No Damage Without Damage Control: The Judiciary's Refusal to Engage with the Foreign Affairs Docket

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INTRODUCTION

A governmental body that cannot do damage-control should not be allowed to do damage in the first place. It is a rather intuitive concept, but it is one that the Framers evidently overlooked when they wrote Article III of the Constitution. Every time a court, particularly the Supreme Court, renders a decision that impacts foreign policy, it acts with the potential to cause international strife, absent the ability to remedy that strife.

Indeed, Supreme Court decisions are impactful. That is why people care so much about who is writing them and what they say. Where foreign sovereigns are involved, there is no doubt that interested international parties are awaiting the decision of the Court, just as the litigants are. Sometimes, in especially rare instances, the foreign sovereign may be a litigant.

But whereas the political branches, especially the executive, have the chance to hedge their foreign policy actions through channels of diplomacy, the Court—after rendering an impactful decision—has no such capability. For example, it would seem inappropriate, or at least strange, for Chief Justice Roberts to reach out to an international leader to explain why that international leader should not be upset by a particular judicial outcome.

A world where the Court would interact with foreign sovereigns would be especially problematic, considering it would open the door to dissenting judges addressing the international landscape. This would undermine—as dissents do—the decision reached by one branch of the United States government.[1]

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1. This, of course, is not to say that dissents are bad. Certainly, they play an important role in democracy. *See generally* Ruth Bader Ginsburg, The Role of Dissenting Opinions, 95 Minn. L. Rev. 1 (2010) https://scholarship.law.umn.edu/mlr/428/?utm_source=scholarship.law.umn.edu%2Fmlr%2F428&utm_medium=PDF&utm_campaign=PDFCoverPages. But, insofar as international politics is concerned, a dissent can undermine the voice of the government inasmuch as the decision is speaking for the government.

Not only would such an action by Chief Justice Roberts be politically awkward, but as will be discussed below, doing so would conceivably be a breach of the ethical standards expected of a judge.[2]

As such, we live in a world where the Court can make decisions for the country, but cannot speak for it. As will be explored further below, this is an undesirable arrangement, to put it mildly.[3]

The Framers of the Constitution wanted the judiciary involved in disputes relating to foreign affairs. Article III of the Constitution itself anticipates their involvement, through its reference to maritime, treaties, and ambassadors.[4] The Framers expressed that intent again in the early days of the Republic. Indeed, "[i]n the Washington administration's view, judicial decision-making did not undermine presidential [foreign] policymaking – it complemented it."[5] This tendency did not start and end with the Washington administration. On the contrary, "the executive branch has regularly urged the federal courts to determine [international law] as matters of federal law."[6]

This is a problem. This paper will show that the judiciary—understanding that they are ill-equipped to handle matters of international consequence—have time and again declined to assume foreign policy powers, despite the fact that the courts frequently take power for itself in other contexts.[7] Where cases come

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2. Though it is true that "Supreme Court Justices aren't required to observe the code [of ethics]," it would certainly be preferable if they carried out their extraordinarily important role ethically. Scott Bomboy, *Why the Supreme Court isn't compelled to follow a code of conduct*, NATIONAL CONSTITUTION CENTER (2016), https://constitutioncenter.org/blog/why-the-supreme-court-isnt-compelled-to-follow-a-conduct-code/ [https://perma.cc/W8K4-73M6]. *See also* David Lat, *Judicial Notice (3.27.22): Who's Afraid of Virginia Thomas?*, ORIGINAL JURISDICTION (March 27, 2022), https://davidlat.substack.com/p/judicial-notice-032722-whosafraid?token=eyJ1c2VyX2lkIjozODU0NjQyOCwiXyI6IjlZVjlBIiwiaWF0IjoxNjQ4NDE0MjQyLCJleHAiOjE2NDg0MTc4NDIsImlzcyI6InB1Yi0yMjk5MzMiLCJzdWIiOiJwb3N0LXJlYWN0aW9uIn0.TZ5vrqLj1b0IZcLs3fH8Ls3fH8pxNuph44rbvMIve9iYIiaU&s=r [https://perma.cc/5JJ6-YDGZ] ("Even though the justices aren't subject to the code of judicial ethics applicable to lower-court judges, they *are* subject to 28 U.S.C. § 455, which provides that 'any justice, judge or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.'"). Indeed, some scholars have advocated for the Supreme Court to adopt the same ethical rules binding on other courts. *See e.g.,* Kenneth Jost, *Time For Ethics Reform at Supreme Court*, JOST ON JUSTICE (Apr. 2, 2022) http://www.jostonjustice.com/2022/04/time-for-ethics-reform-at-supreme-court.html [https://perma.cc/RM6L-XS67]. Absent the ethical guardrails, some spectators have questioned whether the Justice's behavior would hold up if considered against the *Model Code of Judicial Conduct* binding on all other federal judges. *See e.g.,* Fix the Court, *Code of Ethics*, https://fixthecourt.com/fix/codeofethics/#:~:text=The%20nine%20justices%20of%20the,and%20participation%20in%20political%20activities [https://perma.cc/V3HQ-39VZ] (last visited Apr. 18, 2022) ("Research compiled from Fix the Court points out that while none of the justices has committed a removal offense, all nine of them are culpable of various ethical oversights, from leaving assets off their annual financial disclosure reports to speaking at partisan fundraisers to ruling on cases despite credible conflicts of interest.").

3. *See infra*, Part III.

4. U.S CONST. art. III.

5. Kevin Arlyck, *The Courts and Foreign Affairs at the Founding*, 2017 B.Y.U L. REV. 1, 7 (2017).

6. Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV L. REV. 1824, 1843 (1998).

7. *See, e.g.*, Marbury v. Madison, 5 U.S. 137 (1803); *see generally* Josh Chafetz, *Nixon/Trump: Strategies of Judicial Aggrandizement*, 1 GEO L. REV. 126 (2021).

before the courts that require adjudication that could impact foreign policy, the courts have routinely crawled into their proverbial shell.

This paper suggests a better approach. Though the courts have instituted doctrines that limit the degree to which they will involve themselves in disputes of international consequence, they should – assuming Congress will not – develop a hardline rule that precludes them from taking on foreign affairs cases. Of course, such a rule requires a definition for the term "foreign affairs case." The test proposed by this paper will outline a definition.

Part One of this paper will outline a number of reasons why the courts are unequipped to handle foreign policy cases. Part Two will exhibit key cases and decisions throughout the history of the courts that show that judges simply have no desire to adjudicate foreign policy. The goal here, in presenting an array of cases that touch upon a myriad of topics, is to show that the judiciary's foreign policy aversion is not limited to a specific type or grouping of cases. On the contrary, from – *inter alia* – the creation of doctrine to statutory interpretation, the courts have routinely expressed a broad and general aversion to cases impacting foreign diplomacy. Like a football team unable to succeed on offense, the courts have consistently "punted" these issues out of their courtrooms, notwithstanding the fact that the political branches have squarely attempted to direct these cases to them. The political branches should cease to seek remedies from the courts where, as here, the courts are not likely to acquiesce.[8]

Finally, Part Three will present, in addition to the necessary definitions, the test the Court should establish when foreign affairs cases come before it and will begin to consider what should happen when the test is not satisfied.

I. COURTS ARE NOT EQUIPPED TO DEAL WITH FOREIGN POLICY

Courts have never been a good breeding ground for foreign policy. Judges are not politicians, and their expertise is the law and its application, not strategy and diplomacy.[9] As Chief Justice Roberts once reminded the American populace, judges are "not politicians; we're judges, we're a court . . . ."[10] It can, and should, be reasonably argued that removing the designation of politician and replacing it with judge or justice removes the expectation of certain skills, capabilities, and competencies, perhaps even the very ones needed to thrive in the politics of foreign affairs. They are different jobs, after all, and they come with different job

8. *See, e.g.*, Chafetz, *supra* note 7.

9. *See* John Roberts, CONFIRMATION HEARING ON THE NOMINATION OF JOHN G. ROBERTS, JR. TO BE CHIEF JUSTICE OF THE UNITED STATES, No. J–109–37 (2005) ("Judges are not politicians who can promise to do certain things in exchange for votes . . . . I will remember that it's my job to call balls and strikes, and not to pitch or bat."); *see also id.* (Senator Mike DeWine stating "Judges are not members of Congress. They are not elected. They are not members of State legislatures. They are not Governors. They are not Presidents. Their job is not to pass laws, implement regulations, nor to make policy.").

10. JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 11 (2007).

descriptions. Additionally, as early American history shows, juries—a staple of the judicial system—were and are totally inappropriate for disputes that involve or implicate sovereigns, especially foreign ones.[11] Finally, as a practical matter, international law and its application domestically is generally murky territory, which makes it especially sensitive territory in which a court can inflame international tensions.[12]

Taken together, the judiciary is not the forum for foreign policy and dispute resolution related to it.

