ECONOMIC SECURITY AS NATIONAL SECURITY: CFIUS AND JUDICIAL OVERSIGHT IN THE ERA OF EXECUTIVE OVERREACH

KOHEI TAKIGUCHI*

The President has the statutory authority to block proposed foreign investments in the United States based on reviews by the Committee on Foreign Investment of the United States (CFIUS) of whether such investments pose national security risks. Consistent with the increasingly pervasive concept of national security in U.S. policy in recent years, CFIUS has taken a more assertive role, creating greater uncertainty among foreign investors. However, two barriers exist to judicial review on the merits of the President's decisions to block transactions. First, the Supreme Court has ruled that the President's actions are insulated from statutory claims under the Administrative Procedure Act and certain non-statutory ultra vires claims. Second, the CFIUS statute has a finality clause that provides further protection by explicitly barring judicial review of the President's decisions.

This Note contends that the President's decisions to block foreign investments should be subject to substantive judicial review. It demonstrates the need and justification for such review by pointing to instances of executive overreach in the area where national security and economic measures overlap. It then analyzes courts' approaches to the executive branch's national security decisions in economic sanctions cases. Such an analysis reveals that amending the CFIUS statute to provide for a similar review framework would enable courts to safeguard private parties' liberties while respecting the government's national security interests.

*†LL.M., 2025, NYU School of Law. All opinions and views expressed herein are solely those of the author and should not be attributed to any affiliation.

I. INTRODUCTION

The U.S. President possesses unique constitutional powers over national security and foreign affairs.[1] At the same time, Congress has delegated various national security-related authorities to the President by statute.[2] The judiciary has traditionally exercised its power to review the executive branch's exercise of statutory national security powers

1. U.S. CONST. art. II. § 2.

2. Amy L. Stein, *A Statutory National Security President*, 70 FLA. L. REV. 1183, 1193 (2018).

highly deferentially.[3] This is especially true when the action in question is taken by the President, rather than by an agency.[4]

Since the 2010s, the concept of national security has become increasingly pervasive in U.S. policy.[5] In particular, the U.S. government has conflated economic and national security interests. Numerous economic measures, such as tariffs and export controls, have been linked to national security narratives and leveraged to advance U.S. interests in the U.S.-China rivalry and to protect the domestic industrial base.[6] Consequently, the President more frequently invokes national security powers with little, if any, judicial oversight,[7] creating a greater risk of executive overreach.[8]

Consistent with this trend is the expanded jurisdiction of the Committee on Foreign Investment of the United States ("CFIUS").[9] CFIUS is an interagency body that serves the President in overseeing the potential national security risks of certain foreign direct investment in the United States.[10] Section 721 of the Defense Production Act of 1950 ("Section 721") authorizes CFIUS to review foreign investments and gives the President the power to block transactions based on CFIUS reviews.[11] Foreign investors face greater uncertainty due to CFIUS's aggressive assertion and enforcement of its authority.[12]

---

3. Kristen E. Eichensehr & Cathy Hwang, *National Security Creep in Corporate Transactions*, 123 COLUM. L. REV. 549, 554 (2023).

4. *See* William Yeatman, Cato Institute, Policy Analysis No. 935, *Reining in the Unreasonable Executive: The Supreme Court Should Limit the President's Arbitrary Power as Regulator* 6 (Nov. 1, 2022), https://www.cato.org/sites/cato.org/files/2022-10/pa-935.pdf (arguing that "courts allow obvious abuses of discretion" when the President, rather than an agency, is the decisionmaker); *see* Kathryn E. Kovacs, *Constraining the Statutory President*, 98 WASH. U. L. REV. 63, 66 (2020) (noting that judicial review of the President's action pursuant to statutory authority is "constrained significantly" compared to an agency's action).

5. *See infra* Part IV.A.

6. *See infra* Part IV.A.

7. *See infra* Part IV.C.

8. *See infra* note 246 and accompanying text.

9. *See infra* Part II.F.

10. James K. Jackson, Cong. Rsch. Serv., RL33388, *The Committee on Foreign Investment in the United States (CFIUS)* 1 (2020).

11. 50 U.S.C. § 4565 (2018).

12. *See infra* Part IV.B.; *See also* Eichensehr & Hwang, *supra* note 3, at 596–602 (describing the disruptive effect of the uncertainty in the CFIUS process on dealmaking from a contract theory perspective).

However, Section 721 explicitly bars judicial review of the President's actions and findings. It is true that in *Ralls*,[13] the court upheld the foreign investor's due process challenge, marking the first judicial challenge by a foreign investor to the President's decision under the CFIUS regime. Yet, *Ralls* also reveals that the finality provision makes it virtually impossible for foreign investors to ask the court to review the substance, rather than the process, of the President's decisions to block a transaction.[14] Moreover, even without the finality provision, the President's actions under statutory authority are shielded from substantive judicial review under Supreme Court precedents.[15]

This Note contends that the President's decisions should be subject to substantive judicial review. Given the Supreme Court precedents, however, simply deleting the finality provision would not achieve a framework that balances national security and private parties' liberty. This Note therefore proposes amending Section 721 to explicitly provide for the court's power to review and set aside the President's decisions when the President exceeds or abuses their authority. Part II provides an overview of the history of CFIUS and identifies the features of the Foreign Investment Risk Review Modernization Act of 2018 ("FIRRMA").[16] Part III explains how Section 721's finality clause and Supreme Court precedents impede merits review. Part IV demonstrates the need and justification for substantive judicial review of the President's actions by pointing to instances of suspected executive overreach. Part V analyzes courts' approaches to the executive branch's national security decisions in economic sanctions cases to explore the appropriate scope and framework of judicial scrutiny of the President's decisions.

---

13. Ralls Corp. v. Comm. on Foreign Inv. (*Ralls I*), 926 F. Supp. 2d 71 (D.D.C. 2013); Ralls Corp. v. Comm. on Foreign Inv. (*Ralls II*), 987 F. Supp. 2d 18 (D.D.C. 2013); Ralls Corp. v. Comm. on Foreign Inv. (*Ralls III*), 758 F.3d 296 (D.C. Cir. 2014) (reversing and remanding *Ralls II*).

14. 50 U.S.C. § 4645(e)(1); *see infra* Part III.

15. *See infra* notes 85–89 and accompanying text.

16. Foreign Investment Risk Review Modernization Act of 2018, Pub. L. No. 115-232, 132 Stat. 1636, 2173 (2018) (codified at 50 U.S.C. § 4565).

II. HISTORY OF CFIUS

A. *Early Days: Before Exon–Florio*

The origins of national security restrictions on foreign investment date back to World War I.[17] In response to the national security concerns caused by German investments in the United States, Congress passed the Trading with the Enemy Act ("TWEA"), giving the President broad authority to take action against foreign investment during times of war and national emergency.[18] TWEA became the U.S. government's primary authority to regulate foreign direct investment in the United States on national security grounds.[19]

In 1975, President Ford created CFIUS through Executive Order 11858[20] due to concerns regarding growing investment in the United States by members of the Organization of the Petroleum Exporting Countries.[21] CFIUS was charged with monitoring the impact of foreign investment and coordinating the implementation of policy on such investment,[22] but it did not actively engage in policy issues during the 1970s.[23]

B. *Exon–Florio Amendment*

In 1988, amid concern over acquisitions of sensitive U.S. firms, Congress enacted the Exon–Florio Amendment and created Section 721.[24] The statute granted the President explicit authority to investigate and, subject to his finding that (1) "credible evidence" existed that the foreign interest exercising control might take action that threatened national security, and (2) other U.S. laws were inadequate to protect national security, to block the foreign acquisition of a U.S. company or

---

17. *See* EDWARD D. GRAHAM & DAVID M. MARCHICK, U.S. NATIONAL SECURITY AND FOREIGN DIRECT INVESTMENT 4–8 (2006).

18. Trading with the Enemy Act of 1917, Pub. L. No. 65-91, § 5(b), 40 Stat. 411, 415 (1917) (codified as amended at 50 U.S.C. § 4305(b)); GRAHAM & MARCHICK, *supra* note 17, at 4–5.

19. GRAHAM & MARCHICK, *supra* note 17, at 5.

20. Exec. Order No. 11858, 40 Fed. Reg. 20263 (May 7, 1975).

21. GRAHAM & MARCHICK, *supra* note 17, at xi.

22. Exec. Order No. 11858, *supra* note 20.

23. Heath P. Tarbert, *Modernizing CFIUS*, 88 GEO. WASH. L. REV. 1477, 1484–85 (2020).

24. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5021, 102 Stat. 1107, 1425 (1988) (codified as amended at 50 U.S.C. app. § 2170); *see* Jackson, *supra* note 10, 6–7 (2020).

order divestment.[25] The Exon–Florio Amendment's non-exhaustive list of factors the President may consider covered domestic industries' ability to meet national defense and national security requirements, and the impact of foreign citizens' control of domestic industries on that ability.[26] The President's findings were explicitly insulated from judicial review.[27]

President Reagan delegated his authority to administer Exon–Florio to CFIUS through Executive Order 12661,[28] thereby transforming the largely silent agency into an important component of the statutory foreign investment screening regime.[29] In November 1991, the Treasury Department issued regulations setting forth CFIUS's review and investigation process, which was based on a voluntary notification system.[30]

The CFIUS process has consistently been comprised of two phases: a review and an investigation. Under the Exon–Florio Amendment, CFIUS commenced a 30-day review process upon receipt of the transaction parties' voluntary notification, whether pre- or post-transaction, and determined whether to proceed to a 45-day investigation phase.[31] The President was required to decide whether to block the transaction within 15 days after the investigation was completed and, if he determined to take action, to provide Congress with a written report.[32]

C. *Byrd Amendment*

Section 721, created by the Exon–Florio Amendment, has undergone several amendments, expanding CFIUS's authority and the factors to be considered in CFIUS's national security review, while strengthening congressional oversight. In 1992, Congress amended the Exon–Florio provision through the National Defense Authorization Act for Fiscal Year 1993.[33] The amendment required CFIUS to conduct an investigation into acquisitions by foreign government-

25. Omnibus Trade and Competitiveness Act § 5021(c) (1988).

26. § 5021(e).

27. § 5021(c).

28. Exec. Order No. 12661 § 3-201, 54 Fed. Reg. 779, 780 (Dec. 27, 1988).

29. Jackson, *supra* note 10, at 7–8.

30. *Id.* at 8.

31. Omnibus Trade and Competitiveness Act § 5021(a).

32. § 5021(c).

33. National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 837, 106 Stat. 2315, 2464 (1992) (codified as amended at 50 U.S.C. app. § 2170); *see also* Tarbert, *supra* note 23, at 1488.

controlled entities that could impact national security.[34] It also added new factors that may be considered: the potential effects on sales of military goods or technology to countries of concern and U.S. international technological leadership in areas affecting national security.[35] At the same time, it expanded the reporting requirement to include cases where the President decided not to block a transaction.[36]

D. *FINSA*

In 2006, CFIUS approved the purchase of Peninsular & Oriental Steam Navigation Company—a British maritime company that managed six major U.S. ports—by Dubai Ports World—a company owned by the United Arab Emirates—without conducting an investigation, despite the new provision under the Byrd Amendment.[37] This decision was based on an interpretation that an investigation was not mandatory unless CFIUS found that the acquisition could affect national security. However, some members of Congress sharply criticized CFIUS's decision, arguing that an investigation was required if the acquirer was controlled by a foreign government.[38]

Following this controversy, Congress passed the Foreign Investment and National Security Act ("FINSA")[39] in 2007, which further strengthened the CFIUS process while increasing congressional oversight.[40] Among other major changes, FINSA introduced new factors for CFIUS to consider, including the potential national security-related effects on U.S. critical infrastructure and critical technologies.[41] FINSA also codified the existing practice of CFIUS negotiating and entering into mitigation agreements with foreign investors to mitigate or remove business arrangements that raised national security concerns.[42]

---

34. National Defense Authorization Act for Fiscal Year 1993 § 837(a)(2).

35. § 837(b).

36. § 837(a)(2)(C).

37. Press Release, U.S. Dep't of the Treasury, *CFIUS and the Protection of the National Security in the Dubai Ports World Bid for Port Operations* (Feb. 24, 2006), https://home.treasury.gov/news/press-releases/js4071; Jackson, *supra* note 10, at 9.

38. Jackson, *supra* note 10, at 4, 9.

39. Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, §§ 2, 3, 121 Stat. 246 (2007) (codified at 50 U.S.C. app. § 2061 note).

40. Foreign Investment and National Security Act §§ 4, 5, 7; Tarbert, *supra* note 23, at 1491–92.

41. Foreign Investment and National Security Act § 4.

42. Foreign Investment and National Security Act § 5; Jackson, *supra* note 10, at 32.

E. *Eve of FIRRMA: CFIUS Facing Challenges*

The challenges CFIUS encountered in the subsequent decade prompted a comprehensive reform of the CFIUS process through FIRRMA in 2018.[43] During the 2010s, CFIUS's caseloads exhibited substantial increases in both volume and complexity.[44] New investment trends, such as multi-fold fund structures and sovereign-directed investments, particularly those originating from China, influenced the complexity of the CFIUS analysis.[45] Additionally, the expanding applicability of commercial innovations for military use and the emergence of novel national security vulnerabilities stemming from the data-driven economy compounded the substance of the CFIUS review.[46] Furthermore, while CFIUS's jurisdiction was limited to control transactions, a growing number of non-controlling transactions outside CFIUS's jurisdiction were identified as potentially posing national security concerns.[47] CFIUS also began considering that some investments were deliberately structured to circumvent its jurisdiction.[48] Finally, China's military and economic rise, particularly President Xi Jinping's announcement of the "Made in China 2025" Plan, which aimed to make China the dominant leader in strategic sectors, urged U.S. policymakers to implement trade and investment policies to address the concerns regarding China.[49] Consequently, FIRRMA passed through Congress with overwhelming bipartisan support.[50]

F. *FIRRMA*

FIRRMA broadened CFIUS's jurisdiction beyond traditional control transactions,[51] creating the following new classifications of "covered transactions:" (1) real estate transactions near U.S. government facilities of national security sensitivities; (2) non-controlling investment in a U.S. business that relates to critical infrastructure or critical technologies or that collects sensitive personal data of U.S. citizens;

---

43. Tarbert, *supra* note 23, at 1492–99.

44. *Id.* at 1493–94.

