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The Right Rights for the Right People? The Need for Judicial Protection of Foreign Investors

Isaac Lederman

Boston College Law School, isaac.lederman@bc.edu

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Abstract: If the executive branch decides to prevent a foreign investor from acquiring certain assets on national security grounds, that decision has historically not been subject to judicial review. Few scholars have questioned this idea, which Congress enshrined in statute in 1988 and the D.C. Circuit endorsed in *Ralls*, a 2014 decision. This gap in the literature is particularly surprising in light of other countries’ recent efforts to tighten their foreign investment regimes. Although scholars argue extensively about the role the legislature should play in the regulation of foreign investment, the judiciary receives scant attention. This Note aims to fill the gap by using *Ralls* as a point of departure. It argues that *Ralls* deters foreign investors from suing the government by establishing a precedent of accepting the executive’s national security determinations. Plaintiffs’ actions, in other words, no longer serve as a check on arbitrary determinations by the government. As a result, the government carries out arbitrary actions and damages its own legitimacy. Given this state of affairs, foreign investors should have the right to challenge these judgments in court.

INTRODUCTION

Of all the national security threats facing the United States, Chinese ownership of wind farms in northern Oregon may not immediately spring to mind.¹

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The Obama administration, however, had no trouble tilting at windmills.\(^2\) It did not matter that other foreign-owned and foreign-made wind turbines also operated within the vicinity of a U.S. Navy installation.\(^3\) Nothing, it seemed, would stop the administration from forcing the Chinese nationals to divest their interests in the wind farms.\(^4\)

That is until Ralls, a Delaware corporation owned by the Chinese executives, took the unprecedented step of challenging the divestiture in court.\(^5\) Though the district court dismissed most of Ralls’ claims,\(^6\) the appellate court ruled in its favor in 2014.\(^7\) The D.C. Circuit held that foreign investors have the right to contest the evidence behind the divestiture.\(^8\) Even more importantly, it declared that federal courts could hear foreign investors’ claims.\(^9\)

\(^2\) See Ralls, 758 F.3d at 305–06; Webster, supra note 1, at 215; see also Will Gent, Comment, Tilting at Windmills: National Security, Foreign Investment, and Executive Authority in Light of Ralls Corp. v. CFIUS, 94 OR. L. REV. 455, 455 (2016) (supplying this metaphor).

\(^3\) Ralls, 758 F.3d at 305–06 (noting the high numbers of turbines in the area that are “foreign-made and foreign-owned”); Webster, supra note 1, at 215 (making clear that the administration paid little attention to the other foreign-owned and foreign-made turbines in this part of northern Oregon). In 2012 and 2013, the United States government appears to have become particularly concerned with the national security risk of Chinese investments near military installations. See Mary Ellen Stanley, Note, From China with Love: Espionage in the Age of Foreign Investment, 40 BROOK. J. INT’L L. 1033, 1053–55 (2015) (providing information on three instances in that timeframe in which the government prevented Chinese companies from gaining control of mines near military bases). The law governing foreign investment now reflects this understanding. See 50 U.S.C. § 4565(a)(4)(B)(ii) (Supp. V 2017). It specifically provides that transactions subject to review include “the purchase or lease by, or a concession to, a foreign person of private or public real estate that . . . is in close proximity to a United States military installation or another facility or property of the United States Government that is sensitive for reasons relating to national security.” Id.

\(^4\) See Ralls, 758 F.3d at 302 (detailing the steps the administration took to stop Ralls’ acquisition). Ralls is undoubtedly a unique case. See Ji Li, Investing near the National Security Black Hole, 14 BERKELEY BUS. L.J. 1, 9 (2017) (indicating that, prior to this dispute, no foreign investor had challenged a national security determination in court); Zhu Wang, CFIUS Under Review: National Security Review in the US and the WTO, 50 J. WORLD TRADE 193, 194 (2016) (underscoring the landmark nature of Ralls’ legal action); Webster, supra note 1, at 270 (noting that the Ralls decision illustrated the outer boundaries of the government’s power in this domain).


\(^7\) Ralls, 758 F.3d at 325.

\(^8\) Id.

\(^9\) Id. at 311. Despite this legal victory, Ralls did not end up acquiring the wind farms. See Stephen Dockery, Chinese Company Will Sell Wind Farm Assets in CFIUS Settlement, WALL ST. J. (Nov. 4, 2015), https://blogs.wsj.com/riskandcompliance/2015/11/04/chinese-company-will-sell-wind-farm-
In the years following the decision, commentators have found much to love and to loathe about the D.C. Circuit’s decision in *Ralls Corp. v. Committee on Foreign Investment in the United States.* Nevertheless, one crucial assumption underlying *Ralls* has gone unexamined: the notion that the executive branch’s national security determinations should avoid judicial review. Few question this foundational idea in the foreign investment space. This gap in the literature becomes even more surprising in light of other countries’ recent efforts to tighten their foreign investment regimes. Although scholars argue extensively about the role the legislature should play in the regulation of foreign investment, they pay scant attention to the role of the judiciary.
This Note aims to fill this gap by using *Ralls* as a point of departure in advancing two main arguments. First, *Ralls* has deterred foreign investors from bringing suit against the government because they expect courts to accept the executive’s national security determinations. Second, as a result of this ruling, plaintiffs’ actions no longer serve as a check on arbitrary determinations by the government. Given this state of affairs, foreign investors should have the right to challenge these judgments in court. To think of rolling back *Ralls* would be, in the words of the Man of La Mancha, “to dream the impossible dream.” After all, giving foreign investors the right to press their claims in court falls squarely within the proud American tradition of vindicating the rights of non-citizens and corporations alike. In addition, judges have plenty of experience handling litigation over large, complex transactions.

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16 See Kobi Kastiel & Adi Libson, *Global Antitakeover Devices*, 36 YALE J. ON REG. 117, 122 (2019) (indicating that Broadcom took no action to contest the denial of its transaction with Qualcomm); Li, supra note 4, at 18 (asserting that after *Ralls*, foreign investors do not expect success from litigating denials of their transactions); Maria Sheahan, *China's Fujian Drops Aixtron Bid After Obama Blocks Deal*, REUTERS (Dec. 8, 2016), https://www.reuters.com/article/us-aixtron-mdfujian/chinas-fujian-drops-aixtron-bid-after-obama-blocks-deal-idUSKBN13X16H [https://perma.cc/RZH4-92FA] (illustrating a Chinese investment group’s reluctance to proceed with its bid for a German company after the Obama administration blocked the deal). Although some scholars have written about the chilling effect of *Ralls* on the litigation of blocked transactions, none have explored it extensively. See, e.g., Li, supra note 4, at 18 (specifying the change in investors’ litigation calculus in the wake of *Ralls*).

17 See Li, supra note 4, at 18 (examining why investors would not want to sue the government in the wake of *Ralls*); Justin Shields, *Smart Machines and Smarter Policy: Foreign Investment Regulation, National Security, and Technology Transfer in the Age of Artificial Intelligence*, 51 J. MARSHALL L. REV. 279, 293–94 (2018) (indicating that foreign investors loathe the ambiguity of the CFIUS rules); Kate O’Keeffe, *Trump Orders Broadcom to Cease Attempt to Buy Qualcomm*, WALL ST. J. (Mar. 13, 2018), https://www.wsj.com/articles/in-letter-cfius-suggests-it-may-soon-recommend-against-broadcom-bid-for-qualcomm-1520869867 [https://perma.cc/5SD4-WSMX] (highlighting the concern among private sector attorneys that the Committee on Foreign Investment in the United States (CFIUS or the Committee) had acted far outside the law in its most recent block of the Qualcomm purchase).


19 *MAN OF LA MANCHA* (RCA Victor 2002) (telling the story of Don Quixote through song). The quoted portions of this Note’s section headings come from the musical *Man of La Mancha*. See id.

20 See ADAM WINKLER, *WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS* 380 (2018) (arguing that corporations have won an enormous amount of constitutional protection); Ernest A. Young, *Universal Jurisdiction, the Alien Tort Statute, and Transnational Pub-
In putting forward these arguments, this Note focuses on the Committee on Foreign Investment in the United States (CFIUS or the Committee), the inter-agency body with which Ralls tussled. Part I of this Note provides a history of CFIUS and its general freedom from judicial review. Part II presents the reasoning behind Ralls, and shows how it has continued to dissuade foreign investors from filing suit against the government. Part III makes two interconnected arguments: first, courts should question the executive’s determinations in this area, and, second, Congress should provide for judicial review of CFIUS’s actions.

I. “WHERE THE BRAVE DARE NOT GO”: COURTS’ ABSENCE FROM THE CFIUS REVIEW PROCESS

Since the founding of the Committee in 1975, it has operated largely free from judicial intervention. Congress has served as the primary check on its authority. The legislative branch has policed transactions far more aggressively than CFIUS, and pushed the Committee to more protectionist ends.

The Ford administration established CFIUS in 1975 to forestall discriminatory action by Congress. A number of statutes, such as the Defense Production Act and the Foreign Investment and National Security Act of 2007, have allowed the government to审查 foreign investments. These acts have been used to block transactions in sensitive sectors such as aerospace, defense, and critical infrastructure. However, the courts have generally declined to second-guess the Committee’s determinations.

Courts have been reluctant to hear cases challenging CFIUS actions for several reasons. First, the Committee enjoys a significant degree of discretion in making its decisions. As a result, courts have been hesitant to second-guess the Committee’s determinations.

Second, the Committee is not subject to judicial review. This means that foreign investors have no easy path to challenge the Committee’s actions. As a result, foreign investors are left with no effective means of challenging the Committee’s decisions.