A. INTERNATIONAL DISPUTE RESOLUTION REQUIRES ENGAGEMENT THAT EXTENDS BEYOND LAW

Because of the system under which the judiciary operates, courts are not capable of handling matters of international consequence. Foreign policy and diplomacy require strategy. They require a certain wheeling, dealing, and negotiating that extend beyond applying the rule of law. That is why even though "the constitution expressly grants Congress the power to regulate foreign [policy,] lawmakers have for decades provided presidents special authority to negotiate" on behalf of the country.[13] Foreign policy often requires swift and decisive decision making that cannot be properly appreciated by the administrative clutter and backlog of a judicial system.[14] The Constitution recognizes that foreign policy requires a certain degree of discretion and flexibility, which is why it made the executive – through what some have called "residual powers"[15] – the "sole organ"[16] of this domain. To be sure, scholars have noted that the Supreme Court may have been lazy when coining the sole organ language.[17] The executive has never truly been the *sole* organ of foreign policy. Congress has always had a role to play. The courts, as the very existence of this paper suggests, have had a more minor role to play too.[18]

Still, the "sole organ" language can be helpful because it reflects that the Office of the Presidency has a certain flexibility which offers it great structural "advantages *vis-à-vis* the [other branches] in obtaining foreign affairs information

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11. *See* Matthew P. Harrington, *The Economic Origins of the Seventh Amendment*, 87 IOWA L. REV. 145 (2001).

12. *See generally* Koh, *supra* note 6.

13. Jonathan Masters, *U.S. Foreign Policy Powers: Congress and the President*, Council on Foreign Relations (2017), https://www.cfr.org/backgrounder/us-foreign-policy-powers-congress-and-president [https://perma.cc/E5FJ-6AUV].

14. Jack. S. Levy, *Psychology And Foreign Policy Decision-Making, in* THE OXFORD HANDBOOK OF POLITICAL PSYCHOLOGY 301-23 (2nd Ed. 2013).

15. *See generally* Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001).

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

17. *See*, *e.g.*, Louis Fisher, *Presidential Inherent Power: The "Sole Organ" Doctrine*, 37 PRES. STUD. Q. 139 (2007).

18. *See, e.g.*, Thomas M. Franck, *Courts and Foreign Policy*, 83 FOREIGN POL'Y 66, 66–86 (1991).

and in responding to changing world conditions."[19] The justice system, in contrast, offers no such flexibility.[20] As a mere finder of fact and law, the judiciary's involvement in foreign disputes is at best awkward.[21]

Furthermore, foreign affairs cases extend beyond specific questions of law. National security, economics, and environmental concerns are among the countless concerns that might come up in any particular foreign affairs deliberation. The resolution to these issues is not necessarily rooted in law, rather, they are remedied and their initiatives are spearheaded in the form of policy and stratagem.[22] It is true, to be sure, that sometimes a case revolving around domestic law may extend beyond law and into the realm of domestic policy.[23] But a court reviewing matters of domestic policy is different in kind than one reviewing foreign policy, precisely because the courts have not reiterated time and again that they are ill-equipped to deal with domestic policy, as they have in the international context. Furthermore, in the context of domestic policy, the judiciary itself

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19. *See* Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 482 (1998) (italics added).

20. *See id*. Though not directly on point, the following documented tale shows just how flexible the Executive Branch can be when it comes to preventing angering a foreign leader: According to reports, Robert Kraft, the owner of the New England Patriots National Football League team, once went abroad to visit Russia. He met with Russian dictator Vladimir Putin. Kraft elected to show Putin one of his Super Bowl rings. Putin reportedly looked at it, pocketed it, and walked away. Kraft, understandably, was incensed. Though he wanted to take action in response to Putin's theft, he later got a call from the State Department that said: "It would *really* be in the best interest of US-Soviet relations if you meant to give the ring as a present." John Breech, *Here's how Vladimir Putin stole a Super Bowl ring from the Patriots' Robert Kraft*, CBS SPORTS (2017), https://www.cbssports.com/nfl/news/heres-how-vladimir-putin-stole-a-super-bowl-ring-from-the-patriots-robert-kraft/ [https://perma.cc/RW4Y-7CW5]. While the executive branch, as it did in Kraft's instance, can make phone calls to preserve the country's relationships outside its borders, the Court could – and would – not.

21. There are certainly many that would doubt the Court's role, as it has been articulated herein, "as a mere finder of fact and law." This paper, to a degree, assumes that finding fact and law is what the judiciary is institutionally designed to do. As Justice White said, it is the role of the Supreme Court to "decide cases," nothing more, nothing less. DeWine, *supra* note 9 ("Justice White said the role of the United States Supreme Court was simply to decide cases."). Arguments are often made that judges specifically do take into account policy consequences of decisions instead of merely applying the law. This, some contend, shows that judges are far from a mere "neutral arbiter between the contending sides," as the court presents itself to be, but rather that they are one of the "three branches of the federal system" and that "there is no reason to think that [they] are free of institutional interests and agendas merely by virtue of the fact that its members wear robes." Chafetz, *supra note* 7. To the extent that this argument is true, it is simply all the more reason why there should be institutional safeguards in place that limit the extent to which the Judiciary can branch out of its characterization of a purely dispute resolution body.

22. President Joe Biden's foreign policy platform does not mention the word "court" once. *See, e.g., The Power of Americas' Example: The Biden Plan for Leading the Democratic World to Meet the Challenges of the 21st Century*, BIDENHARRIS, https://joebiden.com/americanleadership/ [https://perma.cc/M74C-6J2A] (last visited Apr. 22, 2022).

23. Though, it is worthy of note, that there are purists that think that courts – to the extent possible – should limit their decisions to the law and its application. *See e.g*., Jeremy Waldron, *The Rule of Law and the Role of Courts*, 10 GLOBAL CONSTITUTIONALISM 91, 91 (2021) ("it is particularly important for courts to recognize that their authority is limited in scope and that they should not be guided by any overall political program . . ."). *But see* Albert Tate Jr., *"Policy" in Judicial Decisions*, 20 LA. L. REV. 62, 63 (1959) ("I think [t]he [judge] properly should decide on the basis of what is best for the community as a precedent and of what impresses him as the fair solution of the question for the parties concerned: that is, on the basis of policy considerations.").

will have to deal with the consequences of its decisions. It might not have the ability to do so in the foreign policy context.

It is worth noting that scholars have argued that courts are as equipped to handle foreign affairs cases as they are to handle any other case. One scholar in particular went as far as to say that if a court's lacking expertise "should disqualify them from adjudicating foreign relations issues, it should also disqualify them from adjudicating most other issues in the federal courts."[24] Perhaps this is true. But, once again, the operative and fundamental difference in the international context is the extent to which the courts themselves have conceded that they are unable to properly decide these cases.

In sum, requiring the judiciary to render decisions affecting foreign policy requires courts to either leave important non-legal policy issues out of their rulings, or worse, include them – and participate in an endeavor in which they are "uniquely incompetent."[25]

B. THE JUDICIARY'S CONSTRUCTION DOES NOT LEND ITSELF WELL TOWARD FOREIGN AFFAIRS

The construction of the American judicial system, relying as it does so heavily on the layman, does not lend itself well toward the work of foreign diplomats and diplomacy. Furthermore, requiring judges to make foreign policy determinations – as these cases inevitably do – may make judges work beyond their mandate and make political calculations. This, as articulated below, may be problematic in light of the ethical standards expected of judges.

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24. Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1937 (2015). The authors make an interesting argument, continuing:

> A particular judge might not hear many cases touching on foreign relations in her career, but she also might not hear many antitrust cases, separation of powers cases, or endangered species cases — all areas considered to be eminently within the domain of the judiciary. Indeed, no particular judge is likely to be an expert in every area of law, but the structure of the legal system assumes this, requiring attorneys to provide courts with information. To the extent that frequency of cases leads to expertise, judicial incompetence is equally solvable by courts taking a more active role in adjudicating foreign affairs issues. In other words, the normalization of foreign relations will, over time, make the judiciary more competent than it currently is. Claims that the judiciary should defer to executive branch interpretations of constitutional or international law are particularly confusing. To the extent one believes that terms in the Constitution are evolving, it is not clear why the executive branch should have greater authority to determine their evolving meaning than the judicial branch. Determining the meaning of 'declare war' over time seems hardly more complicated than deter- mining the meaning of 'cruel and unusual.' This interpretive function is at the core of what courts do. In that light, claims of judicial incompetence are no different than they are in domestic affairs. The answer in the domestic context, however, has not been to grant expansive deference to all executive branch actions.

Id.

25. Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71, 131 (2000).

1. JURIES ARE INAPPROPRIATE TO DECIDE FOREIGN AFFAIRS CASES

As the court system saw in the early days of the Republic, juries are biased, and these biases were especially potent in matters relating to foreign policy.[26] Historically, juries were biased during the Neutrality Crises,[27] unwilling as they were to convict French privateers,[28] just as they were biased when it came to British debt cases.[29]

This presented a serious issue for the young Republic because "foreigners would not invest in a society whose legal institutions appeared arbitrary or capricious."[30] Crucial to a (young) country's success is "the attractiveness of a country's . . . policies. [As such,] [w]hen our policies are seen as legitimate in the eyes of others," the country is better off.[31]

Thus, the Framers recognized that foreign policy issues needed to be "insulated from . . . public sentiment."[32] That being the case, it is strange that the Framers by way of Article III handed these issues to the court system, where the societal opinion is often the dispositive factor.

