies" whereby agencies with overlapping jurisdictions provide the President with competing perspectives that allow for better decision-making).

frictionless situations should therefore trouble even unitary executive theorists.

5. Cognitive Biases

As a result of the diminution of inter-branch, inter-party, inter-agency, and intra-agency checks, executive branch decision-making in a frictionless government situation is more likely to reflect cognitive biases, including optimism, overconfidence, and confirmation biases, as well as fundamental attribution errors, the illusion of transparency, and groupthink.

Cognitive biases are human behaviors that differ in systematic ways from the economic model of rational decision-making.[72] As Professor Russell Korobkin writes, "[a] large body of evidence, now familiar to the legal community, demonstrates that individual judgment and choice [are] often driven by heuristic-based reasoning as opposed to the pure optimization approach presumed by rational choice theory."[73] Such biases will be exacerbated by many of the phenomena that characterize frictionlessness.[74] Further, and especially problematically for foreign relations, these biases tend to "lean in a hawkish direction," making it "more likely for any individual to decide to initiate conflict."[75]

Several troubling cognitive biases arise in the foreign relations and national security arenas. *Optimism bias* causes individuals to overinflate the likelihood of success of a particular decision and underappreciate the

[72] See Gregory Mitchell, Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence, 91 Geo. L.J. 67, 83 (2002) ("It is this potential for cognitive bias and resultant error that the legal decision theorists primarily refer to when they assert that 'human decisionmaking processes are prone to nonrational, yet systematic, tendencies.'" (quoting Jon D. Hanson & Douglas A. Kysar, Taking Behavioralism Seriously: The Problem of Market Manipulation, 74 N.Y.U. L. Rev. 630, 633 (1999))).

[73] Russell Korobkin, The Problems with Heuristics for Law, *in* Heuristics and the Law 45, 45 (G. Gigerenzer & C. Engel eds., 2006).

[74] Raymond S. Nickerson, Confirmation Bias: A Ubiquitous Phenomenon in Many Guises, 2 Rev. Gen. Psych. 175, 188 (1998) (suggesting that requiring individuals to articulate counterarguments can mitigate their overconfidence in their own judgments).

[75] Ganesh Sitaraman & David Zionts, Behavioral War Powers, 90 N.Y.U. L. Rev. 516, 552 (2015); see also Daniel Kahneman & Jonathan Renshon, Hawkish Biases, *in* American Foreign Policy and the Politics of Fear: Threat Inflation Since 9/11, at 79, 79 (A. Trevor Thrall & Jane K. Cramer eds., 2009) (observing that cognitive biases increase the probability of aggressive action and decrease the probability of collaboration).

likelihood of failure.[76] U.S. decision-makers seem to have suffered from optimism bias in their predictions about how Afghan government forces would respond to the Taliban offensive in Afghanistan in 2021, for instance.[77] The *overconfidence bias* leads a decision-maker to "unrealistically value her own abilities" and "inflate the importance of those abilities relative to those of her adversary (or relative to situational factors)."[78] One example of the overconfidence bias is the U.S. decision to invade Iraq in 2003, in which the United States was overconfident about its intelligence about Saddam Hussein's weapons of mass destruction and the U.S. military's ability to quickly stabilize the security situation in Iraq.[79] *Confirmation bias* reflects the fact that "[p]eople tend to seek information that they consider supportive of favored hypotheses or existing beliefs and to interpret information in ways that are partial to those hypotheses or beliefs,"[80] even when this is not the best objective reading of the information.[81] Under the *illusion of transparency*, "[p]eople assume that more information about their views or feelings have 'leak[ed] out' than have actually been conveyed to others," including their adversaries.[82] This affects how adversaries understand U.S. redlines, threats, and other policies. Those making *fundamental attribution errors* "tend to underplay the context of their potential adversary's decisions, and assume their actions are based on ill motives" rather than on

[76] See Christine Jolls, Cass Sunstein & Richard Thaler, A Behavioral Approach to Law and Economics, 50 Stan. L. Rev. 1471, 1524 (1998).

[77] See Itai Shapira, The Unique Challenge of Assessing Partners and Allies, Royal United Servs. Inst. (Apr. 27, 2022), https://www.rusi.org/explore-our-research/publications/commentary/unique-challenge-assessing-partners-and-allies [https://perma.cc/A57K-2HVG] (identifying role of optimism bias in U.S. overestimation of Afghan forces' will to fight the Taliban and Iraq forces' will to fight ISIS).

[78] Sitaraman & Zionts, supra note 75, at 527.

[79] See Will Iraqis Treat the U.S. as Liberators?, ABC News (Mar. 24, 2003, 12:43 AM), https://abcnews.go.com/International/story?id=79607&page=1 [https://perma.cc/L3CF-UT88]; Marion Messmer, The Interconnected Impacts of the Iraq War, Chatham House (Mar. 23, 2023), https://www.chathamhouse.org/2023/03/interconnected-impacts-iraq-war; Steve A. Yetiv, National Security Through a Cockeyed Lens: How Cognitive Bias Impacts U.S. Foreign Policy 56–60 (2013) (discussing the Iraq invasion as an example of overconfidence bias).

[80] Nickerson, supra note 74, at 177.

[81] See Christina E. Wells, State Secrets and Executive Accountability, 26 Const. Comment. 625, 643 (2010).

[82] Sitaraman & Zionts, supra note 75, at 533 (alteration in original) (quoting Thomas Gilovich, Kenneth Savitsky & Victoria Husted Medvec, The Illusion of Transparency: Biased Assessments of Others' Ability to Read One's Emotional States, 75 J. Personality & Soc. Psych. 332, 332 (1998)).

exogenous, situational factors.[83] Finally, the *secrecy heuristic* "leads people to perceive secret information as more valuable and accurate, regardless of actual differences in the quality of that information."[84] Because foreign relations and national security issues generally involve highly classified information about external threats and foreign government activities, decision-makers presented with classified information that contradicts unclassified information may fall prey to the secrecy heuristic.

Although these cognitive biases generally affect individuals' cognition, groups collectively can succumb to less than fully rational decision-making as well. Irving Janis, who conducted extensive early research on *groupthink*, defined it as a "a mode of thinking that people engage in when they are deeply involved in a cohesive in-group, when the members' strivings for unanimity override their motivation to realistically appraise alternative courses of action."[85] Decision-making bodies that suffer from groupthink engage in extreme concurrence-seeking and, as a result, make poor decisions. Dissent and independent thinking are discouraged; those who do object may be removed from the group. This creates an illusion of consensus and invulnerability, which can also mean that the group suffers from overconfidence in its judgments or decisions.[86] Group members also may adopt "[s]tereotyped views of enemy leaders as too evil to warrant genuine attempts to negotiate, or as too weak and stupid to counter whatever risky attempts are made to defeat their purposes."[87] Factors contributing to groupthink include cohesive and homogenous groups, stressful external threats, and time pressure.[88]

The constriction of checks on the executive in frictionless government may render executive decision-making groups more homogeneous, both in their makeup and their perspectives, and therefore more susceptible to groupthink. Executive actors who are, by job title or temperament,

[83] Id. at 534.

[84] Shirin Sinnar, Procedural Experimentation and National Security in the Courts, 106 Calif. L. Rev. 991, 1034 (2018); see also Mark Travers, Leaf Van Boven & Charles Judd, The Secrecy Heuristic: Inferring Quality from Secrecy in Foreign Policy Contexts, 35 Pol. Psych. 97, 97–98 (2014) (finding that secret information is viewed as of higher quality and is more likely to influence decisions than public information is).

[85] Irving L. Janis, Groupthink: Psychological Studies of Policy Decisions and Fiascoes 9 (1982).

[86] Id. at 174–75.

[87] Id. at 174.

[88] Id. at 109–11, 248, 250.

inclined to take a different approach to the prevailing wisdom may be "uninvited" to policy meetings, stay silent during discussions because they perceive that contrary views will not be welcome, or feel as though they have few allies inside or outside the executive who support their position. As Amy Zegart writes, driving group members to shy away from "questioning, dissenting, and exploring alternative viewpoints—even though these are precisely the types of behaviors found to improve analysis," is a problem.[89] As she puts it, "When everyone's agreeing, you shouldn't be comforted. You should be worried."[90]

Further, as Part II reveals, frictionless government situations, at least at their outset, tend to be characterized by stressful external threats and time pressure, as with the attacks on Pearl Harbor and on the World Trade Center and the Pentagon. Indeed, Janis cites the U.S. Navy's failure to anticipate the Japanese attack on Pearl Harbor as an example of groupthink, where the Navy rationalized that such an attack was unlikely even though the United States had intercepted messages previewing an offensive attack in the Pacific.[91] The conditions that lead to frictionless government are also conditions that can make executive officials—both as individuals and in groups—more susceptible to cognitive biases. These biases include a lack of pressure to question facts and to give reasons for decisions, the perceived need for quick decision-making, and a tendency to classify much of the relevant information (and thereby limit the number of diverse viewpoints at the table).

Cognitive biases may not only be an effect of a frictionless government situation but may also contribute to a further weakening of already weak inter-agency checks. When agency officials feel strong pressure not to obstruct an inter-agency consensus that has formed, the inter-agency checks that serve a key role in developing good policy may further

[89] Amy B. Zegart, Spies, Lies, and Algorithms: The History and Future of American Intelligence 129 (2022).

[90] Id. at 130.

[91] Irving L. Janis, Victims of Groupthink: A Psychological Study of Foreign Policy Decisions and Fiascoes 80 (1972). Janis counsels in favor of "vigilant" decision-making in which the decision-maker searches carefully for relevant information, assimilates it in an unbiased way, and carefully appraises alternatives before choosing. Irving L. Janis & Leon Mann, Coping with Decisional Conflict, 64 Am. Scientist 657, 658 (1976). Such decision-making requires "a rough balance of power, influence, and policy-making resources among members of the group." Eric Stern & Bengt Sundelius, Understanding Small Group Decisions in Foreign Policy: Process Diagnosis and Research Procedure, *in* Beyond Groupthink: Political Group Dynamics and Foreign Policy-Making 123, 132–33 (Paul 't Hart, Eric K. Stern & Bengt Sundelius eds., 1997).

diminish.[92] Many historical examples of U.S. groupthink have not turned out well, as Part II shows.

C. The Lifecycle of a Frictionless Government Situation

As noted above, frictionless government situations often begin with an attack on the United States or the start of an armed conflict—that is, with the manifestation of an acute external threat to the country.[93] If frictionless government situations usually begin with an external enemy, when and how do they end? Frictionless government tends to be ephemeral, though it is difficult to predict in advance how long a frictionless government scenario will endure before widespread support for a policy wanes. Policy decisions that are wildly popular at their onset lose their sheen over time because, for example, the policies prove flawed or ineffective, or aspects of the policy that were originally classified come to light and reveal poor judgment, or sustaining the policy becomes too costly, or the public perspectives on the balance the policy strikes between security and civil liberties change. Indeed, it is precisely because executive actions taken during frictionless government time and again ultimately prove flawed that we think they must be examined carefully. Such examination at the outset can help to avoid the pitfalls that ultimately cause the policies to lose support—but before the errors are made and the harms become manifest.

Deciding when a particular situation ceases to be frictionless can be an imprecise exercise because support for what began as an overwhelmingly popular policy can wane gradually. Friction can reemerge in the form of efforts to amend a statutory authorization, or the onset of partisan divisions about the policy, or disagreements within executive agencies about whether to persist with or alter the policy. While the repeal of statutes passed during frictionless government would clearly signal the

[92] In this regard, we find ourselves in agreement with the "many-minds" argument that groups of decision-makers generally make better decisions than do individuals making decisions on their own. Many-minds advocates tend to justify their claims in four ways:

> [T]he aggregate judgment of many might employ dispersed information better than the judgment of one; the judgments of many heads, over time, might weed out bad policies or institutions through an evolutionary process; closely related to the last, tradition might embody the contributions of many minds; finally, deliberation and argument among the many might contribute diverse perspectives, resulting in better policies or institutions than any one could devise.

Adrian Vermeule, Many-Minds Arguments in Legal Theory, 1 J. Legal Analysis 1, 4 (2009).

[93] See supra note 22 and accompanying text.

end of consensus among Congress and the executive to pursue that policy, repeal is not required to end a frictionless government scenario.[94]

With the passage of time, and especially if results fall short of initial expectations or if the policy ends up having a notable impact on civil liberties, party differences over foreign policy tend to widen, both because of disagreements over the issues at stake and because the perspectives of elite leadership change.[95] As evidence of this, those who identify as Democrats are much more inclined to support the foreign policies of a Democratic President, and Republicans are likely to take cues from a Republican occupying the White House. As Robert Lieber has noted, "[i]n today's polarized climate, politics can be delayed at the water's edge, but it certainly does not stop for long."[96]

D. Counterarguments and Caveats

Notwithstanding our concerns about frictionless government, two possible counterpoints merit attention. First, can frictionlessness lead to good policy—that is, expeditious action that overcomes normal partisan gridlock—and if so, how do we know whether frictionless government will produce good or bad policies in any given case? Second, if frictionlessness ultimately fades, is adding friction at the first sign of frictionless government worth the effort?

1. Can Frictionlessness Produce Good Policy?

In short, yes. Despite the weaknesses and risks identified above, frictionless government may occasionally produce sound policy that is properly calibrated to address foreign policy threats. In such cases, the executive has correctly evaluated the security threat at issue, with Congress in full support of the executive's policies. Perhaps the executive has chosen the right tools to deploy, acting within the core purpose of the statutory authorities that Congress has given it. And perhaps it has provided the right process as it uses these tools—producing sound threat analyses before exercising its authority, debating various options at length

[94] See infra Subsection II.A.3.

[95] Adam J. Berinsky, In Time of War: Understanding American Public Opinion from World War II to Iraq 86–126 (2009).

[96] Lieber, Politics Stops, supra note 24; see also Adrian Vermeule, Emergency Lawmaking After 9/11 and 7/7, 75 U. Chi. L. Rev. 1155, 1172–74 (2008) (discussing how "the stage of genuine solidarity" in the aftermath of something like a terrorist attack is "evanescent" and how political actors quickly revert back to "partisan advantage-seeking").

among diverse experts, and meeting all procedural requirements in relevant statutes.

But there are enough very salient examples where frictionless government has produced bad outcomes that frictionlessness should always demand our attention. The next Part highlights important examples of frictionlessness and how they have gone badly wrong.

The challenge then is how to determine in the moment whether frictionlessness is producing outcomes that will later be deemed problematic. There are at least two external factors that may indicate that the lack of friction in a given case will be more or less troubling. One is whether allies and legal experts view the U.S. action as consistent with international law. Where the United States acts consistent with international law, allies are more likely to support U.S. actions and perhaps engage in actions that are similar to or that support U.S. efforts. The current U.S. response to Russia's invasion of Ukraine, discussed in the next Part, clearly meets that standard, and thus offers comfort that the policies produced during this instance of frictionless government are normatively less concerning.[97] By contrast, in situations where U.S. actions violate international law or are only disputably legal, foreign governments may stay silent or oppose the United States. Lack of support from U.S. allies should stimulate extra concern about frictionless government within the United States because it may be an early signal that frictionless government is masking legal, strategic, or ethical problems.

The second factor is the extent to which the frictionless policies affect individual civil liberties, particularly the rights of individuals who are members of groups that have historically suffered discrimination or marginalization.[98] In those cases, actors inside and outside government should be on guard and immediately skeptical about policies produced in a frictionless scenario. As explained in Part II, the World War II-era Japanese internment cases, the volume of litigation brought by draftees in the Vietnam War, and the quick turn to the courts to challenge the legal status and treatment of al Qaeda and Taliban detainees after 9/11 offered

[97] The Vietnam War, in contrast, produced a range of international law critiques and responses. See, e.g., Richard Falk, International Law and the United States Role in Viet Nam, 75 Yale L.J. 1122 (1966); Off. of the Legal Adviser, U.S. Dep't of State, The Legality of United States Participation in the Defense of Viet Nam, 75 Yale L.J. 1085 (1966).

[98] See Jia, supra note 28, at 683 (noting that the "rally effects" and bipartisanship created by external threats lock in "policy positions that would benefit from scrutiny").

contemporary indicia that these frictionless policies were problematic under domestic or international law (or both).[99]

In general, it will be difficult to know at the time a frictionless situation arises whether the foreign policy that emerges will be sound in the longer term. History suggests, however, that frictionless policy often is flawed. For this reason, the next Subsection argues that adding friction into all frictionless situations is the prudent course.

2. Is Adding Friction Worth the Cost?

One might worry about two possible costs of adding friction back into frictionless government situations. First, efforts to stimulate contestation might not be worth the investment, given that frictionless government eventually fades as elements of friction ultimately find their way into the policy ecosystem and cause the government to adjust course.[100] Second, one might argue that our proposals to introduce friction into all frictionless government scenarios go too far, risking gumming up the works unnecessarily in scenarios where frictionless government would produce good policies and do so expeditiously.

As to the first possible cost, while historical examples show that the overwhelming consensus that defines frictionless government eventually dissipates, they also show that consensus tends to break down only once

[99] Minoru Yasui got himself arrested immediately after the curfew rules went into effect on March 28, 1942. Brian Niiya, Yasui v. United States, Densho Encyc. (Oct. 5, 2020, 6:05 PM), https://encyclopedia.densho.org/Yasui_v._United_States/. Fred Korematsu and Gordon Hirabayashi were both arrested in May 1942 (two months after President Roosevelt signed Executive Order 9066). Shiho Imai, Korematsu v. United States, Densho Encycl. (July 29, 2020, 5:37 PM), https://encyclopedia.densho.org/Korematsu%20v.%20United%20States; Brian Niiya, Hirabayashi v. United States, Densho Encyc. (Mar. 12, 2024, 12:02 AM), https://encyclopedia.densho.org/Hirabayashi_v._United_States/. While in jail, Korematsu agreed to allow the ACLU to use his case as a test case to challenge the constitutionality of the Executive Order. Facts and Case Summary—Korematsu v. U.S., U.S. Cts., https://www.uscourts.gov/educational-resources/educational-activities/facts-and-case-summary-korematsu-v-us [https://perma.cc/55CP-CZ3A] (last visited Oct. 5, 2024). Mitsuye Endo filed her case on July 12, 1942 (four months after President Roosevelt signed Executive Order 9066). Brian Niiya, Mitsuye Endo, Densho Encyc. (Aug. 20, 2024, 5:54 PM), https://encyclopedia.densho.org/Mitsuye%20Endo. The first major Vietnam case was *United States v. Mitchell*, in which a draftee failed to appear for induction in January 1965. 246 F. Supp. 874, 877 (D. Conn. 1965). A spate of litigation followed, much of which claimed that the war was unconstitutional and violated international law. See generally Rodric Schoen, A Strange Silence: Vietnam and the Supreme Court, 33 Washburn L.J. 275 (1994) (discussing the many federal lawsuits challenging the war on constitutional and international law grounds).

[100] See supra Section I.C.

the harms of the policies adopted in the frictionless period start to become clear—and that often takes time. Serious violations of constitutional and human rights can occur in short periods of time, as can poor decisions that spark or expand armed conflict or other serious foreign policy tensions. Our goal is to avoid those harms by getting the policy right in the first place.

As to the second potential cost, friction is not an insurmountable roadblock. It is a speedbump, or better yet a series of speed bumps, that slow but do not stop government policy-making.[101] The procedural checks on policy-making that we describe in Part III are intended to ensure that government decisions are taken with due consideration and full information about the likely results they will cause, even when decisions are made in the heat of national or international crises. And other of our proposals focus on after-action reviews of recent crises and the legal authorities they generated, ensuring that heat-of-the-moment actions are reconsidered when temperatures have cooled.

In short, avoiding the harms that frictionless government often causes is, we believe, worth the investment necessary to introduce some friction. At the same time, the friction we envision would not so hamstring policy-making as to cause significant costs in the U.S. government's ability to respond to crises.

To make the harms from frictionless government more concrete, the next Part turns to an account of how important frictionless government situations have emerged and evolved in practice.

II. FRICTIONLESS GOVERNMENT IN PRACTICE

This Part considers several real-world examples of frictionless government. The historical examples illustrate instances in which policies produced in frictionless situations were deeply flawed. Decision-makers relied on faulty factual premises, embraced xenophobic or racist beliefs, or sought short-term gains at the cost of longer-term strategic goals. The contemporary case study of the response to Russia's full-scale invasion of Ukraine, however, provides a counterpoint to show that frictionless government does not inexorably produce bad foreign policy. Which path

[101] There is a rough parallel to this idea in the technological setting. Paul Ohm and Jonathan Frankle have argued for "desirable inefficiency," a term they use to describe inefficient design patterns that computer engineers adopt "to make space for human values" such as legitimacy, fairness, and liberty. Paul Ohm & Jonathan Frankle, Desirable Inefficiency, 70 Fla. L. Rev. 777, 777, 782 (2018).

the current U.S. tensions with China will follow remains an open question. This Part concludes by drawing on the case studies to identify several recurring harms that frictionless government tends to produce.