Third, the Committee’s determinations are often made in the national interest. As a result, courts have been hesitant to second-guess the Committee’s decisions. In general, courts have been reluctant to view the Committee’s determinations as mere matters of economic interest. Instead, they have seen the Committee’s determinations as part of a broader national security interest.

Fourth, the Committee’s determinations are often based on classified information. As a result, courts have been reluctant to second-guess the Committee’s determinations. Courts have generally been hesitant to review the Committee’s decisions in cases where the Committee has relied on classified information.

Finally, the Committee is an inter-agency body. This means that the Committee’s determinations are often made in coordination with other agencies. As a result, courts have been hesitant to second-guess the Committee’s determinations. In general, courts have been reluctant to view the Committee’s determinations as mere matters of coordination. Instead, they have seen the Committee’s determinations as part of a broader national security interest.

These factors have led to a situation where foreign investors have no easy path to challenge CFIUS actions. As a result, foreign investors are left with no effective means of challenging the Committee’s decisions. This has had a chilling effect on foreign investment in the United States.

II. “WHERE THE BRAVE DARE NOT GO”: HOW TO CHALLENGE CFIUS ACTIONS

Courts have been reluctant to second-guess the Committee’s determinations. However, there are steps that can be taken to challenge CFIUS actions. First, foreign investors can challenge CFIUS actions in the Court of Federal Claims. This court has the authority to hear cases challenging CFIUS actions. However, the Court of Federal Claims has been reluctant to hear cases challenging CFIUS actions.

Second, foreign investors can challenge CFIUS actions in the Court of Appeals for the Federal Circuit. This court has the authority to hear cases challenging CFIUS actions. However, the Court of Appeals for the Federal Circuit has been reluctant to hear cases challenging CFIUS actions.

Third, foreign investors can challenge CFIUS actions in the Supreme Court. This court has the authority to hear cases challenging CFIUS actions. However, the Supreme Court has been reluctant to hear cases challenging CFIUS actions.

Fourth, foreign investors can challenge CFIUS actions in the Court of International Trade. This court has the authority to hear cases challenging CFIUS actions. However, the Court of International Trade has been reluctant to hear cases challenging CFIUS actions.

These steps are not without their limitations. In general, foreign investors are faced with a difficult task of challenging CFIUS actions. However, these steps are available to foreign investors who wish to challenge CFIUS actions.

III. “WHERE THE BRAVE DARE NOT GO”: CONGRESS’ ROLE

Congress has a role to play in challenging CFIUS actions. Congress has the authority to review CFIUS actions. However, Congress has been reluctant to review CFIUS actions.

Congress has been reluctant to review CFIUS actions for several reasons. First, Congress is not well-equipped to review CFIUS actions. Congress does not have the same level of expertise as the Committee. As a result, Congress has been hesitant to review CFIUS actions.

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These factors have led to a situation where Congress has been reluctant to review CFIUS actions. As a result, Congress has been unable to challenge CFIUS actions. This has had a chilling effect on foreign investment in the United States.

IV. “WHERE THE BRAVE DARE NOT GO”: RECOMMENDATIONS

To address the challenges facing foreign investors, this Note recommends two steps. First, courts should question the executive’s determinations in this area. Courts should be more willing to second-guess the Committee’s determinations.

Second, Congress should provide for judicial review of CFIUS actions. Congress should be more willing to review CFIUS actions. This will provide foreign investors with a more effective means of challenging CFIUS actions.

These recommendations are not without their limitations. In general, foreign investors are faced with a difficult task of challenging CFIUS actions. However, these recommendations are available to foreign investors who wish to challenge CFIUS actions.
tion Act of 1950 (DPA) and the International Emergency Economic Powers Act (IEEPA), empowered the President to take action to limit foreign control over certain sectors of the economy. Under IEEPA, for instance, the President can in peacetime take remedial measures to respond to national emergencies emanating from outside the United States. None of these statutes, however, explicitly endowed the Commander-in-Chief with the ability to track or halt investment from outside the country.

This gap in the statutory framework greatly concerned Congress, as it considered the prospect of petrodollars flooding America. From March 1973 to October 1974, the Arab oil producing states protested the United States’ support of the Israeli war effort with an economically damaging oil embargo. In the wake of this crisis, Congress wanted to punish the perpetrators.

To prevent the legislative branch from doing so, President Ford created CFIUS to serve as a monitor of foreign investment and a coordinator of federal

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32 See C.S. Eliot Kang, *U.S. Politics and Greater Regulation of Inward Foreign Direct Investment*, 51 INT’L ORG. 301, 315 (1997) (indicating that the Ford administration tried to convince Congress that the regulatory regime then in place could protect the United States in the face of large capital inflows from OPEC member states); Zaring, supra note 14, at 91 (pointing to the loopholes resulting from the patchwork of statutes covering foreign investment prior to 1975).
33 See Matthew J. Baltz, *Institutionalizing Neoliberalism: CFIUS and the Governance of Inward Foreign Direct Investment in the United States Since 1975*, 24 REV. INT’L POL. ECON. 859, 863 (2017) (emphasizing scholarly agreement that the Arab oil embargo revolutionized American regulation of foreign investment); Kang, supra note 32, at 302 (noting that Congress did not like the idea of petrodollars returning from the same countries that had embargoed the United States); Li, supra note 11, at 261 (shedding light on Congress’s particular concern that OPEC member states would use petrodollars to purchase assets of critical importance to the American economy). A “petrodollar” is money earned from the sale of oil. See *Petrodollar*, CAMBRIDGE ENGLISH DICTIONARY ONLINE, https://dictionary.cambridge.org/us/dictionary/english/petrodollar [https://perma.cc/KBK3-44XM] (supplying this definition).
35 See Kang, supra note 32, at 312 (stressing the fact that the American media had fanned fears of Arab oil producing states acquiring control of key American assets); Li, supra note 11, at 261 (under-scoring American fears about Arabs purchasing crucial American property); Webster, supra note 1, at 226 (demonstrating senators’ fear of an Arab takeover of American companies).
policy towards inbound capital flows. At the time of its establishment by executive order, CFIUS had eight members: the Director of the Office of Management and Budget, the Attorney General, the Chairman of the Council of Economic Advisers, the United States Trade Representative, the Secretary of Commerce, the Secretary of Defense, the Secretary of the Treasury, and the Secretary of State. This setup guaranteed the representation of both economic and national security concerns. Whereas the Secretary of Defense, for example, would know about the danger posed by a particular transaction, his counterpart at Treasury could speak to the need to maintain America’s openness to foreign investment.

Nevertheless, Congress still wished for a more fearsome body. In its first five years of existence, CFIUS met ten times. It requested, but did not require, that foreign investors provide preliminary reports about their holdings in the United States. Though the Committee investigated a number of foreign investments, it did not possess the authority to block transactions or force acquirers to divest assets.

The need for this power only became apparent when Fujitsu attempted to purchase eighty percent of Fairchild Semiconductor (Fairchild) in October 1986. Americans worried that Japan would surpass the United States as the

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36 Li, supra note 4, at 4 (showing how President Ford gave CFIUS a limited remit in an attempt to preempt congressional action); Dustin Tingley et al., The Political Economy of Inward FDI: Opposition to Chinese Mergers and Acquisitions, 8 CHINESE J. INT’L POL. 27, 36 (2015) (describing the Committee’s initial mandate); Zaring, supra note 14, at 92 (showing that the President wished to preserve America’s openness to foreign investment by creating CFIUS).

37 Exec. Order No. 11,858, 40 Fed. Reg. 20,263 (May 7, 1975). The Secretary of the Treasury serves as chair of the Committee. Id.


39 See id. (clarifying how these debates over the merits of a deal typically happen).

40 See Li, supra note 11, at 261 (observing that in its first thirteen years of existence, CFIUS had no authority to block transactions or force acquirers to divest assets); Tingley et al., supra note 36, at 36 (noting that the vagueness of the Committee’s charge doomed it to irrelevance prior to 1988); Zaring, supra note 14, at 92 (pointing to congressional anger with the lack of Committee action).

41 Sullivan, supra note 14, at 211.

42 Li, supra note 11, at 261.

43 See JAMES K. JACKSON, CONG. RESEARCH SERV., RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 4–5 (2018) (describing how CFIUS carried out its investigations before 1988); Zaring, supra note 14, at 92 (explaining that by 1989, the Committee had investigated twenty-nine transactions). From 1980 to 1987, the Department of Defense (DOD) represented CFIUS’s main source of investigative work. JACKSON, supra, at 4–5. Although CFIUS never tried to block a transaction outright, it along with DOD did force foreign acquirers to withdraw their offers and succeeded in having U.S. takeover targets reassign classified work to domestic corporations. Id. at 5.

44 See Kang, supra note 32, at 320 (describing the depth of congressional hostility to the idea of Fujitsu owning a majority of the Fairchild Semiconductor (Fairchild) stock); Tingley et al., supra note 36, at 36–37 (highlighting the aspects of the deal that Congress found troubling); Zaring, supra note
world’s superpower.\textsuperscript{45} Japanese firms’ buying spree in the early 1980s heightened these concerns and left Americans bristling at the thought of foreign ownership of their storied brands.\textsuperscript{46}

Thus, when Japan’s largest computer manufacturer announced its intentions to acquire a majority stake in Fairchild, Congress took notice.\textsuperscript{47} The legislative branch helped scuttle the transaction and seized the opportunity to empower CFIUS yet again.\textsuperscript{48} Confronted with fierce resistance, Fujitsu withdrew its bid for Fairchild.\textsuperscript{49}

Fresh from this victory, Congress sought to protect the nation’s strategically important assets.\textsuperscript{50} It passed legislation in 1988 that gave the President

14, at 92 (leaving no doubt that the plan to acquire a majority stake in a Silicon Valley icon drove Congress to reform the law governing foreign investment). The Fujitsu deal came at a time when the semiconductor industry was just beginning to become powerful. See Lee Drutman, \textit{The Business of America Is Lobbying: How Corporations Became Politicized and Politics Became More Corporate} 181 (2015) (confirming that the passage of the Semiconductor Protection Act of 1984 represented a major victory for the tech industry).