Though the first Judiciary Act worked toward resolving the issue of jury bias by "eliminating juries in cases that had a direct impact on the nation's revenue and commerce,"[33] the "jury continues to occupy a special place in the judicial process."[34] Where a case implicates foreign affairs, the jury presents a risk of bias against certain countries or their political leadership.[35] Even where no bias is present, a jury's arbitrary or capricious decision can hurt the American government in the eyes of the international community if it perpetuates inequitable outcomes. This is not to say, of course, that foreign sovereigns or foreigners will per se fail to succeed in domestic litigation. On the contrary, some suggest that foreigners fare better in our judicial system.[36]

Still, there is an unpalatable potential disconnect between the way our jury system is structured and foreign diplomacy. It could, and probably would, be viewed as degrading to a foreign sovereign that twelve laymen, who may not understand international politics, will assess matters of importance to foreign sovereigns in a courtroom.

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26. *See* Harrington, *supra* note 11.

27. *See infra*, Part II for more background.

28. *See* Arlyck, *supra* note 5, at 18.

29. *See* Harrington, *supra* note 11.

30. *Id*. at 149.

31. CHAFETZ, *supra* note 10, at 3 (quoting Ruth Marcus, *Disorder in the Court,* Wash. Post, Apr. 3, 2020, at A14).

32. David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 940 (2010).

33. Harrington, *supra* note 11, at 150.

34. *Id*. at 147.

35. *Id*.

36. *See generally* Kevin M. Clermont & Theodore Eisenberg, *Xenophilia or Xenophobia in U.S. Courts? Before and After 9/11*, 4 J. EMPIRICAL LEGAL STUD. 441 (2007).

After all, the United States itself does not want the treasury's fate left to the hands of juries.[37] That is why, with the exception of tort lawsuits,[38] jurisdiction for lawsuits against the United States government generally belongs to the United States Court of Federal Claims.[39] Notably, the Court of Federal Claims does not utilize juries. Rather, the United States government only puts the risk of its own liability in the hands of experienced expert judges. It should be no surprise, then, that other governments also may not want to be assessed by juries. And indeed, part of the rationale of the Foreign Sovereign Immunity Act ("FSIA") was that it was demeaning to foreign sovereigns to give them the status of an ordinary party in our courts.[40] It is the desire of the U.S. government to afford foreign sovereigns the "dignity that is consistent with their status as sovereign entities."[41]

Ultimately, the American judicial system is not engineered for cases impacting foreign sovereigns.

2. THE MODEL CODE OF JUDICIAL CONDUCT CUTS AGAINST COURTS' INVOLVEMENT IN FOREIGN AFFAIRS CASES

The Model Code of Judicial Conduct writes that "a judge shall not permit . . . political . . . interests or relationships to influence the judge's judicial conduct or judgment."[42] But a case that impacts foreign policy necessarily relies on a Judge's opinion on global politics. Judges do not even try to hide that international politics can shade their decisions. In *Jesner v Arab Bank, PLC,*[43] a case that considered and addressed corporate liability under the Alien Tort Statute, Justice Kennedy was forthright about his concern regarding the foreign tensions created out of the litigation. The *Model Rules* would seem to counsel against such external considerations when adjudicating a legal dispute between parties.

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37. *See* Matthew H. Solomson, *Court of Federal Claims:Jurisdiction, Practice, and Procedure*, Ch.30.II (2016) (citing McElrath v. United States, 102 U.S. 426 (1880) for the proposition that if the government can be sued only "by its own consent," then it can determine the conditions upon which it ought to face that potential liability).

38. The Federal Tort Claims Act (28 U.S.C § 1346(b)); *see also* Bowling v. United States, 93 Fed. Cl. 551 (2010) ("While the FTCA provides a waiver of the United States' sovereign immunity in negligence [among other tort] cases . . . the waiver applies only in federal district court.").

39. The Tucker Act (28 U.S.C § 1491). Amazingly, the Tucker Act, in serving as a waiver of the government's sovereign immunity, provides that "[i]n exercising jurisdiction under this subsection, the courts shall give due regard to the interests of national defense and national security and the need for expeditious resolution of the action." *Id.* Thus, in this act, which Congress clearly anticipates as having the potential to implicate national security, Congress leaves the national security determinations in the hands of the Court, who refuses to get involved in such matters. *See e.g., Austin v. U.S. Navy Seals 1–26*, 595 US _ (2022) (Kavanaugh, J. concurring) ("courts [have] traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.").

40. Scott Dodson, *Dignity*: *The New Frontier of State Sovereignty*, 56 OKLA L. REV. 777, 778 (2003).

41. *Id.*

42. MODEL CODE OF JUDICIAL CONDUCT R. 2.4. (ABA 2020) [hereinafter MODEL CODE].

43. Jesner v. Arab Bank, PLC, 584 U.S. 1386, 1399 (2018) ("In addition, a remand to the Court of Appeals would require prolonging litigation that already has caused significant diplomatic tensions with Jordan for more than a decade."); *see* infra, Part II.

The *Model Code*, similarly, do not allow for the courts to take the most intuitive action when faced with foreign affairs questions, which is to ask the more capable branches. The *Model Code* states that "a judge shall not. . .consult with an executive or a legislative body or official."[44] As such, where certain cases require an exploration of politics or policy, the Court – in acknowledgement that "the competency of the political branches in foreign affairs . . . [are] better suited than the judiciary to the policy-oriented decisionmaking" are hamstrung, since they cannot seek guidance from the political branches.[45]

Perhaps under the *Model Code*, a court could go to the political branches to consult about these cases under the exception allowing for a judge to speak with an "executive or a legislative body or official . . . in connection with matters concerning the law, the legal system, or the administration of justice."[46] But to the extent that judges utilize this exception, the ultimate solution is clunky. It is silly for judges to employ the help of the political branches – which is a concession that they are lacking institutional expertise – and then regurgitate (or even worse, ignore) their guidance, when it would be far more efficient and effective for the political branches to just take the matter into their own hands.

Finally, the *Model Code* provide that a "judge shall not convey . . . the impression that any person or organization is in a position to influence the judge."[47] But when writing a decision that responds to the actions of those in the international community, can there be any genuine doubt that a judge is being influenced by other (political) actors? Indeed, as mentioned above, Justice Kennedy basically admitted the influence of a foreign sovereign in *Jesner*.[48]

C. INTERNATIONAL LAW, AND ITS APPLICATIONS, IS FAR FROM CLEAR

Finally, a third issue that arises when international law and policy enter the American courtroom is defining what it is and how to apply it. What precisely is international law? Is it customary international law?[49] Is it treaty law? Is it resolutions enacted by the UN? Once a definition is adopted, how should the American legal system go about working within it? Can canons of construction and conventions used in America be used to interpret international rules whose drafters may have never considered those conventions? For example, *stare decisis*, a staple in the American legal system, does not exist in international tribunals. How does the legal system account for "the relative unfamiliarity of US judges with

44. MODEL CODE R. 3.2.

45. Note, *The Charming Betsy Canon, Separation of Powers, and Customary International Law*, 121 HARV. L. REV. 1215, 1219 (2008).

46. MODEL CODE R. 3.2.

47. MODEL CODE R.4.2.

48. *See* Jesner v. Arab Bank, PLC, 584 U.S. 1386, 1399 (2018).

49. It was not even a given that America recognized customary international law until the Supreme Court told us so in 1900. *See The Paquete Habana*, 175 U.S. 677 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.")

international law" despite "the rapidly growing number of international cases in US courts?"[50]

Professors Curtis Bradley and Jack Goldsmith ask similarly vexing questions:

> Under what authority do the U.S. courts apply CIL [customary international law]? What is the relationship between CIL and federal treaties and statutes? Do issues of CIL arise under the laws of the United States for purposes of Article III? Can states violate CIL? Are state courts bound by federal court interpretations of CIL?[51]

Indeed, the lack of clarity on what constitutes international law and who it applies to may be why international tribunals are largely inefficient.[52] Given the fact that participating in international law tribunals and treaties is consent based, some query whether it is even "law," at all.[53] All of these considerations complicate the inquiry of when and how American courts should treat international law within this country's legal framework.

Recognizing that courts need to apply fuzzy or unclear law all the time, it is worth noting that the international context is distinguishable for a few familiar reasons. The first, as discussed, is because, unlike in most other areas, the court acknowledges that it is at a loss when trying to deal with these cases.[54] This makes sense, considering the courts have played a role in crafting the law domestically, but have had little to say about how America conducts its foreign policy, and even less input in the creation of international law.

Second, a court should not be able to do damage where it cannot do damage control (namely, in the international arena). It would be highly inappropriate, and perhaps violate the *Model Code of Judicial Conduct*, if a court – after rendering a decision – reached out to a foreign adversary to explain that decision, because it would imply that the adversary was considered when the judges developed a position on the case.[55]

Finally, application of fuzzy law in the international context is different from the application of it domestically because the space of international diplomacy is

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50. Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law As Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 820 (1997).