45. *Id.* at 1494–95.

46. *Id.* at 1495–96.

47. *Id.* at 1496; 50 U.S.C. § 4565(a)(3) (2012) (defining covered transactions).

48. Tarbert, *supra* note 23, at 1496–97.

49. *Id.* at 1497–99.

50. *Id.* at 1502.

51. *See* 50 U.S.C. § 4565(a)(3) (2012). This category is maintained under FIRRMA. *See* Foreign Investment Risk Review Modernization Act § 1703(a)(4)(B)(i).

(3) changes in foreign investor rights regarding a U.S. business; and (4) any arrangement designed to evade CFIUS regulations.[52]

Additionally, FIRRMA includes a precatory provision indicating the "sense of Congress" that the following factors may be considered when analyzing national security risks: (1) involvement of a country of "special concern" that has a strategic goal of acquiring critical technology or infrastructure; (2) potential national security-related effects of cumulative control of critical infrastructure, energy asset, critical material, or critical technology; (3) compliance history with U.S. law of a foreign person; (4) impact of foreign citizens' control of domestic industries on the United States' ability to meet national security requirements; (5) likely extent of exposure of U.S. citizens' sensitive data to foreign governments or persons; and (6) risk of cybersecurity vulnerabilities being created or exacerbated.[53] In September 2022, President Biden issued an executive order to elaborate on existing factors in Section 721 and mandate CFIUS to consider three factors in response to the sense of Congress: (1) effects on U.S. supply chains outside the defense industrial base; (2) effects on U.S. technological leadership; (3) aggregate industry investment trends arising from multiple transactions in a particular sector; (4) cybersecurity risks; and (5) risk to U.S. persons' sensitive data.[54]

FIRRMA also altered the filing and review process in several ways to enhance thoroughness and efficiency.[55] It created the process of short-form filings called declarations[56] with two objectives: (1) to reduce transactions that fall within CFIUS's jurisdiction but are not notified (commonly referred to as "non-notified" transactions), and (2) to streamline the review of low-risk transactions.[57] A declaration may result in the approval of the transaction, the initiation of a formal review process, or a so-called "shoulder shrug," in which CFIUS indicates it is unable to reach a conclusion but does not request a regular

52. Foreign Investment Risk Review Modernization Act § 1703(a)(4).

53. § 1702(c); Christopher M. Davis, Cong. Rsch. Serv., 98-825, *"Sense of" Resolutions and Provisions* 1–3 (2019) (explaining that "sense of Congress" provisions are language included in bills to express Congress's opinion about the subject matter of the bills, but such provisions have no formal effect on public policy or force of law).

54. Exec. Order No. 14083, 87 Fed. Reg. 57369 (Sept. 20, 2022).

55. Tarbert, *supra* note 23, at 1506–08, 1510–11.

56. Foreign Investment Risk Review Modernization Act § 1706(v)(II).

57. Tarbert, *supra* note 23, at 1506.

notice.[58] The timelines for the CFIUS process under FIRRMA were adjusted to make the overall process more flexible and efficient.[59]

Although filings under FIRRMA remain largely voluntary, declarations are mandatory in two circumstances: where a foreign government directly or indirectly acquires a "substantial interest" in a U.S. business,[60] and for transactions involving a U.S. business dealing with critical technologies.[61]

The expansion of CFIUS's authority was accompanied by increased congressional oversight. For example, FIRRMA requires CFIUS to include more details in its annual reports to Congress and provide a classified briefing to members of Congress.[62] The unclassified version of the reports shall be made available to the public.[63]

Regarding the potential future development of CFIUS policy, in February 2025, President Trump issued a memorandum titled "America First Investment Policy."[64] The memorandum promises to maintain the open investment environment by promoting inbound investment from allied countries and passive investments from all foreign persons while proposing to further restrict inbound and outbound investment involving China and other foreign adversaries.[65] The proposed measures to encourage investment from allies include creating a fast-track process[66] and making compliance with mitigation agreements less burdensome.[67] At the same time, the memorandum contemplates using and strengthening the authority of CFIUS and other legal instruments to restrict adversary access to sensitive technologies.[68] Yet, the

58. § 1706(b)(1)(C)(v)(III).

59. § 1709(b)(1) (extending the review period for regular notices from 30 days to 45 days); Tarbert, *supra* note 23, at 1508 (noting that the extension of the review period was intended to reduce the number of investigations and requests for withdrawal and resubmission of a notice due to time insufficiency); Foreign Investment Risk Review Modernization Act § 1709(b)(2)(C)(ii)(I) (allowing CFIUS to extend the 45-day investigation period by 15 days in "extraordinary circumstances").

60. § 1706(b)(1)(C)(v)(IV)(bb).

61. § 1706(b)(1)(C)(v)(IV)(cc).

62. § 1719.

63. *Id.*

64. The White House, Presidential Memorandum on America First Investment Policy (Feb. 21, 2025), https://www.whitehouse.gov/presidential-actions/2025/02/america-first-investment-policy/.

65. *Id.*

66. *Id.* § 2(c).

67. *Id.* § 2(g).

68. *Id.* § 2(f).

implementation of these measures is largely subject to further agency or legislative action.[69]

III. TWOFOLD BARRIER TO SUBSTANTIVE JUDICIAL REVIEW

A. *CFIUS in Court: Summary of Ralls Case*

Although ten transactions have been blocked by the President under Section 721,[70] *Ralls* is the only case where courts have ruled on legal challenges to CFIUS's and the President's authority.[71]

1. *Factual Background*

In March 2012, Ralls Corp., a Delaware corporation owned by two Chinese nationals, purchased four American-owned companies to develop wind farm projects in or near a restricted airspace in Oregon.[72] Ralls filed a CFIUS notice on June 28, 2012, after closing.[73] Having determined that the acquisition posed a national security threat, CFIUS issued a temporary order dated July 28, 2012 (as amended on August 2, 2012) restricting Ralls's access to, and preventing further construction at, the wind farm sites, pending CFIUS's or the President's final action.[74] On September 13, 2014, CFIUS completed its investigation and submitted its report and recommendation to President Obama.[75] On September 28, 2014, he issued an order prohibiting the transaction and requiring, among other things, the divestiture of the project companies.[76]

In response to the CFIUS's interim order, Ralls sued before the U.S. District Court for the District Court of Columbia seeking to

---

69. *See* Morgan, Lewis & Bockius LLP, *President Issues National Security Memorandum on America First Investment Policy* (Feb. 25, 2025), https://www.morganlewis.com/pubs/2025/02/president-issues-national-security-memorandum-on-america-first-investment-policy.

70. Fenwick & West LLP, *And Then There Were 10: Trump Admin Unwinds Suirui Group Co.'s Acquisition of Jupiter Systems* (Jul. 15, 2025), https://whatstrending.fenwick.com/post/and-then-there-were-10-trump-admin-unwinds-suirui-group-co-s-acquisition-of-jup.

71. *Id.* ("Only one case has meaningfully tested that limitation and partially reached the merits of a challenge to the president's and CFIUS' authority—Ralls Corp. v. CFIUS, decided by the U.S. Court of Appeals for the District of Columbia Circuit in 2014.").

72. *Ralls III*, 758 F.3d at 304–05.

73. *Id.* at 305.

74. *Id.* at 302, 305.

75. *Id.* at 305.

76. *Id.* at 306.

invalidate the interim order and to enjoin its enforcement, and added claims challenging the presidential order after it was issued.[77] Ralls alleged: (1) the CFIUS order exceeded its statutory authority and violated the Administrative Procedure Act of 1946 ("APA"),[78] (2) the presidential order constituted an *ultra vires* action by imposing restrictions other than the suspension or prohibition of the transaction, to which Ralls asserted the President's authority under Section 721 was limited, (3) the CFIUS order and the presidential order deprived Ralls of its property without due process, and (4) the CFIUS order and the presidential order unconstitutionally deprived Ralls of equal protection by treating Ralls differently from other foreign owners of existing turbines located in or near the restricted airspace.[79]

2. *D.C. District Court Decisions*

The District Court dismissed the *ultra vires* and equal protection challenges to the presidential order on the ground that it lacked jurisdiction over these challenges due to the finality provision in Section 721.[80] The court treated CFIUS's interim order as moot once the President acted.[81] Despite allowing the due process challenge to the presidential order to proceed to the merits,[82] the District Court ultimately found that Ralls did not have a constitutionally protected property interest.[83] The court reasoned that, despite the known risk of a presidential veto, Ralls had chosen not to seek the opportunity available under statute to submit a notification and obtain CFIUS's determination before acquiring property rights.[84]

In examining the reviewability of Ralls's challenge to the presidential order, the District Court first confirmed that "[i]t is well-accepted that [APA] does not confer jurisdiction on Article III courts to review actions of the President."[85] The District Court cited the Supreme Court decisions in *Franklin*[86] and *Dalton*, which established that

77. *Id.* at 306.

78. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified at 5 U.S.C. §§ 551–59, 701–06 (2018)).

79. *Ralls I*, 926 F. Supp. 2d at 81.

80. *Id.* at 82–94; 50 U.S.C. app. § 2170(e) (2012).

81. *Ralls I*, 926 F. Supp. 2d at 83–91, 95–99.

82. *Id.* at 91–95.

83. *Ralls II*, 987 F. Supp. 2d at 27–32.

84. *Id.* at 27.

85. *Ralls I*, 926 F. Supp. 2d at 83 (quoting Dalton v. Specter, 511 U.S. 462, 469 (1994)).

86. Franklin v. Massachusetts, 505 U.S. 788 (1992).

the President's action is not "final agency action" subject to judicial review under APA because the President is not an "agency."[87]

The District Court then noted that, although non-statutory *ultra vires* claims are not inherently unreviewable even in the realm of national security, the finality provision under Section 721 bars judicial review of the particular claim Ralls raised.[88] In denying the inherent unreviewability of Ralls's claim that the President lacked the authority to impose the types of restrictions included in the presidential order, the court looked to *Dakota Central*, where the Supreme Court found an *ultra vires* challenge based on lack of the President's authority is reviewable, whereas one based on "a mere excess or abuse of discretion in exerting a power given" is not.[89] Ralls's claim was the first type of challenge.[90]

Nonetheless, based primarily on the language and structure of the finality provision, the court concluded that Ralls's claim fell within the type of challenge Congress intended to preclude. The court did not deny the possibility that a court may be able to review and find a presidential action on its face *ultra vires* if "the President does not consider appropriate to suspend or prohibit a covered transaction, or . . . the President has not found that the affected transaction will impair the national security of the United States."[91] But Ralls did not contest that the President had made these findings.[92]

The court also dismissed Ralls's equal protection claim under the finality clause because the claim sought review of the merits of the President's decision. [93]

3. *D.C. Circuit Court Decision*

Ralls appealed the dismissal of the due process challenge to the presidential order—but dropped the *ultra vires* and equal protection challenges—and all claims against the CFIUS order.[94] The D.C. Circuit reversed and remanded.[95]

---

87. *Ralls I*, 926 F. Supp. 2d at 83 (quoting *Dalton*, 511 U.S. at 469, which further cites *Franklin*, 505 U.S. at 801).

88. *Ralls I*, 926 F. Supp. 2d at 83–91.

89. *Id.* at 85 (quoting Dakota Cent. Tel. Co. v. South Dakota, 250 U.S. 163, 184 (1919)).

90. *Id.*

91. *Id.* at 88 (emphasis deleted).

92. *Id.*

93. *Id.* at 92.

94. *Ralls III*, 758 F.3d at 307.

95. *Id.* at 325.

The D.C. Circuit rejected the district court's dismissal of the due process claim, by noting that Ralls's property rights had "fully vested upon the completion of the transaction" and were necessarily entitled to due process protections,[96] and concluded that the presidential order violated the Due Process Clause.[97] It also found that the claims against the CFIUS order satisfied the "capable of repetition yet evading review" exception to mootness[98]—an exception that applies where "(1) the duration of the challenged action is too short to be fully litigated, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again."[99]

On the reviewability of the due process claim, the D.C. Circuit found that neither the statutory text nor the legislative history expressly precluded judicial review of Ralls's as-applied constitutional claim challenging the process preceding the presidential action.[100] Citing the *Mathews* test—which weighs (1) the private interest affected by the official action, (2) the risk of erroneous deprivation and the probable value of additional procedural safeguards, and (3) the government's interest including the fiscal and administrative burdens of the additional procedural requirement—the D.C. Circuit held that "at the least, . . . an affected party [must] [1] be informed of the official action, [2] be given access to the unclassified evidence on which the official actor relied and [3] be afforded an opportunity to rebut that evidence."[101]

Regarding the challenges to the CFIUS order, the D.C. Circuit noted that courts treat the first "evading review" prong as satisfied when the action lasts less than two years and when such a short duration is typical of the action.[102] Here, CFIUS's interim order was in effect for only 57 days until the President blocked the transaction, which was typical given the statutory timeframes of the CFIUS process and the President's decision.[103] The D.C. Circuit found that the second "capable of repetition" prong was satisfied on the ground that Ralls's intent to continue pursuing wind farm projects throughout the United

96. *Id.* at 316.

97. *Id.* at 319.

98. *Id.* at 321–25.

99. *Id.* at 321 (quoting Clarke v. United States, 915 F.2d 699, 704 (1990)) (brackets omitted).

100. *Ralls III*, 758 F.3d at 311.

101. *Id.* at 317–19 (quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

102. *Ralls III*, at 322–32 (citing Del Monte Fresh Produce Co. v. United States, 570 F.3d 316, 322 (2009)).