\textsuperscript{45} See Li, supra note 4, at 4 (pointing to Americans’ concerns about the economic success of their ally and competitor); Tingley et al., supra note 36, at 36 (observing that congressional dislike of Japanese investment came from forecasts of Japanese economic dominance); Webster, supra note 1, at 228 (noting how the economic dynamism of Japan in the early 1980s turned it into the United States’ main rival).

\textsuperscript{46} See Tingley et al., supra note 36, at 36 (demonstrating that some American officials had issues with a number of Japanese acquisitions); Webster, supra note 1, at 229–30 (specifying the depth of congressional distaste for Japanese investment).

\textsuperscript{47} See Li, supra note 11, at 261 (demonstrating the centrality of the Fujitsu deal to CFIUS reform in the 1980s); Zaring, supra note 14, at 92–93 (confirming that Fujitsu’s attempt to purchase Fairchild motivated Congress to overhaul the regulation of foreign investment).

\textsuperscript{48} See Sullivan, supra note 14, at 213 (describing scholarly consensus about the importance of congressional opposition to the transaction); Zaring, supra note 14, at 92–93 (connecting the resistance to the Fujitsu-Fairchild tie-up to CFIUS reform). One of the ironies of the Fujitsu-Fairchild deal is that in 1986 the American semiconductor company was owned by Schlumberger, a French multinational. Webster, supra note 1, at 231.

\textsuperscript{49} Sullivan, supra note 14, at 213; Tingley et al., supra note 36, at 37; Webster, supra note 1, at 231. Fujitsu’s proposed acquisition of a majority stake in Fairchild managed to stir fear in the hearts of many Americans. Sullivan, supra note 14, at 214. The \textit{Los Angeles Times} analogized the transaction to “selling Mount Vernon to the redcoats.” William C. Rempel & Donna K.H. Walters, \textit{The Fairchild Deal: Trade War: When Chips Were Down}, L.A. TIMES (Nov. 30, 1987), http://articles.latimes.com/print/1987-11-30/news/mn-16900_1_fairchild-semiconductor [https://perma.cc/N9BS-K6M8]. Given the depth of public concern, even members of the usually free-trade Reagan administration admitted that the deal presented some national security issues. Kang, supra note 32, at 320; Sullivan, supra note 14, at 214. The deal came at a tough time for Fairchild. See Daniel Holbrook et al., \textit{The Nature, Sources, and Consequences of Firm Differences in the Early History of the Semiconductor Industry}, 21 STRATEGIC MGMT. J. 1017, 1018 (2000) (providing background on the company). The firm had risen to prominence because of its role in the invention of the integrated circuit, the tool at the heart of all Information Age technologies. \textit{Id.} at 1026–27. This invention helped the firm prosper. \textit{Id.} at 1027. When two of the original founders of the company left to form Intel in 1968, however, the firm fell on hard times. \textit{Id.} None of the subsequent acquirers of the storied business were able to return the chipmaker to greatness. \textit{Id.}

\textsuperscript{50} See Zaring, supra note 14, at 92–93 (arguing that the proposed Fujitsu-Fairchild transaction prompted CFIUS reform). \textit{But see} Kang, supra note 32, at 322 (showing that even before the an-
the explicit authority to investigate foreign investments, block significant transactions, and set conditions for the approval of acquisitions.51

In order to suspend a foreign merger, acquisition or takeover, the President must conclude that no other law except for the IEEPA would sufficiently protect national security and that “credible evidence” exists that the transaction in question would harm national security.52 The credible evidence would come from initial thirty day reviews and subsequent forty-five day investigations to be ordered at the discretion of the Committee.53 In this context, national security referred to defense, not broader economic concerns.54 Though this standard seemingly makes it difficult to block a transaction, it is worth remembering that before the Exon-Florio Amendment only the declaration of a national emergency by the President or the discovery of violations of federal securities, environmental, or antitrust law would suffice.55

Though the new law never mentioned the Committee, President Reagan used an executive order to provide that it would carry out these examinations, a change later codified by Congress and still in effect today.56 CFIUS soon specified the voluntary nature of the review process.57 Although the review process was voluntary, the Treasury Department’s 1991 regulations provided that non-notification of the Committee would result in assets being indefinitely liable to divestment and other Presidential action.58 In spite of all these changes, announcement of the Fujitsu-Fairchild deal, Congress was considering options to overhaul the Committee. It seems most fair to say that whatever appetite Congress had for rewriting the country’s foreign investment laws increased dramatically after the uproar over Fujitsu’s acquisition of Fairchild. JACKSON, supra note 43, at 5; Tingley et al., supra note 36, at 36–37.


52 JAMES K. JACKSON, CONG. RESEARCH SERV., RL33312, THE EXON-FLORIO NATIONAL SECURITY TEST FOR FOREIGN INVESTMENT 3 (2013) (explaining the mechanics of the Exon-Florio Amendment); Zaring, supra note 14, at 93.

53 Sullivan, supra note 14, at 214.

54 JACKSON, supra note 43, at 19. To this day the meaning of the term “national security” remains unclear. See Li, supra note 11, at 262 (highlighting the ambiguity of the definition of national security at the time of the passage of the Exon-Florio Amendment); Christopher M. Tipler, Comment, Defining ‘National Security’: Resolving Ambiguity in the CFIUS Regulations, 35 U. PA. J. INT’L L. 1223–24 (2014) (underscoring the difficulties posed by the lack of a clear definition of national security).


57 JACKSON, supra note 52, at 5.
es, courts still had no role to play in the regulation of foreign investment, as the Exon-Florio amendments specifically barred judicial review of the President’s actions.\textsuperscript{59}

Despite its new capabilities and protection from the judiciary, the Committee did not really disrupt deal making.\textsuperscript{60} In many regards, the Committee’s actions under this new regime resembled its actions under the old regime.\textsuperscript{61} In its first investigation under the new law, for instance, CFIUS did not stop a German firm from buying the last remaining producer of silicon wafers in the United States.\textsuperscript{62} Rather, the Committee imposed a number of conditions to protect the American semiconductor industry.\textsuperscript{63} Although CFIUS had no qualms about using its new strength, it only put its suspension power to use once in the twentieth century.\textsuperscript{64} In 1990, the Committee unanimously recommended that President George H.W. Bush force a Chinese corporation with ties to the Chinese government to divest its acquisition of a Boeing parts supplier.\textsuperscript{65}

\textsuperscript{59} 50 U.S.C. § 4565(e)(1) (prohibiting judicial review of the actions and findings of the President). \textit{But see} Ralls, 758 F.3d at 312 (holding that the DPA does allow for some judicial review of the President’s actions).


\textsuperscript{61} \textit{Compare} Jackson, \textit{supra} note 43, at 4–5 (noting that CFIUS, together with DOD, forced corporations to accede to the government’s demands in order to carry out their investments), with Kang, \textit{supra} note 32, at 327–29 (observing that under the Exon-Florio Amendment, the Committee often used its power to extract concessions from companies seeking to invest in the United States).

\textsuperscript{62} Kang, \textit{supra} note 32, at 328.

\textsuperscript{63} \textit{Id.}

\textsuperscript{64} \textit{See} Jackson, \textit{supra} note 43, at 7 (noting that the President blocked one transaction in the twentieth century and four transactions in the twenty-first century thus far). CFIUS has used unofficial actions, however, to block additional transactions. \textit{See}, e.g., Sullivan, \textit{supra} note 14, at 217 (explaining that in 1989, the Committee unofficially forced the Tokuyama Soda Company to withdraw its bid for General Ceramics after informing the potential acquirer that it would tell the President to block the transaction).

Although President Bush followed CFIUS’s recommendation, Congress wished the Committee would do more.66 Between 1988 and 1993, CFIUS conducted fewer than twenty investigations of pending transactions.67 In 1993, Congress tried to increase the number of investigations with the Byrd Amendment (after its sponsor, Senator Robert Byrd (D-WV)).68 The amendment attempted to make investigation mandatory when the acquirer has ties to a foreign government and the transaction could affect national security.69 This change proved ineffectual, as the Committee conducted only ten investigations in the twelve years between 1993 and 2005.70 The most significant aspect of the Byrd Amendment may be the fact that it requires a report to Congress at the end of each investigation, thereby giving the legislative branch another opportunity to insert itself into the conversation around a given transaction.71

66 See JACKSON, supra note 52, at 21 (emphasizing the fact that CFIUS undertook relatively few investigations after 1988); Zaring, supra note 14, at 94–95 (stressing the Committee’s inactivity after 1990).

67 See JACKSON, supra note 52, at 21 (contending that the Committee conducted only fifteen investigations from 1988 to 1993); Zaring, supra note 14, at 93 (asserting that CFIUS carried out only sixteen investigations from 1988 to 1993).


69 JACKSON, supra note 43, at 8; Sullivan, supra note 14, at 216; Tingley et al., supra note 36, at 37. The Byrd Amendment provides, in relevant part:

The President or the President’s designee shall make an investigation, as described in subsection (a), in any instance in which an entity controlled by or acting on behalf of a foreign government seeks to engage in any merger, acquisition, or takeover which could result in control of a person engaged in interstate commerce in the United States that could affect the national security of the United States. Such investigation shall—

(1) commence not later than 30 days after receipt by the President or the President’s designee of written notification of the proposed or pending merger, acquisition, or takeover, as prescribed by regulations promulgated pursuant to this section; and

(2) shall be completed not later than 45 days after its commencement.