51. *Id*. at 818–19.

52. This lack of clarity is also due to the consent-based nature of international law: "International tribunals like the International Court of Justice [do] not provide effective enforcement . . . because jurisdiction turn[s] on state consent." *Id*. at 832.

53. Constantine J. Petallides, *International Law Reconsidered: Is International Law Actually Law?* INQUIRIES J. (2012), http://www.inquiriesjournal.com/articles/715/international-law-reconsidered-is-international-law-actually-law [https://perma.cc/6BXLWBFN].

54. *See, e.g*., Nestle USA Inc. v. Doe, 141 U.S. 1931 (2021) ("Because '[t]he political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns,' there will always be a sound reason for courts not to create a cause of action for violations of international law . . . ." (citing *Jesner*, *supra* note 43)).

55. MODEL CODE R. 2.4 (writing that a "judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge.").

especially sensitive territory. Bad foreign policy can result in inflaming a very flammable international community.[56]

It is well within the country's interest to prevent adjudication on gray issues that are hard to reconcile when doing so may cause international turmoil. It is patently reasonable to assert that decisions in cases that can go either way and doctrines that are particularly messy may anger foreign sovereigns who thought their interests would be preserved in a particular case.

The political branches, in contrast, are not bound by legal formality or technicality. They are not dealing with the application of gray areas of law. On the contrary, at the congressional stage, the law is yet formed, and the sky is the limit for what Congress may construct. Congress and the President can act on the motivation of practical impact. This flexibility grants them the ability to do what needs to be done for the country (so long as that action is legal.) Courts, in contrast, would have to follow that which has been created by others, and doctrine that might be convoluted.

II. COURTS DO NOT WANT WIDESPREAD FOREIGN AFFAIRS POWERS

Judges are aware of their own limitations. That is why, throughout American history, the courts – no strangers to grabbing powers when given the chance to do so – have elected to relieve itself of foreign policy duties.[57] This is not to say that the Court never takes on foreign affairs cases.[58] On the contrary, it is clear – for example – that "federal courts have applied customary international law since the beginning of the Republic . . . ."[59] The docket under Chief Justices Marshall and Jay was similarly plentiful with cases of international import.[60] However, the judiciary's recognition that "federal courts generally lack the institutional expertise . . . to oversee foreign policy and national security and should be wary of straying where they do not belong . . .,"[61] has manifested itself in a number of different ways since the founding. By analyzing history, key cases, judicially constructed doctrine, and statutory interpretation, this Note will show that the Court has rejected involvement in foreign affairs cases with relative consistency.

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56. Jesner v. Arab Bank, PLC, 584 U.S. 1386, 1399 (2018).

57. *See* Franck, *supra* note 18.

58. The Court seems especially willing to hear treaty cases. *See, e.g.,* Missouri v. Holland, 252 U.S. 416 (1920); Reid v. Covert, 354 US 1 (1957); Bond v. U.S., 572 US 844 (2014). Perhaps this is because Article III specifically references these cases to the Court, tying the Justices hands and forcing them to take the cases.

59. Koh, *supra* note 6, at 1852.

60. *See* Ariel N. Lavinbuk, *Rethinking Early Judicial Involvement in Foreign Affairs: An Empirical Study of the Supreme Court's Docket*, 114 YALE L.J. 855, 1872 (2005) ("Under Chief Justices Jay and Marshall, the Court heard more than 1300 cases between 1791 and 1835 . . . . Nearly two in five cases heard by the Jay Court involved international issues. During John Marshall's thirty-five-year term as Chief Justice, only one year, 1803, failed to see a single foreign relations case reach the Supreme Court.")

61. Jesner v. Arab Bank, *PLC*, 584 U.S. 1386, 1419 (2018) (Gorsuch, J. concurring in part); *see also Id.* (Sotomayor, J. dissenting) ("I agree that the political branches are well poised to assess the foreign policy concerns attending ATS litigation, which is why I give significant weight to . . . the Executive Branch.").

A. HISTORY: THE NEUTRALITY CRISIS

During the Neutrality Crisis, in which a newfound and fledgling American democracy was unsure of how to respond during a war between the French and the British, "the Washington administration turned to the courts" for help.[62] For example, Washington sought an advisory opinion from the Supreme Court on how to respond to the hostilities taking place between the two warring countries.[63] Similarly, in order to appease a rageful British government, Washington's cabinet pursued criminal prosecution of French privateers.[64] Additionally, the Washington administration encouraged private litigants to perpetuate lawsuits relating to privateering for the same purpose.[65]

Despite these efforts, "the administration's initial attempts to enlist the judiciary largely failed."[66] The Court did not write the advisory opinion, juries would not convict privateers, and Richard Peters—"one of the nation's foremost jurists" — effectively punted the private lawsuits across borders.[67]

Eventually, the executive's persistence finally led the Court to react. In the case of *Glass v. Sloop Betsey*,[68] which dealt with the issue of French privateers, the Court released a bland opinion that "fail[ed] to cite to any authority or offer any reasoning" and ultimately "left open more questions than it answered."[69] The Court's opinion was a reaffirmation of what it had indicated during the earlier portions of the Neutrality Crises: the judiciary had no interest in solving a diplomatic problem that the Executive Branch would not.

Washington should have taken matters into his own hands. Having just fought and won a revolution, Washington had the capability, knowhow, and tools with which to deal with warring countries.[70] He knew about politics and leadership, and Washington was certainly able to weigh international considerations.[71]

These are the very skills that judges, as legal scholars, life-time appointees, and non-politicians, are not expected to possess.[72] The Bench does not provide the tools to deal with an issue like the Neutrality Crisis, but the Presidency of the United States did and does.

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62. Arlyck, *supra* note 5, at 14.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.* at 28.
68. Glass v. Sloop Betsey, 3 U.S. 6 (1794).
69. Arlyck, *supra* note 5, at 33.
70. Editors, *George Washington*, HISTORY.COM ("George Washington (1732-99) was commander in chief of the Continental Army during the American Revolutionary War (1775-83)."), https://www.history.com/topics/us-presidents/george-washington#:~:text=George%20Washington%20(1732%2D99),president%2C%20from%201789%20to%201797.&text=During%20the%20American%20Revolution%2C%20he,and%20became%20a%20national%20hero [https://perma.cc/Y26Z-LKL9].
71. *Id.*
72. *See* DeWine, *supra* note 9.

The actions of the judiciary in the early days of the Republic reflects a trend that has continued until the present. The courts in the modern era have remained consistent in observing the precedent set at the founding: when the better-equipped Executive Branch sends foreign policy issues to an inadequate forum (the courts,) the court's retort is to express little interest in solving the executive's problems for him.

B. KEY CASES: THE 9/11 JURISPRUDENCE

In a tragic event in American history that needs little introduction, "nineteen hijackers took control of four commercial jets on the morning of September 11, 2001, and flew the planes into the towers of the World Trade Center, the Pentagon, and Shanksville, Pennsylvania."[73] In response, "President Bush issued a flurry of unilateral directives to combat terrorism."[74] These unprecedented actions were met, perhaps unsurprisingly, with litigation. Professor Stephen Vladeck calls the litigation that ensued the "September 11 terrorism jurisprudence."[75]

One case of particular import was *Boumediene v. Bush*,[76] which came about in response to two jarring actions taken by President Bush. The first "was Bush's unilateral decision to create a new court system . . . ."[77] Indeed, "the president signed an order allowing special military tribunals to try any noncitizen suspected of plotting and/or committing terrorist acts or harboring known terrorists."[78] This decision by President Bush was particularly startling in light of the Supreme Court's "landmark decision in *Ex parte Milligan*, which barred the federal government from trying civilians in ad hoc military tribunals when civilian courts were available."[79]

The second decision by President Bush that led to litigation was the decision of the United States to "ship captured members of al Qaeda and the Taliban to . . . Guantanamo Bay, Cuba."[80]

On the basis of these actions, *Boumediene* came before the Court presenting the question of whether Guantanamo Bay occupants "have the constitutional privilege of habeas corpus."[81] The Court held that detainees do have this

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73. WILLIAM G. HOWELL, POWER WITHOUT PERSUASION, 1 (2003).

74. *Id.*

75. Stephen I. Vladeck, *The Passive-Aggressive Virtues*, 111 COLUM. L. REV. Sidebar 122, at 127.

76. Boumediene v. Bush, 553 U.S. 723 (2008).

77. Howell, *supra* note 73, at 2.

78. *Id.*

79. Stephen Vladeck, *The Imperial Presidency's Enablers*, Foreign Affairs (2021), https://www.foreignaffairs.com/reviews/review-essay/2021-10-19/imperial-presidencys-enablers [https://perma.cc/4UFH-2Z5B]. In other words, *Ex Parte Milligan*'s holding protected citizens and President Bush's directive was specific to non-citizens.