103. *Id.*

States might result in future acquisitions of easements to project sites near sensitive government facilities.[104]

Consequently, the D.C. Circuit remanded Ralls's challenges to the CFIUS order to the district court, with instructions that Ralls be provided with the requisite process.[105] However, the issues on remand were left unresolved as Ralls subsequently entered into an undisclosed settlement, agreeing to dispose of the properties.[106]

B. *Foreign Investors' Toolkit: What Courts Can Review*

1. *Substantive Challenges*

Although the enactment of FIRRMA after *Ralls* granted the D.C. Circuit the exclusive jurisdiction regarding civil actions challenging the President's actions or findings,[107] the *Ralls I* decision of the District Court of Columbia is instructive on how challenges to the President's decisions on the merits are barred from judicial review, since Ralls did not appeal the dismissal of its *ultra vires* and equal protection challenges.[108]

As described above, *Ralls I* reveals that the barrier to legal challenges to presidential actions under Section 721 from judicial review is twofold: (1) *Franklin*, *Dalton,* and *Dakota Central* preclude APA challenges and *ultra vires* claims challenging the merits of the President's findings,[109] and (2) the finality provision bars the other type of *ultra vires* challenges concerning a lack of authority and other substantive claims, such as equal protection challenges.[110]

2. *Procedural Challenges*

By contrast, both the District Court and the D.C. Circuit found they had jurisdiction over Ralls's due process challenge. The D.C. Circuit held that Ralls was entitled to notice of official action, access to

---

104.*Id.* at 324–25.

105.*Id.* at 325.

106.Ji Li, *Investing near the National Security Black Hole*, 14 BERKELEY BUS. L.J. 1, 8 (2017); Philippa Maister, *CFIUS Reaches Settlement with Ralls Corp*, fDi Intelligence (Nov. 23, 2015), https://www.fdiintelligence.com/content/60b3fd77-ad88-54be-adee-d16d32542d69.

107.Foreign Investment Risk Review Modernization Act of 2018 § 1715(e)(2), 132 Stat. at 2191.

108.*Ralls III*, 758 F.3d at 307.

109.*See supra* notes 85–89 and accompanying text.

110.*See supra* notes 91–92 and accompanying text.

unclassified information, and an opportunity to rebut the evidence.[111] In practice, CFIUS now issues a so-called "Ralls letter" containing an unclassified summary of the purported national security risks and the unclassified information on which it relied, typically a few days before taking action.[112] However, given the D.C. Circuit's decision was premised on the finding that Ralls had acquired a fully vested property right "upon the completion" of the transaction, it remains unclear whether a foreign investor has due process rights to the property that the investor intends to acquire if the proposed transaction is blocked before completion.[113] While it did not explicitly deny such rights, the D.C. Circuit suggested that a foreign investor may lack due process rights if their property interests are contingent on a government action under the relevant law and the circumstances.[114]

Aside from the challenges raised by Ralls, the Takings Clause of the Fifth Amendment, which prohibits "private property [from being] taken for public use, without just compensation,"[115] might provide another procedural basis for challenging the President's order, at least where a foreign investor is forced to divest assets it has already acquired.[116] Since courts have not addressed this claim in CFIUS cases, however, uncertainties remain, such as whether and what remedies are available[117] and the appropriate measure of "just compensation."[118]

111.*See supra* note 101 and accompanying text.

112.James Brower & Nicholas Weigel, *Are CFIUS Decisions Legally Vulnerable?*, LAWFARE (Jan. 16, 2025, 10:14 AM), https://www.lawfaremedia.org/article/are-cfius-decisions-legally-vulnerable.

113.*Id.*

114.*See Ralls III*, 758 F.3d at 316–17 (distinguishing the case from Dames & Moore v. Regan, 453 U.S. 654 (1981) by emphasizing the difference between the legal bases for the property interests in question; further noting *Dames & Moore*'s express limitation of its holding to the facts of the case).

115.U.S. CONST. amend. V (takings clause).

116.Brower & Weigel, *supra* note 112 (noting *Ralls III*'s holding that foreign investors who have acquired assets have a constitutionally protected property interest; suggesting that the President's decisions to block transactions qualify as regulatory takings for public use).

117.*See* Petition for Review at 33, TikTok Inc. v. Comm. on Foreign Inv., No. 20-1444 (D.C. Cir. Nov. 10, 2020) ("Prospective relief is warranted where . . . just compensation would not be available if the unlawful order is enforced."). The case has not been decided as it has been held in abeyance. *See infra* note 200 and accompanying text.

118.Brower & Weigel *supra* note 112; *see* TikTok Inc. & ByteDance Ltd. v. Garland, 122 F.4th 930, 969 (D.C. Cir. 2024) (holding that a statute forcing the divestiture of assets is not "a complete deprivation of economic value," hence not a *per se* regulatory taking).

Although Section 721's exclusion from judicial review is limited to the President's actions and findings, there are several obstacles to litigating CFIUS's actions when a transaction is blocked by the President's order. CFIUS's recommendations to the President based on its investigation are nonbinding and thus are not "final agency action" subject to APA review.[119] Absent a CFIUS order, the foreign investor is unlikely to have a cause of action. Similarly, non-statutory *ultra vires* challenges against an agency's actions are available only in very limited circumstances.[120] Even if an affected party has a cause of action, CFIUS's action will be mooted when the President subsequently decides to block a transaction. In *Ralls*, the D.C. Circuit found that the CFIUS order satisfied the "capable of repetition yet evading review" exception.[121] While the "evading review" prong would be relatively easy to satisfy given the short statutory timeframe in which CFIUS acts,[122] given the fact-specific finding regarding the "capable of repetition" prong based on Ralls's intention to pursue similar investments in the future,[123] whether this exception is available in a specific case would depend on the circumstances and be difficult to predict.

IV. NECESSITY OF JUDICIAL REVIEW

As discussed above, Congress has expanded the President's and CFIUS's authority to review and block foreign investments.[124] As a result, the number and range of foreign investors affected by such decisions have increased.[125] In particular, the reform undertaken through

---

119.Brower & Weigel *supra* note 112; *see* 5 U.S.C. § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.").

120.*See* Nyunt v. Chairman, Broad. Bd. of Governors, 589 F.3d 445, 449 (D.C. Cir. 2009) (explaining that *ultra vires* claims are available "only where (i) the statutory preclusion of review is implied rather than express; (ii) there is no alternative procedure for review of the statutory claim; and (iii) the agency plainly acts in excess of its delegated powers and contrary to a specific prohibition in the statute that is clear and mandatory") (internal citations omitted).

121.*See supra* note 99 and accompanying text.

122.*See supra* notes 102–03 and accompanying text.

123.*See supra* note 104 and accompanying text.

124.*See supra* Part II.

125.The number of investigations and withdrawn notices has increased over time and has stayed at higher levels after the first Trump administration. *See* Committee on Foreign Investment in the United States, *Annual Report to Congress for CY 2023*, at 15 (2024), https://home.treasury.gov/system/files/206/2023CFIUSAnnualReport.pdf; Committee on Foreign Investment in the United States, *Annual Report to Congress for CY*

FIRRMA reflects the expanding concept of national security, especially the conflation of economic and national security in U.S. policy.[126] This trend has led to increasingly economically focused national security claims, which are premised on less imminent risks than traditional national security threats like terrorism, and therefore easier for the executive to invoke.[127] Insulating such claims from judicial scrutiny creates a greater risk of executive overreach.

To demonstrate the need for judicial review of the President's decisions under Section 721, this section first provides a broad context on the increasingly pervasive national security narratives in recent executive practice, then examines the questionable legitimacy of some decisions by the President to block foreign investments, and finally highlights criticisms of the common-law barrier to judicial oversight of the presidential authority in general, as established by *Franklin*, *Dalton*, and their progeny.

A. *Expanding Notion of National Security*

Embracing the proposition that "[e]conomic security is national security,"[128] the first Trump administration implemented numerous economic measures and initiatives in the name of national security. The administration launched a series of restrictions targeting Huawei, a Chinese telecommunications company developing 5G technologies.[129] President Trump imposed tariffs on steel and aluminum using Section 232 of the Trade Expansion Act of 1962 ("TEA"), which authorizes the President to adjust the importation of articles that "threaten[s] to impair the national security."[130] Suspicions of Chinese technology theft prompted the use of another tariff authority, Section 301 of the Trade

---

2013, at 3 (2015), https://home.treasury.gov/system/files/206/2014-CFIUS-Annual-Report-for-Public-Release.pdf. *See also* Eichensehr & Hwang, *supra* note 3, at 589 ("Companies that view themselves as peripheral to or simply not involved in national security are increasingly likely to be caught up in national security reviews").

126.Eichensehr & Hwang, *supra* note 3, at 562–70.

127.Eichensehr & Hwang, *supra* note 3, at 589.

128.The White House, National Security Strategy of the United States of America, at 17 (2017), https://trumpwhitehouse.archives.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf.

129.Jill C. Gallagher, Cong. Rsch. Serv., R47012, *U.S. Restrictions on Huawei Technologies: National Security, Foreign Policy, and Economic Interests* 12 (2022).

130.19 U.S.C. § 1862(a)–(c) (2018); NERINA BOSCHIERO, US TRADE POLICY, CHINA AND THE WORLD TRADE ORGANISATION 40–41 (2023).

Act of 1974.[131] The Export Control Reform Act of 2018,[132] which was passed simultaneously with FIRRMA as part of the National Defense Authorization Act for Fiscal Year 2019, plays a pivotal role in restricting access to U.S. emerging and foundational technologies by adversaries.[133]

The Biden administration generally maintained these policies and further advanced them, especially in the context of the U.S.-China rivalry.[134] The administration repeatedly tightened export controls on semiconductor products to curb China's capabilities in strategically important technologies such as artificial intelligence.[135] In announcing its actions against China's unfair trade practices, the Biden administration linked economic and national security to supporting investment and job creation in various sectors, including traditional manufacturing

131.Memorandum of March 22, 2018 Actions by the United States Related to the Section 301 Investigation of China's Laws, Policies, Practices, or Actions Related to Technology Transfer, Intellectual Property, and Innovation 83 Fed. Reg. 13099 (Mar. 28, 2018); 19 U.S.C. § 2411.

132.Export Control Reform Act of 2018, Pub. L. No. 115-232, 132 Stat. 2208 (2018).

133.*See* Tarbert, *supra* note 23, at 1512–15; *see also* Anthea Roberts, Henrique Choer Moraes & Victor Ferguson, *Toward a Geoeconomic Order in International Trade and Investment*, 22 J. INT'L ECON. L. 655, 660 (2019) (citing the increase of CFIUS investigations, the Huawei ban, and tariffs on steel and aluminum as examples of states increasingly relying on claims of national security to recalibrate the relationship between economics and security).

134.The White House, Interim National Security Strategic Guidance 15 (2021), https://bidenwhitehouse.archives.gov/wp-content/uploads/2021/03/NSC-1v2.pdf ("our policies must reflect a basic truth: in today's world, economic security is national security"); Gallagher, *supra* note 129, at 3 ("[t]he Biden Administration largely maintained [the Section 232] tariffs); *see* Kyla H. Kitamura & Keigh E. Hammond, Cong. Rsch. Serv., IN12519, *Expanded Section 232 Tariffs on Steel and Aluminum* 1 (2025) ("[t]he Biden Administration ke[pt] Huawei on the Entity List and enforce[d] restrictions on 5G technologies."); *see* Cameron Cavanagh, *Small Yard, High Fence? U.S. Economic restrictions on the People's Republic of China*, Georgetown Security Studies Review (Dec. 26, 2023), at https://gssr.georgetown.edu/the-forum/topics/geoeconomics/small-yard-high-fence-u-s-economic-restrictions-on-the-peoples-republic-of-china/ (describing the economic restrictions on China the Biden administration announced in the areas of export controls, financial sanctions, inbound investment screening, and outbound investment screening).

135.Barath Harithas & Andreas Schumacher, Center for Strategic and International Studies, *Where the Chips Fall: U.S. Export Controls Under the Biden Administration from 2022 to 2024* (Dec. 12, 2024), at https://www.csis.org/analysis/where-chips-fall-us-export-controls-under-biden-administration-2022-2024.

industries such as steel and shipbuilding, as well as semiconductors, green technologies, and healthcare.[136]

On January 20, 2025—the first day of his second term—President Trump announced that the new administration would pursue the U.S. economic and national security interests through a "robust and reinvigorated trade policy."[137] He declared across-the-board tariffs leveraging Section 232 of TEA[138] and, unprecedentedly, the emergency power under the International Emergency Economic Powers Act ("IEEPA").[139] The national emergencies underlying the tariffs against Canada, Mexico, China, and Brazil, and the global "reciprocal tariffs," are purported to address a broad range of issues: illegal immigration, drug trafficking, politically motivated human rights abuses in Brazil, and the U.S. trade deficit, which is allegedly undermining domestic

---

136.White House, *FACT SHEET: Biden-Harris Administration Announces New Actions to Protect U.S. Steel and Shipbuilding Industry from China's Unfair Practices* (Apr. 17, 2024), https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2024/04/17/fact-sheet-biden-harris-administration-announces-new-actions-to-protect-u-s-steel-and-shipbuilding-industry-from-chinas-unfair-practices/; Department of Commerce, *FACT SHEET: President Biden Takes Action to Protect American Workers and Businesses from China's Unfair Trade Practices* (May 14, 2024), https://www.commerce.gov/news/fact-sheets/2024/05/fact-sheet-president-biden-takes-action-protect-american-workers-and.

137.The White House, Presidential Memorandum on America First Trade Policy (Jan. 20, 2025), https://www.whitehouse.gov/presidential-actions/2025/01/america-first-trade-policy/.

138.Adjusting Imports of Steel into the United States, Proclamation 10896, 89 Fed. Reg. 9817 (Feb. 18, 2025); Adjusting Imports of Steel into the United States, Proclamation 10908, 90 Fed. Reg. 14075 (Mar. 26, 2025).