§ 837, 106 Stat. at 2464.

70 GRAHAM & MARCHICK, supra note 51, at 57. Most commentators agree that Congress failed in its effort to increase the number of investigations. See, e.g., JACKSON, supra note 43, at 8 (observing that the Committee disagreed with Congress about the requirements of this provision, and thus rendered the change meaningless); Christopher F. Corr, A Survey of United States Controls on Foreign Investment and Operations: How Much Is Enough?, 9 AM. U. J. INT’L L. & POL’Y 417, 430 (1994) (arguing that this particular amendment to the law governing CFIUS had little legal import). In any event, it is remarkable that even the events of September 11, 2001, did little to alter the Committee’s operation. See Souvik Saha, Comment, CFIUS Now Made in China: Dueling National Security Review Frameworks as a Countermeasure to Economic Espionage in the Age of Globalization, 33 NW. J. INT’L L. & BUS. 199, 210 (2012) (explaining how the regulation of foreign investment changed in the aftermath of the terrorist attack). On its own initiative, CFIUS decided to raise the standards for approving transactions and included the Department of Homeland Security (DHS) in its membership. Id.

71 Corr, supra note 70, at 430–31; Zaring, supra note 14, at 94.
As before, the specter of large foreign acquisitions once again pushed Congress to overhaul the regulation of foreign investment. In 2005, a Chinese state-owned oil company made an $18.5 billion bid for the American oil giant Unocal. Six weeks passed before the state-owned enterprise withdrew its offer in the face of withering criticism about the danger of foreign ownership of a major oil company. Shortly thereafter, Dubai Ports World, a corporation wholly owned by the government of Dubai, fared even worse in its quest to purchase the Peninsular and Oriental Steam Navigation Company, a British firm with operations at six major American ports. CFIUS’s January 2006 approval of this sale emboldened congressional critics of the transaction. Within three weeks, Dubai Ports World had divested its American holdings.

After these whirlwind days of oversight, Congress finally found a way to ensure that the Committee scrutinized investment entering the United States. With the Foreign Investment and National Security Act of 2007 (FINSA), the legislative branch codified CFIUS’s powers in a statute. Moreover, it broad-

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72 See Li, supra note 4, at 4 (pointing to the importance of high-profile foreign acquisition attempts in motivating foreign investment reform efforts in the late 2000s); Zaring, supra note 14, at 95 (indicating that the bid of the China National Offshore Oil Company (CNOOC) for Unocal in 2005 and Dubai Ports World’s bid for Peninsular and Oriental Steam Navigation Company led Congress to change the law governing CFIUS).


75 GRAHAM & MARCHICK, supra note 51, at 138; Sullivan, supra note 14, at 222; Webster, supra note 1, at 236; Zaring, supra note 14, at 95. The British company operated in the ports of Baltimore, Houston, Miami, Newark, New Orleans, and Philadelphia. GRAHAM & MARCHICK, supra note 51, at 137.

76 See Webster, supra note 1, at 236 (stating that CFIUS’s approval of the deal angered Congress). The Dubai Ports World transaction provoked xenophobic remarks from both sides of the aisle. GRAHAM & MARCHICK, supra note 51, at 138. Representative Duncan Hunter (R-CA), for instance, called the United Arab Emirates, the home of Dubai, “a bazaar for terrorist nations to receive prohibited components from sources from the free world and from the non-free world.” Sean Alfano, Key GOP Lawmaker Blasts Ports Deal, CBS NEWS (Mar. 3, 2006), https://www.cbsnews.com/news/key-gop-lawmaker-blasts-ports-deal/ [https://perma.cc/U8Y7-4X4Q] (highlighting Representative Hunter’s opposition to the Dubai Ports World transaction).

77 Sullivan, supra note 14, at 223. Like Chevron before it, AIG ended up in control of the Peninsular and Oriental Steam Navigation Company. Id.

78 See Li, supra note 11, at 262 (stressing that the Committee did not really gain power until 2007); Webster, supra note 1, at 237 (detailing how the 2007 legislation empowered CFIUS); Zaring, supra note 14, at 95–97 (recounting the changes brought about by the 2007 Act).

ened the concept of national security to include economic concerns. This represented a major change, as it shifted the Committee’s focus away from more traditional defense concerns. In addition, FINSA provided for fifteen-day presidential determinations to follow the regular thirty-day reviews and forty-five day investigations when necessary. Beyond that, President George W. Bush promulgated an executive order under FINSA expanding committee membership to include five executive office members. Most importantly, Congress increased the number of transactions subject to CFIUS review. In essence, the Committee had to examine the vast majority of foreign transactions.

80 JACKSON, supra note 43, at 19 (emphasizing the broader definition of national security enshrined in the Foreign Investment and National Security Act of 2007 (FINSA)). FINSA provides, in relevant part, that the definition of national security now also encompasses:

(6) the potential national security-related effects on United States critical infrastructure, including major energy assets;
(7) the potential national security-related effects on United States critical technologies;
(8) whether the covered transaction is a foreign government-controlled transaction, as determined under subsection (b)(1)(B);
(9) as appropriate, and particularly with respect to transactions requiring an investigation under subsection (b)(1)(B), a review of the current assessment of—

(A) the adherence of the subject country to nonproliferation control regimes, including treaties and multilateral supply guidelines, which shall draw on, but not be limited to, the annual report on ‘Adherence to and Compliance with Arms Control, Nonproliferation and Disarmament Agreements and Commitments’ required by section 403 of the Arms Control and Disarmament Act;

(B) the relationship of such country with the United States, specifically on its record on cooperating in counterterrorism efforts, which shall draw on, but not be limited to, the report of the President to Congress under section 7120 of the Intelligence Reform and Terrorism Prevention Act of 2004; and

(C) the potential for transshipment or diversion of technologies with military applications, including an analysis of national export control laws and regulations;

(10) the long-term projection of United States requirements for sources of energy and other critical resources and material; and

(11) such other factors as the President or the Committee may determine to be appropriate, generally or in connection with a specific review or investigation.


81 JACKSON, supra note 43, at 19. For example, in the 1980s, CFIUS conducted most of its investigations at the behest of DOD. Id. at 4–5. As explained earlier, although the Committee never tried to block a transaction outright in the years before Exon-Florio, it along with DOD did force foreign acquirers to withdraw their offers and succeeded in having U.S. takeover targets reassign classified work to domestic corporations. Id. at 5.

82 Id. at 11.


84 DAVIS POLK & WARDWELL LLP, FINSA FINAL REGULATIONS 2 (2008), https://www.davispolk.com/files/files/Publication/a5009dea-cee6-4bee-80a9-60c81541969a/Preview/PublicationAttachment/f408a504-c974-49d8-b0b4-650641f8a0e0/11.19.08.FINSA.final.regs.pdf [https://perma.cc/JT4X-GQ7M].

85 See id. at 7–9 (identifying the narrow categories of transactions not subject to review). Congress sought to remedy its previous drafting mistakes by specifying the Committee’s charge. Zaring,
With this new mandate, CFIUS began to inspire fear in the heart of dealmakers.\textsuperscript{86} Between 1988 and 2005, the Committee conducted twenty-five investigations and saw foreign investors voluntarily shelve their plans thirteen times.\textsuperscript{87} In the seven-year period from 2008 to 2015, the Committee carried out 333 investigations.\textsuperscript{88} Even though the Great Recession dampened merger and acquisition activity, in 2009 alone the Committee completed as many investigations as it had in the seventeen-year period between 1988 and 2005.\textsuperscript{89} More remarkably, this increased activity coincided with investors voluntarily withdrawing from 103 transactions between 2008 and 2015.\textsuperscript{90} Though this number may seem high, CFIUS approved eighty-nine percent of the transactions for which it received notification.\textsuperscript{91}

When foreign companies have not wished to exit transactions on their own accord, CFIUS has recommended that the President block these deals, a step taken by the Commander-in-Chief four times from 2008 to 2018.\textsuperscript{92} \textit{Ralls} represents the only time a court has done anything for a foreign investor faced with one of those denials.\textsuperscript{93} This may change under the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), which provides that the United States Court of Appeals for the District of Columbia Circuit will serve as the venue for all civil actions against the Committee.\textsuperscript{94} Though this reform
may seem groundbreaking, the new statute maintains the general presumption that the decisions of the President and the Committee remain unreviewable. ⁹⁵

Even by the highly deferential standards used by American courts to review national security matters, this presumption is unusual. ⁹⁶ Although courts often do not question the judgment of the executive on matters of national security, they still set limits on the President. ⁹⁷ The Supreme Court has made clear that the President’s Commander-in-Chief power does not turn the executive into the master of the nation’s economic affairs. ⁹⁸ Furthermore, the Court has taken issue with the executive branch using vague notions of national security and imagined peril to ride roughshod over fundamental rights. ⁹⁹ Moreover, the nation’s highest court has spelled out that even foreign nationals sent to Guantanamo Bay have the right to judicial review of the executive’s actions. ¹⁰⁰


⁹⁶ See DAVID RUDENSTINE, THE AGE OF DEFERENCE: THE SUPREME COURT, NATIONAL SECURITY, AND THE CONSTITUTIONAL ORDER 315 (2016) (arguing that the Supreme Court has adopted an extremely deferential stance towards the executive and thus failed to check the use of power by the President); Robert M. Chesney, National Security Fact Deference, 95 VA. L. REV. 1361, 1362 (2009) (shedding light on the fact that courts accept the executive’s version of events in national security cases); David Cole, The First Amendment’s Borders: The Place of Holder v. Humanitarian Law Project in First Amendment Doctrine, 6 HARV. L. & POL’Y REV. 147, 148 (2012) (underscoring the willingness of the Supreme Court to sacrifice the protection of free speech in the name of national security, despite the lack of evidence pointing to a threat). But see Samuel Issacharoff & Richard H. Pildes, Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime, 5 THEORETICAL INQUIRIES L. 1, 44 (2004) (showing that even in wartime, courts have questioned the executive and prevented the President from doing what he pleases); Stephen Reinhardt, Weakening the Bill of Rights: A Victory for Terrorism, 106 MICH. L. REV. 963, 969–70 (2008) (reviewing RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY (2006)) (pointing to some cases in which judges did not abdicate their responsibility to curb the use of power by the President).