A. Historical Examples of Frictionless Government

Frictionless government is not a new phenomenon. Past examples have occurred when the United States is on a war footing. Although this Section is not an exhaustive list of frictionless government situations, the examples below are salient ones that provide reasons for caution.[102] The examples include the U.S. policy of Japanese American internment after the Pearl Harbor attack, Congress's initial support for the use of force in Vietnam, and the 2001 Authorization for the Use of Military Force.[103] We selected these case studies because their facts and impact are well-documented, they represent different eras in U.S. foreign policy, and they offer a clear view of the harms that can result from frictionless government.

[102] We do not attempt to identify every case in which frictionless government appeared, nor do we attempt to identify what proportion of foreign relations or national security decisions are frictionless. We also do not claim that only frictionless government can produce misguided or unlawful policies.

[103] Although we focus on these specific events, we found historical commentary suggesting that a range of Cold War-related policies could be described as frictionless. See, e.g., Robert D. Johnson, Congress and the Cold War, 3 J. Cold War Stud. 76, 87–88 (2006).

Others have suggested that the 2003 invasion of Iraq might constitute a frictionless government situation because the statute authorizing force and the war's initiation reflected high levels of bipartisan and inter-branch agreement—and resulted in what many now consider a disastrous foreign policy decision. See, e.g., Richard Haass, Revisiting America's War of Choice in Iraq, Project Syndicate (Mar. 17, 2023), https://www.project-syndicate.org/onpoint/iraq-war-20-years-later-causes-misconceptions-and-lessons-by-richard-haass-2023-03 [https://perma.cc/Q8YZ-9HS4]. However, the Executive itself engaged in considerable internal debate about whether to invade Iraq. See Melvyn Leffler, Confronting Saddam Hussein: George W. Bush and the Invasion of Iraq 79–98 (2023). Further, Congress substantively debated and ultimately narrowed the scope of the war authorization. Bruce Ackerman & Oona Hathaway, Limited War and the Constitution: Iraq and the Crisis of Presidential Legality, 109 Mich. L. Rev. 447, 460–63 (2011). Finally, the vote in the House was 296-133, with both Democrats and Republicans voting no. Roll Call 455 | Bill Number: H.J. Res. 114, U.S. House of Representatives.: Clerk (Oct. 10, 2002, 3:05 PM), https://clerk.house.gov/Votes/2002455?RollCallNum=455 [https://perma.cc/G99G-KN39]. On balance, we do not think this reflects the level of overwhelming consensus that constitutes frictionless government.

1. World War II and Japanese American Internment

On December 8, 1941, the day after Japan attacked Pearl Harbor, President Franklin D. Roosevelt asked for and received a declaration of war against Japan. That declaration passed both houses of Congress with a single "no" vote.[104] The frictionlessness that manifested itself with respect to Japan extended to measures internal to the United States as well. Ten days after the declaration of war, President Roosevelt appointed a commission led by Supreme Court Justice Owen Roberts to conduct a fact-finding inquiry into the attack on Pearl Harbor. The commission's January 1942 report stated that, prior to December 1941, there were Japanese spies in Hawaii, some of whom had "no open relations with the Japanese foreign service."[105] Although the report did not indicate that individuals in the Japanese American community were engaged in espionage or sabotage, "public agitation in favor of evacuation dated from publication of the Roberts Report."[106] At the same time, the U.S. military's West Coast Defense Command began to push for "control" over Japanese Americans on the West Coast.[107] California state officials soon joined in.[108]

Members of Congress also urged the President to create exclusion zones from which the United States would evacuate Japanese nationals and Japanese Americans. Shortly after the release of the Roberts report, the entire congressional delegations from California, Oregon, and Washington sent a letter to President Roosevelt recommending "the immediate evacuation of all persons of Japanese lineage . . . from all strategic areas."[109] This letter directly led to executive action on the issue.[110] And on February 19, Senator Tom Stewart introduced a bill in

[104] Greg Robinson, By Order of the President: FDR and the Internment of Japanese Americans 74 (2001).

[105] Comm'n on Wartime Relocation & Internment of Civilians, Personal Justice Denied: Report of the Commission on Wartime Relocation and Internment of Civilians 57 (C.L. Pub. Educ. Fund & Univ. of Wash. Press 1997) (1982) (quoting Comm'n Appointed by the President of the U.S. to Investigate & Report the Facts Relating to the Attack Made by Japanese Armed Forces Upon Pearl Harbor in the Territory of Haw. on Dec. 7, 1941, Attack Upon Pearl Harbor by Japanese Armed Forces, S. Doc. No. 77-159, at 12–13 (2d Sess. 1942)).

[106] Id. at 58; Robinson, supra note 104, at 95–96.

[107] Robinson, supra note 104, at 84.

[108] Id. at 92. At least one foreign ally followed suit; in January 1942, the government of Canada ordered all male Japanese nationals to be removed from British Columbia. Id. at 93.

[109] H.R. Rep. No. 77-1911, at 3 (1942).

[110] Id.

Congress that would have authorized the Secretary of War to detain indefinitely any citizen believed to have ties to an enemy country.[111]

Seventy-four days after Pearl Harbor, President Roosevelt issued Executive Order 9066, which authorized the Secretary of War "to prescribe military areas . . . from which any or all persons may be excluded" and impose restrictions on the ability of individuals to "enter, remain in, or leave" such areas.[112] It effectively authorized the military to evacuate all Japanese Americans on the West Coast and, ultimately, forcibly incarcerate them.[113] The U.S. Army eventually evacuated more than 110,000 people from California and portions of Oregon, Washington, and Arizona.[114]

A month later, Congress quickly (and with little debate or opposition) criminalized violations of that Order. The impetus for this legislation originated with the Executive, which sent draft bill text to Congress, urging Congress to quickly introduce and pass it.[115] After little debate,[116] Congress approved the bill by voice vote on March 19, just 10 days after its introduction.[117] The President signed the bill on March 21, 1942.[118]

As this legislative history reflects, congressional support for Japanese internment was bipartisan. On February 23, just a few days after Roosevelt signed Executive Order 9066, Republican Representative Thomas Rolph of California stated that the President should be "highly commended for instructing the War Department to establish military areas from which all civilians—citizens or aliens—may be excluded."[119] That same day, Democratic Representative John Rankin of Mississippi emphasized his "insistence that the Japanese in this country, in Alaska,

[111] S. 2293, 77th Cong. (1942).

[112] Exec. Order No. 9,066, 7 Fed. Reg. 1407 (Feb. 19, 1942).

[113] Executive Order 9066: Resulting in Japanese-American Incarceration (1942), Nat'l Archives, https://www.archives.gov/milestone-documents/executive-order-9066 [https://perma.cc/9CDW-W949] (last visited Oct. 4, 2024); see also Brian Niiya, Public Law 503, Densho Encyc. (Feb. 1, 2024, 9:57 PM), https://encyclopedia.densho.org/Public_Law_503/ (describing Public Law 503, legislation enacted pursuant to Executive Order 9066 that established criminal sanctions for violating military restrictions).

[114] Robinson, supra note 104, at 127–28.

[115] H.R. Rep. No. 77-1906, at 2–3 (1942); S. Rep. No. 77-1171, at 2 (1942).

[116] 88 Cong. Rec. 2722–26, 2729–30 (1942).

[117] Id. at 2725–26, 2730. Because the vote was a voice vote, there is no recorded roll call vote and hence no precise tally of yeas and nays.

[118] Act of Mar. 21, 1942, ch. 191, 56 Stat. 173 (repealed 1948).

[119] 88 Cong. Rec. 1529 (1942).

and in Hawaii be placed in concentration camps at once."[120] Reports from the House Select Committee Investigating National Defense Migration (known as the Tolan Committee), which held hearings in the immediate aftermath of Executive Order 9066, also reveal widespread support for Japanese internment within Congress and across the country. According to those reports, many of the governors of inland states resisted accepting Japanese evacuees, with five explicitly recommending they be placed in "concentration camps."[121] In short, there was both bipartisan and widespread geographic enthusiasm for such a program in Congress, the executive, and the states.

The Committee's interim reports recognized potential problems with the exclusion policy, observing that the "curtailment of the rights and privileges of the American-born Japanese citizens of this country will furnish one of the gravest tests of democratic institutions in our history."[122] Nevertheless, the Committee affirmed its recommendation to proceed with internment.[123] In its Final Report, the Committee failed even to discuss the concerns associated with internment and concluded that the program had been "guided and strengthened by the temper of public opinion."[124] The legal, moral, and policy problems that the Committee considered during in its work thus fell away in its final product.

Those who objected to internment were few and far between. In the brief debate over the enforcement bill, Republican Representative Earl Michener urged that "bills of this type, interfering with or even protecting the rights of citizens, should be given some consideration on the floor of the House and should be thoroughly understood and debated before their passage."[125] Republican Senator Robert Taft called the bill "probably the 'sloppiest' criminal law I have ever read or seen anywhere."[126] Senator Sheridan Downey and Representatives Jerry Voorhis and John Coffee "vigorously opposed evacuation and internment and maintained that

[120] 88 Cong. Rec. app. at A768 (1942); see also id. at A917–18 (1942) (statement of Rep. Jensen) (Representative Ben Jensen of Iowa submitted a letter and resolution adopted by a group of his constituents, urging the detention of "all enemy alien residents" in the United States).

[121] H.R. Rep. No. 77-1911, at 27–30 (1942).

[122] H.R. Rep. No. 77-2124, at 11 (1942).

[123] Id. at 11–12.

[124] H.R. Rep. No. 78-3, at 10 (1943).

[125] 88 Cong. Rec. 2730 (1942).

[126] Id. at 2726.

opposition for a full two months after Pearl Harbor."[127] However, they were in the small minority of members of Congress who opposed the policy.[128]

In sum, the U.S. policy of Japanese American internment can be characterized as a frictionless foreign policy scenario, reflecting widespread bipartisan and bicameral support, as well as consensus between the executive and Congress. It is unclear precisely how long the consensus around internment lasted. In its Final Report in January 1943, the Tolan Committee indicated that the program still enjoyed widespread support nearly a year after Roosevelt signed the Executive Order.[129] Yet even by July 1942, we can identify some friction reentering the process, perhaps driven by military necessity: the U.S. military was exploring whether it should create units of U.S.-born Japanese Americans to fight in the war.[130] On February 1, 1943, President Roosevelt issued a statement indicating that he wanted to ensure that loyal Japanese Americans were not denied the democratic right to exercise their citizenship.[131] In July 1943, the Senate adopted a resolution asking the President to order the War Relocation Authority to take the necessary steps to segregate disloyal persons and persons of questionable loyalty from those whose loyalty was established,[132] and calling for a report on resettlement, which "was a ploy to put pressure on the administration to speed up the closing of the camps."[133] It thus appears that internment policy was frictionless for about five months before the executive and Congress began to rethink the policy's sweeping nature.

Internment formally ended on December 17, 1944, when General Pratt rescinded all previous exclusion orders and permitted all people of Japanese heritage to return to their homes.[134] The Executive likely rescinded the orders because it knew that the Supreme Court would

[127] Gerald Stanley, Justice Deferred: A Fifty-Year Perspective on Japanese-Internment Historiography, 74 S. Cal. Q. 181, 201–02 n.29 (1992).

[128] Niiya, supra note 113.

[129] H.R. Rep. No. 78-3, at 10.

[130] Robinson, supra note 104, at 163–65.

[131] Id. at 170.

[132] S. Res. 166, 78th Cong. (1943).

[133] Robinson, supra note 104, at 195.

[134] Public Proclamation No. 21, 10 Fed. Reg. 1, 53–54 (Dec. 17, 1944). This order fails to reflect that many internees lost their homes and other property while they were interned. See Sold, Damaged, Stolen, Gone: Japanese American Property Loss During WWII, Densho: Catalyst (Apr. 4, 2017), https://densho.org/catalyst/sold-damaged-stolen-gone-japanese-american-property-loss-wwii/ [https://perma.cc/9MPA-JMQB].

publish its decision in *Ex parte Endo* the following day.[135] In that case, the Court held that the government "has no authority to subject citizens who are concededly loyal to its leave procedure."[136] It is unclear whether the Roosevelt Administration would have rescinded the exclusion orders absent *Endo*, but it is clear that both the executive and Congress had already begun to reconsider their approach toward internment of loyal citizens.

In sum, the executive and legislative branches worked in concert to establish the Japanese internment program, which had widespread—indeed, nearly universal—support for at least several months and remained in effect for several years. Congress played a role in stimulating President Roosevelt's initial order, just as the Roosevelt Administration played a role in proposing legislation to enforce the order. Yet history is unforgiving in its assessment of the deeply problematic policy-making at evidence here.

2. Vietnam War

The Gulf of Tonkin Resolution and the early days of the Vietnam War offer another example of frictionless government. On August 4, 1964, President Lyndon B. Johnson announced that he had ordered retaliatory strikes against North Vietnam in the wake of the Gulf of Tonkin incident, in which North Vietnamese forces reportedly attacked two U.S. destroyers.[137] The next day, Johnson asked Congress for "a resolution expressing the support of the Congress for all necessary action to protect our Armed Forces and to assist nations covered by the [Southeast Asia Treaty Organization] Treaty."[138] Democratic Senator J. William Fulbright immediately introduced a resolution mirroring President Johnson's request.[139] Members of Congress were virtually unanimous in supporting Johnson's military response and the proposed resolution (often referred to as the Gulf of Tonkin Resolution). For example, Democratic Senator Thomas Dodd predicted that such actions would be "approved by the

[135] Greg Robinson, Ex parte Mitsuye Endo (1944), Densho Encyc., https://encyclopedia.densho.org/Ex_parte_Mitsuye_Endo_(1944)/ (last updated Jan. 5, 2024, 1:47 AM).

[136] Ex parte Endo, 323 U.S. 283, 297 (1944).

[137] August 4, 1964: Report on the Gulf of Tonkin Incident, Miller Ctr., https://millercenter.org/the-presidency/presidential-speeches/august-4-1964-report-gulf-tonkin-incident (last visited Aug. 24, 2024).

[138] Lyndon B. Johnson, Message from the President of the United States, Preserving the Peace in Southeast Asia, H.R. Doc. No. 88-333, at 2 (1964).

[139] S.J. Res. 189, 88th Cong. (1964).

overwhelming majority of the American people and by their Representatives in Congress."[140] The legislative history reflects broad bipartisan and bicameral support for a U.S. military response.

There were only two dissenters. In a lengthy speech, Democratic Senator Wayne Morse argued that the President lacked constitutional authority "to send American boys to their death on a battlefield in the absence of a declaration of war,"[141] and that Congress was essentially forfeiting its war power in the Resolution.[142] Morse also criticized U.S. involvement in Vietnam as a policy matter, arguing that the United States was a "provocateur" in South Vietnam and criticizing that country's non-democratic regime.[143] Democratic Senator Ernest Gruening opposed the Resolution because it "means sending our American boys into combat in a war in which we have no business, which is not our war, into which we have been misguidedly drawn, which is steadily being escalated."[144] Despite these dissents, the Resolution passed easily only two days after Johnson's speech and with fewer than nine hours of committee consideration and floor debate.[145] The House voted unanimously in favor, with only Morse and Gruening voting against the Resolution in the Senate.[146] Years later, the *New York Times* would describe the Resolution as "conceived in crisis and haste as a demonstration of national unity."[147]

The bipartisan, bicameral consensus in support of U.S. activities in Vietnam lasted for several years. As President Johnson considered escalating the war in early 1965, a few more Senate Democrats began to express opposition to both continuing and expanding the war, but they

[140] 110 Cong. Rec. 18151 (1964) (statement of Sen. Dodd); see also id. at 18404 (questioning by Sen. Jacob Javits) (indicating his support for the Gulf of Tonkin Resolution); id. at 18243 (remarks of Rep. Durward Hall) (stating that "extreme military action is no vice in defense of freedom when our capital ships are attacked, and now the Nation is and must be united on this premise").

[141] Id. at 18136.

[142] Id. at 18133.

[143] Id. at 18133–34.

[144] Id. at 18469.

[145] Gulf of Tonkin Measure Voted in Haste and Confusion in 1964, N.Y. Times, June 25, 1970, at L3.

[146] 110 Cong. Rec. 18471 (1964); id. at 18555; see also S. Rep. No. 94-922, at 13 (1976) (describing the 1964 debates on the Gulf of Tonkin Resolution as an example of Congress's "hasty and inadequate consideration" of a law giving the President an open-ended grant of power).

[147] Gulf of Tonkin Measure Voted in Haste, supra note 145.

remained a small minority.[148] The overwhelming majority of Congress still favored continued military involvement in Vietnam, notwithstanding those small pockets of friction.[149] Congress rapidly approved by a very wide margin President Johnson's May 1965 request for $700 million in additional funds for the war in Vietnam.[150] During the deliberations on the bill, Democratic Representative L. Mendel Rivers proclaimed that "voices of dissent . . . must be shown as unrepresentative of the great weight of public and congressional opinion."[151] That summer, however, dissent began to grow, including from Senator Fulbright, who had supported the Gulf of Tonkin Resolution, though significant pro-war support remained.[152]

Support for the President's Vietnam policy began to erode more dramatically in 1966. That March, Congress approved a $4.8 billion supplemental authorization that passed in the Senate by a vote of 93 to 2 and in the House by a vote of 392 to 4.[153] However, the Senate's consideration of the House appropriations bill was "characterized by

[148] William Conrad Gibbons, The U.S. Government and the Vietnam War: Executive and Legislative Roles and Relationships, S. Rep. No. 98-185, pt. 2, at 395 (Comm. Print 1984) (prepared for the Senate Committee on Foreign Relations) (detailing a speech given by Senator George McGovern in January 1965, where he announced his opposition to expanding American involvement and extending the conflict); William Conrad Gibbons, The U.S. Government and the Vietnam War: Executive and Legislative Roles and Relationships, S. Rep. 100-163, pt. 3, at 36 (Comm. Print 1988) (prepared for the Senate Committee on Foreign Relations) (detailing a public statement by Senator Richard Russell expressing his opposition to continued U.S. involvement); Ford Says Johnson Hides Vietnam Cost, N.Y. Times, Sept. 12, 1965, at L13 (reporting an accusation by House Minority Leader Gerald Ford that President Johnson was hiding the financial cost of American efforts in Vietnam); Humphrey, in Memo to Johnson in 1965, Warned of Vietnam, N.Y. Times, May 9, 1976, at L27 (reporting that then-Senator Hubert Humphrey warned President Johnson in a 1965 memorandum that Johnson's "Administration has a heavy investment in policies which can be jeopardized by an escalation in Vietnam" and "[t]he best possible outcome a year from now would be a Vietnam settlement").

[149] See, e.g., William Conrad Gibbons, The U.S. Government and the Vietnam War: Executive and Legislative Roles and Relationships, S. Rep. No. 100-163, pt. 3, at 133–35 (Comm. Print 1988) (prepared for the Senate Committee on Foreign Relations) (statements of Republican Sens. Dirksen, Saltonstall, Mundt, Tower, and Monroney and Democratic Sens. Smathers, Dodd, and Douglas).

[150] See H.R.J. Res. 447, 89th Cong., 79 Stat. 109 (1965).

[151] S. Rep. No. 100-163, pt. 3, at 244.

[152] Id. at 304–06; see also Senate Hist. Off., Senate Stories | Chairman J. William Fulbright and the 1964 Tonkin Gulf Resolution (June 12, 2023), https://www.senate.gov/artandhistory/senate-stories/chairman-fulbright-and-the-tonkin-gulf-resolution.htm [https://perma.cc/6QDN-8ZFC].

[153] Stephen Dycus et al., National Security Law 308 (7th ed. 2020).

lengthy and acrimonious debate" and included a proposal by Senator Morse to repeal the Gulf of Tonkin Resolution and a proposal by Senator Gruening to prohibit drafted servicemen from being sent to Southeast Asia unless they volunteered or Congress approved their assignment.[154]

At this point, the level of debate and criticism about the policy began to reflect elements of friction. In 1967, several members of Congress who had supported the Resolution now opposed the war,[155] and as part of an authorization bill, Congress issued a "Statement of Congressional Policy" that expressed support for the President's efforts "to prevent an expansion of the war in Vietnam and to bring that conflict to an end . . . ."[156] Although the statement did not drastically alter U.S. policy in Vietnam, it represented Congress's first attempt to limit President Johnson's conduct of the war. The House approved the conference report, which included the policy statement, by a vote of 364-13.[157] Even among the general public, it took time for support for the war to weaken: the first nationwide protest against the Vietnam War did not occur until that same year.[158]

By fall 1967, the bipartisan, bicameral, and inter-branch consensus had crumbled. Perhaps the clearest evidence of the breakdown in consensus was a secret survey of members of Congress that Johnson commissioned. Of the 169 members' responses, "104 were negative [with respect to the war, and its domestic political effects], 22 were positive, 18 contained both good and bad news, and 25 were noncommittal or irrelevant."[159] Congress repealed the Resolution in 1971,[160] by which point the President's policy clearly confronted significant friction. Finally, in June 1973, Congress passed, and the President signed, a measure ending U.S. involvement in Southeast Asia.[161]

[154] CQ Almanac, Supplemental Defense Authorization for Viet Nam War 390 (1996). The Senate rejected Morse's amendment by 92-5 and Gruening's by 94-2. Id. at 391–92.