139.Christopher A. Casey, Cong. Rsch. Serv., IN11129, *The International Emergency Economic Powers Act (IEEPA), the National Emergencies Act (NEA), and Tariffs: Historical Background and Key Issues* 1 (2025). Declaring a National Emergency at the Southern Border of the United States, Proclamation 10886, 90 Fed. Reg. 8327 (Jan. 20, 2025) (declaring a national emergency related to the border with Mexico); Exec. Order No. 14193, 90 Fed. Reg. 9113 (Feb. 1, 2025) (declaring the imposition of tariffs on imports from Canada by extending the national emergency declared by Proclamation 10886 to Canada); Exec. Order No. 14194, 90 Fed. Reg. 9117 (Feb. 1, 2025) (declaring the imposition of tariffs on imports from Mexico); Exec. Order No. 14195, 90 Fed. Reg. 9121 (Feb. 1, 2025) (declaring the imposition of tariffs on imports from China by extending the national emergency declared by Proclamation 10886 to China); Exec. Order No. 14257, 90 Fed. Reg. 15041 (Apr. 2, 2025) (declaring a national emergency relating to trade deficits and the imposition of reciprocal tariffs); Exec. Order No. 14323, 90 Fed. Reg. 37739 (July 30, 2025) (declaring a national emergency relating to policies, practices, and actions of the Government of Brazil; further declaring the imposition of tariffs on imports from Brazil).

industries.[140] Another novel use of IEEPA as a tariff authority is "secondary tariffs" against countries that trade with countries subject to existing U.S. economic sanctions.[141] This measure is similar to secondary sanctions, where economic restrictions are extended to third parties that deal with sanctioned parties to prevent circumvention of primary sanctions.[142] The America First Investment Policy also reflects the new administration's approach to national and economic security.[143]

B. *Questionable Presidential Decisions under the CFIUS Regime*

The conflation of economic and national security discussed above is reflected in the increasingly aggressive practices of CFIUS. The President's decisions to block transactions have been criticized for overstepping statutory boundaries and being susceptible to non-national security motives of stakeholders and the President himself.

1. *Aixtron: CFIUS's Aggressive Territorial Reach*

In 2016, President Obama blocked the attempted Chinese acquisition of the German chip equipment manufacturer. On May 23, 2016, Aixtron SE and the Fujian Grand Chip Investment Fund LP, a Chinese-owned private equity fund, announced that Fujian would launch a €670 million takeover offer for Aixtron.[144] After reviewing the transaction in response to the parties' filing due to Aixtron's U.S. operations,[145] CFIUS recommended that the parties abandon the entire

---

140.Declaring a National Emergency at the Southern Border of the United States, Proclamation 10886, *supra* note 139; Exec. Order No. 14193, *supra* note 139; Exec. Order No. 14194, *supra* note 139; Exec. Order No. 14195, *supra* note 139; Exec. Order No. 14257, *supra* note 139; Exec. Order No. 14323, *supra* note 139.

141.Exec. Order No. 14245, 90 Fed. Reg. 13829 (Mar. 24, 2025) (declaring the imposition of tariffs on imports from any country that imports Venezuelan oil as designated by the Secretary of State); Exec. Order No. 14329, 90 Fed. Reg. 38701 (Aug. 6, 2025) (declaring the imposition of tariffs on imports from India for its importation of Russian Federation oil).

142.*See* DOWLAH, CAF, ECONOMIC AND FINANCIAL SANCTIONS OF THE UNITED STATES: LEGAL PERSPECTIVES. 13–14 (2025); *see* Covington & Burling LLP, *Trump Administration Imposes Secondary Tariffs on India* (Aug. 8, 2025), https://www.cov.com/en/news-and-insights/insights/2025/08/trump-administration-imposes-secondary-tariffs-on-india.

143.*See supra* notes 64–69 and accompanying text.

144.Aixtron SE, *GCI to Launch Offer for AIXTRON SE*, (May 23, 2016 7:52 AM), https://www.aixtron.com/en/press/press-releases/GCI%20to%20launch%20offer%20for%20AIXTRON%20SE_n929.

145.Aixtron SE, SEC Staff No-Action Letter, 2016 WL4409358 (Aug. 17, 2016).

transaction and referred the matter to the President.[146] The German regulator withdrew its earlier approval of the transaction, reportedly due to security-related information provided by U.S. intelligence officials.[147] On November 17, 2016, President Obama issued an order prohibiting the acquisition of Aixtron's U.S. business.[148] The Treasury's press release mentioned Chinese government ownership of some of the investors in the acquirer and the national security risk related to the military applications of Aixtron's technical know-how, as well as the contribution of Aixtron's U.S. business, including its wholly-owned subsidiary based in California, to such know-how.[149] The acquisition was not consummated as the parties eventually abandoned the entire transaction.[150]

This failed transaction between non-U.S. entities posed questions regarding CFIUS's jurisdictional reach. CFIUS's authority to review transactions under FINSA was limited to those resulting in foreign control of a U.S. business.[151] Under the regulations in effect at the time, a U.S. business was defined as "any entity, irrespective of the

---

146.Aixtron, *AIXTRON SE: Tender Offer by Grand Chip Investment GmbH / Referral of CFIUS Decision to the President of the United States* (Nov. 18, 2016, 10:38 PM), https://www.aixtron.com/en/investors/AIXTRON%20SE%20Tender%20Offer%20by%20Grand%20Chip%20Investment%20GmbH%20/%20Referral%20of%20CFIUS%20Decision%20to%20the%20President%20of%20the%20United%20States_n893.

147.Aixtron SE, *AIXTRON SE: Withdrawal of Clearance Certificate and Reopening of Review Proceedings by the Ministry of Economics Pertaining to the Takeover by Grand Chip Investment GmbH*, (Oct. 24, 2016, 6:39 AM), https://www.aixtron.com/en/investors/AIXTRON%20SE%20Withdrawal%20of%20Clearance%20Certificate%20and%20reopening%20of%20review%20proceedings%20by%20the%20Ministry%20of%20Economics%20pertaining%20to%20the%20takeover%20by%20Grand%20Chip%20Investment%20GmbH_n894; Covington & Burling LLP, *President Obama Blocks Chinese Acquisition of Aixtron SE* 2 (Dec. 5, 2016), https://www.cov.com/-/media/files/corporate/publications/2016/12/president_obama_blocks_chinese_acquisition_of_aixtron_se.pdf.

148.Regarding the Proposed Acquisition of a Controlling Interest in Aixtron SE by Grand Chip Investment GmbH, 81 Fed. Reg. 88067 (Dec. 2, 2016).

149.Press Release, U.S. Dep't of the Treasury, *Statement on the President's Decision Regarding the U.S. Business of Aixtron SE* (Dec. 2, 2016), https://home.treasury.gov/news/press-releases/jl0679.

150.Aixtron, *AIXTRON SE: Lapse of Takeover Offer by Grand Chip Investment GmbH* (Dec. 8, 2016, 2:03 PM) https://www.aixtron.com/en/press/press-releases/AIXTRON%20SE_n891.

151.50 U.S.C. § 4565(a)(3) (2012). CFIUS's expanded jurisdiction under FIRRMA encompasses new categories of investments, but they are defined by the concept of "U.S. business"; *see supra* note 52 and accompanying text.

nationality of the persons that control it, engaged in interstate commerce in the United States, *but only to the extent of its activities in interstate commerce*."[152] Read alongside the examples provided in the regulations, CFIUS's jurisdiction could reasonably be construed as limited to businesses in the United States.[153] Although the presidential order only prohibited the acquisition of "[t]he U.S. business of Aixtron" comprised of Aixtron's U.S. subsidiary and its assets "used in, or owned for the use in or benefit of" Aixtron's interstate commerce in the United States, such language could include assets outside the United States.[154]

With this issue unresolved, CFIUS shifted to a more aggressive approach in a post-FIRRMA transaction where a Chinese private equity firm, Wise Road Capital, attempted to acquire Magnachip Semiconductor Corp. in 2021.[155] Despite Magnachip's very limited nexus to the United States, CFIUS requested the parties file a notification.[156] After the parties followed the request, CFIUS issued an interim order prohibiting the completion of the transaction pending its review.[157] The parties eventually withdrew the CFIUS filing and terminated the merger agreement.[158] Although the phrase "but only to the extent of its activities in interstate commerce" was deleted from the definition of a U.S. business when the new regulations under FIRRMA took effect,[159] practitioners claim CFIUS's jurisdiction remains subject to the same limitation based on the legislative and regulatory history, CFIUS's own previous interpretation, and the general presumption against extraterritoriality under U.S. law.[160]

152.31 C.F.R. § 800.226 (2008) (emphasis added).

153.*Id.*; *see also* Covington & Burling LLP, *supra* note 147, at 3.

154.*See* Covington & Burling LLP, *supra* note 147, at 4.

155.Brandon L. Van Grack & James Brower, *CFIUS's Expanding Jurisdiction in the Magnachip Acquisition*, LAWFARE (Oct. 11, 2021, 8:01 AM), https://www.lawfaremedia.org/article/cfiuss-expanding-jurisdiction-magnachip-acquisition.

156.*Id.*

157.Magnachip Semiconductor Corp., Current Report (Form 8-K), at 2 (June 15, 2021).

158.Magnachip Semiconductor Corp., *Magnachip and Wise Road Capital Announce Withdrawal of CFIUS Filing and Mutual Termination of Merger Agreement*, (Dec. 13, 2021), https://investors.magnachip.com/news-releases/news-release-details/magnachip-and-wise-road-capital-announce-withdrawal-cfius-filing.

159.31 C.F.R. § 800.252.

160.Covington & Burling LLP, *supra* note 147; Grack & Brower, *supra* note 155.

2. *Qualcomm: CFIUS in a Takeover Battle*

President Trump's decision to block Broadcom Ltd.'s hostile bid for Qualcomm, Inc. in 2018 also raised questions about CFIUS's authority. Broadcom was the result of Avago Technologies Ltd.'s acquisition of another Southern California-based corporation, Broadcom Corp., where the surviving entity was renamed after the target upon completion of the acquisition.[161] As Avago was a Singaporean corporation formed through spin-offs from U.S.-based Hewlett-Packard Co., Broadcom was domiciled in Singapore.[162] In 2017, during the CFIUS process to acquire another U.S. company, Broadcom agreed to redomicile to the United States,[163] which Broadcom's CEO announced at the White House alongside President Trump, who welcomed the decision.[164]

With this corporate history, Broadcom made its initial unsolicited offer to acquire Qualcomm on November 6, 2017.[165] After Qualcomm rejected the offer, Broadcom launched a proxy fight by nominating directors to Qualcomm's board.[166] While the takeover battle was

---

161.Jeremy C. Owens & Therese Poletti, *How Broadcom vs. Qualcomm Went from Hostile Takeover Bid to a Trump Blockade*, MARKET WATCH (Mar. 13, 2018, 7:49 AM), https://www.marketwatch.com/story/how-broadcom-vs-qualcomm-went-from-hostile-takeover-bid-to-a-trump-blockade-2018-03-12#comments_sector; Broadcom Inc., Financial News, *Avago Technologies to Acquire Broadcom for $37 Billion* (May 28, 2015), https://investors.broadcom.com/news-releases/news-release-details/avago-technologies-acquire-broadcom-37-billion.

162.Owens & Poletti, *supra* note 161.

163.Supantha Mukherjee & Sonam Rai, *Broadcom Closes $5.5 Billion Brocade Deal*, REUTERS (Nov. 17, 2017 10:16 AM), https://www.reuters.com/article/us-brocade-commns-m-a-broadcom/broadcom-closes 5-5-billion-brocade-deal-idUSKBN1DH1T9.

164.Michael J. de la Merced, *Broadcom Targets Qualcomm in Largest-Ever Tech Deal*, N.Y. TIMES (Nov. 6, 2017) https://www.nytimes.com/2017/11/06/business/dealbook/broadcom-qualcomm-merger.html.

165.Broadcom Ltd., Financial News, *Broadcom Proposes to Acquire Qualcomm for $70.00 per Share in Cash and Stock in Transaction Valued at $130 Billion* (Nov. 6, 2017), https://investors.broadcom.com/news-releases/news-release-details/broadcom-proposes-acquire-qualcomm-7000-share-cash-and-stock-0.

166.Qualcomm, Inc., *Qualcomm Board of Directors Unanimously Rejects Broadcom's Unsolicited Proposal* (Nov. 13, 2017), https://investor.qualcomm.com/news-events/press-releases/news-details/2017/Qualcomm-Board-of-Directors-Unanimously-Rejects-Broadcoms-Unsolicited-Proposal-11-13-2017/default.aspx; Shravanth Vijayakumar et al., *Timeline: Broadcom-Qualcomm Saga Comes to an Abrupt End*, REUTERS (Mar. 14, 2018), https://www.reuters.com/article/markets/asia/timeline-broadcom-qualcomm-saga-comes-to-an-abrupt-end-idUSKCN1GQ22N/ (summarizing key developments, including Broadcom's nomination of 11 candidates to Qualcomm's board on December 4, 2017 and its subsequent reduction of nominees to six on February 13, 2018).

ongoing, Qualcomm unilaterally filed a voluntary notification with CFIUS, seeking review of Broadcom's proxy solicitation.[167] Members of Congress also called for a review.[168] On March 4, 2018, CFIUS filed an agency notice broadening the scope of review to cover the proposed hostile takeover itself.[169] It also issued an interim order directing (1) Qualcomm's shareholder meeting scheduled for March 6, 2018 be postponed by 30 days and (2) Broadcom provide CFIUS with five days' notice before taking any action toward the planned redomiciliation.[170] On March 12, 2018, President Trump issued an order prohibiting the proposed takeover and the election of Broadcom's candidates as directors.[171]

The Qualcomm order was criticized in terms of both jurisdiction and substance. Given that Broadcom's employees and properties were mostly located in the United States,[172] its planned redomiciliation, once completed, would have removed CFIUS's jurisdiction by eliminating its status as a foreign person.[173] This time pressure seems to have driven CFIUS to accelerate the process and assert jurisdiction at the proxy contest stage where an acquisition agreement was not yet signed; an unusual course of action.[174] Again, CFIUS's authority under FINSA was limited to a "merger, acquisition, or takeover that is proposed or

---

167.Qualcomm, Inc., Current Report (Form 8-K), at Exhibit 99.1 (Mar. 5, 2018) (a copy of the Treasury's letter to the parties' lawyers dated March 5, 2018).

168.Owens & Poletti, *supra* note 161.

169.*Id.*

170.Qualcomm, Inc., Current Report (Form 8-K), at Exhibit 99.1 (Mar. 5, 2018) (a copy of the Interim Order Regarding the Proposed Acquisition of Qualcomm, Inc. issued by CFIUS on March 4, 2018).

171.Regarding the Proposed Takeover of Qualcomm Inc. by Broadcom Ltd., 83 Fed. Reg. 11631 (Mar. 12, 2018).