⁹⁷ See Adam B. Cox, Deference, Delegation, and Immigration Law, 74 U. CHI. L. REV. 1671, 1671 (2007) (arguing that judges have been extremely reluctant to question the executive’s judgment with regards to immigration); Martin S. Flaherty, The Constitution Follows the Drone: Targeted Killings, Legal Constraints, and Judicial Safeguards, 38 HARV. J. L. & PUB. POL’Y 21, 34 (2015) (showing that precedent supports extending due process rights to non-citizens outside conventional battlefields); David W. Opperbeck, Drone Courts, 44 RUTGERS L.J. 413, 448 (2014) (demonstrating that the Supreme Court has delineated the outer limits of military discretion).


⁹⁹ See N.Y. Times Co. v. United States, 403 U.S. 713, 719 (1971) (Black, J., concurring) (opposing the use of a vague notion of security to trump First Amendment rights).

Though this presumption about the lack of judicial review has existed since 1988, *Ralls* left no doubt about courts’ acceptance of it. The following Part illustrates the chilling effect *Ralls* has consequently had on the litigation of presidential denials.

II. “TO FIGHT THE UNBEATABLE Foe”: WHY FOREIGN INVESTORS NO LONGER GO TO COURT AFTER *Ralls*

In the six years since *Ralls Corporation v. Committee on Foreign Investment in the United States*, the President has blocked three transactions. Between 1990 and 2012, the President prevented the consummation of only two deals. At first glance, the number of denials after *Ralls* may seem small, as CFIUS reviewed 462 transactions between 2014 and 2016 alone. Nevertheless, the fact that the President invoked this power three times since 2014 is significant, because only a handful of cases ever make it to the Commander-in-Chief for review. The fact that this dynamic has changed suggests that CFIUS has gone from being the friend of foreign investors to their foe.

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101 *Ralls*, 758 F.3d at 311 (“[C]ourts are barred from reviewing final ‘action[s]’ the President takes ‘to suspend or prohibit any covered transaction that threatens to impair the national security of the United States.’”); Li, *supra* note 4, at 18.

102 See Kastiel & Libson, *supra* note 16, at 122 (noting that Broadcom took no action to challenge the block of its transaction with Qualcomm); Li, *supra* note 4, at 18 (arguing that *Ralls* changed foreign investors’ litigation calculus in that it lowered their expectations of success against the government); Sheahan, *supra* note 16 (illustrating a Chinese investment group’s reluctance to proceed with its bid for a German company after the Obama administration blocked the deal).

103 JACKSON, *supra* note 43, at 7; see *Ralls Corp. v. Comm. on Foreign Inv.*, 758 F.3d 296 (D.C. Cir. 2014).

104 JACKSON, *supra* note 43, at 7. To put it differently, 60% of all the presidential denials ever came in the wake of *Ralls*. *Id.*


106 See *id.* (showing that between 2014 and 2016, foreign investors abandoned their transactions ten times and withdrew their notices to the Committee fifty-two times). In fairness to CFIUS, they approved eighty-nine percent of transactions between 2008 and 2015, and have generally sought to help investors consummate their deals. See JACKSON, *supra* note 43, at 21 (providing data on the Committee’s approval rate); COMM. ON FOREIGN INV. IN THE U.S., *supra* note 86, at 21 (observing that between 2013 and 2015, ten percent of the deals reviewed by the Committee ended in a mitigation agreement).

The D.C. Circuit’s 2014 decision in *Ralls*, however, has not emboldened investors to take the Committee and the President to court. It has instead made legal challenges a losing proposition. To advance these arguments, Section A of this Part shows how *Ralls* signaled judges’ approval of the presumption against judicial review. Section B then demonstrates how *Ralls* seems to have dissuaded foreign investors from pursuing their claims against the government, even in particularly egregious cases.

A. “To Reach the Unreachable Star”: How *Ralls* Closed the Courthouse Doors

To many, *Ralls* appeared to herald a new era of judicial involvement in the regulation of foreign investment. Under this line of reasoning, foreign investors can take their claims to court and win against the government. This optimism unfortunately seems misguided, as *Ralls* reaffirmed the longstanding presumption against judicial review.

The D.C. Circuit’s decision is significant in allowing foreign investors to contest the non-privileged, non-classified evidence leading to the blocking of a transaction. Like any prosecutor, CFIUS must present the material evidence...
supporting its charge. Investors can then attempt to refute the evidence before them. This represents a major change because before *Ralls*, the law provided no remedy to investors injured by the Committee or the President.

Nevertheless, even this aspect of *Ralls* has proven to be of little use to prospective plaintiffs. To begin with, CFIUS does not wish to share its evidence with investors. As it screens transactions, the Committee works with classified information about national security threats. It is hardly unreasonable for CFIUS not to want to share this sensitive information with foreign entities that could pose a danger to the United States. In addition, most of the other evidence the Committee uses in making its determinations is likely privileged, as it comes from the parties seeking approval. Thus, even if CFIUS did wish to increase transparency in this regard, it could not do so. Although FIRRMA now permits the D.C. Circuit to consider this evidence *in camera* and ex parte, the continuing presumption against judicial review seems to mean that few plaintiffs will ever bring their cases to court.

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116 Webster, *supra* note 1, at 269–70 (providing more information on the due process rights now guaranteed to foreign investors).

117 *Ralls*, 758 F.3d at 319; *Li, supra* note 4, at 18; *Li, supra* note 11, at 276.

118 *Wang, supra* note 4, at 194; Webster, *supra* note 1, at 270; *Griffin, supra* note 10, at 1782; *Stanley, supra* note 3, at 1058.

119 See DORSEY & WHITNEY LLP, GREATER SCRUTINY ON FOREIGN INBOUND INVESTMENTS: UPDATE ON THE FOREIGN INVESTMENT RISK REVIEW MODERNIZATION ACT OF 2018 (2018), https://www.dorsey.com/newsresources/publications/client-alerts/2018/08/foreign-investment-risk-review-modernization-act [https://perma.cc/FN7D-X4Z4] (substantiating that the *Ralls* decision has had no practical effect, as the information about these transactions is typically privileged or classified or both); *O’Keeffe, supra* note 17 (highlighting the unprecedented nature of the block of the Broadcom- Qualcomm deal and Broadcom’s lack of options afterward).


122 See LATHAM & WATKINS LLP, *supra* note 121, at 5 (describing CFIUS’s access to otherwise unavailable classified information).

123 See DORSEY & WHITNEY LLP, *supra* note 119 (detailing the nature of the evidence the Committee uses).

124 See id.

125 *Id.; see 50 U.S.C. § 4565(e)(1) (Supp. V 2017) (exempting the actions and findings of the President from judicial review).* FIRRMA provides, in relevant part:

If a civil action challenging an action or finding under this section is brought, and the court determines that protected information in the administrative record, including clas-
More significant is the fact that Ralls affirmed the presumption that the courts will not question the executive’s national security determinations. They will accede to the executive and its judgment in this area. That is to say, the fact that other foreign-owned and foreign-made wind turbines also operated within the vicinity of the U.S. Navy installation does not matter. Some scholars suggest that only when confronted with utterly unreasonable behavior should courts raise doubts about the executive’s judgment in this area. As the following Section shows, this understanding has had a chilling effect on CFIUS litigation.

B. “To Bear with Unbearable Sorrow”: Foreign Investors’ Lack of Options After Ralls

As spelled out above, in the six years since Ralls, the President has blocked three transactions. In these cases, the D.C. Circuit’s 2014 decision has not helped investors. By dictating a policy of strict judicial deference,


See Ralls, 758 F.3d at 311 (exempting the President and the Committee from judicial review); Li, supra note 4, at 18 (underscoring the fact that the court was endorsing the presumption against judicial review); Li, supra note 11, at 276 (stressing the significance of the court’s blessing of the presumption against judicial review).

See Ralls, 758 F.3d at 311 (implying that courts have no role to play in questioning the executive branch’s national security determinations).

See id. at 305 (testifying to the fact that other foreign-owned and foreign-made wind turbines also operated within the vicinity of a U.S. Navy installation). But see Webster, supra note 1, at 215 (doubting that Chinese ownership of wind farms posed a national security threat); Griffin, supra note 10, at 1782 (arguing that the wind farms had a loose connection to national security).

See Li, supra note 11, at 277 (advocating in favor of applying the utterly unreasonable standard to matters of foreign investment); Posner, supra note 11, at 957 (arguing that judges should take part in national security decision making “only if utterly convinced of the completely unreasonable character of the act or practice that they are asked to prohibit”). Judge Richard Posner, the main proponent of this theory, seems to believe that it has roots in Justice Holmes’s jurisprudence. See Posner, supra note 11, at 957 (calling Justice Holmes a legal realist like himself). History, however, suggests otherwise. See Neil Duxbury, The Birth of Legal Realism and the Myth of Justice Holmes, 20 ANGLO-AM. L. REV. 81, 99–100 (1991) (showing that, despite his aversion to legal formalism, Justice Holmes was not the forerunner of today’s legal realists).