80. HOWELL, *supra* note 73, at 3.

81. *Boumediene*, 553 U.S. at 732.

privilege. However, before delving deeper into the outcome of *Boumediene*, it is worth noting the import of these cases generally.

Professor Vladeck notes that in all of the 9/11 cases, save one exception, the Supreme Court "passive aggressively" asserted power and jurisdiction, while specifically failing to use their rightful platform to adjudicate the cases on the merits.[82] Similarly, Professor Thomas Frank, a professor of international law, coined the term "orphan cases" for foreign policy cases where "the judiciary refuses to get involved," even if they have the jurisdictional right to do so.[83]

The outcomes of the 9/11 cases, specifically, and so-called orphan cases generally, have been "marked by repeated assertions of judicial authority devoid of resolution of the legality of the challenged governmental conduct."[84] Instead, these decisions have generally avoided substance.[85]

The 9/11 orphan cases show that the Court has had the opportunity to render decisions that materially impact foreign policy, but declines to utilize these opportunities to render decisions that can have a substantive impact on the government's foreign policy posture.[86]

The 9/11 cases are a quintessential example of the Court acknowledging that, while they have jurisdiction over a certain category of cases, they are eager to leave the substantive and merits-based decisions to the political branches. There are two reasons why the Court would grant *certiorari* for cases that they do not want to address: first, the Court could have used these cases to accomplish other goals. Look, for example, at the famous case of *Iqbal v. Ashcroft*, which, though technically a 9/11 case, was used by the Court as a mechanism with which to refine the pleading rules outlined in the *Federal Rules of Civil Procedure*.[87] The Court did not need to address the substance to accomplish its goals in *Iqbal*. However, perhaps a more favorable interpretation to the analysis herein is that they granted *certiorari* because they specifically wanted to seize the opportunity to show and further articulate their disdain for foreign diplomacy cases, jurisdictional and constitutional mandates be damned.

With the background of the 9/11 cases now having been provided, it would be prudent to return now to *Boumediene*, as its outcome is particularly relevant to this analysis. The *Boumediene* Court, when presented with the question of whether the federal courts may release Guantanamo detainees, held that Guantanamo detainees may seek remedy from the federal district courts. However, important for our purposes is the following astounding fact: the federal

82. Vladeck, *supra* note 75.

83. Franck, *supra* note 18, at 66.

84. Vladeck, *supra* note 75, at 140.

85. *Id.* at 125 ("justices . . . have been decidedly unwilling to engage the substance of" cases involving national security issues).

86. *Id.*

87. Iqbal v. Ashcroft, 556 U.S. 662 (2009).

courts – thirteen years after *Boumediene* gave them the right to do so– are yet to ever hear any of these cases on the merits.[88]

This is seemingly because, as has been portrayed, courts simply do not want to make impactful foreign policy decisions. The district courts are happy, just as is the Supreme Court, to avoid making these decisions.[89] The judiciary continues to refuse to make substantive determinations on the foreign affairs docket, and the *Boumediene* Court tells us why. Justice Kennedy, writing in *Boumediene*, noted that the judiciary has a long history of "abstaining from questions involving formal sovereignty and territorial governance."[90] That long history has been borne out for good reason. Because, as Justice Kennedy said it, the Court has long recognized "certain matters requiring political judgments are best left to the political branches."[91]

C. JUDICIALLY CONSTRUCTED DOCTRINES

The courts have used the power of case law to construct doctrines that mitigate the impact it can have on foreign affairs. Two doctrines are discussed herein: The Act of State Doctrine, which precludes federal courts from finding that a foreign sovereign has broken the law, even where the foreign sovereign is not a party to the suit, such that any cases implicating foreign sovereigns must be dismissed on the merits.[92] The second is the Charming Betsy Canon, a form of statutory interpretation adopted by the courts, specifically designed to ensure that judicial outcomes do not conflict with international law, in order to avoid decisions that can create international problems for the government.[93]

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88. Vladeck, *supra* note 75, at 124 (". . . whereas the Court in four different decisions has ensured that the federal courts will play a central role in reviewing the detentions of noncitizens at Guantánamo, it has refused to take any case raising detention question on the merits, including the substantive standard for detention, the evidentiary burden on the government, the relevance vel non of international law, whether detainees are entitled to notice and a hearing prior to their transfer to a third-party country, and various other key procedural issues. So, too, the Court has refused to consider claims by former Guantánamo detainees that they were mistreated while detained, leaving intact a D.C. Circuit decision that held in the alternative that the defendants were entitled to qualified immunity and that the plaintiffs failed to state a viable cause of action. Taken together, these decisions have been widely read (including by judges on the D.C. Circuit) as reflecting an unwillingness on the Justices' part to do anything vis-à-vis Guantánamo other than assert their jurisdiction.").

89. *See, e.g.*, In re: Terrorist Attacks on September 11, 2001, 298 F.Supp.3d 631 (S.D.N.Y. 2018).

90. *Boumediene*, 553 U.S. at 765.

91. *Id.*

92. Cases in which the foreign sovereign is a party are governed by the Foreign Sovereign Immunities Act (28 U.S.C § 1330) which similarly precludes judgment from courts that can negatively impact foreign relations.

93. Murray v. The Charming Betsey, 6 U.S. 64 (1804).

1. THE ACT OF STATE DOCTRINE

The Act of State Doctrine, created by courts for courts, states that the judiciary will not make any ruling (barring some exceptions) that implicates or impugns negatively upon a foreign sovereign. The Doctrine makes clear that courts will always assume that a foreign sovereign has behaved properly, even in cases where the foreign sovereign has obviously not behaved properly. The most famous example of this is *Banco Nacional de Cuba v. Sabbatino*,[94] where "the Supreme Court held that there was no exception to the Act of State Doctrine for acts of state that *violated* CIL."[95] That is quite amazing. So apprehensive is our system about courts that "issue rulings that could potentially embroil the entire nation in international controversies"[96] that the Supreme Court of the United States will find against a plaintiff – on the merits – simply because the case implicated a foreign sovereign, even where it was clear to all that the foreign sovereign expressly violated international law.

The Doctrine exists because courts recognize that they are not in a position to speak negatively about a foreign entity. In criticizing a foreign sovereign, or in pointing out that they have broken the law, the judiciary — by speaking on the imprimatur of the United States government — could upheave or otherwise injure foreign policy initiatives. Upon creating a foreign policy crisis, it does not have the ability to do damage control through diplomatic channels. Thus, by creating the Act of State Doctrine, the courts have perpetually limited itself from making such findings.

2. THE CHARMING BETSY CANON

The Charming Betsy Canon, as it was first articulated by Chief Justice Marshall, stated that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[97] This concept has been codified in the Restatement, and it is applied regularly by courts.[98]

Because the Chief Justice declined to elaborate on the basis of this rule, scholars have been forced to pontificate on its purpose. One "well-accepted rationale" is the separation of powers rationale, in which "Professor Bradley, propose[s] that the cannon stems from a separation of powers principle" designed to prevent "judicial encroachment into the foreign affairs prerogatives of the political branches."[99]

Professor Bradley believes that because "the political branches [have an] advantage *vis a vis* the courts in obtaining foreign affairs information and in

94. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).
95. Bradley & Goldsmith, *supra* note 50, at 828–29 (emphasis added).
96. Koh, *supra* note 6.
97. *Murray*, 6 U.S. at 118.
98. *See* Bradley, *supra* note 19, at 482.
99. *The Charming Betsy Canon*, *supra* note 45, at 1216.

responding to changing world conditions . . . for functional reasons, the political branches should determine when and how the United States violates international law."[100]

As such, when presented with a statute that need not, but may, violate international law, the courts should assume – perhaps erroneously – that Congress had no intent to violate international law. The Canon effectively requires that the judiciary contorts domestic law, especially where "violations [of international law] offend other nations and create foreign relations difficulties for the United States."[101]

Worthy of note is that, opposite Professor Bradley, scholars have recognized that a presumption that statutes should not be interpreted to be inconsistent with international law could just as easily increase the courts' role in international conflicts. On the basis of that realization, they suggest underlying theories of the Charming Betsy canon very different from the Separation of Powers concept articulated by Professor Bradley.

However, many of those other theories have been repudiated because they "explicitly invite[] the judiciary to participate both in foreign relations policy and in legislation, areas from which it is precluded by the Constitution." [102] This makes the separation of powers conception the most compelling theory of the bunch.

If Bradley's conception of the canon is correct, Chief Justice Marshall intentionally deferred the power to interpret domestic law as he desired, and tied the hands of all future courts, by allowing them only one form of analysis. Namely, the one that requires a finding that cannot, in any normal circumstance, create international strife.

Notably, since the Charming Betsy Canon was created, few (if any) courts have questioned it, such that nowadays it is considered a "bedrock of . . . judicial construction."[103]

D. STATUTORY INTERPRETATION: THE ALIEN TORT STATUTE LITIGATION

Often the subject of litigation, the Alien Tort Statute ("ATS"), passed shortly after the founding of this country, still takes the time of the courts. That is because "ATS cases trigger highly contested questions about the roles of the three branches of the federal government . . . ."[104]

The statute states in its entirety: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[105]

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100. Bradley, *supra* note 19, at 525.