172.Michael de la Merced, *How Foreign Is Broadcom? A Tale of the Tape: DealBook Briefing*, N.Y. TIMES (Mar. 7, 2018), https://www.nytimes.com/2018/03/07/business/dealbook/gary-cohn-leaving.html.

173.Michael Leiter et al., *Broadcom's Blocked Acquisition of Qualcomm*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 3, 2018), https://corpgov.law.harvard.edu/2018/04/03/broadcoms-blocked-acquisition-of-qualcomm/.

174.*See* Kate O'Keeffe, *U.S. Government Intervenes in Broadcom's Bid for Qualcomm*, WALL. ST. J. (Mar. 6, 2018), https://www.wsj.com/articles/u-s-orders-qualcomm-to-delay-board-meeting-for-review-of-broadcom-offer-1520250104 (pointing out that CFIUS's decision to "kick . . . off an accelerated review of the potential deal before it was even signed, skipping a typical 30-day preliminary assessment period and plunging straight into its investigation" was a surprise); *see also* Cecilia 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 (citing an attorney's comment that "it was 'extraordinary' that Mr. Trump would intervene in the transaction before a full investigation by the government panel was complete").

pending . . . by or with any foreign person which could result in foreign control" of a U.S. business.[175] It is doubtful that Broadcom's mere proxy contest for board seats constituted a covered transaction, given that uncertainties remained around the shareholder vote and the board's endorsement.[176]

Additionally, CFIUS relied on dubious national security concerns irrelevant to Broadcom's foreign nature.[177] CFIUS alleged that Broadcom intended to reduce Qualcomm's long-term investment, including research and development (R&D) expenditures. Such reductions could then weaken its technological competitiveness, which was essential to the United States' advantage in 5G technology over China, given Qualcomm's leadership in 5G technology and dominant role in the U.S. telecommunications infrastructure.[178] However, a private equity-style direction, as CFIUS called it, would have been equally as likely if the acquirer had been an American private equity firm.[179] Moreover, Broadcom committed to 5G technology development, pledging a $1.5 billion investment to mitigate CFIUS's concerns.[180] CFIUS could have negotiated the maintenance of R&D spending and imposed a legally binding obligation through a mitigation agreement.[181] In its communication to the parties, CFIUS also referred to "Broadcom's relationships with third party foreign entities" as another risk factor without providing details.[182] Yet, Broadcom's ties with China were not much different from Qualcomm's and other multinational technology companies'.[183]

Furthermore, the takeover battle in this case underscores the necessity of independent judicial review. The circumstances suggest that Qualcomm took advantage of the national security screening for a separate motivation, i.e., takeover defense.[184] Through the unilateral filing,

---

175.50 U.S.C. § 4565(a)(3) (2012).

176.Ann Lipton, *Qualcomm's Cavalry*, BUS. L. PROF BLOG (Mar. 10, 2018), https://www.businesslawprofessors.com/2018/03/qualcomms-cavalry/.

177.*Id.*; Leiter et al., *supra* note 173.

178.Qualcomm, Inc., Current Report (Form 8-K), *supra* note 170, at Exhibit 99.1.

179.Lipton, *supra* note 176.

180.Imani Moise, *Broadcom Pledges $1.5 Billion U.S. Investment to Ease Regulatory Scrutiny*, WALL. ST. J. (Mar. 7, 2018), https://www.wsj.com/articles/broadcom-pledges-1-5-billion-u-s-investment-to-ease-regulatory-scrutiny-1520426473.

181.50 U.S.C. § 4565(l)(1)(A) (2012).

182.Qualcomm, Inc., Current Report (Form 8-K), *supra* note 164, at Exhibit 99.1.

183.Leiter et al., *supra* note 173.

184.Lipton, *supra* note 176 ("In this case, Qualcomm asked for the review, in an elegant example of the use of the regulatory system as a takeover defense mechanism"); MP McQueen, *How Lawyers Used CFIUS Review to Defeat Broadcom's Takeover of Qualcomm*,

Qualcomm could present CFIUS with its case against Broadcom's hostile bid to the extent it was associated with the expanding notion of national security.[185] The fact that two members of Congress who requested a review had received donations from Qualcomm in the past indicates the possibility of influencing the CFIUS process through lobbying.[186] Confining the CFIUS process to the political branches can make it susceptible to external influence motivated by interests other than national security.

3. *TikTok: CFIUS to Fend Off the Chinese Viral App*

As part of the effort to address national security concerns over TikTok, the first Trump administration used the presidential power under Section 721. In November 2017, ByteDance Ltd., a company headquartered in Beijing and operating TikTok, acquired musical.ly, which operated a video-based social network called Musical.ly.[187] While the Musical.ly app had a user base in the United States, the parties did not notify CFIUS.[188] ByteDance formally merged Musical.ly into TikTok in 2018.[189] TikTok grew rapidly in popularity in the United States and worldwide shortly thereafter.[190]

AM. LAW. INT'L (Apr. 18, 2018, 3:40 PM), https://www.law.com/nationallawjournal/2018/04/18/how-lawyers-used-cfius-review-to-defeat-broadcoms-takeover-of-qualcomm/; *see* Amy Deen Westbrook, *Securing the Nation or Entrenching the Board? The Evolution of CFIUS Review of Corporate Acquisitions*, 102 MARQ. L. REV. 643, 650 (2019) (observing that CFIUS's broad power to block transactions emerged as "a super poison pill" as a result of Qualcomm's successful effort to fend off Broadcom's acquisition).

185.*See* Lipton, *supra* note 176 (expressing suspicion that CFIUS's March 5, 2018 letter might be based on Qualcomm's narrative); *see also* GRAHAM & MARCHICK, *supra* note 17, at 143 (warning that adding economic security to the CFIUS statute would increase the risk of politicization because domestic companies could more easily fashion arguments to exploit the CFIUS process against foreign investors).

186.*See* Owens & Poletti, *supra* note 161 (pointing out that the two congressmen had received donations from Qualcomm).

187.Madison Malone Kircher & Remy Tumin, *From the Renegade to the Supreme Court: A Timeline of TikTok's Rise and Fall*, N.Y. TIMES (Jan. 17, 2025), https://www.nytimes.com/article/tiktok-ban-viral-timeline.html.

188.Raymond Zhong, *How TikTok's Owner Tried, and Failed, to Cross the U.S.-China Divide*, N.Y. TIMES (Aug. 6, 2020), https://www.nytimes.com/2020/08/03/technology/tiktok-bytedance-us-china.html.

189.Kircher & Tumin, *supra* note 187.

190.*See* Mansoor Iqbal, *TikTok Revenue and Usage Statistics (2025)*, BUS. OF APPS (Feb. 2, 2025), https://www.businessofapps.com/data/tik-tok-statistics/ (explaining the growth of TikTok's popularity over time).

In October 2019, lawmakers began to raise concerns over the potential for the Chinese government to use TikTok to censor politically sensitive content, collect personal information under intelligence laws, and advance foreign influence campaigns.[191] CFIUS subsequently commenced a national security review of the 2017 musical.ly acquisition.[192]

In August 2020, President Trump issued a series of executive orders restricting TikTok. The first, Executive Order 13942, was issued on August 6, 2020, under IEEPA in response to the national emergency declared on May 15, 2019, regarding foreign adversaries' ability to exploit vulnerabilities in the U.S. information and communication technology and services supply chains.[193] This Order restricted TikTok's U.S. operations based on the allegations that the Chinese Communist Party would be able to access Americans' personal information, mandate political censorship, and spread disinformation. On the same day, another Executive Order was issued to restrict WeChat's U.S. operations on similar grounds.[194] On August 14, 2020, President Trump invoked his Section 721 authority over the musical.ly acquisition to order ByteDance to divest (1) assets, wherever located, used to support TikTok's U.S. operations and (2) data derived from TikTok or Musical.ly users in the United States.[195]

With respect to the IEEPA orders, courts granted temporary injunctions based on the First Amendment or IEEPA's "personal

---

191.*See* Letter from Sen. Marco Rubio Treasury Secretary Steven Mnuchin (Oct. 9, 2019), https://cdn.vox-cdn.com/uploads/chorus_asset/file/19273614/20191009_Letter_to_Secretary_Mnuchin_re_TikTok.pdf (requesting that CFIUS launch a national security review of TikTok's acquisition of Musical.ly); *see also* Letter from Sen. Charles E. Schumer & Sen. Tom Cotton to Acting Dir. of Nat'l Intelligence Joseph McGuire (October 23, 2019), https://www.democrats.senate.gov/imo/media/doc/10232019%20TikTok%20Letter%20-%20FINAL%20PDF.pdf (raising the concerns as national security risks); Jack Nicas, Mike Isaac & Ana Swanson, *TikTok Said to Be Under National Security Review*, N.Y. TIMES (Nov. 1, 2019), https://www.nytimes.com/2019/11/01/technology/tiktok-national-security-review.html; Kircher & Tumin, *supra* note 187.

192.Nicas, et al., *supra* note 191.

193.*See* Exec. Order No. 13942, 85 Fed. Reg. 48637 (Aug. 6, 2020) (prohibiting certain transactions with ByteDance and its subsidiaries); *see* Exec. Order No. 13873, 84 Fed. Reg. 22689 (May 15, 2019) (declaring national emergency regarding the information and communications technology and services supply chain).

194.*See* Exec. Order No. 13943, 85 Fed. Reg. 48641 (Aug. 6, 2020) (prohibiting certain transactions with Tencent Holdings Ltd., the owner of WeChat, and its subsidiaries).

195.Regarding the Acquisition of Musical.ly by ByteDance Ltd., 85 Fed. Reg. 51297.

communication" and "informational material" exceptions.[196] The government appealed the injunctions, but after the Biden administration withdrew the IEEPA orders, the parties agreed to voluntarily dismiss the cases.[197]

In response to the Section 721 divestment order, ByteDance commenced conversations with potential buyers, with significant involvement from the U.S. government.[198] On November 10, 2020, ByteDance filed a petition seeking to enjoin the divestment order based on the Due Process Clause, APA, and the Takings Clause under the Fifth Amendment.[199] The case has not been decided as it is currently held in abeyance at the parties' request.[200]

Following President Biden's takeover of the administration, Congress took further action to restrict TikTok. In April 2024, Congress enacted the Protecting Americans from Foreign Adversary Controlled Applications Act (PAFACA).[201] PAFACA effectively requires ByteDance and its subsidiary TikTok Inc. to divest their applications within the statutory deadline by prohibiting parties from providing services necessary to the applications thereafter.[202] After the Supreme Court ruled that PAFACA does not violate the First Amendment rights of ByteDance, TikTok, and TikTok users,[203] the ban took effect on

---

196.*See* Kristen E. Eichensehr, *United States Pursues Regulatory Actions Against TikTok and WeChat over Data Security Concerns*, 115 AM. J. INT'L L. 124, 126–27 (2020) (describing the lawsuits filed by WeChat users, ByteDance, and TikTok users); *see* U.S. WeChat Users All. v. Trump, 488 F. Supp. 3d 912, 917 (N.D. Cal. 2020) (granting WeChat users' motion for a preliminary injunction on First Amendment grounds); *see* TikTok Inc. v. Trump, 490 F. Supp. 3d 73, 83 (D.D.C. 2020) (granting part of ByteDance's motion for a preliminary injunction based on IEEPA's personal communications and informational materials exceptions); *see* TikTok Inc. v. Trump, 507 F. Supp. 3d 92, 112 (D.D.C. 2020) (granting the remainder of ByteDance's motion for a preliminary injunction based on the same exceptions and the Secretary's failure to consider reasonable alternatives pursuant to APA); *see* Marland v. Trump, 498 F. Supp. 3d 624, 641 (E.D. Pa. 2020) (granting TikTok users' motion for a preliminary injunction based on IEEPA's personal communications and informational materials exceptions).

197.Stephen P. Mulligan, Cong. Rsch. Serv., LSB10940, *Restricting TikTok (Part I): Legal History and Background* 2 (2023).

198.Eichensehr, *supra* note 196, at 129–30.

199.Petition for Review, *supra* note 117, at 1–3, 34.

200.Status Report, TikTok Inc. v. Comm. on Foreign Inv., No. 20-1444 (D.C. Cir. Nov. 21, 2025).

201.Protecting Americans from Foreign Adversary Controlled Applications Act, Pub. L. 118-50, div. H, 138 Stat. 955 (2024) (codified at 15 U.S.C. § 9901 note).

202.§ 2(a).

203.TikTok Inc. v. Garland, 145 S. Ct. 57, 72 (2025).

January 19, 2025.[204] The TikTok app briefly paused its operations in the United States, but resumed them after President-elect Trump announced that he would pause enforcement upon taking office on January 20, 2025.[205] He made good on his word by issuing an executive order directing the Attorney General not to take any action to enforce PAFACA for 75 days.[206] After multiple extensions of the enforcement delay[207] despite PAFACA's provision authorizing the President to grant an extension of "no more than 90 days,"[208] President Trump issued an executive order approving a proposed transfer of the operation of the TikTok U.S. application to a joint venture controlled by U.S. persons, as a "qualified divestiture" under PAFACA.[209] At the time of writing, the U.S. government is discussing a final resolution with the Chinese government, whose regulatory approval is required for the proposed transfer to be finalized.[210]

The TikTok saga has sparked debate in different areas.[211] Regarding CFIUS, the August 14, 2020 order to unwind a three-year-old

---

204.*Id.* at 57.

205.David McCabe, *TikTok Flickers Back to Life After Trump Says He Will Stall a Ban*, N.Y. TIMES (Jan. 19, 2025) https://www.nytimes.com/2025/01/19/technology/trump-tiktok-ban-executive-order.html.

206.Exec. Order No. 14166, 90 Fed. Reg. 8611 (Jan. 20, 2025).

207.Exec. Order No. 14258, 90 Fed. Reg. 15209 (Apr. 4, 2025); Exec. Order 14310, 90 Fed. Reg. 26913 (June 19, 2025); Exec. Order 14350, 90 Fed. Reg. 45903 (September 16, 2025).