See Kastiel & Libson, supra note 16, at 122 (noting the lack of a Broadcom challenge to the denial of its transaction); Li, supra note 4, at 18 (spelling out how Ralls reduced foreign investors’ expectations of success in litigation against the government); Platt & Fontanella-Khan, supra note 15 (corroborating Broadcom’s unwillingness to take the Trump administration to court); Sheahan, supra note 16 (making clear that a Chinese investment group did not contest the block of its transaction with a German company).

JACKSON, supra note 43, at 7.

See Li, supra note 4, at 18 (indicating that Ralls decreased foreign investors’ desire to take the government to court).
Ralls has signaled to potential plaintiffs that their cases will not succeed.\textsuperscript{133} Circumstantial evidence strongly suggests that Ralls has deterred foreign investors from litigating the denials of their transactions.\textsuperscript{134} To advance this argument, this Note examines three transactions in chronological order.\textsuperscript{135} Subsection 1 focuses on the struggles of a Chinese investment group.\textsuperscript{136} Subsection 2 details the difficulties a private equity firm encountered in dealing with the Committee.\textsuperscript{137} Subsection 3 concludes with an exploration of how President Trump and CFIUS prevented the consummation of the largest tech deal ever.\textsuperscript{138}

1. Of Semiconductors and Switches: The Unwinding of a Chinese Investment Group’s Purchase of a German Chipmaker

In 2016, a Chinese investment group with backing from the Chinese government failed in its attempt to take over a German semiconductor firm.\textsuperscript{139} Fujian Grand Chip Investment Fund (Fujian) had launched a €670 million (approximately $720 million) bid for Aixtron in May 2016.\textsuperscript{140}

This relatively small deal caused such great concern, because it involved the strategically important semiconductor industry.\textsuperscript{141} Although Aixtron did
not call the United States home, it had a large American subsidiary and played a critical role in helping the American defense industry produce more efficient missile systems.¹⁴²

Beyond that, the legislative and executive branches had long shielded the semiconductor industry from foreign investment.¹⁴³ Nearly three decades earlier, Congress helped stop Japan’s largest computer manufacturer from acquiring a leading American semiconductor firm.¹⁴⁴ Shortly thereafter, CFIUS imposed a number of conditions to preserve the American semiconductor industry when a German firm bought the last remaining producer of silicon wafers in the United States.¹⁴⁵ In early 2016, even deals involving light-emitting diodes (LEDs), which are also semiconductors, encountered opposition from CFIUS.¹⁴⁶ As was the case with Aixtron, the American government worried that the technology of a Dutch lighting business could lead to more efficient missile systems in China.¹⁴⁷
Even in light of this long history of protectionism, the Obama administration took extraordinary steps to scuttle the Fujian-Aixtron deal. On September 8, 2016, the German Economics Ministry approved the takeover. On October 24, the ministry withdrew its approval and reopened its investigation into the transaction. This abrupt turnaround likely happened at least in part because of information from the American government that the technology Fujian wished to acquire could help China achieve its nuclear ambitions. After German officials received this information at an intelligence briefing at the U.S. Embassy in Berlin, they reneged their blessing of the deal.

Fujian’s troubles continued in America. The German and Chinese firms voluntarily notified CFIUS of their transaction. During its national security review, the Committee informed both parties of its concerns about the transaction. After conducting its national security review, the Committee recommended that the President block the deal. The President followed CFIUS’s recommendation and prevented the Chinese investment group from gaining control of a German company.

The Chinese investment group dropped its bid, and did not challenge the determination, despite the fact it had an otherwise colorable legal case against CFIUS and the President. Before diving into the arguments it could have
made, it is important to note that Fujian may not have been entirely without fault. Some commentators worried that Fujian and another Chinese firm may have colluded to put Aixtron in distress in order to make the takeover bid possible.

Regardless of whether those allegations are true, the Committee only has jurisdiction over businesses residing in the United States. The Obama administration appears to have interpreted this requirement quite liberally in asserting jurisdiction over Aixtron. Fujian could have argued that CFIUS and the President exceeded their powers in blocking its takeover of the German firm Aixtron. On these grounds alone, Fujian could have met the stringent utterly unreasonable standard articulated above because Aixtron resided in Germany, not the United States.

Moreover, the Chinese investment group could have contested the idea that it posed a national security threat. In 2015, CFIUS gave its approval to another Chinese investment group with the backing of the Chinese government, a

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160 See, e.g., id. Fujian and the other Chinese firm, San’an Optoelectronics have some similarities. See Paul Mozur, Germany Withdraws Approval for Chinese Takeover of Aixtron, N.Y. TIMES (Oct. 24, 2016), https://www.nytimes.com/2016/10/25/business/dealbook/germany-china-technology-takeover.html [https://perma.cc/6CFR-CG4M] (detailing the relationship between the two companies). Both receive government funds and do business with each other. Id. They also share a common investor. Id. Nevertheless, no direct evidence has emerged that clearly suggests wrongdoing on the part of either company. See Paul Mozur & Jack Ewing, Rush of Chinese Investment in Europe’s High-Tech Firms Is Raising Eyebrows, N.Y. TIMES (Sept. 16, 2016), https://www.nytimes.com/2016/09/17/business/dealbook/china-germany-takeover-merger-technology.html?module=inline [https://perma.cc/C38N-5SWU] (giving reasons for concern about the dealings of Fujian and San’an Optoelectronics, but not proving that they colluded to push down Aixtron’s share price). If anything, these concerns about collusion may reflect long-standing American fears about Asian investment. See Webster, supra note 1, at 274 (arguing that Americans have long harbored suspicions about Chinese investment).

161 COVINGTON & BURLING LLP, supra note 141, at 3. Though FIRRMIA has expanded CFIUS jurisdiction to cover a much broader array of transactions, it did not expand CFIUS’ geographic jurisdiction. See 50 U.S.C. § 4565(a)(4)(B)(iii) (providing that the Committee can review, among other things, the flow of sensitive technology out of the country); SHEARMAN & STERLING LLP, NEW CFIUS LAW MOVES TO PROTECT EMERGING TECHNOLOGIES AND PERSONAL INFORMATION, TAKES AIM AT CHINESE INVESTMENT 2 (2018), https://bit.ly/396xd5e [https://perma.cc/TAT8-499S] (observing that even the new law does not give CFIUS extraterritorial jurisdiction).

162 See COVINGTON & BURLING LLP, supra note 141, at 4 (suggesting that by construing CFIUS’s jurisdiction to extend to assets outside the United States, the Obama administration was exceeding its authority and setting itself up for a legal challenge).

163 See id. (arguing that a legal challenge on these grounds has merit).

164 See Li, supra note 11, at 277; Posner, supra note 11, at 957.

165 Compare Chazan, supra note 139 (specifying U.S. intelligence services’ fears about Fujian), with Feng, supra note 158 (making clear that purchases of American semiconductor firms by entities tied to the Chinese government have not always suffered intense scrutiny).
group that was acquiring an American semiconductor company. In addition, the fact that Aixtron’s technology could help China achieve its nuclear ambitions did not mean that it would. The German government did not worry about this dual-use until the Obama administration signaled its fears behind closed doors. Nevertheless, *Ralls* and its strong presumption against judicial review seem to have hindered Fujian from ever raising these arguments in court.

2. When the Chips Are Down: How a Silicon Valley Private Equity Firm Lost Its Bet on an American Semiconductor Company

In November 2016, Canyon Bridge Capital Partners (Canyon Bridge) offered $1.3 billion for Lattice Semiconductor Corporation (Lattice). Investors had their doubts about the transaction almost immediately. Lattice’s shares soon started selling for less than Canyon Bridge’s offer price.

The private equity firm faced even greater difficulties on the political and regulatory front. In early December, twenty-two members of the House of

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167 *See* Chazan, *supra* note 139 (indicating that it was not certain that China would use the technology in its nuclear program).

168 *Id.*

169 *See* COVINGTON & BURLING LLP, *supra* note 141, at 4 (making clear that the presumption against judicial review made the litigation of the extraterritorial application of CFIUS’s power highly unlikely); *Li, supra* note 4, at 18 (setting forth the theory that *Ralls* made foreign investors less likely to sue the government).


171 *Baker, supra* note 109 (pointing to the difficulties faced by Canyon Bridge Capital Partners (Canyon Bridge) in consummating this particular transaction).

172 *Id.*

Representatives wrote to Treasury Secretary Jack Lew to express their concern about the transaction.\textsuperscript{174} The lawmakers worried that the Chinese government was using Canyon Bridge as a front to covertly purchase American semiconductor technology with military applications.\textsuperscript{175} These allegations did not entirely lack merit, as ninety-nine percent of the firm’s funding came from a Chinese state-owned investment company.\textsuperscript{176} Nevertheless, Lattice sold its military design unit in 2012 and thereafter focused on the civilian chip market.\textsuperscript{177}

The executive branch did not look any more favorably on the deal than Congress.\textsuperscript{178} In late December, the companies notified CFIUS of their transaction.\textsuperscript{179} The following month, an Obama administration advisory panel released a report detailing the threat posed by China’s aggressive investment in strong desire to maintain America’s dominance in the semiconductor market in the face of fierce competition from China).


\textsuperscript{175} Id. Lawmakers’ concern about transactions like Canyon Bridge-Lattice helped motivate CFIUS reform. See Chelsea Naso, \textit{PE Closely Watching CFIUS Bill, Ropes & Gray Co-Chair Says}, LAW360 (June 25, 2018), https://www.law360.com/articles/1056623/pe-closely-watching-cfius-bill-robes-gray-co-chair-says [https://perma.cc/WEU3-3LC3] (making clear that, as the FIRRMA legislation was making its way through Congress, private equity firms worried about their ability to raise capital from international sources); Henny Sender & Don Weinland, \textit{Private Equity Groups Fear US Clampdown on Chinese Investors}, FIN. TIMES (Aug. 5, 2018), https://www.ft.com/content/c481575e-988b-11e8-ab77-f854c65a4465 [https://perma.cc/4FC4-VFC2] (indicating that both private equity and venture capital firms expressed concern that the FIRRMA legislation would restrict their ability to deploy funds from outside the country).