[155] William Conrad Gibbons, The U.S. Government and the Vietnam War: Executive and Legislative Roles and Relationships, S. Rep. No. 103-83, pt. 4, at 579–80 (Comm. Print 1994) (prepared for the Senate Committee on Foreign Relations) [hereinafter 1994 SFRC Vietnam Report].

[156] Act of Mar. 16, 1967, Pub. L. No. 90-5, § 401(2), 81 Stat. 5, 6. The Senate approved the statement by a vote of 72-19. 113 Cong. Rec. 4942, 4943, 4948, 4949 (1967) (enacted).

[157] 1994 SFRC Vietnam Report, supra note 155, at 599.

[158] U.S. Marshals and the Pentagon Riot of October 21, 1967, U.S. Marshals Serv. https://www.usmarshals.gov/who-we-are/history/historical-reading-room/us-marshals-and-pentagon-riot-of-october-21-1967#main [https://perma.cc/R2UA-UYQE] (last visited Oct. 4, 2024).

[159] 1994 SFRC Vietnam Report, supra note 155, at 804–05.

[160] Act of Jan. 12, 1971, Pub. L. No. 91-672, § 12, 84 Stat. 2053, 2055.

[161] H.R.J. Res. 636, 93d Cong., § 108, 87 Stat. 134 (1973).

Throughout the conflict, the federal courts were loath to reach decisions on the merits that would have constrained the President's policy-making, though a host of affected individuals challenged the constitutionality of the war in court. The lower courts relied on doctrines such as the political question doctrine to avoid concluding that the President was acting unconstitutionally.[162] And the Supreme Court never heard a case challenging the legality of the Vietnam War, leading Justice Douglas to dissent repeatedly from the Court's denials of certiorari on the ground that the war presented justiciable constitutional questions.[163]

In sum, a frictionless government situation existed for the first two years of heightened U.S. military involvement in Vietnam. When President Johnson proposed funding and selective service bills, Congress enthusiastically passed the bills by extraordinarily large margins until 1967. Further, members of Congress across the aisle called for continued escalation, sometimes beyond the President's chosen course of action, until the human and financial costs of the war became too substantial. Only then did the frictionless government conditions disappear.

Most commentators now believe that the U.S. role in the Vietnam War was deeply misguided. The Johnson Administration had not told the truth about the Tonkin incident.[164] Almost sixty thousand U.S. servicemembers died, and many more were wounded in a lost war.[165] Some members of Congress believed that they had approved a resolution that would help "avoid a major war in Southeast Asia,"[166] but came to realize that the Administration was using the Resolution to expand the war into Laos and Cambodia.[167] Even a key architect of the war—then-Secretary of Defense

[162] See, e.g., Orlando v. Laird, 443 F.2d 1039, 1042–43 (2d Cir. 1971) (deciding that the form by which Congress authorized a conflict was a political question); DaCosta v. Laird, 471 F.2d 1146, 1155 (2d Cir. 1973) (holding that the President's decision to mine North Vietnam's harbors was a political question).

[163] James L. Moses, William O. Douglas and the Vietnam War: Civil Liberties, Presidential Authority, and the "Political Question," 26 Presidential Stud. Q. 1019, 1027 (1996).

[164] Harold H. Bruff, Untrodden Ground: How Presidents Interpret the Constitution 318–20 (2015); David Wise, The Politics of Lying: Government Deception, Secrecy, and Power 43–47 (1973).

[165] Vietnam War U.S. Military Fatal Casualty Statistics, Nat'l Archives, https://www.archives.gov/research/military/vietnam-war/casualty-statistics [https://perma.cc/95PJ-9D2M] (last visited Oct. 4, 2024).

[166] Gulf of Tonkin Measure Voted in Haste, supra note 145.

[167] See generally John Hart Ely, The American War in Indochina, Part II: The Unconstitutionality of the War They Didn't Tell Us About, 42 Stan. L. Rev. 1093 (1990) (discussing when and how Congress began to learn about U.S. activities in Laos and Cambodia).

Robert McNamara—wrote that officials "of the Kennedy and Johnson administrations who participated in the decisions on Vietnam acted according to what we thought were the principles and traditions of this nation . . . . Yet we were wrong, terribly wrong."[168] Among his diagnoses of the cause of the disaster was that "deep-seated disagreements among the president's advisers about how to proceed were neither surfaced nor resolved."[169] The surface consensus proved disastrous.

3. September 11 Attacks

The aftermath of the September 11 attacks offers another example of frictionless government policy-making, at least with regard to executive actions taken overseas. The day after the attacks, the White House presented a draft joint resolution to the leaders of the House and Senate, who negotiated directly with the White House about the resolution's language, rather than using the usual committee process.[170] The final version of the Authorization for Use of Military Force ("AUMF") itself was written broadly, giving the President authority to "use all necessary and appropriate force against those nations, organizations, or persons" that he determined to have planned or aided the attacks and those harboring such actors.[171] Within three days of the attacks, Congress passed the AUMF[172] with only one vote in opposition.[173] The statute lacked limits on where and within what time frame the President must act,

[168] Robert McNamara, In Retrospect: The Tragedy and Lessons of Vietnam, at xvi (1995).

[169] Id. at 332.

[170] David Abramowitz, The President, the Congress, and Use of Force: Legal and Political Considerations in Authorizing Use of Force Against International Terrorism, 43 Harv. Int'l L.J. 71, 71 (2002).

[171] Authorization for the Use of Military Force, S.J. Res. 23, 107th Cong., 115 Stat. 224 (2001). The White House originally sought an even broader authorization that would have authorized the President to "deter and pre-empt any future acts of terrorism or aggression against the United States," but Congress opposed that language and it was stripped from the final AUMF. Abramowitz, supra note 170, at 73. Nevertheless, at least one member of Congress described the requirement of a connection to the authors of the September 11 attacks as a "slim anchor" and otherwise allowed "war against any and all prospective persons and entities." 147 Cong. Rec. 17114 (2001) (statement of Rep. Norton); see also Curtis Bradley & Jack Goldsmith, Congressional Authorization and the War on Terrorism, 118 Harv. L. Rev. 2047, 2081 (2005) (noting that "legislative debates on the AUMF overwhelmingly suggest that Congress did not view the 'necessary and appropriate' phrase as a limitation on presidential action").

[172] 115 Stat. 224 (passed by Congress on Sept. 14, 2001, and enacted on Sept. 18, 2001).

[173] Roll Call 342 | Bill Number: H.J. Res. 64, House of Reps.: Clerk (Sept. 14, 2001, 11:17 PM), https://clerk.house.gov/Votes/2001342 [https://perma.cc/6F37-YLN4].

did not require him to make any findings, and did not restrict the resources or methods he could use to achieve his goals.[174] It also required no reporting to Congress, other than the standard six-month reports that Presidents must submit under the War Powers Resolution when U.S. troops are deployed abroad.[175] When the President addressed a joint session of Congress on September 20, almost every sentence he spoke about the planned U.S. military and intelligence response to the attacks received a standing ovation from the entire congressional body.[176] The passage of the 2001 AUMF was thus nearly frictionless, though it would have great significance for the next two decades.

In the immediate wake of the AUMF's enactment, President Bush deployed U.S. forces to Afghanistan to fight al Qaeda and the Taliban. These actions clearly fit within the scope of what Congress intended and initially garnered wide congressional and public support. In the spring of 2002, *Foreign Affairs* published a piece describing the U.S. operation in Afghanistan as a "masterpiece of military creativity and finesse."[177] The general consensus that the war in Afghanistan was a "good war" was not challenged until 2006–2007, when the security situation in the country deteriorated.[178] Journalists themselves may have promoted the positive view of the Afghan conflict. One study exploring the rhetorical device of the "war on terror" notes, "[c]aptivated by a powerful master narrative after 9/11 and in the run-up to the Iraq war, American journalists found it difficult to resist being drawn into the national anxiety and general pro-

[174] Bradley & Goldsmith, supra note 171, at 2080.

[175] Compare 115 Stat. 224, with War Powers Resolution, 50 U.S.C. § 1543(c).

[176] George W. Bush, Address to a Joint Session of Congress and the American People, The White House (Sept. 20, 2001), https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html [https://perma.cc/RQP3-CLF4]; Presidential Address, C-SPAN (Sept. 20, 2001), https://www.c-span.org/video/?166196-1/presidential-address.

[177] Michael E. O'Hanlon, A Flawed Masterpiece, 81 Foreign Affs. 47, 47 (2022).

[178] David Rohde & David Sanger, How the 'Good War' in Afghanistan Went Bad, N.Y. Times (Aug. 12, 2007), https://www.nytimes.com/2007/08/12/world/asia/12iht-12afghan1.7087249.html; Marc Garlasco, "Troops in Contact": Airstrikes and Civilian Deaths in Afghanistan, Hum. Rts. Watch (Sept. 8, 2008), https://www.hrw.org/report/2008/09/08/troops-contact/airstrikes-and-civilian-deaths-afghanistan [https://perma.cc/9X6Z-9BUH]; see Clayton Thomas, Cong. Rsch. Serv., R46955, Taliban Government in Afghanistan: Background and Issues for Congress 1, 3 (2021) (providing background on Taliban activities in Afghanistan, including the deteriorating security situation in the country by 2006–2007).

Bush patriotic fervor."[179] Nevertheless, some argue that the seeds of a failed Afghanistan strategy were laid during this period.[180]

U.S. military operations in Afghanistan and detention operations at Guantanamo Bay relied overtly on the 2001 AUMF for several decades, but a range of other secret military and intelligence operations did so as well.[181] First, the AUMF (as well as a covert action authority) served as the basis for the CIA's rendition, detention, and interrogation program, which ultimately came in for very sharp criticism by the Senate Select Committee on Intelligence.[182] Although the *Washington Post* published a story about the CIA's program in late December 2002, the story noted that "no direct evidence of mistreatment of prisoners in U.S. custody has come to light."[183] It was not until 2005 that journalists reported on the full scope of the CIA's detention program, which included facilities in Thailand, Afghanistan, eastern European countries, and part of the Guantanamo facility, and which deployed harsh interrogation techniques.[184] Second, the National Security Agency relied in part on the AUMF as authority for the Terrorist Surveillance Program, a warrantless wiretapping program inside the United States.[185] Third, the executive has interpreted the AUMF expansively to justify force against an undisclosed

[179] Stephen Reese & Seth Lewis, Framing the War on Terror, 10 Journalism 777, 778 (2009), https://journalism.utexas.edu/sites/default/files/framing-war-on-terror-sagepub.pdf [https://perma.cc/54UF-A6TB].

[180] See, e.g., Matt Waldman, System Failure: The Underlying Causes of US Policy-Making Errors in Afghanistan, 89 Int'l Affs. 825 (2013) (detailing policies and decisions that were suboptimal for achieving U.S. goals in Afghanistan).

[181] See Jack Goldsmith, The Terror Presidency: Law and Judgment Inside the Bush Administration 104–09 (2007).

[182] See generally S. Select Comm. on Intel., Committee Study of the Central Intelligence Agency's Detention and Interrogation Program, S. Rep. No. 113-288 (2014).

[183] Dana Priest & Barton Gellman, U.S. Decries Abuse but Defends Interrogations: 'Stress and Duress' Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities, Wash. Post (Dec. 26, 2002, 12:00 AM), https://www.washingtonpost.com/archive/politics/2002/12/26/us-decries-abuse-but-defends-interrogations/737a4096-2cf0-40b9-8a9f-7b22099d733d/.

[184] Dana Priest, CIA Holds Terror Suspects in Secret Prisons: Debate Is Growing Within Agency About Legality and Morality of Overseas System Set Up After 9/11, Wash. Post (Nov. 1, 2005, 7:00 PM), https://www.washingtonpost.com/archive/politics/2005/11/02/cia-holds-terror-suspects-in-secret-prisons/767f0160-cde4-41f2-a691-ba989990039c/; ABC News, CIA's Harsh Interrogation Techniques Described (Nov. 17, 2005, 2:26 PM), https://abcnews.go.com/Blotter/Investigation/story?id=1322866 [https://perma.cc/7YEB-9VVG].

[185] Memorandum from Jack L. Goldsmith, Assistant Att'y Gen., Off. of Legal Couns., U.S. Dep't of Just., to John Ashcroft, Att'y Gen., U.S. Dep't of Just., Review of the Legality of the STELLAR WIND Program 3, 21–22 (May 6, 2004), https://www.justice.gov/sites/default/files/pages/attachments/2014/09/19/may_6_2004_goldsmith_opinion.pdf [https://perma.cc/LZU7-CUQG].

number of groups that did not exist in 2001, including the Islamic State in Iraq and Syria and al Shabaab in Somalia.[186]

Because this set of programs was known to very few people within either Congress or the executive, we do not argue that those programs themselves can be characterized as frictionless. It was the secrecy of the programs that allowed unwise policies to persist, unchecked by Congress or courts, for several years.[187] But these clandestine and highly controversial programs illustrate that statutes passed in a chaotic and frictionless situation may be susceptible to broad interpretations by the executive that exceed the activities Congress likely intended to authorize, and may omit important oversight provisions or other limitations that could introduce healthy friction into the statute's implementation over subsequent years.[188]

Notwithstanding the lack of friction around U.S. policy-making and warfighting in Afghanistan, friction quickly arose *domestically* around detentions. In addition to deploying troops to Afghanistan (and elsewhere), the government turned its eye inward, which led the FBI to use immigration charges to arrest hundreds of foreign nationals who it encountered while investigating the 9/11 attacks.[189] The FBI detained 768 foreign nationals—called "special interest detainees"[190]—in the first eleven months after September 11.[191] The Chief Immigration Judge issued a directive ordering the deportation hearings to be closed to the public, which reduced the friction that could have arisen if the deportations violated the law.[192] However, in early 2002, journalists challenged the court closures under the First Amendment. One court of appeals forced the procedures to be opened, while another affirmed the

[186] Brian Finucane, Putting AUMF Repeal Into Context, Int'l Crisis Grp. (June 25, 2021), https://www.crisisgroup.org/united-states/putting-aumf-repeal-context.

[187] See Goldsmith, supra note 181, at 205–06.

[188] We believe that the 2001 AUMF and the U.S. military's use of that statute as the basis for its operations against various terrorist groups no longer constitutes an example of frictionless government, though the statute remains on the books.

[189] Nat'l Comm'n on Terrorist Attacks Upon the U.S., The 9/11 Commission Report 327–28 (2004) ("Beginning on September 11, Immigration and Naturalization Service agents working in cooperation with the FBI began arresting individuals for immigration violations whom they encountered while following up leads in the FBI's investigation of the 9/11 attacks.").

[190] Id. at 327.

[191] Detainees: Hearing Before the S. Comm. on the Judiciary, 109th Cong. (2005) (written statement of Glenn A. Fine, Inspector Gen., U.S. Dep't of Just.) [hereinafter Statement of Glenn A. Fine].

[192] N. Jersey Media Grp., Inc. v. Ashcroft, 308 F.3d 198, 199 (3d Cir. 2002).

government's position.[193] The Justice Department's Inspector General introduced further friction into special interest detention when he published a report in April 2003 finding "significant problems" with how the Department of Justice had handled the detentions.[194] Further, some of the detainees challenged their detentions on the merits, alleging (among other things) that the government unlawfully prolonged their detention to investigate any ties to terrorism and that it physically mistreated them.[195] And in May 2003, the House held its first hearing on these practices.[196] In short, the U.S. special interest detainee program operated with limited friction between September 2001 and early 2003, at which point members of Congress and the Department of Justice Inspector General brought wider public attention to legal flaws in the executive's program.

Detentions of enemy combatants at Guantanamo also quickly encountered friction, particularly from non-governmental organizations and in the courts. In late December 2001, the Bush Administration opened the Guantanamo Bay detention facility.[197] As early as January 15, 2002, Amnesty International issued a press release expressing concern about the treatment and legal status of the detainees.[198] Later in 2002, scholars

[193] Compare Detroit Free Press v. Ashcroft, 195 F. Supp. 2d 937, 948 (E.D. Mich.), *aff'd*, 303 F.3d 681, 711 (6th Cir. 2002) (opening 9/11 deportation hearings to the public), with *N. Jersey Media Grp.*, 308 F.3d at 221 (affirming the government's position that 9/11 deportation hearings must be closed to the public); see also Sara Thacker, Courts Split on Whether Immigration Hearings Should Be Open to the Public, Reps. Comm. for Freedom of the Press (Oct. 1, 2002), https://www.rcfp.org/journals/the-news-media-and-the-law-fall-2002/courts-split-whether-immigrat/ [https://perma.cc/JTF5-D4HW] (reporting on the conflicting opinions concerning the court closures issued by the U.S. Courts of Appeals for the Third and Sixth Circuits).

[194] Off. of the Inspector Gen., U.S. Dep't of Just., The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks 195 (2003), https://oig.justice.gov/sites/default/files/legacy/special/0306/full.pdf [https://perma.cc/HD56-RTN7]; Statement of Glenn A. Fine, supra note 191.

[195] See, e.g., Elmaghraby v. Ashcroft, No. 04-cv-01809, 2005 WL 2375202, at *1 (E.D.N.Y. Sept. 27, 2005); Ashcroft v. Iqbal, 556 U.S. 662, 668–69 (2009).

[196] War on Terrorism: Immigration Enforcement Since September 11, 2001: Hearing Before the Subcomm. on Immigr., Border Sec. & Claims of the H. Comm. on the Judiciary, 108th Cong. (2003).

[197] For a history of the decision-making that led to the choice of Guantanamo as a detention facility, see John Bellinger III, Guantanamo Redux: Why It Was Opened and Why It Should Be Closed (and Not Enlarged), Lawfare (Mar. 12, 2017, 5:01 PM), https://www.lawfaremedia.org/article/guantanamo-redux-why-it-was-opened-and-why-it-should-be-closed-and-not-enlarged [https://perma.cc/Y8P5-Q9GN].

[198] Press Release, Amnesty Int'l, USA: AI Calls on the USA to End Legal Limbo of Guantánamo Prisoners (Jan. 15, 2002), https://www.amnesty.org/en/documents/amr51/009/2002/en/ [https://perma.cc/GP75-MZJH].

began to critique the military commissions that the government had created to try the detainees.[199] And in May 2002, a public defender filed a habeas petition on behalf of Yasir Hamdi, an American citizen captured in Afghanistan and detained as an enemy combatant in Virginia.[200] Extensive Guantanamo detainee litigation followed.

The September 11 example highlights two points. First, the frictionlessness surrounding the AUMF's passage and its capacious language enabled a broad set of U.S. activities, many of which were carried out in deep secrecy for several years. Second, the differences between the speed at which overseas and domestic friction arose is relevant to the normative proposals discussed in Part III.

B. Recent Incarnations of Frictionless Government

In the past few years, the U.S. government has repeatedly identified Russia and China as the biggest threats to U.S. national security.[201] Russia's full-scale invasion of Ukraine provided a clear instance of frictionless government, albeit one that has not (yet) fallen prey to the pitfalls exhibited in the historical cases described above. To date, the competition with China thankfully has not developed into armed conflict, but U.S. policy toward China has nonetheless displayed elements of frictionlessness that counsel caution. This Section takes up each of these examples in turn.

1. Russia's Full-Scale Invasion of Ukraine

Russia's full-scale invasion of Ukraine on February 24, 2022, sparked a months-long period of inter-branch and bipartisan consensus on the need to support Ukraine and punish Russia. Commentators noted in the wake of the invasion "that Putin had achieved an almost impossible task—unifying most of Washington's bitterly opposed factions behind a

[199] Laura A. Dickinson, Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law, 75 S. Cal. L. Rev. 1407, 1413–21 (2002). See generally Neal K. Katyal & Laurence H. Tribe, Waging War, Deciding Guilt: Trying the Military Tribunals, 111 Yale L.J. 1259 (2002).

[200] Hamdi v. Rumsfeld, 296 F.3d 278, 279–80 (4th Cir. 2002). Jose Padilla, who the United States detained in Chicago, filed a habeas petition the next month. Padilla v. Bush, 233 F. Supp. 2d 564, 571 (S.D.N.Y. 2002). Both cases ultimately went to the Supreme Court. See Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Rumsfeld v. Padilla, 542 U.S. 426 (2004).