208.*See* Joe Fisher & Allen Cone, *Trump Extends Sale, Ban of TikTok Another 75 Days*, UPI (Apr. 4, 2025), https://www.upi.com/Top_News/US/2025/04/04/tiktok-ban-deadline-trump/5381743771906/ (quoting a professor's observation that "there is a lack of clarity around the limits of Trump's authority" in extending the enforcement delay beyond the statutory 90-day limitation); Protecting Americans from Foreign Adversary Controlled Applications Act § 2(a)(3) (authorizing the President to "grant a 1-time extension of not more than 90 days" of the statutory deadline subject to procedural requirements).

209.Exec. Order No. 14352, 90 Fed. Reg. 47219 (Sep. 25, 2025); Protecting Americans from Foreign Adversary Controlled Applications Act § 2(g)(4).

210.*See* David McCabe, *Little Word of a TikTok Deal Out of Trump-Xi Meeting*, N.Y. TIMES, (Oct. 30, 2025), https://www.nytimes.com/2025/10/30/us/politics/trump-xi-tiktok-deal.html; *see* Meghan McCarty Carino, *Export controls on TikTok's algorithm are unique but not unprecedented*, MARKETPLACE (Sep. 22, 2025), https://www.marketplace.org/story/2025/09/22/explainer-tiktok-deal-and-export-controls-on-algorithms (explaining the Chinese regulatory license required for the transfer of TikTok's algorithm).

211.*See generally* Anupam Chander & Paul M. Schwartz, *The President's Authority Over Cross-Border Data Flows*, 172 U. PA. L. REV. 1989 (2024) (analyzing the TikTok saga and the national securitization of personal data to propose necessary elements to

acquisition raises a jurisdictional question.[212] ByteDance claims that today's TikTok app and its U.S. user base were developed independently of what ByteDance acquired as part of musical.ly in 2017.[213] Since the U.S. TikTok business did not arise from the "covered transaction," ByteDance argues, the order requiring the divestiture of the entire U.S. TikTok business, including assets that have never been located in the United States, exceeds the President's statutory authority.[214]

Interestingly, Trump opposed the bill that became PAFACA and repeatedly delayed enforcement despite his prior attempt to ban TikTok in 2020.[215] He argued that it would give a competitive advantage to Meta, which banned him from Facebook after the January 6, 2021 riot.[216] This is further evidence that the President's decisions about enforcement targets may be unduly influenced by political motives.[217]

4. *U.S. Steel: CFIUS amidst Electoral Politics*

The proposed acquisition of United States Steel Corporation by Nippon Steel Corporation, which was once blocked but ultimately approved after a change of administration, underscores the increasing risk of politicization of the CFIUS process. On December 18, 2023, the

---

constrain the presidential authority to regulate information flows). *See also* Sarah Filipiak, *Banning TikTok: Turning Point for U.S. Data Security or Threat to Free Speech?*, OHIO TODAY (Jan. 17, 2025), https://www.ohio.edu/news/2025/01/banning-tiktok-turning-point-u-s-data-security-or-threat-free-speech (curating scholars' comments regarding the TikTok ban's implications in cybersecurity, the U.S.-China rivalry, free speech, innovation in the social media space, counter-disinformation strategy).

212.*See* Brower & Weigel *supra* note 112 (indicating that similar claims to ByteDance's jurisdictional challenge could arise from future retroactive orders); *see* Courtney Fingar, *Congress' TikTok Bill Tries To Fix What CFIUS Failed To Do Years Ago*, FORBES (Mar. 19, 2024), https://www.forbes.com/sites/courtney-fingar/2024/03/19/with-tiktok-ban-congress-tries-to-do-what-cfius-could-not/ ("Some speculate that CFIUS' claim to coverage of the ByteDance/Musical.ly transaction was dubious due to the length of time that transpired before review as well as concerns that Musical.ly did not have enough of a U.S. base at the time of its sale.").

213.Petition for Review, *supra* note 117, at 9–11, 21–22.

214.*Id.*

215.Edward Helmore, *Donald Trump Flip-Flops on TikTok and Now Rails Against a Ban*, GUARDIAN (Mar. 11, 2024, 7:10 PM), https://www.theguardian.com/technology/2024/mar/11/donald-trump-tiktok-ban-biden; *see* Alex Leary, *Trump Grants 75-Day Extension to Reach TikTok Deal*, WALL ST. J. (Apr. 4, 2025), https://www.wsj.com/tech/trump-grants-75-day-extension-to-reach-tiktok-deal-10f75554 ("Trump in his first term led the charge against TikTok, but he reversed himself in the 2024 campaign, crediting it with helping him increase his share of the youth vote.").

216.Helmore, *supra* note 215; Leary, *supra* note 215.

217.Chander & Schwartz, *supra* note 211, at 2044.

U.S. and Japanese steelmakers announced the execution of a merger agreement.[218] However, the United Steelworkers ("USW") immediately declared its opposition to the deal and its desire to "keep this iconic American company domestically owned and operated."[219] Members of Congress also criticized the proposed transaction, citing the need to protect domestic steel production, as a matter increasingly seen as a national security interest, and as union workers were considered an important political constituency in the upcoming presidential election.[220] As early as January 31, 2024, presidential candidate Donald Trump expressed his opposition to the idea of selling U.S. Steel to Japan.[221] On March 14, 2024, President Biden issued a statement that "it is vital for [U.S. Steel] to remain an American steel company that is domestically owned and operated," acknowledging that he had "told . . . steel workers [he] ha[d] their backs."[222] Another key player is Cleveland-Cliffs, Inc., an American steelmaker outbid by Nippon Steel. Its CEO suggested he could exert influence to impede the Nippon Steel acquisition

---

218.News Release, United States Steel Corp. & Nippon Steel Corp., *Nippon Steel Corporation (NSC) to Acquire U. S. Steel, Moving Forward Together as the 'Best Steelmaker with World-Leading Capabilities'* (Dec. 18, 2023), https://cdn.prod.website-files.com/657e2ba174351fdd7e22a128/661d65b7a72e9a7f2c43a239_X%20Joint%20USS%20-%20NSC%20Press%20Release.pdf.

219.Press Release, United Steelworkers, *USW Slams Nippon Plan to Acquire USS* (Dec. 18, 2023), https://usw.org/press-release/usw-slams-nippon-plan-to-acquire-us/.

220.Andrew Ross Sorkin et al., *Washington Comes for the U.S. Steel Deal*, N.Y. TIMES (Dec. 20, 2023), https://www.nytimes.com/2023/12/20/business/dealbook/washington-us-steel-national-security.html.

221.Gavin Bade & Brittany Gibson, *Trump pledges to block US Steel sale*, POLITICO, (Jan. 31, 2024, 05:52 PM) https://www.politico.com/news/2024/01/31/trump-us-steel-sale-00138910.

222.The White House, *Statement from President Biden on US Steel* (Mar. 14, 2024), https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2024/03/14/statement-from-president-biden-on-us-steel/; *see also* Press Release, United Steelworkers, *Biden Supports Steelworkers as USW Continues Opposition to Proposed USS-Nippon Deal* (Feb. 2, 2024), https://usw.org/press-release/biden-supports-steelworkers-as-usw-continues-opposition-to-proposed-uss-nippon-deal/ (noting that President Biden personally assured USW of his support).

and continued to oppose it publicly.[223] Reports indicate that the president of USW favored Cleveland-Cliffs as U.S. Steel's purchaser[224]

The CFIUS review was conducted under political pressure from these parties. Throughout the process, Nippon Steel made multiple proposals to address the concerns raised by CFIUS and gave assurances to steelworkers. Nippon Steel's proposals included a $2.7 billion capital investment in U.S. Steel's facilities, giving CFIUS rights to oversee U.S. Steel operations (including a veto over capacity reductions), and a pledge to support the U.S. government's trade remedy investigations.[225] Nippon Steel also agreed with the union not to implement layoffs or close unionized facilities until September 2026.[226]

The Biden administration did not make a final decision before the presidential election, reportedly due to political considerations.[227] On January 3, 2025, President Biden prohibited the transaction.[228] On January 6, 2025, U.S. Steel and Nippon Steel filed two lawsuits: one against President Biden and CFIUS, alleging the CFIUS process was tainted by politics; and the other against Cleveland-Cliffs, its CEO, and USW's president, accusing them of illegal collusion.[229]

The situation began to shift after President Trump took office. On April 7, 2025, notwithstanding his opposition during the

---

223.Alexandra Alper, *Exclusive: Rival CEO Spread Doubt About Nippon Steel Deal Prospects, Documents Allege*, REUTERS (Jan. 6, 2025, 6:19 PM), https://www.reuters.com/markets/deals/rival-ceo-spread-doubt-about-nippon-steel-deal-prospects-wall-street-documents-2025-01-05/.

224.Editorial Board, *U.S. Steel and the Corruption of Cfius* (Jan. 3, 2025) WALL ST. J., https://www.wsj.com/opinion/biden-blocks-nippon-u-s-steel-deal-cfius-united-steelworkers-cleveland-cliffs-japan-fa301474.

225.David J. Lynch & Jeff Stein, *Japanese Buyer Sends Biden New U.S. Steel Proposal in Final Bid for Support*, WASH. POST (Dec. 31, 2024), https://www.washingtonpost.com/business/2024/12/31/nippon-us-steel-biden-union/.

226.*Id.*

227.*See* Alan Rappeport et al., *Biden Administration Is Likely to Delay Decision Over U.S. Steel*, N.Y. TIMES (Sept. 13, 2024), https://www.nytimes.com/2024/09/13/business/us-steel-nippon-biden.html (describing the difficulty of deciding before the election due to the differing positions of business groups and legal experts on the one hand and USW on the other).

228.Regarding the Proposed Acquisition of United States Steel Corporation by Nippon Steel Corporation, 90 Fed. Reg. 2605 (Jan. 3, 2025).

229.Alan Rappeport, *U.S. Steel and Nippon Sue Biden Over Decision to Block Merger*, N.Y. TIMES (Jan. 6, 2025), https://www.nytimes.com/2025/01/06/business/us-steel-nippon-lawsuit.html.

presidential campaign, he directed CFIUS to review the transaction *de novo*.[230] On June 13, 2025, President Trump issued an executive order approving the transaction, subject to the execution of a national security agreement.[231] The executive order maintained that the acquisition presented a national security risk but added that the risk could be adequately mitigated by attaching conditions.[232] On the same day, the transaction parties entered into a national security agreement with the U.S. government that provides a commitment of approximately $11 billion in new investments and the issuance of a "golden share" that gives the U.S. government veto power over a wide range of matters.[233] On June 18, 2025, the transaction was completed.[234]

The U.S. Steel decision again underscores the growing risk of politicization of the CFIUS process. The politically powerful union's open opposition to the proposed transaction, in concert with Nippon Steel's rival bidder, created suspicions that President Biden was predetermined to block the deal for political reasons before the CFIUS review was completed.[235] This risk is particularly high in the age of merging economic and national security concepts.[236]

230.White House, Presidential Memorandum on Review of Proposed United States Steel Corporation Acquisition (Apr. 7, 2025), https://www.whitehouse.gov/presidential-actions/2025/04/review-of-proposed-united-states-steel-corporation-acquisition/.

231.Regarding the Proposed Acquisition of United States Steel Corporation by Nippon Steel Corporation, 90 Fed. Reg. 26185 (June 13, 2025).

232.*Id.* § 2.

233.Nippon Steel Corporation & United States Steel Corporation, *Nippon Steel Corporation and U. S. Steel Finalize Historic Partnership* (June 18, 2025), https://www.nipponsteel.com/en/newsroom/news/2025/pdf/20250614_100.pdf.

234.*Id.*

235.*See U.S. Steel and the Corruption of Cfius*, *supra* note 224 ("Mr. Biden is essentially redefining national security to include economic nationalism, which will introduce many new gates for political interference."); Sarah Bauerle Danzman, *Biden's Blocked US Steel Deal Carries Big Risks. Here Are the Top Three.*, NEW ATLANTICIST (Jan. 3, 2025), https://www.atlanticcouncil.org/blogs/new-atlanticist/bidens-blocked-us-steel-deal-carries-big-risks-here-are-the-top-three/.

236.*See* GRAHAM & MARCHICK, *supra* note 17, at 143 (warning that adding economic security to the CFIUS statute would increase the risk of politicization because domestic companies could more easily fashion arguments to exploit the CFIUS process against foreign investors); *see* Tarbert, *supra* note 23, at 1521–22 (explaining that FIRRMA keeps CFIUS's focus exclusive to national security despite advocates for economic tests partly because such expansion could have "left CFIUS vulnerable to lobbying by special interest groups, each intent on protecting their respective industries.").

Additionally, CFIUS did not have a compelling justification for its national security argument.[237] CFIUS raised concerns over the possibility of reduced domestic production capacity and non-cooperation in trade remedy cases, which would undermine the domestic steel industry.[238] Notably, U.S. Steel's business is not directly associated with defense—the U.S. military's steel requirements account for only three percent of domestic production, and U.S. Steel is not a defense contractor.[239] Commentators argue that Nippon Steel's acquisition would strengthen rather than undermine U.S. national security.[240] A sale to Japan, a strong ally of the United States, would lead to growth for U.S. Steel and a more competitive and resilient domestic steel industry than a sale to a domestic rival or no deal at all.[241] Moreover, mere economic effects, such as the loss of market share or employment in an industry, do not constitute a national security issue if the industry has numerous suppliers that offer easily substitutable goods.[242] In this regard, alternative sources of steel supply are available globally, and the U.S. military

237.*See* Ellen Nakashima et al., *Biden Rejected Appeals of Several Top Advisers in Blocking U.S. Steel Bid*, WASH. POST (Jan. 4, 2025), https://www.washingtonpost.com/business/2025/01/04/biden-steel-nippon-advisers/ (reporting that the Biden administration's advisers counseled against blocking the transaction).

238.*See* Christian Contardo, *The Nippon Steel Decision Is Not About Japan*, USALI PERSPECTIVES, 5, No. 8, (Mar. 10, 2025), https://usali.org/usali-perspectives-blog/the-nippon-steel-decision-is-not-about-japan (analyzing the concerns CFIUS expressed in its correspondence to the transaction parties).

239.David J. Lynch & Jeff Stein, *Biden Preparing to Block Nippon Steel Purchase of U.S. Steel*, WASH. POST, (Sep. 4, 2024), https://www.washingtonpost.com/business/2024/09/04/biden-prepares-reject-us-steel-deal/.