\textsuperscript{178} See Baker, \textit{supra} note 109 (noting that Canyon Bridge and Lattice could not convince CFIUS and the President of the merits of their transaction in the space of eight months); O’Keeffe, \textit{supra} note 173 (pointing to the companies’ difficulties with CFIUS and the President).

\textsuperscript{179} Gershberg & Schenck, \textit{supra} note 170.
the semiconductor industry in a sign that the United States would in all likelihood closely scrutinize the deal.\textsuperscript{180}

Consequently, the companies spent the next eight months begging the Committee to approve the acquisition.\textsuperscript{181} Among other things, the companies took the unusual step of withdrawing their notice to CFIUS and then re-filing it.\textsuperscript{182} These efforts did not sway CFIUS, which recommended that the President block the transaction.\textsuperscript{183}

Canyon Bridge and Lattice’s subsequent appeals to the Commander-in-Chief proved fruitless.\textsuperscript{184} The private equity firm’s promise to double Lattice’s workforce did not win over the President.\textsuperscript{185} President Trump’s subsequent block of the transaction sent a strong signal that his administration, like the one before it,\textsuperscript{186} would disfavor Chinese investment in the semiconductor industry.\textsuperscript{187} In any event, neither Canyon Bridge nor Lattice took the administration to court over this block of their transaction.\textsuperscript{188}

Like Fujian, the companies had colorable legal arguments.\textsuperscript{189} First, the Committee unilaterally stopped the export of this semiconductor technology in

\textsuperscript{180} EXEC. OFFICE OF THE PRESIDENT, REPORT TO THE PRESIDENT: ENSURING LONG-TERM U.S. LEADERSHIP IN SEMICONDUCTORS 2 (2017) (asserting that the Chinese government’s support of the semiconductor industry threatened U.S. national security); see O’Keeffe, supra note 173 (showing that the Committee would scrutinize deals of this nature).

\textsuperscript{181} Baker, supra note 109; Gershberg & Schenck, supra note 170; O’Keeffe, supra note 173. More generally, growing anti-China sentiment animated the opposition to the deal. See, e.g., Dou & O’Keeffe, supra note 176 (observing that Canyon Bridge-Lattice represented just one flashpoint in increasingly tense U.S.-China trade relations).

\textsuperscript{182} Gershberg & Schenck, supra note 170. This practice has occurred with much greater frequency under the Trump administration. \textit{Id.} One rationale appears to be that CFIUS is unable to meet its own deadlines for completing review. \textit{See id.} (offering this explanation). Attorneys who practice before the Committee believe that this may reflect either staffing shortages or a deliberate policy choice. \textit{Id.} In any event, publicly available data, which extends only to 2016, show a marked increase in re-filing. COMM. ON FOREIGN INV. IN THE U.S., supra note 105, at 1. In 2014, seven notices were withdrawn and re-filed. \textit{Id.} In 2015, nine notices were withdrawn and re-filed. \textit{Id.} In 2016, however, fifteen notices were withdrawn and re-filed. \textit{Id.}

\textsuperscript{183} Baker, supra note 109; Gershberg & Schenck, supra note 170; O’Keeffe, supra note 173.

\textsuperscript{184} Baker, supra note 109; Gershberg & Schenck, supra note 170; O’Keeffe, supra note 173.

\textsuperscript{185} Gershberg & Schenck, supra note 170.

\textsuperscript{186} EXEC. OFFICE OF THE PRESIDENT, supra note 180, at 2.


\textsuperscript{188} See Pierson, supra note 170 (showing that Canyon Bridge and Lattice decided against suing the Committee and the President).

\textsuperscript{189} See, e.g., Zivotofsky v. Kerry, 135 S. Ct. 2076, 2091 (2015) (looking to how two branches of government have handled a separation of powers issue); Dou & O’Keeffe, supra note 176 (showing that Lattice had turned its focus to the civilian market); FRESFIELDS BRUCKHAUS DERINGER LLP, PRESIDENT TRUMP PROHIBITS CANYON BRIDGE’S $1.3BN ACQUISITION OF LATTICE SEMICONDUCTOR, DESPITE PLEDGE TO DOUBLE US WORKFORCE (2017), http://knowledge.freshfields.com/m/
a break from settled practice.\textsuperscript{190} Previously, CFIUS allowed Congress and other parts of the executive branch to determine what constituted strategically important materials and to prevent their transfer to certain nations.\textsuperscript{191} Now CFIUS, without oversight and notice, was deciding what technologies could go to what countries.\textsuperscript{192} These potential plaintiffs could have questioned this departure from custom.\textsuperscript{193} On these grounds alone, they would have met the stringent utterly unreasonable standard laid out above, as the Committee was yet again exceeding its mandate.\textsuperscript{194} Second, even if the private equity firm acted at the behest of the Chinese government, Lattice no longer made technology with military applications, a fact that minimized the risk that the purchase would affect national security.\textsuperscript{195}

3. Bullying the Buyer: How the Government Browbeat Broadcom out of the Largest Tech Deal in History

The D.C. Circuit’s decision may have also prevented Broadcom from consummating the largest tech deal in history.\textsuperscript{196} Of all the parties facing denials in

\begin{footnotesize}
\begin{enumerate}
\item See FRESHFIELDS BRUCKHAUS DERINGER LLP, \textit{supra} note 189 (indicating that the Committee was stopping the outflow of technology that neither Congress nor the executive branch had determined to pose a threat to national security in the hands of the acquiring country).
\item See FRESHFIELDS BRUCKHAUS DERINGER LLP, \textit{supra} note 189 (making clear that CFIUS had done nothing to notify the public of its action).
\item See, \textit{e.g.}, \textit{Zivotofsky}, 135 S. Ct. at 2091 (using historical practice to hold that only the President can recognize sovereign states); NLRB v. Canning, 573 U.S. 513, 524 (2014) (looking to historical practice to hold that the President can make appointments during any recess). Despite the appeal of an argument under the Administrative Procedures Act (APA), CFIUS determinations are not subject to the Act. 50 U.S.C. § 4559(a) (exempting government decisions involving defense production generally from APA review); \textit{cf.} Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) (providing that unexplained or unacknowledged policy reversals qualify as arbitrary and capricious under the APA). See \textit{generally} TODD GARVEY, CONG. RESEARCH SERV., R41546, A \textit{BRIEF OVERVIEW OF RULEMAKING AND JUDICIAL REVIEW} (2017) (describing judicial review of APA matters).
\item See \textit{Li}, \textit{supra} note 11, at 277; Posner, \textit{supra} note 11, at 957.
\item See \textit{Dou} & O’Keeffe, \textit{supra} note 176 (attesting that Lattice sold its military design unit in 2012). CFIUS did not exceed its jurisdiction in recommending the block of this transaction, as Canyon Bridge falls squarely within the definition of a “foreign person” under the old Committee regulations. See COVINGTON & BURLING LLP, CFIUS REFORM: \textit{KEY QUESTIONS FOR PRIVATE FUNDS TO CONSIDER} 1–2 (Dec. 5, 2018), cov.com/-/media/files/corporate/publications/2018/12/cfius_reformkey_questions_for_private_funds_to_consider.pdf (showing that to qualify as a foreign person under the old regulations, a foreign entity must exercise some degree of control over the fund in question).
\item See Michael J. de la Merced, \textit{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-
\end{enumerate}
\end{footnotesize}
the wake of *Ralls*, the chip company had the strongest arguments against the Committee and the President. In 2015, Avago Technologies acquired Broadcom, and took its name. Though Avago resided in Singapore, it started as the chip business of the American technology company Hewlett-Packard.

In the years since the tie-up, Broadcom acquired a number of companies. Among other things, it won CFIUS approval to acquire the network gear maker Brocade Communications Systems (Brocade) by agreeing to move its headquarters back to the United States. Among others, President Trump

merger.html [https://perma.cc/BCH9-SFT5] (explaining that Broadcom’s $100 billion bid for Qualcomm would have represented the largest tech deal in history); James Fontanella-Khan et al., *Trump’s Broadcom Block Sends Ripples Across Corporate America*, FIN. TIMES (Mar. 13, 2018), https://www.ft.com/content/c08a7a46-2675-11e8-b27e-cc62a39d57a0 [https://perma.cc/5TQ2-RMAE] (showing that Broadcom had no way to challenge the block of its transaction).

See FRESHFIELDS BRUCKHAUS DERINGER LLP, PRESIDENT TRUMP BLOCKS BROADCOM TAKEOVER OF QUALCOMM DESPITE RE-DOMICILIATION EFFORTS (2018), http://knowledge.freshfields.com/m/Global/r/3727/president_trump_blocks_broadcom_takeover_of_qualcomm [https://perma.cc/74UY-7FNB] (pointing to the fact that CFIUS was pushing the boundaries of its jurisdiction with the block and had weak arguments that Broadcom posed a national security threat); Fontanella-Khan et al., *supra* note 196 (demonstrating that the ending of the Broadcom-Qualcomm deal raised due process concerns); Kang & Rappeport, *supra* note 15 (indicating that the President took the extraordinary step of suspending the transaction before CFIUS had finished its investigation); Ann Lippton, *Qualcomm’s Cavalry*, BUS. L. PROF BLOG (Mar. 10, 2018), https://lawprofessors.typepad.com/business_law/2018/03/qualcomms-cavalry.html [https://perma.cc/832D-GEYR] (highlighting the flaws in the Committee’s case against Broadcom); O’Keefe, *supra* note 17 (revealing that many private sector lawyers thought that the prohibition of the Broadcom-Qualcomm tie-up represented an abuse of CFIUS’s powers).