101. *Id*. at 495.

102. *The Charming Betsy Canon*, *supra* note 45, at 1218–19.

103. Bradley, *supra* note 19, at 4 (internal quotations omitted).

104. Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1467, 1468 (2014).

105. 28 U.S.C § 1350 (1948).

The statutes' brevity notwithstanding, it has been the center of much controversy, as courts have had to deal with determining its import, usually in the context of human rights litigation.[106]

The modern ATS doctrine began in *Sosa v. Alvarez-Machain*.[107] The *Sosa* Court held that, despite having the appearance of being a mere jurisdictional statute, the ATS must have been passed with implied causes of action, because Congress did not subsequently statutorily pass causes of action that could invoke the ATS, and because there is little chance that the original Congress wanted the statute to be dormant.[108] The implied causes of action emanating out of the ATS, said the Court, were "Blackstone's three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and piracy."[109]

The Court, in *Sosa*, also opened up the possibility for future courts to develop additional causes of action under the ATS. But seventeen years after *Sosa*, and a couple of centuries after the passage of the statute, the federal judiciary "has never—not once in 230 years—invoked the ATS to create a new cause of action."[110]

The courts declined to participate in developing causes of actions that arise under the ATS, according to Justice Gorsuch, because "our Constitution generally assigns *that* power to Congress."[111]

Ultimately, Justice Gorsuch advocates for overruling *Sosa*, precisely because he realizes that the Court's involvement in creating causes of actions under this statute could have a negative impact on foreign policy. Such was the case in *Jesner*, an ATS case that "caused significant diplomatic tensions with Jordan for more than a decade."[112] *Jesner* was a prime example of what Gorsuch later stated was the precise issue with ATS litigation. Namely, it forced the Court to make foreign policy determinations that could have adverse outcomes.

In entertaining such cases, said Justice Gorsuch, the Court "risk[s] doing exactly what Congress adopted the ATS to avoid: complicating or even rupturing this Nation's foreign relationships."[113] Justice Gorsuch, like so many judges before him (albeit often in different contexts,) wants nothing to do with litigation that can negatively impact foreign affairs.

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106. *See generally* Stephens, *supra* note 104; Bradley, *supra* note 19.

107. *See Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

108. *Id*. at pincite.

109. *Id*. at 724.

110. Nestle USA Inc. v. Doe, 141 U.S. 1931, 1942 (2021). Gorsuch, for similar reasons, advocates for the "end [of] ATS exceptionalism" opting for a new rule where it was treated like any other jurisdictional statute, where congressional causes of action need to be established for the cause of action to exist. Jesner v. Arab Bank, PLC, 584 U.S. 1386, 1412 (2018), (Gorsuch, J., concurring).

111. *Nestle*, 141 U.S. at 1942. (Gorsuch, J., concurring) (emphasis in original).

112. Jesner v. Arab Bank, PLC, 584 U.S. 1386, 1399 (2018).

113. *Nestle*, 141 U.S. at 1943. (Gorsuch, J., concurring).

III. THE WAY FORWARD: THE *FILARTIGA* STANDARD AND BEYOND

Filartiga v. Pena-Irala,[114] a "seminal" case,[115] with an incredible longevity for relevance, is often cited by scholars as the definitive example, with a positive outcome, where a court successfully addressed a case on the foreign policy docket. In the case, the Second Circuit held that a foreigner could be held liable for torture in a United States court.

Because of its novel holding, when international law scholars attempt to solve an issue, *Filartiga* is often the case they go to for guidance. I see no reason to depart from that tradition. But *Filartiga* is a narrow opinion. Therefore, this Note submits that courts should indeed follow *Filartiga* when deciding to opine on certain cases, but *Filartiga's* narrow opinion makes such involvement few and far between.

When the "*Filartiga* standard," as outlined below, is not met, courts should dismiss the case and possibly make a notation in that dismissal that the case should be dealt with by the political branches, particularly the executive.[116]

A. THE *FILARTIGA* STANDARD, ITS ELEMENTS, AND ITS IMPLICATIONS

The *Filartiga* court pointed to three important factors that helped it determine that adjudication of the case was proper, despite the foreign diplomacy consequences. A case that cannot satisfy those same three factors, in the form of a doctrinal test, should be defined as a per se "foreign affairs docket" case, such that the court should dismiss the suit.

1. THE TEST

Filartiga stated a narrow holding:

> The ATS affords jurisdiction over a claim for torture against a former foreign government official who came to the United States to escape liability at home, when his state did not assert immunity on his behalf, and when the executive branch supported the assertion of jurisdiction, and subject to consideration of whether the claim could be litigated in the home country.[117]

According to *Filartiga*, courts should deal with a foreign policy issue when three elements are met:

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114. Filartiga v. Pena-Irala, 630 F.2d 876 (1980).

115. William S. Dodge, *The Surprisingly Broad Implications of* Nestlé USA, Inc. v. Doe *for Human Rights Litigation and Extraterritoriality*, JUST SECURITY (June 18, 2021), https://www.justsecurity.org/77012/the-surprisingly-broad-implications-of-nestle-usa-inc-v-doe-for-human-rights-litigation-and-extraterritoriality/ [https://perma.cc/GEJ3-9F9A].

116. How exactly the political branches would deal with these issues is mostly out of the scope of this article, as it has more to do with how the political branches should act than how the judiciary should. Still, some ideas will be briefly explored below.

117. Stephens, *supra* note 104, at 1483.

First, the foreign sovereign, by not claiming immunity on behalf of the defendant, has manifested an ambivalence toward the litigation. This implies that, in the opposite case, where a state specifically does articulate a disdain for the litigation, a federal court's decision could interfere with the government's foreign policy initiatives.

Unlike in American contract law,[118] but much like America's law of evidence,[119] it would be reasonable to consider silence as constituting acquiescence, because it is not reasonable for the system to expect that a foreign sovereign will speak up every time a case they do not care about is before a court.

Therefore, disdain against the litigation must be externally manifested, for a court to decline to hear the case. The burden would be on the party advocating for dismissal to make this showing, or a court could determine that protest has been expressly made *sua sponte*. In *Jesner*, for example, this first element would not have been met because of Jordan's express disdain toward the litigation.

Second, the Executive Branch supports the assertion of jurisdiction. This is akin to the *Bernstein Letters Case*.[120] In that case, the Court made a rare exception to the Act of State Doctrine, holding that because the Executive Branch expressly stated that a judicial outcome in the case would not hamper its foreign policy initiatives, the judicial intervention was permissible. It should be the rule that absent express executive authorization, courts cannot participate in any decisions that would materially impact foreign affairs, because America cannot risk embarrassing the executive as s/he engages in foreign affairs.

Furthermore, as stated in the very first line of this paper, courts must not be able to inflict damage that they cannot control. Because the executive has the capacity to do damage control on the international landscape, they must approve any outcome that impacts foreign policy.

This is consistent with the principle stated by the Supreme Court in *Crosby v. National Foreign Trade Council*, that the President "speak[s] for the Nation with one voice."[121] It is similarly consistent with the Supreme Court's language in other international cases of consequence, such as *Verlinden B.V v. Central Bank of Nigeria* (a Foreign Sovereign Immunity Act case,) where Chief Justice Burger, writing for the majority, stated that "this Court consistently has deferred to the

118. *See, e.g.*, McGlone v. Lacey, 288 F. Supp. 662 (D.S.D. 1968) ("Silence will not of itself constitute an acceptance.").

119. *See, e.g.*, People v. Vinning, 28 N.Y.3d 686 (2017) ("Assent can be manifested by silence, because [a] party's silence in the face of an accusation, under circumstances that would prompt a reasonable person to protest, is generally considered an admission."); *see also* Michael J. Hutter, *'People v. Vining': Adoptive Admissions by Silence,* NEW YORK LAW JOURNAL (2017) ("Vining holds that silence or evasive answers can be viewed as a manifestation of assent to an accusatory statement . . . .") https://www.law.com/newyorklawjournal/almID/1202783055017/ [https://perma.cc/C4CB-9MCZ].

120. The Bernstein Letters Case, 400 U.S. 1019 (1971).

121. Crosby v. National Foreign Trade Council, 530 U.S. 363, 381 (2000).

decisions of the political branches – in particular, those of the Executive Branch – on whether to take jurisdiction over actions [on the foreign affairs docket]."[122]

Third, litigation efforts in the home country (supposing the activity took place elsewhere) have been considered. This is not dissimilar to the International Court of Justice's ("ICJ") jurisdiction rules, which provide that "local remedies must be exhausted before international proceedings may be instituted . . . ."[123] Exhausting all domestic efforts as a prerequisite is a good rule because, should local remedy be available, it is less likely to create international strife than remedy in the United States.