240.Martin Chorzempa, I*mpending Nippon Steel Decision Jeopardizes Independence of National Security Reviews By CFIUS*, PIIE (Oct. 1, 2024, 12:50 PM), https://www.piie.com/blogs/realtime-economics/2024/impending-nippon-steel-decision-jeopardizes-independence-national; Danzman, *supra* note 235.

241.Chorzempa, *supra* note 240; *see* Bob Tita, *Biden Prepares to Block $14 Billion Steel Deal*, WALL ST. J. (Sep. 4, 2024), https://www.wsj.com/business/u-s-steel-warns-of-plant-closings-if-sale-collapses-4ef45756 (reporting that U.S. Steel's CEO stated it would close steel mills if Nippon Steel's acquisition was blocked and its pledged investment was not implemented).

242.*See* Tarbert, *supra* note 23, at 1521–22 (explaining that FIRRMA keeps CFIUS's focus exclusive to national security despite advocates for economic tests); *see* Theodore H. Moran, THREE THREATS: AN ANALYTICAL FRAMEWORK FOR THE CFIUS PROCESS 8 (2009) ("If suppliers are many in number, are dispersed in location and ownership, and offer easily substitutable goods and services, there is no credible national security threat, no matter how vital the good or service.").

does not rely on U.S. Steel or the domestic steel industry.[243] It is also noteworthy that Nippon Steel was willing to enter into a legally binding mitigation agreement to address CFIUS's concerns, and President Trump accepted that approach after he took office.[244]

C. *Franklin & Dalton: Inheriting the Pre-APA Jurisprudence*

Even without the finality clause in Section 721, *Franklin*, *Dalton,* and their progeny significantly restrict substantive review of the President's decisions.[245] As discussed below, scholars have criticized these precedents. In particular, recent executive practices taking advantage of the expanding notion of national security highlight the growing threat to the rule of law and the separation of powers.[246]

Critics of *Franklin* have contended that it should be overturned so that the President can be treated as an "agency" subject to judicial review under APA.[247] The reasoning behind this includes: *Franklin* failed to properly consider the statutory language and legislative history;[248] the President and administrative agencies are not different in function as agents of Congress;[249] judicial oversight is a constitutional prerequisite for the modern administrative state;[250] and Presidents are increasingly aggressive in exercising statutory powers.[251]

Proponents of extending *ultra vires* review to the merits of the President's determinations point out that *Dalton*'s reach should be interpreted narrowly because the President's discretion under the statute

---

243.*See* Moran, *supra* note 242, at 11–12 (explaining that a foreign acquisition of a U.S. steel company does not pose a national security threat because, while the steel industry is vital to U.S. national economic and security interests, there is no realistic likelihood that a foreign acquiror may frustrate supplies to U.S. government); Lynch & Stein, *supra* note 239.

244.*See* Lynch & Stein, *supra* note 225; Regarding the Proposed Acquisition of United States Steel Corporation by Nippon Steel Corporation, *supra* note 231, § 2(b).

245.*See supra* notes 85–89 and accompanying text.

246.*See* Yeatman, *supra* note 4, at 8 ("Because of the Supreme Court's bar on substantive review of the president's statutory powers, 'national security' is effectively whatever the president says it is.").

247.*See generally* Kovacs, *supra* note 4, at 63 (2020); Yeatman, *supra* note 4, at 10 (agreeing with Kovacs and claiming that a "special justification" for overturning *Franklin* exists).

248.Kovacs, *supra* note 4, at 83–88; Yeatman, *supra* note 4, at 4.

249.Yeatman, *supra* note 4, at 4.

250.Kovacs, *supra* note 4, at 89–90.

251.Kovacs, *supra* note 4, at 96–98; Yeatman, *supra* note 4, at 6–10.

at issue was simply unconstrained, unlike under other statutes.[252] Although courts have relied on *Dalton* to support the unreviewability doctrine established by the *Dakota Central* line of cases that began with *Martin v. Mott* in 1827[253], the continued application of the doctrine is no longer justifiable in light of legal developments after *Dakota Central*, including the enactment of APA.[254]

Of course, courts have been highly deferential to the executive decisions that implicate the President's constitutional role in foreign affairs and national security.[255] However, the increasingly assertive exercise of the President's statutory powers in the name of national security warrants greater judicial scrutiny to oversee the separation of powers.

The exercise of tariff powers is noteworthy. In *American Institute for International Steel v. United States*,[256] the Court of International Trade cast doubt on the President's potentially unlimited tariff authority, which is based on the executive's expansive statutory interpretation of national security, while rejecting the plaintiff's facial constitutional challenge to Section 232 of TEA in response to the first Trump administration's tariffs on steel and aluminum.[257]

Additionally, the second Trump administration's unprecedented use of IEEPA as a tariff authority has provoked a legal and political

---

252.Kevin M. Stack, *The Reviewability of the President's Statutory Powers*, 62 VAND. L. REV. 1171, 1195 (2009); Yeatman, *supra* note 4, at 5. In *Dalton*, the President's decision to close a defense base was challenged. *Dalton*, 511 U.S. at 464. The court held that "[t]he [Defense Base Closure and Realignment] Act does not at all limit the President's discretion in approving or disapproving the [Defense Base Closure and Realignment] Commission's recommendations." *Id.* at 476; Defense Base Closure and Realignment Act, Pub. L. No. 101-510, § 2903 (e), 104 Stat. 1808, 1812 (1990).

253.Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827).

254.*See* Stack, *supra* note 252, at 1178–92, 1196–98 (describing federalist origins of the unreviewability doctrine and the shift of the legal landscape).

255.Eichensehr & Hwang, *supra* note 3, at 554.

256.Am. Inst. for Int'l Steel, Inc. v. United States, 376 F. Supp. 3d 1335 (Ct. Int'l Trade 2019).

257.Yeatman, *supra* note 4, 7–8. During oral arguments, a judge asked the government whether there was any product whose imports the President was not authorized to restrict. *Id.*; George Will, *What's Next, a Tariff on Peanut Butter?*, WASH. POST (Feb. 8, 2019), https://www.washingtonpost.com/opinions/whats-next-a-tariff-on-peanut-butter/2019/02/08/98a047e0-2b10-11e9-b011-d8500644dc98_story.html. Another judge wrote a *dubitante* opinion suggesting revisiting *Algonquin*, which precluded the same challenge to Section 232 of the TEA on the ground that it establishes clear preconditions to presidential action, while he joined the majority only because of *Algonquin*'s binding authority. Am. Inst. for Int'l Steel, Inc., 376 F. Supp. 3d at 1345–52 (Judge Katzmann, *dubitante*).

backlash. Legal scholars argue that the sweeping tariffs and the underlying national emergencies exceed the authority Congress delegated to the President through IEEPA.[258] Private businesses and state governments have initiated lawsuits challenging the IEEPA tariffs on similar grounds.[259] Attempts to hinder the President's move are also ongoing in Congress.[260]

These examples further undermine the justification for *Franklin* and *Dalton*, underscoring the need for judicial review of the President's actions, especially economic measures based on an expansive interpretation of statutory national security powers. The blocked transactions reviewed in Part IV.B. also align with this trend and thus justify the removal of the common-law barrier. To accomplish this, it is necessary not only to delete the finality provision from Section 721, but also to add an explicit provision for substantive judicial review.

V. FRAMEWORK OF JUDICIAL REVIEW

This Part explores the appropriate scope and framework of judicial review for CFIUS cases to balance national security interests and private parties' liberty based on the substantive and procedural requirements. Courts have rendered instructive decisions in national security-

---

258.*See* Jennifer Hillman, *Trump's Use of Emergency Powers to Impose Tariffs Is an Abuse of Power*, LAWFARE (Mar. 24, 2025, 12:00 AM), https://www.lawfaremedia.org/article/trump-s-use-of-emergency-powers-to-impose-tariffs-is-an-abuse-of-power (arguing that the tariffs against Canada, Mexico and China exceed the authority delegated to the President under the major questions doctrine); Ilya Somin, *Challenge Trump's Tariffs Under the Nondelegation and Major Questions Doctrines*, THE VOLOKH CONSPIRACY (Feb. 2, 2025, 4:16 PM), https://reason.com/volokh/2025/02/02/challenge-trumps-tariffs-under-the-nondelegation-and-major-questions-doctrines/; *see* Ilya Somin, *Why Trump's "Liberation Day" Tariffs are Illegal*, THE VOLOKH CONSPIRACY (Apr. 3, 2025, 5:51 PM), https://reason.com/volokh/2025/04/03/why-trumps-liberation-day-tariffs-are-illegal/ (arguing that the reciprocal tariffs are illegal on similar grounds).

259.*See generally* Christopher T. Zirpoli, Cong. Rsch. Serv., LSB10940, *Court Decisions Regarding Tariffs Imposed Under the International Emergency Economic Powers Act (IEEPA)*, (2025) (summarizing lawsuits challenging the IEEPA tariffs, including two lower court decisions in favor of the plaintiffs that are, at the time of writing, pending before the Supreme Court).

260.*See* Molly E. Reynolds & Scott R. Anderson, *Can Congress Reverse Trump's Tariffs?*, LAWFARE (Apr. 9, 2025, 8:00 AM), https://www.lawfaremedia.org/article/can-congress-reverse-trump's-tariffs (detailing available procedures to reverse the President's actions under IEEPA and the National Emergencies Act, and the relevant developments in Congress); *see* Riley Beggin, *Senate votes to quash Trump's 'Liberation Day' global tariffs*, WASH. POST (Oct. 31, 2025), https://www.washingtonpost.com/business/2025/10/30/trump-tariffs-senate-vote/ (reporting the Senate passed three resolutions to eliminate the tariffs against Brazil and Canada, and the global tariffs, although they are only symbolic due to the House's preemptive move to block such challenges).

related cases, seeking to protect private interests while expressing prudence in intervening in national security issues.[261]

A. *Foreign Person's Potential Action Threatening National Security*

The first condition for the President's authority to block a transaction under Section 721 is his finding that there is credible evidence that the foreign person might take action that threatens to impair national security.[262]

Given that there is no functional difference between the President and executive agencies in exercising statutory authority,[263] cases involving targeted economic restrictions under IEEPA and the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)[264] provide a useful point of reference. This is because targeted sanctions serve an objective similar to blocking foreign investment under Section 721, which is to restrict individual foreign persons' access to the U.S. market on national security grounds. A key difference from the President's blocking of foreign investments is that decisions to designate sanctioned persons are typically subject to judicial review because executive agencies make such decisions under the criteria and procedures specified by executive orders.[265]

1. *Foreign Person Might Take Action*

Courts have scrutinized national security bodies' factual findings underlying individual designations under APA's or similar standards.[266]

261.*See, e.g.*, Xiaomi Corp. v. Dep't of Def., No. 21-280 (RC), 2021 U.S. Dist. LEXIS 46496, 35 (D.D.C. Mar. 12, 2021) ("This country's national security priorities are undoubtedly compelling government interests, and the executive is to be afforded deference when sensitive and weighty interests of national security and foreign affairs are at stake.") (citing Holder v. Humanitarian L. Project, 561 U.S. 1 (2010)); *see WeChat*, 488 F. Supp. 3d at 32 (noting the government's contention that "an injunction would 'frustrate and displace the President's determination of how best to address threats to national security'" is an "important point").

262.50 U.S.C. § 4565(d)(4)(A) (2018).

263.*See supra* note 249 and accompanying text.

264.Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

265.*See* Elena Chachko, *Administrative National Security*, 108 GEO. L. J. 1063, 1094 (2020) (outlining the mechanism of implementing individual sanctions under IEEPA and AEDPA).

266.*See Id.* at 1100 ("Because the IEEPA is silent on the standard of judicial review of individual designations under its authority, the APA governs their review.") (footnote in original omitted); *see* 8 U.S.C. § 1189(c) (2012) (providing for judicial review of the designation of foreign terrorist organizations under AEDPA).

The test is whether the agency's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[267] In applying this test, courts review the administrative record to determine whether there is "substantial evidence" or "substantial support" for the agency's factual findings.[268]

Courts have consistently acknowledged that the arbitrary and capricious standard is highly deferential and have upheld agencies' findings.[269] Notwithstanding the highly deferential standard, in *Xiaomi* and *Luokung*[270] in 2021, the court granted preliminary injunctions against the prohibition of investment in Chinese companies included in the Department of Defense's ("DOD") list of Communist Chinese military companies ("CCMCs"),[271] which was based on the executive orders issued under IEEPA. In both cases, the D.C. Circuit concluded that DOD's factual findings underlying the designations were not supported by substantial evidence, and the plaintiffs did not meet the statutory criteria for CCMCs.[272]

These cases demonstrate that evaluating evidence enables the court to safeguard private parties' interests while respecting the executive's national security decisions. In CFIUS cases, where the statute requires credible evidence and allows the court to review classified information *ex parte* and *in camera,*[273] this judicial approach could similarly be applied to review the President's finding that the foreign person might take a specific action.

267.5 U.S.C. § 706(2)(A) (2012); 8 U.S.C. § 1189(c)(3)(A) (2012).

268.*See, e.g.*, Al Haramain Islamic Found., Inc., v. Dep't of the Treasury (*AHIF*), 686 F.3d 965, 976 (9th Cir. 2012) ("Under [APA's] standard, [the court] review[s] for substantial evidence the agency's factual findings." (citing Alaska Dep't of Health & Soc. Servs. v. Ctrs. for Medicare & Medicaid Servs., 424 F.3d 931, 937 (9th Cir. 2005)). AEDPA provides that the court shall set aside a designation if the administrative record "lack[s] substantial support." 8 U.S.C. § 1189(c)(3) (2012).

269.*See, e.g.*, *AHIF*, 686 F.3d at 979 (affirming that the Office of Foreign Asset Control's conclusion was based on substantial evidence on the theory that "[the court's] review—in an area at the intersection of national security, foreign policy, and administrative law—is extremely deferential.") (citing Islamic Am. Relief Agency v. Gonzales, 477 F.3d 728, 734 (2007)); *see* Holy Land Found. for Relief & Dev. v. Ashcroft, 333 F.3d 156, 166 (2003) (noting that the case concerning a terrorist designation "involve[d] sensitive issues of national security and foreign policy.").