[201] See, e.g., The White House, National Security Strategy 23 (Oct. 2022), https://www.whitehouse.gov/wp-content/uploads/2022/10/Biden-Harris-Administrations-National-Security-Strategy-10.2022.pdf [https://perma.cc/FKH2-UJKC].

new common enemy and cause."[202] Democratic Senator Chris Coons declared that the Russian invasion was "bringing Congress together in a way, frankly, I haven't seen in my 12 years," noting that "[y]ou'd have to go back to 9/11 to see such a unified commitment."[203]

In the days and weeks following the invasion, the executive branch used preexisting authorities to impose severe sanctions, export controls, and other restrictions on dealings with Russia.[204] But the executive branch also sought and received additional authority from Congress, which acted with overwhelming bipartisan support on issues including trade restrictions on Russia and military assistance to Ukraine. On March 11, 2022, President Biden announced that he would seek to revoke Russia's most-favored-nation trade status,[205] a move that would result in imposition of higher tariffs on imported Russian goods.[206] By a unanimous vote in the Senate and a 420-3 vote in the House, Congress in April passed the Suspending Normal Trade Relations with Russia and Belarus Act to officially revoke the countries' most-favored-nation status.[207] Congress also codified a ban on importing Russian oil by passing the Ending Importation of Russian Oil Act by a unanimous vote in the Senate and a 414-17 vote in the House.[208] Congress made any future termination of the import prohibition dependent on a presidential

[202] Stephen Collinson, Biden's State of the Union Sends Potent Messages to Zelensky and Putin, CNN (Mar. 2, 2022, 1:57 AM), https://www.cnn.com/2022/03/02/politics/joe-biden-volodymyr-zelensky-vladimir-putin-state-of-the-union/index.html [https://perma.cc/K3ML-32LA].

[203] Jonathan Weisman, Ukraine War Shifts the Agenda in Congress, Empowering the Center, N.Y. Times (Mar. 15, 2022), https://www.nytimes.com/2022/03/15/us/politics/ukraine-politics-congress.html.

[204] See Kristen E. Eichensehr, United States and Allies Target Russia and Belarus with Sanctions and Other Economic Measures, 116 Am. J. Int'l L. 614, 614–18 (2022).

[205] Remarks by President Biden Announcing Actions to Continue to Hold Russia Accountable, The White House (Mar. 11, 2022, 10:31 AM), https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/03/11/remarks-by-president-biden-announcing-actions-to-continue-to-hold-russia-accountable/ [https://perma.cc/2NQL-9K2S].

[206] Cathleen D. Cimino-Isaacs, Nina M. Hart, Brandon J. Murrill & Liana Wong, Cong. Rsch. Serv., IF12071, Russia's Trade Status, Tariffs, and WTO Issues (2022).

[207] Suspending Normal Trade Relations with Russia and Belarus Act, Pub. L. No. 117-110, 136 Stat. 1159 (2022); Actions Overview: H.R. 7108—117th Congress (2021–2022), Congress.gov, https://www.congress.gov/bill/117th-congress/house-bill/7108/actions (last visited Oct. 17, 2024).

[208] Actions Overview: H.R. 6968—117th Congress (2021–2022), Congress.gov, https://www.congress.gov/bill/117th-congress/house-bill/6968/actions (last visited Oct. 17, 2024); see Exec. Order No. 14,066, 87 Fed. Reg. 13625 (Mar. 8, 2022) (imposing ban on imports of Russian oil based on presidential declaration).

certification that Russia has agreed to withdraw from and cease hostilities against Ukraine, "poses no immediate military threat of aggression to any" NATO member, and "recognizes the right of the people of Ukraine to independently and freely choose their own government."[209]

Congress also repeatedly authorized military and other assistance for Ukraine in the months following Russia's full-scale invasion.[210] For example, in April 2022, Congress passed the Ukraine Democracy Defense Lend-Lease Act of 2022 by a voice vote in the Senate and a vote of 417-10 in the House, and President Biden signed it into law the next month.[211] Echoing the World War II-era Lend-Lease Act, the law "essentially allow[s] the Biden administration to gift vast tranches of arms to Kyiv."[212]

Any apparent friction in the early days after Russia's full-scale invasion was not friction in the sense of congressional efforts to restrain the executive. Instead, it was the executive that resisted exhortations by some in Congress—from both parties—to do more and faster to support Ukraine. For example, senators of both parties called on the Biden Administration in March 2022 to provide warplanes to Ukraine or facilitate delivery of such planes from Poland,[213] but the executive branch resisted, partly out of concern that Russia might use such a move "as an excuse to widen the fighting to neighboring countries in Europe."[214] A

[209] Ending Importation of Russian Oil Act, Pub. L. No. 117-109, § 3(c)(2)(B)–(C), 136 Stat. 1154, 1155 (2022).

[210] See generally Christina L. Arabia, Andrew S. Bowen & Cory Welt, Cong. Rsch. Serv., IF12040, U.S. Security Assistance to Ukraine (2024). See Kristen E. Eichensehr, United States and Allies Provide Military and Intelligence Support to Ukraine, 116 Am. J. Int'l L. 646, 646–48 (2022).

[211] Ukraine Democracy Defense Lend-Lease Act of 2022, Pub. L. No. 117-118, 136 Stat. 1184; Actions Overview: S.3522—117th Congress (2021–2022), Congress.gov, https://www.congress.gov/bill/117th-congress/senate-bill/3522/actions?q=%7B%22search%22%3A%5B%22s.+3522%22%2C%22s.%22%2C%223522%22%5D%7D&r=4&s=1 (last visited Oct. 17, 2024).

[212] Catie Edmondson, Congress Clears Bill to Allow Lending Arms to Ukraine, N.Y. Times (Apr. 28, 2022), https://www.nytimes.com/2022/04/28/us/politics/ukraine-lend-lease-arms.html.

[213] Stephen Collinson, As the War's Horror Mounts, Biden's Choices Are About to Get More Excruciating, CNN (Mar. 15, 2022, 8:49 AM), https://www.cnn.com/2022/03/15/politics/putin-biden-historic-dilemma/index.html [https://perma.cc/SMC5-2KY4]; Catie Edmondson & Michael D. Shear, Invoking America's Darkest Days, Zelensky Pleads for More U.S. Aid, N.Y. Times (Mar. 16, 2022), https://www.nytimes.com/2022/03/16/us/politics/zelensky-biden-ukraine-aid.html.

[214] Edmondson & Shear, supra note 213. The United States ultimately approved the transfer of F-16 fighter jets to Ukraine in August 2023. Matthew Mpoke Bigg & Vivek Shankar,

similar dynamic arose around whether to designate Russia as a state sponsor of terrorism. In July 2022, the Senate passed by voice vote a resolution "call[ing] on the Secretary of State to designate the Russian Federation as a state sponsor of terrorism."[215] Republican Senator Lindsay Graham noted, "I didn't think there was an issue under the sun that could get 100 Senate votes, but we found it: Russia is a state sponsor of terrorism."[216] Nonetheless, the Biden Administration declined to label Russia as a state sponsor of terrorism, with White House Press Secretary Karine Jean-Pierre explaining that the "designation could have unintended consequences to Ukraine, and the world," including hampering "the ability to deliver assistance in areas of Ukraine" and impeding "food exports to help mitigate the global food crisis."[217]

The gradual reemergence of significant friction in the policy-making process with respect to the Russia-Ukraine conflict is most obvious when considering the trajectory of Congress's actions on appropriations. In 2022, Congress passed four supplemental appropriations packages to address the Russian invasion, including through massive assistance to Ukraine.[218] In a supplemental appropriations bill passed in April 2022, Congress provided billions more aid than the Biden Administration had requested. The Biden administration sought "$33 billion in additional defense, economic and humanitarian assistance for Ukraine . . . [r]oughly half [of which was] expected to fund new military assistance."[219] Congress instead provided $40 billion for military, humanitarian, and other assistance to Ukraine.[220] The bill passed the Senate by 86 votes to

Ukraine Will Get F-16 Fighter Jets from Denmark and Netherlands, N.Y. Times (Aug. 30, 2023), https://www.nytimes.com/2023/08/20/world/europe/ukraine-war-f16-jets.html.

[215] 168 Cong. Rec. S3737 (daily ed. July 27, 2022).

[216] Anita Powell, Biden Says No to Appeals to Designate Russia a State Sponsor of Terror, VOA (Sept. 6, 2022, 8:49 PM), https://www.voanews.com/a/biden-says-no-to-appeals-to-designate-russia-a-state-sponsor-of-terror/6734357.html [https://perma.cc/W6GW-RF44].

[217] Id.

[218] For an overview, see Elizabeth Hoffman, Jaehyun Han & Shivani Vakharia, The Past, Present, and Future of U.S. Assistance to Ukraine: A Deep Dive into the Data, Ctr. for Strategic & Int'l Stud. (Sept. 26, 2023), https://www.csis.org/analysis/past-present-and-future-us-assistance-ukraine-deep-dive-data [https://perma.cc/FN5E-KV52].

[219] Edmondson, supra note 212.

[220] Additional Ukraine Supplemental Appropriations Act, 2022, Pub. L. No. 117-128, 136 Stat. 1211; see Catie Edmondson & Emily Cochrane, The Senate Overwhelmingly Approves $40 Billion in Aid to Ukraine, Sending It to Biden, N.Y. Times (May 19, 2022), https://www.nytimes.com/2022/05/19/us/politics/senate-passes-ukraine-aid.html.

11, and passed the House by 368 votes to 57.[221] Media coverage at the time noted "the remarkable bipartisan support [for the bill] on Capitol Hill" and that "the speed with which it moved through Congress . . . was striking, given the gridlock that has prevented domestic initiatives large and small from winning approval in recent years."[222]

However, the votes against that appropriations bill marked the start of rising opposition, particularly from right-wing legislators and groups, to continued spending on Ukraine. Former President Trump opposed the appropriations bill, and Senate Minority Leader Mitch McConnell worked to minimize the votes against the bill from what he called the "isolationist wing" of the Republican party.[223] A subsequent supplemental appropriations bill including Ukraine funding in September 2022 drew increased opposition in the Senate with a vote of 72-25 and considerable opposition in the House, passing by a vote of 230-201.[224] In October 2022, Representative Kevin McCarthy—then the leader of the Republican minority in the House—warned that a Republican-led House after the midterm election "would be unwilling to 'write a blank check' to Ukraine."[225] The *New York Times* noted that "an increasing number of libertarian-minded conservatives who have adopted former President Donald J. Trump's 'America First' position have vocally opposed authorizing billions of dollars in military and humanitarian aid to Ukraine."[226]

Partisan friction over Ukraine aid continued to grow after the Republicans took control of the House in January 2023. In July, Republican lawmakers proposed cutting funding for Ukraine, though the

[221] 168 Cong. Rec. S2607 (daily ed. May 19, 2022); 168 Cong. Rec. H4782–83 (daily ed. May 10, 2022).

[222] Edmondson & Cochrane, supra note 220.

[223] Id.

[224] All Actions: H.R. 6833—117th Cong. (2021–2022), Congress.gov, https://www.congress.gov/bill/117th-congress/house-bill/6833/all-actions?overview=closed&q=%7B%22roll-call-vote%22%3A%22all%22%7D (last visited Oct. 17, 2024); Continuing Appropriations and Ukraine Supplemental Appropriations Act, 2023, Pub. L. No. 117-180, 136 Stat. 2114 (2022). Because this bill was not solely about Ukraine, it is possible that some of the opposition derived from non-Ukraine related provisions.

[225] Catie Edmondson, McCarthy Suggests That a G.O.P.-Led House Would Question Aid to Ukraine, N.Y. Times (Oct. 18, 2022), https://www.nytimes.com/2022/10/18/us/politics/mccarthy-ukraine-republicans.html.

[226] Id.

House voted down the proposals by wide margins.[227] The Biden Administration sought $24 billion for Ukraine assistance in August 2023,[228] but the request languished amid Republican opposition and dysfunction linked to McCarthy's ouster as the House speaker.[229] After months of delay, Congress eventually included additional Ukraine aid in a supplemental appropriations bill that passed in April 2024 and also included authority for the President to seize frozen Russian government assets.[230]

The Russia example illustrates two important points. First, it demonstrates that frictionless government need not necessarily result in bad policy outcomes. Despite the overwhelming opposition to Russia's actions, especially in the spring and summer of 2022, the U.S. government did not engage in civil liberties violations of domestic actors linked to Russia in the way that the government targeted domestic constituencies in past instances of frictionless government. Moreover, assistance from the United States and other allies has allowed Ukraine to resist Russia's aggression without provoking a broader conflict that could have spilled over into other European countries. Second, this example shows that even when Congress acts in a bipartisan, bicameral way, the executive branch can sometimes check itself, calibrating its actions in such a way that it

[227] Patricia Zengerle, US House Backs 'Culture War' Amendments in Threat to Must-Pass Defense Bill, Reuters (July 13, 2023, 10:59 PM), https://www.reuters.com/world/us/us-house-debates-culture-wars-amendments-must-pass-defense-bill-2023-07-13/.

[228] Peter Baker & Luke Broadwater, Biden Seeks $24 Billion More for Ukraine in Test of Bipartisan Support, N.Y. Times (Aug. 10, 2023), https://www.nytimes.com/2023/08/10/us/politics/biden-ukraine-aid.html.

[229] Lexie Schapitl, The Fate of Ukraine Funding Lies in the Balance with Speaker's Race, NPR (Oct. 6, 2023, 5:00 AM), https://www.npr.org/2023/10/06/1203961930/ukraine-funding-congress-speakers-race [https://perma.cc/E52M-B56K].

[230] Act of Apr. 24, 2024, Pub. L. No. 118-50, 138 Stat. 895, 905–24, 947–51 (making emergency supplemental appropriations for the fiscal year ending September 30, 2024, and for other purposes); see Ashley Deeks, Mitu Gulati & Paul Stephan, What Should the Biden Administration Do with REPO?, Lawfare (May 6, 2024, 9:49 AM), https://www.lawfaremedia.org/article/what-should-the-biden-administration-do-with-repo [https://perma.cc/U8GM-GUY7] (discussing how the Biden Administration should use the new statutory authority to seize Russian state assets); Doug Klain, The United States Needs a Long-Term Approach to Ukraine Aid, Atl. Council (Sept. 2, 2024), https://www.atlanticcouncil.org/blogs/ukrainealert/the-united-states-needs-a-long-term-approach-to-ukraine-aid/ [https://perma.cc/L7ST-JXEY] (noting that "[t]he April 2024 aid package was delayed for months by House Republicans, with Speaker Mike Johnson fearing that hardliners would strip him of his leadership position as they did with his predecessor," but arguing that the politics of Ukraine aid have shifted again, such that "[i]f a new supplemental aid package comes forward, it's likely to find a Congress filled with Republicans who feel more empowered to vote for Ukraine").

does not fully bow to Congress's pressure or act to the limits of its authority. In other words, the Russia example shows that not all instances of frictionless government go badly.

2. The Technological Cold War with China

In the past few years, U.S. policy-making with respect to China has displayed elements of frictionless government, particularly when it comes to the so-called "tech cold war." Notably, unlike the prior examples, the frictionlessness with respect to China has arisen outside the context of an attack on the United States or a hot conflict. Instead, it is driven by a combination of more subtle Chinese operations against the United States such as hostile cyber operations,[231] espionage,[232] and intellectual property theft,[233] as well as certain military actions including aggressive aerial operations near U.S. jets in international airspace[234] and dangerous operations near U.S. naval vessels conducting freedom of navigation operations.[235] The U.S. government's actions combine efforts to avoid a hot war with China with attempts to ensure military dominance if such efforts fail.[236]

The need to be "tough" on China has emerged as a durable point of bipartisan and inter-branch agreement. China policy has been an area of continuity between the Trump and Biden Administrations, albeit with

[231] See, e.g., Off. of the Dir. of Nat'l Intel., Annual Threat Assessment of the U.S. Intelligence Community 11 (2024), https://www.dni.gov/files/ODNI/documents/assessments/ATA-2024-Unclassified-Report.pdf; Julian E. Barnes, China Could Threaten Critical Infrastructure in a Conflict, N.S.A. Chief Says, N.Y. Times (Apr. 17, 2024), https://www.nytimes.com/2024/04/17/us/politics/china-cyber-us-infrastructure.html.

[232] See Ellen Nakashima, Alex Horton, Dan Lamothe & Rosalind S. Helderman, U.S. Military Downs Chinese Balloon over Atlantic Ocean, Wash. Post (Feb. 4, 2023, 10:16 PM), https://www.washingtonpost.com/national-security/2023/02/04/chinese-balloon-shoot-down/; David E. Sanger & Mark Landler, U.S. and Britain Accuse China of Cyberespionage Campaign, N.Y. Times (Mar. 25, 2024), https://www.nytimes.com/2024/03/25/us/politics/china-hacking-us-sanctions.html.

[233] Lingling Wei & Bob Davis, How China Systematically Pries Technology from U.S. Companies, Wall St. J. (Sept. 26, 2018, 10:27 AM), https://www.wsj.com/articles/how-china-systematically-pries-technology-from-u-s-companies-1537972066.

[234] Press Release, U.S. Indo-Pac. Command Pub. Affs., USINDOPACOM Statement on Unprofessional Intercept of U.S. Aircraft over South China Sea (May 30, 2023), https://www.pacom.mil/Media/News/News-Article-View/Article/3410337/usindopacom-statement-on-unprofessional-intercept-of-us-aircraft-over-south-chi/ [https://perma.cc/8SSX-6DR2].

[235] Jim Garamone, Defense Leaders See Increase in Risky Chinese Intercepts, DOD News (June 8, 2023), https://www.defense.gov/News/News-Stories/Article/Article/3421766/defense-leaders-see-increase-in-risky-chinese-intercepts/ [https://perma.cc/27JL-9S73].

[236] See The White House, supra note 201.

some adjustments in rhetoric and level of coordination with allies.[237] Despite the existence of divided government and extreme polarization on many issues, Republicans and Democrats in the House, Senate, and White House all support the executive's assertive moves against China.[238] Indeed, various members of Congress have pressed the Biden Administration to be more aggressive in its approach to China.[239] The unity of views prompted one Democratic House member to assert, "It's become a second era of McCarthyism—sorry to use that word, but it applies . . . . Basically, no politician, Republican or Democrat, can be seen as soft on China, and so that pushes us in the direction of not [discussing] smart policy, but politics."[240] In discussing the bipartisan consensus on countering China, Democratic Senator Mark Warner noted that "[i]f anything, it became so bipartisan that . . . I would see sometimes on the Republican side almost a rush to see who could out-China-hawk each other."[241]

The U.S. government has used long-standing authorities as well as newly enacted ones to address perceived threats from China. Some examples illustrate the frictionless nature of China policy, particularly regarding technology.

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[237] See, e.g., 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; Asma Khalid, Biden Is Keeping Key Parts of Trump's China Trade Policy. Here's Why, NPR (Oct. 4, 2021, 3:36 PM), https://www.npr.org/2021/10/04/1043027789/biden-is-keeping-key-parts-of-trumps-china-trade-policy-heres-why [https://perma.cc/ANF4-QQVG].

[238] See, e.g., Andrew Desiderio, Pelosi and China: The Making of a Progressive Hawk, Politico (July 28, 2022, 4:30 AM), https://www.politico.com/news/2022/07/28/pelosi-china-taiwan-00048352; Liz Goodwin, As China's Power Grows, Candidates Use It as Attack Line, Wash. Post (Sept. 1, 2024, 3:29 PM), https://www.washingtonpost.com/politics/2024/09/01/china-2024-campaign-attacks-tim-walz/ (documenting references to China in campaign ads by politicians of both parties and noting that "[c]ountering China is one of the few remaining bipartisan areas of agreement on Capitol Hill").

[239] See, e.g., Rebecca Klar, Hawley, Buck Introduce Bill to Ban TikTok in US, The Hill (Jan. 25, 2023, 5:09 PM), https://thehill.com/homenews/3830636-hawley-buck-introduce-bill-to-ban-tiktok-in-us/; Timothy Gardner, U.S. House Passes Bill Banning Exports of Reserve Oil to China, Reuters (Jan. 12, 2023, 12:37 PM), https://www.reuters.com/business/energy/us-house-passes-bill-banning-exports-reserve-oil-china-2023-01-12/.

[240] Gavin Bade, 'A Sea Change': Biden Reverses Decades of Chinese Trade Policy, Politico (Dec. 26, 2022, 7:00 AM), https://www.politico.com/news/2022/12/26/china-trade-tech-0007 2232.

[241] Nicholas Welch & Jordan Schneider, Sen. Warner on the RESTRICT Act, AI, Bipartisanship on China, and a New Era of Intelligence, ChinaTalk (May 2, 2023), https://www.chinatalk.media/p/sen-warner-on-the-restrict-act-ai [https://perma.cc/W4CX-Z349].