Filartiga provides a workable framework within which the courts can address these issues and these cases. By using these three factors, in the form of a doctrinal test, the American system would ensure that the judiciary only hears cases where there is "little danger that judicial enforcement will impact . . . foreign policy efforts."[124]

Notably, in the *Filartiga* case itself, despite the fact that these distancing factors were met, "[g]overnment lawyers . . . [still] worried that the [outcome risked] creating tension in our foreign relations."[125] This shows how sensitive the executive branch is to judicial interference in matters of international consequence, and strengthens the view that courts should not hear cases on the foreign affairs docket.

2. DEFINING "FOREIGN AFFAIRS DOCKET" CASES

A case "impacts foreign relations" or is on the "foreign affairs docket" in this context, where the *Filartiga* elements are not met. When a case is a foreign relations case, under this definition, the court – having already acknowledged their inability and lacking infrastructure to deal with such cases – should dismiss them.

Where all three elements are met, in contrast, the case is clearly distanced enough from foreign policy considerations such that there is no legitimate concern that a judicial outcome will harm international relationships and policies. Only where fear of such harm is eliminated should the courts decide these cases. The unpalatable alternative is that the courts decide these cases where they have, time and again, explicitly said that they have no institutional capacity or expertise to do so. Much like with the Political Questions Doctrine, if the elements are met, the Court should simply decline to hear the case.

The additional benefit of a hardline rule such as this one, is that plaintiffs' attorneys can run through the analysis easily (at least in the easy cases), choose

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122. Verlinden B.V v. Central Bank of Nigeria, 461 U.S. 480, 486 (1983).

123. Interhandel Case (Switzerland v. United States), 1959 I.C.J 6 (Mar. 21) ("The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law . . . .").

124. Stephens, *supra* note 104, at 1504 (internal citations omitted).

125. *Id.*

not to bring a lawsuit in the first place, and instead seek alternative remedies. This would avoid forcing the courts to do what it has done since its inception – duck these cases or answer them with an unsatisfactory decision.[126] Such a standard can be instituted doctrinally by the Supreme Court, or alternatively, through congressional legislation.

B. THE IMPACT AND IMPLICATIONS OF THIS STANDARD

This paper would be incomplete without a recognition that the standard created herein would apply to a broad array of cases, as well as affect others that one might not generally consider a "foreign affairs case." In the next few sections, this paper will explain why such a broad application is worthwhile.

Additionally, in the coming paragraphs, the following question must be addressed: if the Executive Branch has acquiesced to the litigation (as in the *Bernstein Letters Case*) why should the rule require further acquiescence from the foreign sovereign? Presumably, if the Executive Branch says the litigation is okay, they have done so with the recognition that the foreign sovereign might lose in court. In such a case, there is little risk that the judicial outcome will embarrass the President. Yet, in *Filartiga*, and in the test herein derived from it, both executive acquiescence and foreign apathy is required. As will be explored below, there is good reason to include both of these elements in the rule.

1. THE STANDARD IS BROAD

It must be noted that this test is, admittedly, a very broad standard. But where the courts have repeatedly iterated that they want out of this business, broad limitations on the courts' jurisdiction are warranted.

The rule outlined herein rests upon two assumptions. The first is that international sovereigns, even authoritarian ones, want to be seen as legitimate in the eyes of the international community.[127] For that reason, a foreign sovereign will not protest against minor litigation like a slip and fall torts suit, where doing so will make them look foolish, petty, and illegitimate in the eyes of the world community.

The second assumption, which is not required for this rule to work (though it would be preferable), is that upon removing the judiciary from these cases, the political branches will help plaintiffs achieve remedy through diplomatic channels. Or, at the very least, the political branches will consider helping aggrieved plaintiffs and decline to do so where the juice is not worth the squeeze.[128]

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126. *See, e.g.*, *supra* Part II.B (illustrating the Court's willingness to avoid the merits of a case). *See* Glass v. Sloop Betsey, 3 U.S. 6 (1794) (illustrating an unsatisfactory decision).

127. *See, e.g.*, Mark Jia, *Special Courts, Global China* 62 VA J. INT'L L. 1, 35 (2022) (discussing China's desire to be viewed as having a legitimate judiciary despite their authoritarian rule – "China's leaders increasingly appreciate that in order for China's legal institutions to be globally influential, they must be, to some significant degree, globally appealing.").

128. Justice Gorsuch expressly acknowledges that the political branches can make this calculation in a way that the Court cannot. Writing in Jesner, Gorsuch provides that "If a foreign state or citizen violates an

One would hope that, where a plaintiff was truly aggrieved, there would be political pressure placed upon the political branches to go and achieve justice on the plaintiff's behalf, particularly where the courts cannot or should not. One can imagine a scenario where activists ran through the streets calling upon their political leaders to ensure justice where, for example, a plaintiff faced a human rights abuse at the hands of a foreign party protected by prong two of this test.

Admittedly, there would be times where the political branches make a judgment call and decline to intervene on behalf of the aggrieved. That outcome might be sad, but it is the cost of doing business.

Pushback against a rule that potentially leaves aggrieved plaintiffs without remedy may be met with two responses: The first is that these plaintiffs are not currently getting remedy anyway. Using, again, human rights abuses as an example, plaintiffs try to achieve remedy through the ATS, but never win. In the rare event that they do win, they often can't collect on the judgment.[129] *Filartiga* itself is the quintessential example of that conundrum. There, the Court rendered judgment for the Plaintiff, but to no practical effect, because the judgment could not be enforced.

The second response, as articulated above, is that there is a cost of doing business, and that is certainly the case when you hold the unenviable job of President of the United States. Ultimately, the choice of whether to seek remedy for an aggrieved plaintiff where the courts could not or should not do so, ought to be left to the President because s/he will be the one forced to deal with the international consequences.

In Washington's Neutrality Crisis case, for example, Washington should have realized that it was up to him to respond to French privateers attacking British ships, because he – as President – would ultimately be tasked with dealing with the consequences of the decision. Washington could have, for example, reached out to the French and/or British diplomatically. He could have ignored the issue. He could have taken military action of his own. There is a world of possible responses Washington could have taken (some wiser than others,) but ultimately, it was for him to decide what the American government's response would be,

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"international norm" in a way that offends another foreign state or citizen, the Constitution arms the President and Congress with ample means to address it. Or, if they think best, the political branches may choose to look the other way." Jesner v. Arab Bank, PLC, 584 U.S. 1386, 1412 (2018), (Gorsuch, J., concurring). Justice Alito wrote similarly: "Congress and the Executive Branch may be willing to trade off the risk of some diplomatic friction in exchange for the promotion of other objectives (such as "holding foreign corporations to account for certain egregious conduct,"). That is their prerogative as the political branches. But consistent with the separation of powers, we have neither the luxury nor the right to make such policy decisions ourselves." *Id.* (Alito, J., concurring in part).

129. Scholars call cases like *Filartiga*, or ones that make it even less far, symbolic victories. They are very proud of those victories. *See* Stephens, *supra* note 104, at 1489. But this is a very practical Note, and symbolism as a victory leaves me unpersuaded.

because he was to be the one tasked with handling the consequences of the chosen response.

2. THE INHERENT TENSION BETWEEN THE *FILARTIGA* PRONGS

There is an inherent tension between the first two *Filartiga* prongs. Namely, one might reasonably question why the court needs both executive acquiescence and the acquiescence of the potentially angered sovereign. Yet, *Filartiga* stressed both of the elements. The tensions can be described thusly: if the Executive Branch has already determined, as they did with the *Bernstein Letters Case*, that the resolution of the dispute will not negatively impact their foreign policy goals, why should the Court care what the foreign sovereign has to say about it?

I present two possible answers. First, while the Court has called the Executive Branch the "sole organ" of foreign policy, it has also qualified that by noting that Congress does – and always has – had a role to play in foreign affairs. While this paper is premised on the principle that the Executive Branch should be the primary actor in foreign diplomacy, because it is the branch with the capacity to do damage control, that does not mean that Congress has no say on how the country treats its international colleagues.

As such, not only do we need the Executive Branch to sign off to ensure compliance with foreign policy goals, we need the foreign sovereign to express apathy because Congress might not want to anger the sovereign, even where the President doesn't care too.

One might reasonably suggest, then, that prong two should call for a congressional vote, rather than foreign acquiescence, but the congressional vote presents issues that foreign sovereign acquiescence does not. Namely, the congressional vote would almost definitely not be unanimous, which detracts from the U.S.' goal of speaking as "one voice" in international affairs.[130]

Additionally, it would simply be clunky to require a vote every time someone wants to sue somebody else in a way that *might* anger a foreign sovereign. In cases of little consequence (such as the trip and fall case or a breach of contract claim) the foreign sovereign is not likely to voice objections. These would be the large majority of cases that fall within the boundaries of this rule. Requiring a congressional vote on each slip and fall case would be impracticable. Moving forward with the suit unless a foreign sovereign expressly protests to it is far more realistic.