270.Luokung Tech. Corp. v. Dep't of Def., 538 F. Supp. 3d 174 (D.D.C. 2021).

271.National Defense Authorization Act for Fiscal Year 1999, Pub. L. 105-261, § 1237, 112 Stat. 2160 (1998) (mandating the Secretary of Defense to publish a list of CCMCs).

272.*Xiaomi*, 2021 U.S. Dist. LEXIS 46496 at 11–24; *Luokung*, 538 F. Supp. 3d at 182–191.

273.50 U.S.C. § 4565(e)(3) (2018).

2. *Action Threatens National Security*

One might cite People's Mojahedin Organization of Iran v. U.S. Dep't of State, 182 F.3d 17 (D.C. Cir. 1999) (*PMOI I*)[274] to argue that the President's finding that a foreign person's potential action threatens national security under Section 721 is unjusticiable due to the political question doctrine. In *PMOI I*, a foreign organization challenged its designation as a foreign terrorist organization under AEDPA. In upholding the designation, the D.C. Circuit reviewed the Secretary's factual finding that the organization was foreign and engaged in terrorist activity, and stated that there was substantial support for the finding.[275] However, the court declined to review the finding that the foreign organization's terrorist activity threatened the security of U.S. nationals or the U.S. national security, invoking the political question doctrine.[276]

However, in a later case, *Zivotofsky*, the Supreme Court substantially narrowed the applicability of the political question doctrine to statutory claims, declaring that deciding the validity of one interpretation of a statute is a "familiar judicial exercise."[277] In the context of Section 721, whether the risk identified by the President constitutes a "national security" risk as intended by Congress is a question of statutory interpretation that can be resolved through the "familiar judicial exercise."[278] Moreover, this question will not be as politically sensitive as in *PMOI I*, given that CFIUS cases tend to involve the executive's

---

274.*PMOI I*, 182 F.3d 17 (D.C. Cir. 1999).

275.*See Id.* at 24–25; 8 U.S.C. § 1189(c)(3) (2012) (providing for the requirements for a foreign terrorist organization designation).

276.*PMOI I*, 182 F.3d at 23.

277.*See* Zivotofsky v. Clinton, 566 U.S. 189, 191, 194–96 (2012) (refusing to apply the political question doctrine to a case where the plaintiff sought to enforce a statute that allowed Americans born in Jerusalem to elect to have "Israel" recorded as the place of birth on their passport). *See also* Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. R. 1897, 1925–26 (2015) (noting that *Zivotofsky* is "of far-reaching significance" in the context of foreign relations cases where lower courts have applied the political question doctrine to claims related to statutory interpretation); *see* Chris Michel, *There's No Such Thing as a Political Question of Statutory Interpretation: The Implications of Zivotofsky v. Clinton*, 123 YALE L.J. 253. (arguing that *Zivotofsky* precludes the applicability of the political question doctrine to statutory claims).

278.*See* Ashley Deeks & Kristen E. Eichensehr, *Frictionless Government and Foreign Relations*, 110 VA. L. REV. 1815, 1891 (2024) (suggesting that courts may play a more robust role in the context of the U.S. government's increasing use of economic tools of national security partly because challenges to such executive actions authorized by statutes are distinguished from other instances where courts have applied the political question doctrine given *Zivotofsky*).

characterization of less imminent risks than terrorism as a national security threat.[279]

Furthermore, the *WeChat* and *TikTok* courts evaluated evidence of the national security threat identified under IEEPA. In finding that the balance of equities between the plaintiffs' interests and the government's national security and foreign policy interests favored the plaintiffs, the court noted that the specific evidence of the threat posed by the plaintiffs was modest while acknowledging that the national security threat related to China was significant and supported by considerable evidence.[280]

The judiciary is constitutionally mandated to oversee the separation of powers between Congress and the executive branch.[281] Determining whether the identified national security threat falls within Congress's intent is well within the mandate.

B. *Inadequacy of Other Laws*

Section 721 also requires the President to find that U.S. laws other than Section 721 and IEEPA do not provide adequate and appropriate authority to protect national security.[282]

In *TikTok*, the court examined a similar requirement. The D.C. Circuit held that the Secretary of State violated APA by effectively banning TikTok without considering whether the national security concerns could be fully resolved through the CFIUS-led divestment process.[283] The court found that the Secretary's failure to consider the "obvious alternative" violates APA's arbitrary and capricious standard, which requires an agency to consider "reasonable alternatives."[284]

In CFIUS cases, the court is similarly well-positioned to ensure a rational decision-making process by reviewing whether any reasonable alternatives exist under other laws and whether the President considered them before blocking a transaction.

279.*See supra* note 127 and accompanying text.

280.*WeChat*, 488 F. Supp. 3d at 929; *TikTok*, 490 F. Supp. 3d at 85; *TikTok*, 507 F. Supp. 3d at 114.

281.Michel, *supra* note 277, at 261–62.

282.50 U.S.C. § 4565(d)(4)(B) (2018).

283.*TikTok*, 507 F. Supp. 3d at 109–12.

284.*Id.* at 111 (citing Citizens against Burlington, Inc. v. Busey, 938 F.2d 190, 195 (D.C. Cir. 1991)).

C. Due Process

In addition to the substantive requirements, it is also crucial for the national security risk identified to be adequately disclosed to the foreign investor during the CFIUS process. It helps ensure compliance with the substantive requirements and the foreign investor's ability to respond effectively. The latter is particularly important for foreign investors who seek to negotiate a mitigation agreement to address the underlying national security concerns.[285]

Ralls noted that due process requires, "at the least," notice of the official action, access to unclassified evidence, and an opportunity to rebut that evidence.[286] Although the court referred to the *Mathews* test as the means of determining the "specific dictates of due process" on a case-by-case basis[287] and mentioned Ralls's "significant" property interests and the government's "substantial" interest in national security,[288] it did not expressly discuss the second *Mathews* factor, i.e., the risk of erroneous deprivation and the probable value of additional procedural safeguards.

In contrast, other courts have considered this factor in a more nuanced manner in cases involving IEEPA-based sanctions implemented by the Office of Foreign Asset Control ("OFAC").[289] In *AHIF* and *Kindhearts*, the courts found that OFAC had violated the plaintiffs' due process rights.[290] In considering the second *Mathews* factor, the

---

285.*See* Petition for Review at 67–69, U.S. Steel Corp., et al v. Comm. on Foreign Inv. et al, No. 25-1004 (D.C. Cir. Jan. 6, 2025) (claiming that U.S. Steel and Nippon Steel were only provided with an inadequate opportunity to correct CFIUS's misunderstandings of material facts or to engage with CFIUS on the proposed terms to mitigate national security risks).

286.*Ralls III*, 758 F.3d at 319.

287.*Ralls III*, 758 F.3d at 317–18 (quoting *Mathews*, 424 U.S. at 335).

288.*See Id.* at 319–21 (pointing to Ralls's "significant" property interests and the government's "substantial" interest in national security, and the lack of the opportunity for Ralls to "tailor its submission to the [CFIUS's and the President's] concerns or rebut the factual premises underlying the President's action").

289.*See* Ann Koppuzha, *Secrets and Security: Overclassification and Civil Liberty in Administrative National Security Decisions*, 80 ALB. L. REV. 501, 519–32 (2017) (illustrating differing approaches between the D.C. Circuit and the Ninth Circuit regarding access to classified information as part of due process).

290.*See AHIF*, 686 F.3d at 984, 988 (holding that OFAC's designation of the plaintiff as a specially designated global terrorist had violated the plaintiff's procedural due process rights by failing to undertake measures to mitigate the potential unfairness arising from the use of classified information and to provide an adequate statement of reasons for its investigation); *see* KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner (*KindHearts I*), 647 F. Supp. 2d 857, 897 (N.D. Ohio 2009) (holding that

courts emphasized the designated entity's inability to respond to OFAC's concerns without knowledge of the reasons for and the factual findings behind OFAC's actions.[291] Having reviewed the circumstances of the case, the courts concluded that enhanced disclosure was appropriate, such as providing an unclassified summary of classified information or sharing classified information with a lawyer with appropriate security clearance.[292]

Although granting some form of access to classified information differs significantly from the D.C. Circuit's formulation of due process including that of *Ralls*,[293] the focus here is not on whether foreign investors should have access to classified information. Rather, the argument here is that courts should closely examine the second *Mathews* factor. It will typically dictate the timely disclosure of the identified national security threat, including the specific action the foreign investor might take, because such disclosure is rarely inappropriate.[294]

D. *Level of Deference*

The discussions above do not seek to propose that the judiciary relinquish the deference traditionally given to the executive branch's

---

OFAC violated the plaintiff's due process rights by blocking its assets pending investigation for terrorist designation without meaningful notice and opportunity to be heard).

291. *See AHIF*, 686 F.3d at 982 ("Without disclosure of classified information, the designated entity cannot possibly know how to respond to OFAC's concerns. Without knowledge of a charge, even simple factual errors may go uncorrected despite potentially easy, ready, and persuasive explanations."); *see Id.* at 986 ("because AHIF-Oregon could only guess (partly incorrectly) as to the reasons for the investigation, the risk of erroneous deprivation was high."). *See KindHearts I*, 647 F. Supp. 2d at 904 (pointing to the plaintiff's inability to meaningfully challenge the government's actions due to OFAC's failure to provide information regarding the amounts and recipients of the funds it claimed had gone to Hamas or its affiliates).

292. *AHIF*, 686 F.3d at 984; KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner, 710 F. Supp. 2d 637, 657–60 (N.D. Ohio 2010).

293. *See Ralls III*, 758 F.3d at 319 (noting that the D.C. Circuit consistently takes the position in national security-related cases that "due process does not require disclosure of classified information supporting official action."). *See also* Koppuzha, *supra* note 289, at 559 (referring to this discrepancy between the Ninth Circuit and the D.C. Circuit as a circuit split).

294. *See* Aimen Mir, Deputy Assistant Sec'y for Inv. Sec., U.S. Dep't of the Treasury, Remarks at the Council on Foreign Relations (Apr. 1, 2016), https://home.treasury.gov/jl0401 ("Only in exceptional instances are the parties unaware of the national security concern at stake. In those instances, revelation of the concerns would itself create a risk to national security.").

national security decisions.[295] As the expanding notion of national security poses a greater threat to liberty,[296] the depth of judicial scrutiny should vary depending on different factors, such as how imminent or remote the government's national security claim is. If the alleged national security threat is so remote as to fall outside the legislative intent, the court should rule that the President's decision exceeds the delegated authority.[297] If the government's claim is properly characterized as a national security threat, the next issue is whether the President's factual findings are based on credible evidence.[298] When the government's claim is economically focused, courts may measure the effect of the proposed acquisition using economic analysis, like in antitrust cases.[299] Courts may also increase scrutiny when third-party constitutional rights, such as the First Amendment rights in the TikTok and WeChat bans, are implicated.[300] Conversely, the court should be more deferential when the government's national security claim pertains to

---

295.*See* Eichensehr & Hwang, *supra* note 3, at 590–91 ("Importantly, while [the potential judicial approach of dividing national security claims into traditional areas of national security versus the economically focused restrictions and decreasing deference only for the latter category] would involve less deference or more searching review by courts, th[is] approach[] would not necessarily mean that judges would give no deference to the executive's national security claims, just reduced deference or increased scrutiny.").

296.*See supra* note 246 and accompanying text.

297.*See supra* notes 277–79 and accompanying text.

298.*See* 50 U.S.C. § 4565(d)(4)(A) (2018).

299.*See* Moran, *supra* note 242, at 1–4 (proposing that among three categories of potential threats posed by foreign acquisitions—(1) dependence on a foreign supplier that may frustrate the provision of crucial goods or services; (2) the transfer of sensitive technology; and (3) infiltration, surveillance or sabotage—the first two categories can be assessed by antitrust analysis and strategic trade theory); Yang Wang, *Incorporating the Third Branch of Government into U.S. National Security Review of Foreign Investment*, 38 HOUS. J. INT'L L. 323, 350 (2016) ("Given courts' expertise in antitrust review, courts should also be trusted to review a CFIUS decision, as long as courts review classified information *in camera*."); *see* Eichensehr & Hwang, *supra* note 3, at 591 (explaining that judges could distinguish traditional and economically focused national security claims and give the executive different levels of deference); *see* John Taishu Pitt & Elliot Silverberg, *CFIUS Reviews Should Be Subject to Judicial Scrutiny*, Council on Foreign Relations (Feb. 12, 2025 11:19 PM), https://www.cfr.org/article/cfius-reviews-should-be-subject-judicial-scrutiny (calling for Congress to allow judicial scrutiny for certain lower-risk traditional industries with less strategic relevance as opposed to advanced technology sectors critical to national security).

300.*See generally* Chander & Schwartz, *supra* note 211 (proposing elements necessary to protect free expression and due process when the President acts on national security grounds to control information systems based on the analysis of the developments of the TikTok ban and PAFACA).

matters in which the court has less expertise, such as potential exploitation of vulnerabilities in critical infrastructure.[301]

VI. CONCLUSION

The court's role in overseeing the separation of powers and protecting private interests is crucial in the era of expanding national security and executive overreach. It is necessary to give the court adequate power to set aside unreasonable actions of the President.

Under *Dakota Central* and *Dalton*, deleting the finality provision will only allow the court to conduct the first type of *ultra vires* review, which is to determine whether the President lacked the authority to act. Judicial review should also extend to whether the President exceeded or abused the delegated authority in acting or making a decision to act.

Therefore, Congress should amend Section 721 to provide that the actions of the President and the findings of the President shall be subject to judicial review,[302] and add a provision that the reviewing court shall hold unlawful and set aside any action or finding of the President under Section 721 found to be an excess or abuse of the authority of the President under Section 721.

With this amendment, the court will be able to strike the appropriate balance between national security and private interests.

301.*See* Moran, *supra* note 242, at 3 ("Evaluation and remediation of [the threats of infiltration, surveillance or sabotage] are more complex").

302.*See* 50 U.S.C. § 4565(e)(1) (precluding judicial review of the President's actions and findings). The amended paragraph should provide "The actions of the President under paragraph (1) of subsection (d) and the findings of the President under paragraph (4) of subsection (d) shall not be subject to judicial review."