Some U.S. government actions have focused on restricting the flow of Chinese products into the United States to prevent their use for espionage or sabotage of critical systems. Among these, the highest-profile actions have focused on Huawei, a Chinese telecommunications equipment company.[242] U.S. officials of both parties have raised national security concerns about Huawei for years,[243] "citing its ties to the Chinese government and military, preferential Chinese policies and financing that enabled its growth and expansion globally, and the potential for espionage."[244] Beginning in 2017, Congress enacted an escalating series of restrictions on the purchase and use of Huawei equipment in the United States.[245] In 2020, these efforts culminated in a $1.9 billion appropriation to a program to reimburse telecommunications providers to "rip and replace" equipment from Huawei and ZTE, another Chinese telecom equipment company, from their networks and substitute in equipment from non-Chinese companies.[246] U.S. officials beginning in the Trump Administration also lobbied U.S. allies to bar Huawei and other Chinese equipment from their 5G networks.[247] After years of delay and threats by the United States to withhold intelligence sharing, a number of U.S. allies, including its Five Eyes intelligence sharing partners, banned Huawei and

[242] For extensive analysis of U.S. actions toward Huawei, see Jill C. Gallagher, Cong. Rsch. Serv., R47012, U.S. Restrictions on Huawei Technologies: National Security, Foreign Policy, and Economic Interests 12–34 (2022).

[243] See, e.g., Mike Rogers & C.A. Dutch Ruppersberger, House Permanent Select Comm. on Intel., Investigative Report on the U.S. National Security Issues Posed by Chinese Telecommunications Companies Huawei and ZTE (2012), https://intelligence.house.gov/sites/intelligence.house.gov/files/documents/huawei-zte%20investigative%20report%20(final).pdf [https://perma.cc/MW6R-8GSJ].

[244] Gallagher, supra note 242, at 1.

[245] Id. at 12–25.

[246] See id. at 23–25; Cecilia Kang, 'Rip and Replace': The Tech Cold War Is Upending Wireless Carriers, N.Y. Times (May 10, 2023), https://www.nytimes.com/2023/05/09/technology/cellular-china-us-zte-huawei.html.

[247] See, e.g., Stu Woo & Kate O'Keeffe, Washington Asks Allies to Drop Huawei, Wall St. J. (Nov. 23, 2018, 4:56 AM), https://www.wsj.com/articles/washington-asks-allies-to-drop-huawei-1542965105.

other Chinese equipment,[248] and European countries are now undertaking their own "rip and replace" efforts.[249]

Other efforts have focused on limiting Chinese investments into the United States in order to curb China's ability to acquire information and know-how via such investments. In 2018, concerns about Chinese investment prompted Congress to pass the Foreign Investment Risk Review Modernization Act of 2018 ("FIRRMA") to broaden the jurisdiction of the Committee on Foreign Investment in the United States ("CFIUS").[250] FIRRMA expanded the transactions subject to CFIUS review to include not just ones in which a foreign person acquires "control" of a U.S. business, but also certain real estate transactions near sensitive security facilities and noncontrolling "other investments" in businesses involved with critical technologies, critical infrastructure, or sensitive personal data of U.S. persons.[251] In September 2022, the Biden Administration issued Executive Order 14,083 to elaborate on factors that CFIUS should consider in evaluating national security risk.[252] Although neither FIRRMA nor the Order specifically mentions China, they "target[] behaviors common to [China's] investments that seek U.S. capabilities in strategic areas prioritized and funded by China's industrial

[248] See Adam Segal, The United Kingdom Bans Huawei from 5G Networks, Council on Foreign Rels. (July 14, 2020, 11:17 AM), https://www.cfr.org/blog/united-kingdom-bans-huawei-5g-networks-0 [https://perma.cc/7X2P-5Q4H]; Canada Bans China's Huawei Technologies from 5G Networks, NPR (May 20, 2022, 12:49 AM), https://www.npr.org/2022/05/20/1100324929/canada-bans-chinas-huawei-technologies-from-5g-networks [https://perma.cc/47Q3-9L49]; Huawei and ZTE Handed 5G Network Ban in Australia, BBC (Aug. 23, 2018), https://www.bbc.com/news/technology-45281495 [https://perma.cc/YZ9H-EQQD]; Huawei: NZ Bars Chinese Firm on National Security Fears, BBC (Nov. 28, 2018), https://www.bbc.com/news/business-46368001 [https://perma.cc/D2RC-B7XE].

[249] Kang, supra note 246.

[250] John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, §§ 1701–1728, 132 Stat. 1636, 2174 (2018) (codified at 50 U.S.C. § 4565); James K. Jackson, Cong. Rsch. Serv., RL33388, The Committee on Foreign Investment in the United States (CFIUS) 11 (2020). Because FIRRMA passed as part of the NDAA, it is difficult to tell how much support there was for FIRRMA in particular, but the votes in favor of the NDAA were lopsided in favor of passage. See Actions Overview: H.R. 5515—115th Congress (2017–2018), Congress.gov, https://www.congress.gov/bill/115th-congress/house-bill/5515/actions (last visited Oct. 17, 2024) (reporting a Senate vote of 87 to 10 and a House vote of 359 to 54).

[251] See Provisions Pertaining to Certain Investments in the United States by Foreign Persons, 84 Fed. Reg. 50174, 50174–76 (Sept. 24, 2019) (codified at 31 C.F.R. pt. 800).

[252] Exec. Order No. 14,085, 87 Fed. Reg. 57369, 57369–73 (Sept. 20, 2022).

policies."[253] CFIUS reviews of China-linked investments peaked in 2017 and fell dramatically by 2020 when "CFIUS came to be perceived as a brick wall for Chinese investors,"[254] before rebounding somewhat in subsequent years.[255]

Concerns about China have played a significant role in the transactions that CFIUS has declined to approve and that Presidents have blocked. Of the eight transactions that Presidents have formally blocked since CFIUS's inception, seven have involved Chinese investors.[256] For example, in August 2020, President Trump ordered ByteDance to divest from TikTok.[257] Trump also issued executive orders pursuant to the International Emergency Economic Powers Act ("IEEPA") to curtail the U.S. operations of TikTok and WeChat, a Chinese messaging app.[258] The orders prompted legal challenges from WeChat users, TikTok content

[253] Cathleen D. Cimino-Isaacs, Stephen P. Mulligan & Karen M. Sutter, Cong. Rsch. Serv., IF12415, CFIUS Executive Order on Evolving National Security Risks and CFIUS Enforcement Guidelines 1 (2024).

[254] Martin Chorzempa, U.S. Security Scrutiny of Foreign Investments Rises, But So Does Foreign Investment, Peterson Inst. for Int'l Econ. (Sept. 1, 2022, 11:09 AM), https://www.piie.com/blogs/realtime-economics/2022/us-security-scrutiny-foreign-investment-rises-so-does-foreign.

[255] Compare U.S. Dep't of Treasury, CFIUS—Annual Report to Congress—CY 2020, at 35, https://home.treasury.gov/system/files/206/CFIUS-Public-Annual-Report-CY-2020.pdf [https://perma.cc/M2E3-5QAF] (showing 55, 25, and 17 notices filed with CFIUS by Chinese acquirers in 2018, 2019, and 2020, respectively), with U.S. Dep't of Treasury, CFIUS—Annual Report to Congress—CY 2023, at 25 https://home.treasury.gov/system/files/206/2023CFIUSAnnualReport.pdf [https://perma.cc/K9G6-9KSF] (showing 46, 36, and 33 notices filed with CFIUS by Chinese acquirers in 2021, 2022, and 2023, respectively).

[256] See Jackson, supra note 250, at 21; Cathleen D. Cimino-Isaacs & Karen M. Sutter, Cong. Rsch. Serv., IF10177, Committee on Foreign Investment in the United States 2 (May 17, 2024), https://crsreports.congress.gov/product/pdf/IF/IF10177 (listing presidential blocks of transactions, including the May 2024 order requiring "a PRC cryptocurrency mining firm to divest its real estate acquisition and operations" near a U.S. Air Force base); Regarding the Acquisition of Musical.ly by ByteDance Ltd., 85 Fed. Reg. 51297 (Aug. 14, 2020); Regarding the Acquisition of StayNTouch, Inc. by Beijing Shiji Information Technology Co., Ltd., 85 Fed. Reg. 13719 (Mar. 6, 2020). The eighth blocked transaction involved Broadcom's attempt to acquire Qualcomm. Although the presidential block of Broadcom's attempted acquisition did not involve a Chinese investor, reports nonetheless indicate that "China was the main concern that drove Mr. Trump's decision over the Qualcomm deal, because allowing an American technology company to be acquired would cede its primacy in the semiconductor and wireless industry." Cecelia Kang & Alan Rappeport, Trump Blocks Broadcom's Bid for Qualcomm, N.Y. Times (Mar. 12, 2018), https://www.nytimes.com/2018/03/12/technology/trump-broadcom-qualcomm-merger.html.

[257] Regarding the Acquisition of Musical.ly by ByteDance Ltd., 85 Fed. Reg. at 51297.

[258] Exec. Order No. 13,942, 85 Fed. Reg. 48637, 48637–38 (Aug. 6, 2020); Exec. Order No. 13,943, 85 Fed. Reg. 48641, 48641–42 (Aug. 6, 2020).

creators, and TikTok itself alleging, among other claims, that the orders violated the First Amendment and exceeded the President's authority under IEEPA by restricting "informational materials."[259] Three federal district courts enjoined the orders,[260] and the Biden Administration ultimately withdrew them.[261] TikTok also sued to challenge the divestment order,[262] although that lawsuit was held in abeyance to allow the company to continue negotiating with CFIUS over a possible mitigation order.[263] In the meantime, Congress passed, and President Biden signed, a ban on TikTok on federal government devices.[264] Then, in April 2024, Congress passed and President Biden signed into law the "Protecting Americans from Foreign Adversary Controlled Applications Act," which bans TikTok in the United States after 270 days unless

[259] Complaint for Declaratory & Injunctive Relief at 3–4, U.S. WeChat Users All. v. Trump, 488 F. Supp. 3d 912 (N.D. Cal. 2020) (No. 20-cv-05910); Complaint for Injunctive & Declaratory Relief at 4–5, TikTok Inc. v. Trump, 490 F. Supp. 3d 73 (D.D.C. 2020) (No. 20-cv-02658); Complaint for Injunctive & Declaratory Relief at 2, Marland v. Trump, 498 F. Supp. 3d 624 (E.D. Pa. 2020) (No. 20-cv-04597).

[260] *U.S. WeChat Users All.*, 488 F. Supp. 3d at 930; *TikTok Inc.*, 490 F. Supp. 3d at 86; *Marland*, 498 F. Supp. 3d at 645. For an overview of the litigation, see Anupam Chander, Trump v. TikTok, 55 Vand. J. Transnat'l L. 1145, 1156–61 (2022); Kristen E. Eichensehr, United States Pursues Regulatory Actions Against TikTok and WeChat over Data Security Concerns, 115 Am. J. Int'l L. 124, 126–29 (2021).

[261] Exec. Order No. 14,034, 86 Fed. Reg. 31423, 31424 (June 9, 2021).

[262] Petition for Review at 2, TikTok Inc. v. Comm. on Foreign Inv. in the U.S., No. 20-1444 (D.C. Cir. Nov. 10, 2020).

[263] TikTok Inc. v. Comm. on Foreign Inv. in the U.S., No. 20-1444 (D.C. Cir. Feb. 19, 2021) (order granting motion to hold case in abeyance); see also Elias Groll, Inside TikTok's Proposal to Address US National Security Concerns, Cyberscoop (Jan. 27, 2023), https://cyberscoop.com/tiktok-national-security-cfius/ [https://perma.cc/FYU6-5R8R] (detailing TikTok's then-ongoing negotiations with CFIUS).

[264] Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, 136 Stat. 4459, 5258–59 (2022) (enacting the No TikTok on Government Devices Act, S.1143). A standalone version of the bill passed the Senate by unanimous consent. See Actions Overview: S.1143—117th Congress (2021–2022), Congress.gov, https://www.congress.gov/bill/117th-congress/senate-bill/1143/actions (last visited Oct. 18, 2024).

ByteDance divests from the app.[265] TikTok and TikTok content creators have challenged the law.[266]

The executive branch and Congress have taken other actions to address concerns about data flows from the United States to China this year as well. At the same time that it passed the TikTok ban, Congress also enacted the "Protecting Americans' Data from Foreign Adversaries Act of 2024," which prohibits data brokers from providing sensitive data of U.S. persons to U.S. adversary countries (including China) or to entities controlled by such countries.[267] In a mark of the bipartisan support for the act, a standalone version of the bill passed the House unanimously.[268] The Commerce Department has also begun a rulemaking process to address concerns about Chinese-made technology in connected cars.[269] Secretary of Commerce Gina Raimondo noted the "need to understand the extent of the technology in these cars that can capture wide swaths of data or remotely disable or manipulate connected vehicles . . . ."[270]

Still other U.S. government actions have clamped down on outbound flows of tech products from the United States that could strengthen China's military. In passing the Export Control Reform Act of 2018 ("ECRA"), Congress strengthened and expanded presidential authority over export controls.[271] House Foreign Affairs Committee Chairman Ed

[265] Making Emergency Supplemental Appropriations for the Fiscal Year Ending September 30, 2024, and for Other Purposes, Pub. L. No. 118-50, 138 Stat. 895, 955–60 (2024) (enacting the Protecting Americans from Foreign Adversary Controlled Applications Act, H.R. 7521). The law permits the President to grant a 90-day extension to the divestment deadline under specified circumstances. Id. A standalone version of the bill passed the House by a vote of 352-65, evidencing some dissent within Congress. Actions Overview: H.R. 7521—118th Congress (2023–2024), Congress.gov, https://www.congress.gov/bill/118th-congress/house-bill/7521/all-actions?s=3&r=1&q=%7B%22search%22%3A%22Protecting+Americans+from+Foreign+Adversary+Controlled+Applications+Act%22%7D (last visited Nov. 4, 2024).

[266] TikTok Inc. v. Garland, No. 24-1113 (D.C. Cir. argued Sept. 16, 2024).

[267] Making Emergency Supplemental Appropriations for the Fiscal Year Ending September 30, 2024, and for Other Purposes, Pub. L. No. 118-50, 138 Stat. 895, 960–63 (2024) (enacting the Protecting Americans' Data from Foreign Adversaries Act of 2024, H.R.7520). The Act defines "foreign adversary country" as those listed in 10 U.S.C. § 4872(d)(2), which includes North Korea, China, Russia, and Iran. Id.

[268] Actions Overview: H.R. 7520—118th Congress, Congress.gov, https://www.congress.gov/bill/118th-congress/house-bill/7520/all-actions?s= (last visited Nov. 4, 2024).

[269] Press Release, U.S. Dep't of Com., Citing National Security Concerns, Biden-Harris Administration Announces Inquiry into Connected Vehicles (Feb. 29, 2024), https://www.commerce.gov/news/press-releases/2024/02/citing-national-security-concerns-biden-harris-administration-announces [https://perma.cc/N8WH-E8SP].

[270] Id.

[271] Pub. L. No. 115-232, §§ 1741–1768, 132 Stat. 1653, 2208–34 (2018).

Royce explained during a markup of ECRA that the statute "closes gaps in our export controls that could permit transfers of cutting-edge technology like artificial intelligence and advanced semiconductors to potential adversaries such as Beijing."[272]

The executive branch has since made robust use of its authorities to target Chinese companies. In 2019, the Commerce Department added Huawei and dozens of its affiliates to the Entity List,[273] which "identifies entities reasonably believed to be involved, or pose a significant risk of being or becoming involved, in activities contrary to the national security or foreign policy interests of the United States," and imposes license requirements for "exports, reexports, and transfers (in-country) to, listed entities."[274] Following the initial Entity List designation, the Commerce Department accused Huawei of "efforts to undermine U.S. export controls"[275] and progressively tightened restrictions on the company, including by placing additional Huawei affiliates and suppliers on the Entity List.[276] In 2020, the Commerce Department further expanded the restrictions on exports to Huawei by using the Foreign Direct Product Rule ("FDPR"), which "subjects foreign-produced items to U.S. jurisdiction if the item was produced using U.S.-origin plant and equipment."[277] In particular, the Commerce Department used the FDPR to prevent Huawei "from obtaining foreign-produced semiconductors that are the direct product of U.S.-origin software or technology or the direct product of a U.S.-origin plant or major equipment of a plant."[278]

[272] Paul K. Kerr & Christopher A. Casey, Cong. Rsch. Serv., R45814, The U.S. Export Control System and the Export Control Reform Act of 2018, at 20 (June 7, 2021), https://crsreports.congress.gov/product/pdf/R/R46814 (quoting Markup of H.R. 5040 et al. Before the H. Comm. on Foreign Affs., 115th Cong. 219 (2018)).

[273] Addition of Entities to the Entity List, 84 Fed. Reg. 22961 (May 21, 2019) (codified at 15 C.F.R. pt. 744).

[274] Id.

[275] Press Release, U.S. Dep't of Com., Commerce Addresses Huawei's Efforts to Undermine Entity List, Restricts Products Designed and Produced with U.S. Technologies (May 15, 2020), https://2017-2021.commerce.gov/news/press-releases/2020/05/commerce-addresses-huaweis-efforts-undermine-entity-list-restricts.html [https://perma.cc/YD4Y-475Y].

[276] Kerr & Casey, supra note 272, at 28.

[277] Id. at 29; see also 15 C.F.R. § 736.2(b)(3) (2024) (explaining the FDPR).

[278] Kerr & Casey, supra note 272, at 29 (citing Export Administration Regulations: Amendments to General Prohibition Three (Foreign-Produced Direct Product Rule) and the Entity List, 85 Fed. Reg. 29849 (May 19, 2020) (to be codified at 15 C.F.R. pts. 730, 732, 736, 744)).

Commenting on the restrictions, Republican Senator Ben Sasse said, "[t]he United States needs to strangle Huawei."[279]

Export controls have also been key to efforts to restrict Chinese access to advanced semiconductors more broadly. In October 2022, the Biden Administration announced export controls on advanced semiconductors in an attempt to "stop cutting-edge exports to a range of Chinese technology companies and cut off China's nascent ability to produce advanced chips itself."[280] Citing ECRA, the Commerce Department explained that the controls will restrict China's "ability to obtain advanced computing chips, develop and maintain supercomputers, and manufacture advanced semiconductors," all of which China employs "to produce advanced military systems."[281] One commentator characterized the October controls as "the single most substantial move by the U.S. government to date in its quest to undermine Chinese technology capabilities."[282] Members of Congress have pushed the Commerce Department to go further in restricting exports to Chinese companies.[283]

Although the United States announced the chip export controls unilaterally, the Biden Administration spent months negotiating with the Netherlands and Japan—key producers of advanced semiconductor manufacturing equipment—to ensure that they too would restrict exports

[279] Ana Swanson, U.S. Delivers Another Blow to Huawei with New Tech Restrictions, N.Y. Times (Sept. 24, 2021), https://www.nytimes.com/2020/05/15/business/economy/commerce-department-huawei.html.

[280] Ana Swanson, Biden Administration Clamps Down on China's Access to Chip Technology, N.Y. Times (Oct. 7, 2022), https://www.nytimes.com/2022/10/07/business/economy/biden-chip-technology.html; see Implementation of Additional Export Controls: Certain Advanced Computing and Semiconductor Manufacturing Items; Super Computer and Semiconductor End Use; Entity List Modification, 87 Fed. Reg. 62186 (Oct. 13, 2022).

[281] Press Release, Bureau of Indus. & Sec., U.S. Dep't of Com., Commerce Implements New Export Controls on Advanced Computing and Semiconductor Manufacturing Items to the People's Republic of China (PRC) (Oct. 7, 2022), https://www.bis.doc.gov/index.php/documents/about-bis/newsroom/press-releases/3158-2022-10-07-bis-press-release-advanced-computing-and-semiconductor-manufacturing-controls-final/file [https://perma.cc/34LX-88RN].

[282] Matt Sheehan, Biden's Unprecedented Semiconductor Bet, Carnegie Endowment for Int'l Peace (Oct. 27, 2022), https://carnegieendowment.org/2022/10/27/biden-s-unprecedented-semiconductor-bet-pub-88270 [https://perma.cc/VJ54-PMSY].