The second reason that the *Filartiga* test makes sense despite the apparent tension between the two prongs is because the test, broad as it is, is designed to push these cases out of the judiciary. That the test would do so with great intensity is a benefit, not a detriment. Think, for a moment, about the (non-exhaustive) list of

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130. *See Crosby*, 530 U.S. at 381. *But see generally* Sarah H. Cleveland, *Crosby and the One-Voice Myth in U.S. Foreign Relations*, 46 VILL. L. REV. 975 (2001).

instances above where the courts, or scholars commenting on them, have tried to keep these cases out of their courtrooms but to little or no avail. In proposing a new rule to remedy that, the test must include a presumption against hearing these cases, and that is what each individual prong does.

C. WHEN THE *FILARTIGA* STANDARD IS NOT MET: USING FOREIGN SOVEREIGN IMMUNITY AS A GUIDE

Suppose the conception outlined in this paper comes to fruition, and courts begin to apply the *Filartiga* test to all cases on the foreign affairs docket. What would become of all disputes that do not meet the test? Well, certainly a world can be imagined where such suits are simply dismissed, the same way a foreign sovereign immunity, Act of State Doctrine, or a case lacking jurisdiction is dismissed.

However, this Note considers alternative options. Anywhere the *Filartiga* standard fails, the case ought to be dismissed by the judiciary with a notation on the order that brings the executive's attention to the case. After all, the Court established long ago that the executive is the "branch of government charged with the conduct of foreign affairs."[131]

The executive, within the parameters passed for it by Congress, could make determinations on whether and how to address these cases. It is the President, said the Court, who is tasked with such determinations, because cases involving "foreign governments are [best] adjusted through diplomatic channels."[132] Of course they are. Because each of these cases "has its effect upon our relations with [another] government," with whom only the President can effectively communicate.[133]

The President can work through diplomatic channels to deal with the issues presented by a case that the court cannot hear, or alternatively, can act through executive action, willing his/her preferred resolution into existence. In the most extreme cases, perhaps, the President can use the force of the United States military to ensure the desired outcome.

The problematic nature of the status quo, which relies too heavily on courts and not enough on the executive, is well-illustrated by the political hoopla that surrounded the enactment of the Justice Against Sponsors of Terrorism Act (JASTA).

In 2016, Congress – over a presidential veto – passed the JASTA, which "allow[s] private litigation against foreign governments in U.S. courts based on allegations that such foreign governments' actions abroad made them responsible for terrorism-related injuries on U.S. soil."[134] Notably, despite the resounding

131. Republic of Mexico v. Hoffman, 324 U.S. 30, 34 (1945).

132. *Id*.

133. *Id*. at 35.

134. Veto Message from the President – S.2040 (Sep. 23, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/09/23/veto-message-president-s2040 [https://perma.cc/H43G-FZB3].

congressional support for JATSA, President Obama vetoed the bill, saying that "JASTA would be detrimental to U.S. national interests" because it takes foreign policy "matters out of the hands of national security and foreign policy professionals and plac[es] them in the hands of private litigants and courts."[135] Rather, President Obama reasoned, the proper approach was a "unified Federal Government response" orchestrated by the Executive Branch, as opposed to a potentially bifurcated response where "different courts reach[] different conclusions" on international liability.[136]

After JASTA passed, President Obama stated that "a number of [United States] allies and partners. . .contacted [him] with serious concerns about the bill."[137] Indeed, the European Union went as far as to say that the legislation "conflict[s] with fundamental principles of international law . . . ."[138] President Obama felt strongly that foreign sovereigns and their liability should be dealt with by the president, rather than through litigation.

President Obama's concerns were legitimate. After all, it is eminently reasonable to suggest that if the executive is the one that must deal with the consequences of government statements or actions regarding foreign sovereigns, it should be the executive (within the parameters granted to it by Congress) that makes those statements or actions.

Where, as articulated above, courts cannot remedy international strife emanating from its opinions, it should not be allowed to render those opinions. This is why President Obama vetoed otherwise politically popular legislation. In this particular instance, legal experts agreed with President Obama, saying that the legislation "threatens American interests abroad and risks rupturing diplomatic relations."[139] In doing so, the bill put the executive, as well as the country writ-large, in a difficult spot from a foreign policy perspective.

Had Congress gone in the opposite direction, and given the JASTA responsibilities to the President instead of the courts, there would have been wide discretion for the President – working within Congress' stated boundaries – on how to approach these cases.[140] This *ad-hoc* presidential approach has been used before.

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135. *Id*.

136. *Id*.

137. *Id*.

138. *See Statement*, European Union Delegation to the United States of America (2016), https://www.washingtonpost.com/news/powerpost/wp-content/uploads/sites/47/2016/09/EU-on-JASTA.pdf [https://perma.cc/C94N-SUD5]. *But see* William S. Dodge, *Does JASTA Violate International Law?*, JUST SECURITY (Sep. 30, 2016), https://www.justsecurity.org/33325/jasta-violate-international-law-2/ [https://perma.cc/7TFKNM3Y] (writing that "JASTA does not clearly violate customary international law" even though it might be "bad policy").

139. John Kruzel, *Legal Experts Say Law Allowing 9/11 Families to Sue Saudi Arabia Has Consequences*, ABC NEWS, (Sept. 28, 2016), https://abcnews.go.com/Politics/legal-experts-law-allowing-911-families-sue-saudia/story?id=42432568 [https://perma.cc/HM87-9JKR].

140. Congress' role in these cases has already been established by the Supreme Court in *Zivotovsky v. Kerry*, 576 U.S. 1, 18 ("[I]t is essential the congressional role in foreign affairs be understood and respected.")

Again, in the Foreign Sovereign Immunity space, prior to the enactment of the FSIA,

> [T]he President had the authority to make case-specific determinations as to whether sovereign immunity should be recognized and it was never 'for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.'[141]

The FSIA perpetuated that theme, leading Justice Scalia to quip that Congress "forced [the courts'] retirement from the immunity . . . business . . . ."[142]

President Obama's concern was perfectly reasonable considering his job description. In a dangerous world where global leaders are hard to predict, the last thing a sitting President (or the Country) needs is to find an international sovereign angered by the actions of the US courts.

CONCLUSION

The federal judiciary is not equipped to handle cases of foreign policy import. When asked to do so, they have declined. Interestingly, not only has the Supreme Court, in particular, avoided taking cases related to foreign affairs, but recently where a lower court was brazen enough to take up such an issue head-on, the Supreme Court stopped them. In *Austin v. U.S. Navy Seals 1–26*,[143] a recent case challenging the government's COVID-19 vaccine requirement on service members who wanted to exercise a religious objection, the district and intermediate appellate court granted an injunction against the military's vaccination rule allowing the Navy Seals to avoid the vaccination, at least temporarily.[144]

The Supreme Court would have none of it. Writing in favor of the government's mandate, Justice Kavanaugh wrote that he disagreed with the lower courts because "[u]nder article II of the Constitution, the President of the United States, not any federal judge, is the commander in Chief of the Armed Forces."[145] To Justice Kavanaugh, the case did not center around a religious issue, but rather a national security one. Pointing to Supreme Court precedent, Justice Kavanaugh explained that "courts [have] traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs."[146]

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141. In re: Terrorist Attacks on September 11, *2001* 298 F.Supp.3d 631 (S.D.N.Y. 2018) (quoting in part Republic of Mexico v. Hoffman, 324 U.S. 30, 35 (1945)).

142. Republic of Argentina v. NML Capital, LTD, 134 U.S. 2250, 146 (2014).

143. Austin v. U.S. Navy Seals 1–26, 595 US _ (2022).

144. U.S. Navy Seals 1–26 v. Biden, 27 F.4th 336 (5th Cir. 2022) ("The district court preliminarily enjoined the Department of Defense ('DoD'), . . . from enforcing certain COVID-19 vaccination requirements against 35 Navy special warfare personnel and prohibited any adverse actions based on their religious accommodation requests.").

145. Austin v. U.S. Navy Seals 1–26, 595 US __, 1302 (2022)

146. *Id*. (citing Department of Navy v. Egan, 484 U.S. 518 (1988)).

Ultimately, Kavanaugh held that judicial intervention on the military's COVID-19 vaccine, only tangentially related to warfare because of upon whom the mandate had been imposed, would be "employing judicial power in a manner that the military commanders believe would impair the military of the United States as it defends the American people."[147] Remarkably, Justice Kavanaugh effectively ignored the lengthy First Amendment question that took the attention of the lower courts,[148] all because he was averse to an argument adverse to the military's stated interest, because the military stated that its interest was founded upon national security.[149] The federal judiciary, in general, has taken the path of least resistance on cases like *Austin*, and the others discussed herein, because their institutional capabilities, ethical guidelines, and the country's best interest does not counsel them towards doing so.

While the judiciary has played a large role in limiting the degree to which it engages in matters involving foreign affairs, it must do more, and if it does not, Congress must step in. *Filartiga*, a seminal case, outlines the concerns that plague these cases, and provides a workable framework within which the judiciary can approach them. Namely, the courts should consider the posture of the implicated foreign sovereign, the executive branch, and the litigants. Because courts lack the political knowhow, stratagem, and capability that the Executive Branch has, it should be the executive, regulated by Congress, charged with dealing with these disputes through diplomatic channels.

147. *Id.*
148. *Id.*
149. *Id.*