[283] Press Release, H. Select Comm. on the Chinese Communist Party, Gallagher, Stefanik, McCaul Call on Commerce to Strengthen Export Controls Before Congress Provides More Funding (Dec. 5, 2023), https://selectcommitteeontheccp.house.gov/media/press-releases/gallagher-stefanik-mccaul-call-commerce-strengthen-export-controls-congress [https://perma.cc/4FFT-7VAA].

to China.[284] The efficacy of the U.S. export controls "depended on the United States securing Dutch and Japanese cooperation to control the types of semiconductor equipment that U.S. companies do not produce and to prevent Dutch and Japanese companies from backfilling the technologies that the United States is no longer willing to sell to China."[285] In March 2023, both countries announced their plans for new export controls to harmonize with the United States.[286] As the U.S. government has progressively tightened its export restrictions,[287] the Netherlands has tightened its restrictions as well, and Japan is under pressure to do the same.[288]

Another category of actions has focused on limiting outbound investment from the United States into China. Investment restrictions initially focused on investments in companies linked to China's military. In an executive order in November 2020, President Trump barred U.S. persons from transacting in publicly traded securities of "Communist Chinese military compan[ies]" and required divestment of such existing

[284] Ana Swanson, Netherlands and Japan Said to Join U.S. in Curbing Chip Technology Sent to China, N.Y. Times (Jan. 30, 2023), https://www.nytimes.com/2023/01/28/business/economy/netherlands-japan-china-chips.html.

[285] Gregory C. Allen, Emily Benson & Margot Putnam, Japan and the Netherlands Announce Plans for New Export Controls on Semiconductor Equipment, Ctr. for Strategic & Int'l Stud. (Apr. 10, 2023), https://www.csis.org/analysis/japan-and-netherlands-announce-plans-new-export-controls-semiconductor-equipment [https://perma.cc/KNK6-TSCB].

[286] See id. (describing the Dutch and Japanese export controls as part of an agreement with the United States); see also Letter from Liesje Schreinemacher, Dutch Minister for Foreign Trade & Dev. Coop., to the U.S. House of Reps. (Mar. 8, 2023), https://www.government.nl/documents/parliamentary-documents/2023/03/10/letter-to-parliament-on-additional-export-control-measures-concerning-advanced-semiconductor-manufacturing-equipment [https://perma.cc/NV56-9KR5]; Japan to Restrict Chipmaking Equipment Exports, With Eye on China, Nikkei (Mar. 31, 2023, 12:14 PM), https://asia.nikkei.com/Business/Tech/Semiconductors/Japan-to-restrict-chipmaking-equipment-exports-with-eye-on-China [https://perma.cc/YP68-P2RY].

[287] Press Release, Bureau of Indus. & Sec., U.S. Dep't of Com., Department of Commerce Implements Controls on Quantum Computing and Other Advanced Technologies Alongside International Partners (Sept. 5, 2024), https://www.bis.gov/press-release/department-commerce-implements-controls-quantum-computing-and-other-advanced [https://perma.cc/95W8-S2BE].

[288] Mackenzie Hawkins, Japan Pressed by US Lawmakers to Strengthen Chip Curbs on China, Bloomberg (Oct. 18, 2024, 5:06 PM), https://www.bloomberg.com/news/articles/2024-10-18/japan-pressed-by-us-lawmakers-to-strengthen-chip-curbs-on-china; Charlotte Van Ouwerkerk, Dutch Match US Export Curbs on Semiconductor Machines, Barron's (Sept. 6, 2024), https://www.barrons.com/news/dutch-match-us-export-curbs-on-semiconductor-machines-fe2e099a [https://perma.cc/JN67-3C58].

holdings.[289] After two of the listed companies challenged their listings and won preliminary injunctions in federal court,[290] President Biden issued a new executive order shifting responsibility for identifying targeted companies from the Defense Secretary to the Treasury Secretary and broadening investment restrictions to include companies that "operate or have operated in the defense and related materiel sector or the surveillance technology sector of" China's economy.[291]

After more than a year of debate and discussion, President Biden issued an executive order in August 2023 directing the Treasury Secretary to issue regulations to prohibit and require notification of certain outbound investments into "countries of concern," namely China.[292] The order focuses on investment related to "sensitive technologies and products in the semiconductors and microelectronics, quantum information technologies, and artificial intelligence sectors that are critical for the military, intelligence, surveillance, or cyber-enabled capabilities" of China.[293] The order followed legislative proposals for outbound investment screening that had garnered bipartisan support in Congress and support from the White House,[294] but had drawn opposition from industry groups.[295] Here again, the United States is not acting alone. The EU is also considering measures to screen outbound investment into China, which, if adopted, could decrease concerns that a U.S.-only screening mechanism might "encourage foreign-headquartered firms to run capital through non-U.S. jurisdictions" to evade review.[296]

With respect to China, frictionless government is not limited to the *federal* government. U.S. states have also taken aim at China, Chinese companies, and Chinese nationals—including through actions that go beyond those taken by the federal government. For example, states have

[289] Exec. Order No. 13,959, 31 C.F.R. § 586 app. A (2023).
[290] See infra note 374 and accompanying text.
[291] Exec. Order No. 14,032, 31 C.F.R. § 586 app. B (2023).
[292] Exec. Order No. 14,105, 88 Fed. Reg. 54867, 54867–88, 54872 (Aug. 11, 2023).
[293] Id. at 54870.
[294] See Eichensehr & Hwang, supra note 31, at 581–82; see also Ellen Nakashima, White House Wants Transparency on American Investment in China, Wash. Post (July 13, 2022, 7:27 PM), https://www.washingtonpost.com/national-security/2022/07/13/china-investment-transparency/ (noting the Biden Administration's support for regulation of outbound investment in advanced Chinese industries).
[295] See Emily Benson & Margot Putnam, The United States Prepares to Screen Outbound Investment, Ctr. for Strategic & Int'l Stud. (Apr. 27, 2023), https://www.csis.org/analysis/united-states-prepares-screen-outbound-investment [https://perma.cc/A82U-QLRU].
[296] Id.

restricted inbound investment and real estate transactions, purporting to add to or supplement the restrictions CFIUS can impose.[297] Numerous states have adopted or are considering restricting foreign nationals' real estate purchases, especially purchases of agricultural land,[298] and "[w]hile many of the states considering a ban on foreign ownership do not mention specific countries in their bills, it's clear that some are targeting China."[299] Florida enacted a law in May 2023 that restricts real estate purchases by certain foreign nationals and explicitly singles out residents of China for more stringent restrictions and harsher penalties.[300] The ACLU filed a lawsuit on behalf of Chinese residents of Florida and a real estate firm arguing that the law violates equal protection and due process and is preempted by federal laws, including CFIUS.[301] The U.S. Court of Appeals for the Eleventh Circuit granted a preliminary injunction against the enforcement of the Florida real estate law.[302]

In addition, more than thirty states have banned TikTok on state-owned devices, and numerous public universities have banned TikTok on campus.[303] In May 2023, Montana became the first state to purport to ban TikTok in the state entirely, prohibiting the company's operations and barring app stores from providing the app for download in the state.[304] TikTok and TikTok users filed legal challenges, arguing, among other claims, that the ban violates the First Amendment, is preempted by federal

[297] See, e.g., Kristen E. Eichensehr, CFIUS Preemption, 13 Harv. Nat'l Sec. J. 1, 2 (2022) (discussing a Texas law restricting investments from China, among other countries).

[298] See J. David Goodman, How U.S.-China Tensions Could Affect Who Buys the House Next Door, N.Y. Times (Feb. 7, 2023), https://www.nytimes.com/2023/02/07/us/texas-china-ownership-real-estate-ban.html.

[299] Monica Potts, Why So Many States Want to Ban China from Owning Farmland, FiveThirtyEight (Feb. 16, 2023, 6:00 AM), https://fivethirtyeight.com/features/why-so-many-states-want-to-ban-china-from-owning-farmland/ [https://perma.cc/YG3C-PBG2].

[300] Fla. Stat. § 692.201–04 (2024); see Kayla Epstein, Chinese Citizens Sue Florida Over Property Buying Ban, BBC (May 23, 2023), https://www.bbc.com/news/world-us-canada-65688683 [https://perma.cc/44ZM-T5VF].

[301] First Amended Complaint at 1–3, 30–34, 39–42, Shen v. Simpson, 687 F. Supp. 3d 1219 (N.D. Fla. 2023) (No. 23-cv-00208), *appeal docketed*, No. 23-12737 (11th Cir. Aug. 23, 2023).

[302] Shen v. Fla. Comm'r of Agric., No. 23-12737 (11th Cir. Feb. 1, 2024) (order granting in part plaintiffs' motion for an injunction pending appeal).

[303] For a running list of state actions, see Restrictions on TikTok in the United States, Wikipedia, https://en.wikipedia.org/wiki/Restrictions_on_TikTok_in_the_United_States [https://perma.cc/5JHV-HMKH] (last visited Oct. 4, 2024).

[304] Mont. Code Ann. § 30-14-158 (2023); Sapna Maheshwari, Montana Governor Signs Total Ban of TikTok in the State, N.Y. Times (May 17, 2023), https://www.nytimes.com/2023/05/17/business/montana-tiktok-ban.html.

laws including the CFIUS statute and IEEPA, and constitutes an unconstitutional bill of attainder.[305] On November 30, 2023, the federal district court in Montana issued a preliminary injunction against the state's TikTok ban.[306] Warning of "the pervasive undertone of anti-Chinese sentiment that permeates the State's case and the instant legislation," the district court concluded that Montana's ban likely violates the First Amendment and dormant Commerce Clause and is preempted by the federal foreign affairs power and by CFIUS.[307] Montana has appealed to the U.S. Court of Appeals for the Ninth Circuit.[308]

The China example highlights several interesting points. First is simply the existence of frictionlessness with respect to a U.S. adversary with which the United States is not (yet) in an armed conflict. The China case study shows that armed conflict is not a necessary trigger to overcoming friction, and relatedly that frictionless situations can persist and ramp up over a period of years, even without a single acute trigger or ongoing armed conflict.

Second, to the extent that there is opposition to actions against China, it is coming from sources outside the political branches of the federal government, including U.S. allies, companies, and courts. U.S. allies have resisted or slow-rolled adopting restrictions on Huawei and semiconductor export controls, though they appear ultimately to have acted in line with U.S. wishes. Companies have also resisted, as evidenced by opposition from industry groups to outbound investment screening. More recently, U.S. companies have also tried to skirt U.S. export controls by producing semiconductors for the Chinese market that fall just outside of U.S. restrictions, prompting scolding from U.S. officials.[309] Courts too have introduced friction, including by ruling for Chinese companies challenging outbound investment restrictions, for WeChat and TikTok at the end of the Trump Administration, and most recently for TikTok again in its challenge to Montana's ban.

[305] See Complaint at 34–43, Alario v. Knudsen, 704 F. Supp. 3d 1061 (D. Mont. 2023) (No. 23-cv-00056); Complaint at 37–61, TikTok Inc. v. Knudsen, No. 23-cv-00061 (D. Mont. May 22, 2023).

[306] *Alario*, 704 F. Supp. 3d at 1068, 1088.

[307] Id. at 1073, 1078, 1084–87.

[308] Defendant's Notice of Appeal at 2, Alario v. Knudsen, No. 23-cv-00056 (D. Mont. Jan. 2, 2024), ECF No. 119.

[309] See David Shepardson, US in Talks with Nvidia About AI Chip Sales to China—Raimondo, Reuters (Dec. 12, 2023, 3:49 AM), https://www.reuters.com/technology/us-talks-with-nvidia-about-ai-chip-sales-china-raimondo-2023-12-11/.

Finally, because the frictionless era in China policy is still ongoing, we cannot provide the same retrospective assessment of policy-making that we have for other case studies. It is too early to make that judgment, but there are reasons for concern. Certainly the actions of some states in particular seem to target China and those associated with it for reasons that are not purely national security-based, raising concerns that racism and xenophobia may be driving policies, as they have in past eras of frictionless government.[310] In addition, as frictionlessness continues to spur the United States to ramp up actions against China, the risk increases that the ongoing accretion of U.S. policies will prompt outcomes that are counterproductive—such as sparking China to accelerate its domestic capacity to produce advanced semiconductors[311]—or dangerous—namely, prompting the outbreak of armed conflict. A recent MIT wargame simulating a political-economic crisis between the United States and China "highlighted the strong possibility that communication miscues and conflict escalation . . . may bedevil policymakers engaged in techno-economic conflict" and demonstrated that adversaries perceived defensive moves "as offensive, tit-for-tat responses [that] led to spiraling and escalation."[312]

C. Recurring Harms from Frictionless Foreign Policy

As the above examples reflect, there is a range of reasons to be concerned about getting U.S. foreign policy wrong, which is why we think it is important to ask skeptical questions of the government, even—or perhaps especially—in a frictionless setting. In particular, we see three main categories of harms that recur in frictionless government situations: sparking or escalating conflict, triggering actions by U.S. adversaries that are counterproductive to U.S. security goals, and unlawfully targeting domestic constituencies perceived to be linked to foreign adversaries.

[310] See supra notes 297–300 and accompanying text; see also Jia, supra note 28, at 654, 657.

[311] See, e.g., David Kirton & Max A. Cherney, Huawei's New Chip Breakthrough Likely to Trigger Closer US Scrutiny, Analysts Say, Reuters (Sept. 6, 2023, 10:08 AM), https://www.reuters.com/technology/huaweis-new-chip-breakthrough-likely-trigger-closer-us-scrutiny-analysts-2023-09-05/.

[312] George J. Gilboy & Eric Heginbotham, America Needs a Single Integrated Operational Plan for Economic Conflict with China, Lawfare (Dec. 17, 2023, 9:00 AM), https://www.lawfaremedia.org/article/america-needs-a-single-integrated-operational-plan-for-economic-conflict-with-china [https://perma.cc/N4LY-H9RX].

Perhaps the most significant concern is the risk of unintentionally sliding into war or escalating conflict. Professor Robert Jervis famously conceptualized the "spiral model" of international conflict, in which actions by states that are merely seeking to enhance their own security can create a vicious circle of security competition.[313] Fundamental attribution errors, illusions of transparency, and other "hawkish" biases contribute to that spiral. When the United States takes steps such as those described in Sections II.A–B to improve its own security, adversaries are likely to perceive these steps as aggressive and react to having their security reduced, including in ways that could further imperil U.S. security and make the outbreak of conflict more likely.[314] As the historical examples show, frictionless government can cause a related problem of fostering the expansion of a conflict once it begins. Broad authorizations for the use of force, passed by Congress in the heat of the moment, have allowed the executive to expand or escalate conflict beyond what Congress initially envisioned and to do so without the focused consideration that the need for another authorization vote would prompt. Authorizations passed in frictionless moments have proven to have a long tail.

Another category of harms from frictionless government comes from the reactions of countries targeted by U.S. policies—reactions that are counterproductive to the policy goals the United States intends to achieve. While the escalatory spiral described above might fall in this category, the U.S. use of economic tools of national security may provide additional examples. The incautious imposition of sanctions or export controls, for instance, driven by strong pressure from Congress or from public fervor about an outside threat, might stimulate their targets to avoid the U.S. financial system or to develop indigenous industries faster than they otherwise would in order to have an alternative source of products that is not subject to U.S. restrictions.[315] Even non-targeted countries or companies might be incentivized to reengineer their technologies to avoid U.S. intellectual property or components so they can escape U.S.

[313] Robert Jervis, Perception and Misperception in International Politics 62–76 (1976).

[314] See, e.g., Charles L. Glaser, The Security Dilemma Revisited, 50 World Pol. 171, 174–76 (1997); Ken Booth & Nicholas J. Wheeler, The Security Dilemma: Fear, Cooperation and Trust in World Politics 1–10 (2008).

[315] See, e.g., Sheehan, supra note 282; Paul Scharre, Decoupling Wastes U.S. Leverage on China, Foreign Pol'y (Jan. 13, 2023, 8:00 AM), https://foreignpolicy.com/2023/01/13/china-decoupling-chips-america/ [https://perma.cc/8CGZ-YE38].

restrictions and serve markets in targeted countries—moves that will undercut the market for U.S. technologies. These tools thus risk imposing economic harm on U.S. companies in the near term and being time-limited in their efficacy in the long term.[316]

Finally, several of the examples discussed above illustrate that it is easy in frictionless times for Congress to enact new laws or for the executive to deploy existing statutes in a way that unlawfully targets domestic constituencies perceived to have links to foreign adversaries. There is a large body of literature that details ways in which the United States has infringed on civil liberties when confronted with emergencies.[317] Although civil liberties may return to their prior equilibrium once friction reenters the system, affected individuals suffer real harm during the frictionless period, and the United States can suffer long-term reputational damage that makes its rights-focused diplomacy much less persuasive.[318] Other states may also point to the U.S. measures to defend their mistreatment of people under their control. As one scholar notes, "the flawed rationales for refusing to treat human beings with dignity—based on their religious beliefs or ethnicity or country of origin—because they supposedly pose a grave security risk, can and has been employed by a host of autocratic governments from Beijing to Budapest."[319] The costs of infringing civil liberties have a direct impact on vulnerable populations and both direct and indirect impacts on the United States.

With these harms in mind, the next Part identifies ways to avoid them by reintroducing friction into frictionless government situations.

[316] Cf. Sarah Kreps & Paul Timmers, Bringing Economics Back Into EU and U.S. Chips Policy, Brookings Inst. (Dec. 20, 2022), https://www.brookings.edu/articles/bringing-economics-back-into-the-politics-of-the-eu-and-u-s-chips-acts-china-semiconductor-competition/ [https://perma.cc/VM9A-XNCZ] (discussing how the U.S. chips policy has "rankled allies in Europe").

[317] See, e.g., David Cole & James X. Dempsey, Terrorism and the Constitution 1 (2d ed. 2002); Kathleen M. Sullivan, Under a Watchful Eye, *in* The War on Our Freedoms 128, 128–46 (Richard C. Leone & Greg Anrig, Jr. eds., 2003). But see Vermeule, supra note 96, at 1156.

[318] See Christopher Preble, The Consequences of a U.S. Overreaction to the Perceived Threat of Terrorism, Atl. Council (Nov. 1, 2021), https://www.atlanticcouncil.org/commentary/article/the-consequences-of-a-us-overreaction-to-the-perceived-threat-of-terrorism/ [https://perma.cc/V9CY-SM7B].

[319] Id.

III. RESTORING FRICTION TO FOREIGN POLICY

How can we reintroduce some level of checks and balances into frictionless government scenarios as quickly as possible, to double-check the executive's work and ensure that its approach is sensible, lawful, and durable?

Some of the checks and balances detailed in the remainder of this Part are similar to those at play in normal policy-making processes, but what distinguishes frictionless government is that the checks may need to be deliberately introduced. Disagreements and points of opposition arise organically in most policy-making processes. For example, congressional votes are often closely divided, and executive branch agencies engage in robust disputes in the inter-agency process. But in frictionless government, the speed bumps and veto gates that are present in normal policy-making processes fall away. Recreating the value of the deliberation and testing that adversarial positions produce in normal policy-making in frictionless government will require concerted effort and potentially the creation of structures to ensure pushback against the orthodoxy.

In addition to deliberately replicating the kinds of traditional checks from Congress, the courts, and the inter-agency process that arise in the more common policy-making settings (which we characterize as "self-imposed friction"), checks on the policy-making process can sometimes come from sources outside of the U.S. federal government altogether. We therefore explore possible checks arising from regulated companies, U.S. state and local governments, and U.S. allies, while recognizing that these external checks will necessarily be more stochastic and driven by interests that do not necessarily align with those of the U.S. government.[320]

Our goal is both descriptive and prescriptive: we identify the possible checks and propose ways to harness them productively to diffuse power, improve the quality of decision-making, or both. But all of these checks—both self-imposed and external—are imperfect. There is no single silver bullet that will halt or reverse a frictionless government situation. Taken together, though, different kinds of actors pushing back, even in some of the modest ways that we highlight below, can make a material difference

[320] For discussions of non-traditional checks on the executive in the national security setting, see generally Ashley Deeks, Secrecy Surrogates, 106 Va. L. Rev. 1395 (2020); Kristen E. Eichensehr, Digital Switzerlands, 167 U. Pa. L. Rev. 665 (2019).

in improving the quality of decision-making and potentially averting the harms that frictionless government often produces.

A. Self-Imposed Friction

Some of the most important sources of friction or potential friction fall within the control of the political branches—the executive and Congress—themselves. We call these techniques "self-imposed friction" because the executive and Congress can create the friction themselves, acting separately or together. Self-imposing these techniques in advance of foreign policy crises would effectively serve as pre-commitment devices.[321] Scholars have identified a range of potential gains that arise when "leaders ced[e] control over certain policy domains where it is apparent that the structural incentives to pursue perverse or counterproductive outcomes are too strong to defy in any given moment."[322] As the primary actor on national security, the executive branch is well-positioned to police its own policy-making. Process reforms within the executive branch are some of the easiest adjustments to make. They require no new legal authorities, can be implemented quickly, and do not require disclosures of sensitive information beyond the executive.

One might wonder whether the executive would really slow down its own decision-making processes. Although perhaps counter-intuitive, past practice suggests the answer is sometimes yes. In a range of situations, the executive has imposed internal deliberative processes on itself with the goals of improving the quality of decision-making, reducing the likelihood of litigation, and upholding rule of law values. The White House's process for authorizing lethal strikes against terrorist actors,[323] its offensive cyber operations process,[324] and the Department of Justice's

[321] For discussions of precommitment devices, see, for example, Jon Elster, Ulysses Unbound: Studies in Rationality, Precommitment, and Constraints (2000); Thomas Schelling, Choice and Consequence (1984).

[322] Jon Michaels, The (Willingly) Fettered Executive: Presidential Spinoffs in National Security Domains and Beyond, 97 Va. L. Rev. 801, 851 (2011) (collecting sources).

[323] White House, Presidential Policy Memorandum Governing Direct Action Counterterrorism Operations Outside Areas of Active Hostilities, https://www.documentcloud.org/documents/23867592-presidential-policy-memorandum?responsive=1&title=1 [https://perma.cc/HCU9-G4Y9] (declassified June 23, 2023).

[324] Ellen Nakashima, The Biden Administration Is Refining a Trump-Era Cyber Order, Wash. Post (May 13, 2022, 7:16 AM), https://www.washingtonpost.com/politics/2022/05/13/biden-administration-is-refining-trump-era-cyber-order/.

state secrets privilege policy[325] are all examples of self-imposed friction on national security decision-making to achieve one or more of those goals. Similarly, Congress can help things along by nudging the executive branch to impose friction on itself or mandating that the executive branch do so.

This Section focuses on three types of friction—forcing dissent, mandating reason-giving, and instituting policy off-ramps—that the executive and Congress can and should impose on themselves. The next Subsection addresses how sources of friction *external* to the political branches may also deploy some of these techniques.

1. Forced Dissent

One way any given set of actors can bolster friction, and therefore checks on policy-making, is to require some subset of the group to dissent. The idea of enforcing dissent to foster better outcomes is not a new one. It has analogues in religious traditions, particularly the Catholic Church's practice of appointing a "devil's advocate" to argue against the canonization of a particular saint.[326] Secular philosophers have also suggested the need to foster dissent. John Stuart Mill, for example, argued that when opinion on an issue consolidates, "[t]he loss of so important an aid to the intelligent and living apprehension of a truth, as is afforded by the necessity of explaining it to, or defending it against, opponents . . . is no trifling drawback," and he therefore urged that there should be "some contrivance" to substitute for naturally occurring disagreement.[327]

[325] Memorandum from the Att'y Gen., U.S. Dep't of Just., to Heads of Exec. Dep'ts & Agencies & Dep't Components, Supplement to Policies and Procedures Governing Invocation of the State Secrets Privilege (Sept. 30, 2022), https://www.justice.gov/d9/pages/attachments/2022/09/30/supplement_to_policies_and_procedures_governing_invocation_of_the_state_secrets_privilege.pdf [https://perma.cc/AM3Q-AATJ].

[326] See 4 New Catholic Encyclopedia 705–06 (Berard Marthaler ed., 2d ed. 2003). Jewish Talmudic law introduced a substantive, not just procedural, requirement with respect to (lack of) dissent: "The Talmud rules that a unanimous verdict by the Sanhedrin (Jewish court) must be thrown out and the defendant must be exonerated[.]" Ephraim Glatt, The Unanimous Verdict According to the Talmud: Ancient Law Providing Insight into Modern Legal Theory, 3 Pace Int'l L. Rev. Online Companion 316, 318 (2013), https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1034&context=pilronline; see also Irene Merker Rosenberg & Yale L. Rosenberg, Guilt: Henry Friendly Meets the MaHaRaL of Prague, 90 Mich. L. Rev. 604, 619 n.92 (1991) (describing the views of an eminent sixteenth-century Talmudic scholar on the rule prohibiting unanimity).

[327] John Stuart Mill, On Liberty and Other Writings 45 (Stefan Collini ed., 1989).

Picking up on Mill's suggestion, Professor Frederick Schauer has urged that:

> If we think . . . that . . . it is essential to challenge accepted ideas as a way of advancing knowledge or avoiding intellectual complacency, then it is important not only to protect the challengers, but to ensure that such challengers exist, even to the point of creating them—as the Catholic Church does with its devil's advocate—and thus, if necessary, to take affirmative steps to create those institutions to ensure that there actually will be challenges.[328]

This approach is easy to translate to the foreign policy realm: During the Cuban Missile Crisis, Attorney General Robert Kennedy proposed that an official play the role of "devil's advocate" to ensure that someone argued vigorously against proposed courses of action.[329] Attorney General Kennedy himself ultimately "was the man assigned to scrutinize and regroup [President John F. Kennedy's] counselors so that a Bay of Pigs could never happen again."[330] As another example, the State Department after-action review of the 2021 withdrawal from Afghanistan reportedly included a recommendation that, in future evacuation situations, the Department should employ a "red team" to challenge assumptions.[331] And the Defense Department has long employed red teaming to challenge its own norms and assumptions.[332]

Executive branch reforms could help to ensure an environment in which internal dissenting opinions about foreign policy decisions are encouraged. Various Presidents have required that dissenting views about proposed covert actions be presented to them before they decide whether

[328] Frederick Schauer, Transparency in Three Dimensions, 2011 U. Ill. L. Rev. 1339, 1355. Secretary of Defense Robert McNamara, reflecting on the Vietnam War, identified features of unilateral executive decision-making that hindered clear-headed policy-making, including a sense of crisis overload, a press for consensus, and intolerance of dissent. McNamara, supra note 168, at 192, 264.

[329] Robert F. Kennedy, Thirteen Days: A Memoir of the Cuban Missile Crisis 86 (1999).

[330] Michael R. Beschloss, The Crisis Years: Kennedy and Khrushchev 1960–1963, at 304 (1991).

[331] Kylie Atwood & Jennifer Hansler, State Department Review of US Withdrawal from Afghanistan Includes Far More Findings Than White House Document, CNN (Apr. 7, 2023, 11:49 AM), https://www.cnn.com/2023/04/07/politics/afghanistan-withdrawal-state-department-review/index.html [https://perma.cc/AEJ4-CYCM].

[332] See, e.g., Def. Sci. Bd. Task Force, Off. of the Under Sec'y of Def., The Role and Status of DoD Red Teaming Activities 1–3 (Sept. 2003), https://irp.fas.org/agency/dod/dsb/redteam.pdf [https://perma.cc/692V-29MB].

to authorize the action.[333] The State Department has a longstanding "dissent channel" allowing employees to communicate contrary views on policy matters to high-level department leaders[334] while ensuring that those who use the channel are protected from retaliation.[335] Similar channels could be established at other agencies.[336] Further, each agency should share such dissent communications with the White House as a matter of course to ensure that the national security leadership is aware of these dissenting views.

Dissent could also effectively be mandated. For example, the White House should require red teaming of national security decisions in order to combat groupthink. As the State Department suggested in the aftermath of the Afghanistan withdrawal, personnel assigned to red teams "play the part of skeptics, competitors, or enemies," and function as "designated in-house dissenters."[337] In general, red teams can pressure-test a proposed policy decision in a range of directions, including whether it will be too assertive or too tentative. Red team participants could also game out a range of first- and second-order responses by international actors, both allies and adversaries, and thus promote longer-term thinking than participants in an immediate crisis might undertake.

Congress could also play a constructive role by mandating that the executive consider or promote dissenting views when making important

[333] Exec. Order No. 12,333 § 1.2(b), 3 C.F.R. § 200 (1982), *reprinted as amended in* 50 U.S.C. § 3001; Loch K. Johnson, Covert Action and Accountability: Decision-Making for America's Secret Foreign Policy, 33 Int'l Stud. Q. 81, 96 (1989).

[334] For the history of the dissent channel, see Department of State's Dissent Channel Revealed, Nat'l Sec. Archive, https://nsarchive.gwu.edu/briefing-book/foia/2018-03-15/department-states-dissent-channel-revealed [https://perma.cc/C3TU-F54H]; see also U.S. Dep't of State, 2 Foreign Affairs Manual § 070 (2018), https://fam.state.gov/fam/02fam/02fam0070.html [https://perma.cc/EY39-FNZC] (establishing regulations for the Department's Dissent Channel).

[335] See 2 Foreign Affairs Manual, supra note 334, § 075.1. For a recent debate about whether the State Department should provide a copy of a dissent channel communication about the Afghanistan withdrawal to Congress, and for the House Foreign Affairs Committee Chairman's agreement to redact the names of the cable's signers, see Daniel Fried, Congress Can Investigate the Afghanistan Withdrawal Without Compromising a Vital Dissent Channel, Just Sec. (Apr. 7, 2023), https://www.justsecurity.org/85891/congress-can-investigate-the-afghanistan-withdrawal-without-compromising-a-vital-dissent-channel/ [https://perma.cc/H8GN-GQRV]; James F. Jeffrey, The State Department Should Provide Congress the Dissent Channel Cable on the Afghanistan Withdrawal, Just Sec. (Apr. 13, 2023), https://www.justsecurity.org/85969/the-state-department-should-provide-congress-the-dissent-channel-cable-on-the-afghanistan-withdrawal/ [https://perma.cc/8A7M-VAZ9].

[336] See Katyal, supra note 56, at 2329.

[337] Zegart, supra note 89, at 133.

defense, foreign policy, and national security decisions. Congress could legislatively require red teaming in these situations, effectively putting the executive branch through its paces. Congress could also help to promote dissenting views by ensuring that it invites to its hearings witnesses who will take a distinct perspective from the executive. Forcing executive branch witnesses to engage with witnesses who take contrasting views would force the executive (and Congress) to at least hear and consider contrary opinions.

2. Mandated Reason-Giving

Another strategy to bolster productive friction is to require reason-giving. As one of us has written, "Reason-giving—the process of offering justifications for a decision—is essential to our system of governance. . . . [P]ublic reason-giving may improve the quality of decisions, deter abuses of authority, and enhance fidelity to legal standards."[338]

Reason-giving can take different forms. The executive can require itself to give reasons. In the intelligence sphere, for instance, giving the rationales behind intelligence judgments "can . . . ensure that the reasons behind a judgment are not self-serving" and "allow others to identify potential flaws in the reasoning—and thus possibly in the judgments themselves."[339] One agency may also force another agency to give reasons: the Department of Justice has decided that it will only assert the state secrets privilege in court on behalf of another agency when the latter agency has explained why disclosure of certain information is likely to cause significant harm to national security.[340] Reason-giving requirements test an executive actor's commitment to a course of action, the rationales behind that action, and its willingness to be held accountable for its choices.

Although the U.S. system does not require members of *Congress* to give reasons when they propose or vote on legislation, there are a range

[338] Deeks, supra note 55, at 615; see also John E. Finn, Constitutions in Crisis: Political Violence and the Rule of Law 30–34 (1991) ("[T]he necessity of producing reasons limits the range of actions that can be undertaken, for not all behavior can be supported by reason.").

[339] Deeks, supra note 55, at 649.

[340] Memorandum from the Att'y Gen., U.S. Dep't of Just., to the Heads of Exec. Dep'ts & Agencies & Dep't Components, Policies and Procedures Governing Invocation of the State Secrets Privilege 1 (Sept. 23, 2009), https://www.justice.gov/sites/default/files/opa/legacy/2009/09/23/state-secret-privileges.pdf [https://perma.cc/VM2A-8Z2C].

of ways to require or prompt the *executive* to give reasons for its policies. First, Congress can require reason-giving by statute. It has done so, for instance, in the covert action statute, which requires the executive to give reasons when it limits congressional access to a presidential finding.[341] More broadly, Congress could require the executive to produce and report to Congress a strategy for addressing the particular national security challenge at hand that integrates the tools that various agencies deploy and explains how they work together to achieve particular goals. Such a strategy document could be much more focused and specific than the public National Security Strategy that each presidential administration releases or the annual threat report from the Director of National Intelligence.

3. Policy Off-Ramps

A final tactic for creating self-imposed friction is to build in policy off-ramps. The most obvious way to ensure that a particular statutory authority is only temporary is to include a sunset clause. In fact, Congress attached four-year sunset clauses to sixteen authorities within the 2001 PATRIOT Act, passed on the heels of the September 11 attacks.[342] Section 702 of the FISA Amendments Act of 2008 contained a five-year sunset clause; Congress has amended and extended that authority several times—sometimes after very robust debate.[343] And, as noted below, Congress allowed Section 215 of the PATRIOT Act, pursuant to which the executive engaged in bulk telephonic metadata collection, to sunset after 15 years.[344]

Another related off-ramp approach for improving executive branch policies would be for the White House or Congress to mandate periodic reviews of the efficacy of tools of national security by the agencies

[341] 50 U.S.C. § 3093(c)(5)(A)–(B) (2018). For other examples, see Deeks, supra note 55, at 643 n.124.

[342] U.S. Dep't of Just., USA PATRIOT Act: Sunsets Report (Apr. 2005), https://www.justice.gov/archive/olp/pdf/sunsets_report_final.pdf [https://perma.cc/BF2F-4D33].

[343] See Adam Klein, FISA Section 702 (2008–2023?), Lawfare (Dec. 27, 2022, 8:30 AM), https://www.lawfaremedia.org/article/fisa-section-702-2008-2023 [https://perma.cc/GR29-C2CW].

[344] Charlie Savage, House Departs Without Vote to Extend Expired F.B.I. Spy Tools, N.Y. Times (Mar. 27, 2020), https://www.nytimes.com/2020/03/27/us/politics/house-fisa-bill.html; Ron Wyden, The Facts About Electronic Surveillance Reform, Just Sec. (Jan. 31, 2024), https://www.justsecurity.org/91633/the-facts-about-electronic-surveillance-reform/ [https://perma.cc/L43R-JE4M].

charged with administering them, as well as an overall review—perhaps by the NSC—that considers holistically the extent to which the U.S. policy is accomplishing its intended goals. A recent study of periodic executive branch reviews required by statute or executive order found that there are ways to structure such reviews as "continuous learning opportunities," especially in areas where technology or society is changing quickly.[345] Periodic reviews may be particularly relevant in instances where the United States relies on economic tools of national security, such as economic sanctions or export controls. A 2019 Government Accountability Office ("GAO") study of economic sanctions reported that the Departments of Treasury, State, and Commerce individually assess the impact of sanctions on particular targets, but noted that "there is no policy or requirement for agencies to assess the effectiveness of sanctions programs in achieving broad policy goals."[346] Although agency officials reported that they feed information into inter-agency discussions coordinated by NSC about broader policy goals, they also identified difficulties in assessing efficacy, including shifting U.S. policy goals and lack of reliable data.[347] Subsequent to the GAO report, the Treasury Department published a review of its sanctions policy that might serve as a model for agency-specific periodic reviews or an executive-wide policy review.[348] However, the review was also limited, focusing on "the framework guiding imposition of economic and financial sanctions and . . . potential operational, structural, and procedural changes to improve Treasury's ability to use sanctions now and in the future."[349] It was self-consciously not "an assessment of the 37 existing sanctions programs" or Office of Foreign Assets Control designations, "nor a full examination of all economic statecraft tools."[350]

[345] Lori Bennear & Jonathan Wiener, Report for the Administrative Conference of the United States: Periodic Review of Agency Regulation 50 (June 7, 2021), https://www.acus.gov/sites/default/files/documents/ACUS%20-%20Periodic%20Review%20-%20Periodic%20Review%20of%20Agency%20Regulation%202021%2006%2007%20final%20%281%29.pdf [https://perma.cc/67WF-4TVQ].

[346] U.S. Gov't Accountability Off., Economic Sanctions: Agencies Assess Impacts on Targets, and Studies Suggest Several Factors Contribute to Sanctions' Effectiveness 18 (Oct. 2019), https://www.gao.gov/assets/gao-20-145.pdf [https://perma.cc/87AY-788V].

[347] Id.

[348] U.S. Dep't of Treasury, The Treasury 2021 Sanctions Review 3 (Oct. 2021), https://home.treasury.gov/system/files/136/Treasury-2021-sanctions-review.pdf [https://perma.cc/A8JG-VZ8H] [hereinafter Sanctions Review] (describing the review process).

[349] Id.

[350] Id.

Periodic review, especially if reported to Congress, would prompt relevant decision-makers to reconsider policies made at a time of broad consensus and possibly with undue speed. There may be a temptation to allow the executive to file such a report in a classified format, but to the extent possible, the reports should be made public. Publication would enable other constituencies—including scholars, industry, and civil society—to challenge the government's conclusions or supplement them with additional information.

The next Section turns from self-imposed friction to friction that actors outside the U.S. government can impose on U.S. government policy-making.

B. External Sources of Friction

Beyond the measures that the executive and Congress can impose on themselves or each other to reintroduce friction into the policy-making process, friction can also arise from actors outside the political branches. In past work, we have each considered the existence and operation of non-traditional checks on the U.S. government, including from companies, foreign governments, and state and local governments.[351] The press, too, can itself produce friction or amplify friction arising from these sources. Although which categories of these actors are most relevant will vary from situation to situation, all of them, along with other parties targeted or regulated by U.S. actions, have the potential to throw sand in the gears in situations of frictionless government. This Section discusses the capacity of these actors to introduce friction and then considers how to channel those actions productively.

To be sure, self-imposed friction and external friction are not entirely distinct. As discussed above, Congress in particular may bring dissenting voices from outside the government into dialogue with government officials by inviting speakers to join hearings with government officials.[352] In other instances, certain executive branch officials choose to meet with outside voices and via that process may alter their own views in ways that create friction within the inter-agency process. But in other

[351] See generally Ashley Deeks, Checks and Balances from Abroad, 83 U. Chi. L. Rev. 65 (2016); Deeks, supra note 320; Kristen E. Eichensehr, Public-Private Cybersecurity, 95 Tex. L. Rev. 467 (2017). See Eichensehr, supra note 320, at 672–79.

[352] See supra Section III.A.

instances, the sources of external friction act largely outside the control of executive or congressional actors.

While we take a capacious view of the entities that may serve as external sources of friction in U.S. policy-making processes, they play the role of checks only contingently, not inherently. All of the entities we discuss here have their own interests, separate and apart from serving as counterweights to U.S. federal government policies. In some cases, those interests may be adverse to those of the United States. Corporations' motives for resisting government policies, for example, may well stem from self-interested business concerns,[353] but at the same time, an absence of public motive does not necessarily undermine their efficacy in creating friction.[354] There are steps that the government and the public can take to stimulate healthy external checks, but they cannot fully control them. Nor should the government or the public depend on any single check as full protection against the perils of frictionlessness. All of the potential checks are imperfect, and so reliance on them should be layered where possible so that if one check is weak or fails entirely, others provide safeguards.

This Section considers three tactics by external actors that may introduce friction: commencing litigation, implementing (or obstructing the implementation of) policies, and lobbying.

1. Litigation

The first tactic of friction that external actors employ is litigation—that is, suing to challenge actions taken by the U.S. government. Careful readers will have noticed that we did not list the judiciary among the self-imposed sources of friction. Instead, we discuss the role of courts here as part of external sources of friction in foreign relations because the judiciary's involvement must be triggered by actors external to the U.S. government who decide to sue.

Of course, courts' role as a potential check on the political branches on national security issues faces a number of limitations.[355] Some are jurisdictional. Parties bringing suit must satisfy standing requirements,[356]

[353] See, e.g., Eichensehr, supra note 320, at 691–93.

[354] See, e.g., Deeks, supra note 320, at 1438–42; Deeks, Checks and Balances from Abroad, supra note 351, at 82–84.

[355] See, e.g., Harold Hongju Koh, The National Security Constitution in the Twenty-First Century 110 (2024) ("Whether on the merits or on justiciability grounds, the courts have ruled for the president in [foreign affairs] cases with striking regularity.").

[356] Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

and their claims must not involve a political question.[357] Other limitations come from congressional statutes, some of which leave broad scope for executive discretion. IEEPA, for example, allows the President to declare a national emergency and exercise a variety of emergency powers whenever he determines that there is "any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States."[358] Still other limitations on courts' checking function come from the deference that judges traditionally afford to the executive on foreign relations and national security issues.[359]

Despite these limitations, external parties' decision to seek judicial review can serve as a useful source of friction. The mere filing of cases operates as a check via forced reason-giving. Even when it is unclear whether a court will conclude that challengers satisfy standing requirements, the government must legally justify its decisions and be subject to external evaluation. The mere existence of the external reviewer in the form of the courts reverberates within the executive branch. Knowing that economic national security actions are likely to be subject to at least some judicial review may encourage executive actors to proceed more deliberately and carefully in their internal decision-making. The prospect of judicial review may also empower different actors within the executive branch—notably Justice Department and agency lawyers who ultimately must defend the executive in court—to insist upon greater process and testing of decision-making and the evidence on which it is based.[360] In other words, the mere prospect of the external separation of

[357] Rucho v. Common Cause, 139 S. Ct. 2484, 2494 (2019).

[358] 50 U.S.C. § 1701(a).

[359] See, e.g., Holder v. Humanitarian L. Project, 561 U.S. 1, 34 (2010). In *Youngstown* itself, Justice Jackson noted that presidential actions pursuant to statutes are "supported by the strongest of presumptions and the widest latitude of judicial interpretation." 343 U.S. 579, 637 (1952) (Jackson, J., concurring). Edward Swaine, who reviewed more than fifty cases falling into Category 1, concluded that "[s]hould presidential action be deemed to fall within Category One, it verges on immunity from judicial challenge." Swaine, supra note 18, at 311. For additional academic discussions of judicial deference to the executive in foreign affairs and national security, see, for example, Curtis A. Bradley, Chevron Deference and Foreign Affairs, 86 Va. L. Rev. 649 (2000); Robert M. Chesney, National Security Fact Deference, 95 Va. L. Rev. 1361 (2009); Ashley S. Deeks, The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference, 82 Fordham L. Rev. 827 (2013); Kristen E. Eichensehr, Foreign Sovereigns as Friends of the Court, 102 Va. L. Rev. 289 (2016).

[360] See Magill & Vermeule, supra note 54, at 1079–80.

powers operating as a check on the executive may invigorate greater internal separation of powers as well.

Moreover, courts have sometimes reined in the political branches' excesses in foreign affairs and national security. In *Youngstown* itself, steel companies sued to block President Truman's seizure of steel mills during the Korean War, and despite the executive's invocation of the Commander-in-Chief Clause, the Supreme Court sided with the companies.[361] The historical examples in Part I show that the courts can play a checking role even in frictionless situations, at least eventually. In *Ex parte Endo*, for example, the Supreme Court held that the War Relocation Authority that was created pursuant to Executive Order 9066 and ratified by Congress lacked authority to detain loyal Japanese Americans.[362] When the ACLU challenged the government's use of Section 215 of the PATRIOT Act, a post-September 11 statute, to collect metadata on all U.S. telephone calls, the Second Circuit held that the government's program exceeded the scope of what Congress had authorized.[363] Even in these cases, however, the courts have often decided cases narrowly.[364]

The U.S. government's recent turn toward using economic tools of national security as the "first resort" to address national security concerns may open the door to courts playing an even more robust role than they have with respect to other national security-related issues for several reasons.[365]

First, economic tools often operate transparently to regulate individuals and entities who can then establish standing to challenge the government's actions. As regulated parties, individuals or companies

[361] 343 U.S. at 587 (majority opinion).

[362] 323 U.S. 283, 297–98 (1944).

[363] ACLU v. Clapper, 785 F.3d 787, 826 (2d Cir. 2015). The Second Circuit also concluded that Section 505 of the PATRIOT Act violated the First Amendment. John Doe, Inc. v. Mukasey, 549 F.3d 861, 864 (2d Cir. 2008).

[364] *Endo*, 323 U.S. at 297, 300; ACLU v. Clapper, 785 F.3d at 824. And, of course, the Court upheld the detention of Japanese American Fred Korematsu on the basis of military necessity on the same day as the *Endo* decision, concluding that the provision of Executive Order 9066 that required him to leave a designated area was constitutional. Korematsu v. United States, 323 U.S. 214, 219–23 (1944). But see Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) ("*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution'" (citing *Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting))).

[365] Sanctions Review, supra note 348, at 2. For additional exploration of the role of courts in economically focused national security cases, see Eichensehr & Hwang, supra note 31, at 583–94.

subjected to economic sanctions or prohibited from exporting products will often be able to show an actual or imminent injury that is concrete and particularized and caused by governmental action.[366] The transparent nature of economic regulations and their targets differentiates these cases from those in which courts have determined that plaintiffs cannot show the injury in fact or causation necessary to challenge other kinds of U.S. national security programs, including where the underlying program at issue was classified.[367]

Second, the fact that the executive branch's use of economic tools of national security largely depends on authority delegated by congressional statutes may make it harder for the executive to insulate its actions by invoking the political question doctrine. In *Zivotofsky v. Clinton*, the Supreme Court declined to hold that a claim arising from a statute allowing individuals born in Jerusalem to ask the State Department to list Israel as their place of birth on their passports posed a political question, asserting that "[t]he existence of a statutory right . . . is certainly relevant to the Judiciary's power to decide Zivotofsky's claim."[368] The Court explained that the judiciary is "not being asked to supplant a foreign policy decision of the political branches with the courts' own unmoored determination of what United States policy toward Jerusalem should be," but instead to "decide if Zivotofsky's interpretation of the statute is correct, and whether the statute is constitutional"—actions the Court called "a familiar judicial exercise."[369] The existence of statutes authorizing executive actions with respect to economic tools distinguishes challenges to such actions from other instances within and outside the national security sphere where courts have held that the political question doctrine bars review.[370]

Third, even where statutes limit judicial review of some aspects of national security-related decisions, courts have avoided construing such restrictions to preclude *all* judicial review. For example, the D.C. Circuit in *Ralls Corp. v. CFIUS* considered and rejected the executive branch's

[366] *Lujan*, 504 U.S. at 560.

[367] See, e.g., Clapper v. Amnesty Int'l, 568 U.S. 398, 402 (2013).

[368] 566 U.S. 189, 196 (2012).

[369] Id.; see also Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986) ("[T]he courts have the authority to construe treaties and executive agreements, and it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts.").

[370] See, e.g., Rucho v. Common Cause, 139 S. Ct. 2484, 2506–08 (2019); Jaber v. United States, 861 F.3d 241, 248–50 (D.C. Cir. 2017).

argument that the CFIUS statute's prohibition on judicial review barred the court's consideration of procedural due process claims brought by a company subject to a presidential divestment order.[371] The court concluded that "due process requires, at the least, that an affected party be informed of the official action, be given access to the unclassified evidence on which the official actor relied and be afforded an opportunity to rebut that evidence."[372]

Fourth, as one of us has argued elsewhere, it is an open question whether courts will apply their usual deference to the executive's national security claims when the courts confront cases involving economic national security tools, though some limited data points suggest the answer may be no.[373] For example, two Chinese companies successfully challenged their inclusion on the Trump administration's outbound investment ban list of companies linked to China's military.[374] In granting a preliminary injunction to one of the companies, the district court acknowledged that courts "afford heightened deference to an agency's determination when it concerns national security,"[375] but concluded that "[d]eference is only appropriate when national security interests are actually at stake, which the Court concludes is not evident here."[376] Economically focused national security claims may provoke greater skepticism among judges because they involve longer term, less concrete risks than, for example, the threat of terrorism, or because the agency actions involve commercial issues that are familiar to judges from contexts outside of national security.[377]

One pair of scholars has argued that courts should be attuned to factors that may be proxies for policy-making friction. Specifically, Levinson and Pildes have suggested that judges should take into account the separation of parties in cases challenging executive action.[378] They argue that courts should shade their interpretation of congressional

[371] 758 F.3d 296, 311 (D.C. Cir. 2014).

[372] Id. at 319.

[373] See Eichensehr & Hwang, supra note 31, at 584–94.

[374] See Xiaomi Corp. v. Dep't of Def., No. 21-cv-00280, 2021 WL 950144, at *1 (D.D.C. Mar. 12, 2021); Luokung Tech. Corp. v. Dep't of Def., 538 F. Supp. 3d 174, 178–79 (D.D.C. 2021).

[375] *Luokung Tech. Corp.*, 538 F. Supp. 3d at 182.

[376] Id. at 195.

[377] For more discussion of the possibility that judges may alter their approach to deference on economically focused national security claims, see Eichensehr & Hwang, supra note 31, at 590–91.

[378] Levinson & Pildes, supra note 42, at 2354–55.

authorizations to the President based on whether Congress passed the authorization during unified or divided government, treating authorizations passed during unified government more restrictively and ones during divided government more generously.[379] They explain that "[j]udicial review may be most needed as a supplemental source of checks and balances in eras of strongly unified government, when partisan majorities pursue linked aims through the political branches without any internal check."[380] But what their account misses is the frictionless situations where the government is even more strongly unified because *bipartisan* majorities are acting across branches. Their suggestion that judges generously construe authorizations passed in times of divided government would exacerbate the disappearance of checks in frictionless government situations. Just as the separation of powers falls short of the Madisonian ideal, so too can the separation of parties. Judges should not treat the existence of divided government as a guarantee that authorizations are the result of vigorous contestation within and between the political branches. It is precisely when there is a total breakdown of separation of powers *and of parties* that some other check—possibly a judicial one—becomes crucial.[381]

Although we do not believe that every suit that a plaintiff brings to challenge government policies is normatively desirable—and thus we do not offer prescriptions for how to increase litigation during periods of frictionlessness—litigation does provide two obvious virtues: it opens the door for the courts to step in to protect individuals, and it tests the legality of government policy, which often will remain in place during the course of the litigation and will be blocked only if the court finds it unlawful. At the very least, therefore, we think that Congress should avoid enacting legislation that strips courts of jurisdiction or blocks causes of action during periods of frictionlessness.

[379] Id.

[380] Id. at 2368.

[381] To their credit, Levinson and Pildes acknowledge that it is "hard to imagine courts expressly making legal doctrine turn on the partisan configuration of government," but they note that "it is easier to imagine them doing so *sub rosa*." Id. at 2355. We do not propose that courts' legal interpretations should vary based on the extant political situation and indeed see substantial risk in courts drawing potentially false reassurance from divided government.

2. Policy Implementation

U.S. foreign policy does not operate in a vacuum. For its policies to be effective, the United States often needs, or at least benefits from, cooperation with a range of other actors, including foreign governments, companies, and sometimes state and local governments. This means that these actors will, in certain cases, have leverage over and may introduce friction into the U.S. government's development or execution of its policies.[382] At least some of this friction, such as that from allies, is desirable and worth fostering.

Consider allied states, whose governments may require the United States to negotiate and compromise in exchange for their cooperation—a process that effectively puts allies in a position to check the U.S. government.[383] Having to bring allies on board (to join military operations or impose sanctions or export controls, say) requires the United States to persuade, give reasons, and share intelligence, all of which tend to sharpen the U.S. government's own analysis and policy-making. Foreign governments are more likely to join (or at least support) U.S. action when that action is consistent with international law and, conversely, are more likely to serve as checks when the action violates international law.

Non-allied foreign governments can also check the United States by reducing the efficacy of its policies. Governments that are the subject of U.S. export controls or sanctions, for example, may find ways to evade them by investing in domestic capabilities or sourcing products from third countries. And for political or economic reasons, third countries may help targeted countries circumvent restrictions, as India has done with oil and gas sanctions on Russia.[384]

Companies, too, may play a critical role in implementing U.S. foreign policy. In some cases, the government needs corporate partners to implement security-related decisions, such as the imposition of sanctions or the increased production of war materiel, so companies' choices to fast-track or slow pedal such implementation constrain the federal

[382] Daniel Abebe, The Global Determinants of U.S. Foreign Affairs Law, 49 Stan. J. Int'l L. 1, 39–40 (2013).

[383] See, e.g., Deeks, supra note 320, at 1449 (noting that "foreign partners are positioned to challenge the quality of U.S. intelligence, the legality of secret operations, and U.S. policy choices").

[384] Gabriel Gavin & Barbara Moens, Row Over Russia Energy Sanctions Gatecrashes EU-India Summit, Politico (May 16, 2023, 9:10 PM), https://www.politico.eu/article/eu-india-summit-russia-oil-sanctions-subrahmanyam-jaishankar/ [https://perma.cc/B3VB-3NBR].

government. For example, telecommunications companies have served as an operational and political speed bump for the federal effort to "rip and replace" equipment made by Chinese companies, particularly Huawei.[385] This program must be implemented by telecommunications companies throughout the United States, many of which have moved slowly to remove and replace existing Chinese equipment in their systems.[386] The delays are largely due to logistical complications and insufficient federal funding rather than to policy objections, but their operational role has, in fact, slowed down a significant federal program.[387] Take as another example Elon Musk's refusal to provide Ukraine with access to Starlink satellites that would have enabled Ukraine to deploy armed submarine drones to attack the Russian naval fleet.[388] Musk reportedly refused because he worried that Ukraine's attack would "cause a major war."[389] After that episode, the U.S. military entered a contract with SpaceX (Starlink's parent company) to ensure better control over Ukraine's access to a critical military tool.[390] Yet another example is a recent decision by Nvidia, a U.S. semiconductor manufacturer. In the face of U.S. efforts to sharply limit China's access to advanced semiconductor chips, Nvidia started to make chips that fell just below a performance cutoff for export controls so that it could continue to sell chips to China without a license,[391] prompting scolding by U.S. officials.[392] These examples illustrate that actions by U.S. companies can directly affect the effectiveness of U.S. policy decisions.

Finally, it is not uncommon for U.S. states and localities to adopt policies that implicate U.S. foreign relations. In cases where a federal policy requires states to help implement it, federal-state engagement can serve as a check because the state entities bring different information, experiences, and ambitions to the project.[393] The Framers themselves

[385] See supra note 246 and accompanying text.

[386] Kang, supra note 246.

[387] Id.

[388] Christian Davenport & Joseph Menn, Musk Refused to Allow Ukraine's Military to Use Starlink to Attack Russian Fleet, Wash. Post (Sept. 11, 2023, 2:00 PM), https://www.washingtonpost.com/technology/2023/09/07/ukraine-starlink-musk-biography/.

[389] Id.

[390] Id.

[391] Raffaele Huang & Asa Fitch, Nvidia Develops New AI Chips, Again, to Keep Selling to China, Wall St. J. (Nov. 10, 2023, 4:06 PM), https://www.wsj.com/tech/nvidia-develops-new-ai-chips-again-to-keep-selling-to-china-d6977a03.

[392] See supra note 309 and accompanying text.

[393] See Deeks, supra note 320, at 1442–46.

envisioned this relationship as a positive source of friction.[394] However, state and local governments can also complicate federal policy-making by going beyond what the federal government seeks to do.[395] In the latter case, the states' and localities' competing approaches may, either deliberately or inadvertently, serve as checks on federal policy-making. For example, states attempted to challenge and check the federal government's policy on climate change during the first Trump administration by continuing to engage internationally and reduce emissions in their jurisdictions.[396] But U.S. states can also stimulate and exacerbate a frictionless government situation. After Russia's 2022 invasion, for instance, New Jersey barred Russian companies from receiving state and local contracts.[397] And many states have enacted restrictions on the purchase of certain real estate by Chinese nationals.[398] Though many of these efforts face legal challenges, the laws' impact while they are in place both reflects and contributes to the frictionlessness of the situations.

Is it possible to harness this range of possible policy-implementation checks productively? We think the answer is yes. One of the healthiest sources of friction will come from democratic allies. Though no other country's interests align perfectly with U.S. interests, democratic allies share a common commitment to the rule of law. U.S. allies therefore should be on high alert when a frictionless situation arises in the United States and should seek to offer input and caution to their U.S. counterparts. Indeed, allies could even choose to condition their assistance to the United States in ways that ensure more cautious consideration as the U.S. government develops its policies. Further, public sentiment has a powerful effect on companies; even small but powerful factions can affect corporate policy. Where companies will be key implementers of U.S. policy, constituencies that are concerned about

[394] See text accompanying note 33.

[395] See, e.g., Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 379 (2000).

[396] See, e.g., Evan Halper, A California-Led Alliance of Cities and States Vows to Keep the Paris Climate Accord Intact, L.A. Times (June 2, 2017, 4:15 PM), https://www.latimes.com/politics/la-na-pol-paris-states-20170602-story.html [https://perma.cc/HUW7-MZ32].

[397] Daniel Han, How JP Morgan Got Out of Russia Sanctions in New Jersey—For Now, Politico (Nov. 23, 2023, 7:00 AM), https://www.politico.com/news/2023/11/23/new-jersey-jp-morgan-russia-00128528.

[398] Rachel Hatzipanagos, Laws Banning Chinese from Buying Property Dredge Up Old History, Wash. Post (Aug. 21, 2023, 6:00 AM), https://www.washingtonpost.com/nation/2023/08/18/florida-chinese-land-laws/#.

the risks of frictionlessness can target those companies as an avenue to trigger policy reconsideration. Finally, state and local governments whose constituents may be adversely affected by frictionless policy—because their citizens' civil liberties are under pressure or because their economies will be harmed, say—should bring those objections to bear in Congress and in the press, which can both report on and amplify those concerns.

3. Lobbying

It's no secret that corporations exert a powerful influence on U.S. politics in general. Typically, business interests are represented (some would say *over*represented) in policy processes by particular politicians who have been lobbied, received campaign contributions, or represent districts where corporations have operations. The same features of corporations that make their influence on policy sometimes pathological also give businesses the potential to exert what might be a constructive influence on politics in frictionless government scenarios. Corporations are well-resourced and highly motivated to defend their interests in order to protect their supply chains, market share, and profits. They may be able, for example, to identify and make government officials aware of long-term economic consequences of policies enacted for shorter-term security reasons. Recent reports indicate that large U.S. chipmakers, for example, are pushing back on new U.S. policies to restrict semiconductor chip sales to China on the ground that the policy will ultimately lead to "a world dominated by Chinese-created chips."[399] One key reason why the White House took a long time to issue the Executive Order on outbound investment to China—and why the government's notice of proposed rulemaking following the Order posed detailed questions that it wanted stakeholders to address—was input by affected companies.[400]

It is worth noting, however, that business interests are not monolithic. While some companies may push back against federal government policies for fear of disrupted supply chains or lost profits,[401] others may

[399] Tripp Mickle, David McCabe & Ana Swanson, How the Big Chip Makers Are Pushing Back on Biden's China Agenda, N.Y. Times (Oct. 5, 2023), https://www.nytimes.com/2023/10/05/technology/chip-makers-china-lobbying.html.

[400] Ana Swanson & Lauren Hirsch, U.S. Aims to Curtail Technology Investment in China, N.Y. Times (Feb. 9, 2023), https://www.nytimes.com/2023/02/09/business/us-china-investing-tech-biden.html.

[401] See, e.g., Meredith Lee Hill & Gavin Bade, Who Reined in the China Committee's Trade-War Proposal?, Politico (Dec. 13, 2023, 10:00 AM), https://www.politico.com/news/2023/12/13/agriculture-lawmakers-lobbyists-quietly-challenge-china-hawks-on-trade-001314

be accelerants, pushing the government to do more, faster because they see opportunities to gain market share from foreign suppliers subject to governmental restrictions.[402] Climate change is a good example of a situation in which companies fall on both sides of a key foreign policy issue, with some companies lobbying the United States to take a more aggressive approach to addressing climate change and others lobbying the United States to resist such efforts.[403] A setting in which companies have interests on multiple sides of an issue means that it is more likely that *some* set of companies will introduce friction into the policy-making process. However, companies may play much less of a checking role in frictionless government situations that do not rely on economic national security tools that directly affect companies' business interests.

Of course, companies are not the only kinds of actors that can engage in lobbying. Non-governmental organizations, rights advocates, and think tanks—each of which may have equities in the foreign policy being developed in a frictionless situation—should weigh in with Congress to introduce underweighted considerations and historical perspectives.

CONCLUSION

Highlighting the need for friction in the U.S. policy-making process may seem counterintuitive during a period in which friction seems to abound within Congress and U.S. politics more generally. However, even today we can identify situations that bear characteristics of frictionless government, and history illustrates that periods of frictionlessness often produce flawed policies and inflict harms on vulnerable groups. This

51 (reporting that agriculture lobbying groups pushed back against congressional proposals to revoke China's permanent normal trade status).

[402] Cf. Eichensehr, supra note 320, at 727–28. Lobbying the U.S. government for tougher controls may come with risks for U.S. companies. See, e.g., Lingling Wei, Beijing Bans Micron as Supplier to Big Chinese Firms, Citing National Security, Wall St. J. (May 21, 2023, 9:54 PM), https://www.wsj.com/articles/beijing-bans-micron-as-supplier-to-big-chinese-firms-citing-national-security-5f326b90 (suggesting that China targeted Micron because it believed Micron lobbied the Biden administration to impose chip export controls).

[403] Rory Sullivan, Robert Black & Georgina Kyriacou, What Is Climate Change Lobbying?, London Sch. of Econ.: Grantham Rsch. Inst. on Climate Change & the Env't (Feb. 17, 2023), https://www.lse.ac.uk/granthaminstitute/explainers/what-is-climate-change-lobbying/ [https://perma.cc/558S-9A2K] (noting in global context that "[s]ome companies have lobbied governments to put in place regulations and policies that help the private sector to contribute to domestic and international climate change goals," while others, "particularly in high-carbon sectors, have chosen to lobby to maintain the current systems of industry regulation [and] to delay change towards net zero").

Article attempts to identify the characteristics and costs of frictionlessness in order to avoid the pitfalls that have bedeviled policy processes in the past. The goal of introducing checks, balances, and explicit friction into policy-making is to foster competition among ideas about how best to achieve U.S. strategic aims, while also avoiding the inertia that plagues so many of today's politically fraught topics.[404] It is a difficult line to walk, but doing so is crucial.

[404] Cf. INS v. Chadha, 462 U.S. 919, 944 (1983) ("Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government . . . .").