200 Id. Since its inception, Avago underwent a number of corporate transformations. *Id.*; see Subject Indap, Opinion, *US Supreme Court Weighs Shareholders’ M&A Legal Battles*, FIN. TIMES (Jan. 14, 2019), https://www.ft.com/content/2a2bf08a-178c-11e9-9e64-d150b3105d21 [https://perma.cc/U79H-U8TZ] (describing how a case about one of Avago’s acquisitions in that time period made its way to the Supreme Court for review); see also Isaac Lederman, Comment, *When the Same Words Mean Different Things: Varjabedian v. Emulex Corp., and the Requirements of Section 14(e) of the Exchange Act*, 60 B.C. L. REV. E. SUPP. 120, 125 (2019), https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3750&context=bclr [https://perma.cc/H9XA-5ML7] (providing background on the case involving one of Avago’s acquisitions). The combined company carried out a number of successful acquisitions. Owens & Poletti, *supra* note 199.

201 Owens & Poletti, *supra* note 199.

celebrated the idea of Broadcom returning to the United States. The CEO of Broadcom even went to the White House to announce that his company was moving its headquarters back to America.

In November 2017, Broadcom, still basking in the glow of its White House treatment, set its sights on its most ambitious target yet: Qualcomm. The Singapore-based chipmaker offered over $100 billion for its American rival to consummate the largest tech deal in history. After Qualcomm refused this bid, Broadcom pursued hostile means to win over its competitor. In particular, Broadcom sought to nominate directors to its rival's board. Even if the shareholders elected these nominees, Broadcom would not necessarily control Qualcomm. These potential directors had no legal obligation to pass control of Qualcomm stock over to Broadcom.

As Broadcom raised its bid and asked for fewer board seats, the deal came under regulatory scrutiny in late February 2018. Even before members of Congress requested that the administration review the transaction, CFIUS com had consummated the Brocade Communications Systems (Brocade) deal; Owens & Poletti, supra note 199.

203 de la Merced, supra note 196; Owens & Poletti, supra note 199.
204 de la Merced, supra note 196.
206 de la Merced, supra note 196 (calling the transaction “the biggest takeover in the history of the technology industry”); Vijayakumar et al., supra note 205.
207 Platt & Fontanella-Khan, supra note 15; Vijayakumar et al., supra note 205.
208 Lipton, supra note 197; Vijayakumar et al., supra note 205.
209 Lipton, supra note 197; Kate O’Keeffe et al., 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 [https://perma.cc/N4PK-HB3N] (showing that Secretary of the Treasury Steven Mnuchin as well as other members of CFIUS doubted that the nomination of directors would mean Broadcom exercised control over Qualcomm); see also Steven Davidoff Solomon, Air Products Bid Dies as Airgas Poison Pill Lives on, N.Y. TIMES (Feb. 15, 2011), https://dealbook.nytimes.com/2011/02/15/air-products-withdraws-airgas-bid-after-ruling/ [https://perma.cc/8JHA-7EJW] (demonstrating that the nomination of directors to a target’s board did not end in an acquisition in at least one instance).
210 Lipton, supra note 197.
211 See Diane Bartz, Secretive U.S. Security Panel Reportedly Discussing Broadcom’s Qualcomm Bid, SAN DIEGO TRIB. (Feb. 26, 2018), https://www.sandiegouniontribune.com/business/technology/sd-fi-secret-panel-looking-at-broadcom-qualcomm-bid-20180226-story.html [https://perma.cc/CYA4-QGJl] (demonstrating that both Congress and the executive branch were beginning to focus on the deal in late February); Vijayakumar et al., supra note 205 (confirming that CFIUS had begun to train its sights on the transaction in late February). The government had, in broad strokes, signaled its concern about deals like Broadcom- Qualcomm in the middle of February. See Open Hearing on Worldwide Threats Before the S. Select Comm. on Intelligence, 115th Cong. 23–24 (2018) (statement of Daniel R. Coats, Director of National Intelligence) (emphasizing the threat posed by technology transactions by which foreigners gained access to strategically important assets).
had begun looking into the tie-up.212 This came partly at the request of Qualcomm, which was in effect turning national security review into an antitakeover device.213 In any event, some in the Committee, including its chair, had doubts that it could even intervene in this deal, as Broadcom’s nominees would not give it control of Qualcomm.214

Nevertheless, on March 4, 2018, CFIUS ordered Qualcomm to delay its shareholder meeting about Broadcom’s nominees.215 Instead of conducting an initial review of the transaction, the Committee announced that it would immediately begin a national security investigation of the deal.216 In addition, the Committee told Broadcom that it needed five business days’ notice before the company relocated to the United States.217 These moves represented a major departure from settled practice.218 Little, if any, precedent existed for CFIUS to postpone a shareholder vote or scrutinize a deal that had yet to close.219

The Committee rationalized these actions as necessary to protect Qualcomm’s research and development (R&D) spending and the development of 5G wireless technology in America.220 In CFIUS’s view, Broadcom would

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212 Bartz, supra note 211. Among others, Representative Duncan Hunter (R-CA), who had helped scuttle the Dubai Ports deal, wrote directly to President Trump to request that CFIUS review the Broadcom-Qualcomm transaction. Alfano, supra note 76; Bartz, supra note 211; Owens & Poletti, supra note 199.

213 O’Keefe et al., supra note 209; Vijayakumar et al., supra note 205; see Kastiel & Libson, supra note 16, at 122 (characterizing Qualcomm’s use of the national security review process as an antitakeover device); cf. Lex, Opinion, Cobham/Advent: Royal Air Farce, FIN. TIMES (Sept. 18, 2019), https://www.ft.com/content/0da60163-baf3-3faf-b4cc-293f6eda891f?emailId=5d82e54225b986000414b0bb [https://perma.cc/9J96-DJQX] (“Patriotic heritage is the first resort of the would-be bid blocker.”).

214 O’Keefe et al., supra note 209.

215 Id.; Owens & Poletti, supra note 199; Vijayakumar et al., supra note 205.

216 O’Keefe et al., supra note 209.


218 O’Keefe et al., supra note 209. The Wall Street Journal called this entire intervention “highly unusual.” Id.

219 Id.

220 See Letter from Aimen N. Mir, Deputy Assistant Sec’y, U.S. Dep’t of the Treasury, to Mark Plotkin, Covington & Burling LLP, & Theodore Kassinger, O’Melveny & Myers LLP 2–3 (Mar. 5, 2018), https://www.sec.gov/Archives/edgar/data/804328/000110465918015036/a18-7296_7ex99d1.htm#Exhibit99_1_081114 [https://perma.cc/Q7LN-LUAS] (arguing that Broadcom would take a private equity approach and reduce Qualcomm’s research and development (R&D) spending); see also Lipton, supra note 197 (highlighting these arguments). One former CFIUS member compared the rarity of these actions to Halley’s Comet. O’Keefe et al., supra note 209. In any event, Aimen Mir, who oversaw the review of the Broadcom-Qualcomm deal, subsequently became a partner at the law
behave like an American private equity firm and aggressively cut Qualcomm’s R&D spending.\textsuperscript{221} This in turn would endanger the development of 5G in America.\textsuperscript{222}

Beyond that, CFIUS pointed to the risks posed by Broadcom’s relationships with unspecified third-party entities.\textsuperscript{223} Some understood this as an oblique reference to the Chinese telecommunications company Huawei, a company with which both Broadcom and Qualcomm had dealt.\textsuperscript{224}

In any case, CFIUS began to exert even more pressure on Broadcom.\textsuperscript{225} On March 9, 2018, Broadcom released a statement indicating that its shareholders would vote on moving its headquarters on March 23.\textsuperscript{226} The Committee reacted quickly; on March 11, it wrote to Broadcom’s counsel to warn that,
in the absence of more information from the company, it would refer the transaction to the President. 227 The following day, President Trump blocked the transaction.228

Despite having a strong case against the Committee and the President, Broadcom seems to have chosen not to litigate this denial. 229 To begin with, CFIUS lacked jurisdiction over this transaction. 230 Broadcom never exercised control over Qualcomm.231 Even if Qualcomm’s shareholders had elected Broadcom’s nominees, these directors would not necessarily have acted at the behest of the potential acquirer.232 This lack of jurisdiction even troubled some in the Committee, including its chair.233 Beyond that, CFIUS did not follow the proper procedures for blocking a transaction.234 It never completed the required thirty day review and forty-five day investigation before referring the matter to the President.235 This disregard for jurisdictional boundaries and procedure more generally would meet the utterly unreasonable standard articulated above.236

Lastly, the Committee did not have the strongest national security rationale for its actions against Broadcom. 237 CFIUS claimed that Broadcom

228 O’Keeffe, supra note 17; Owens & Poletti, supra note 199; Vijayakumar et al., supra note 205.
229 See Li, supra note 4, at 18 (observing how Ralls altered foreign investors’ litigation calculus); Diane Bartz et al., President Trump Halts Broadcom Takeover of Qualcomm, REUTERS (Mar. 12, 2018), https://in.reuters.com/article/qualcomm-m-a-broadcom/president-trump-halts-broadcom-takeover-of-qualcomm-idINKCN1GO1RR [https://perma.cc/9RB3-46GM] (describing Broadcom’s limited options in the wake of President Trump’s block of the transaction); Fontanella-Khan et al., supra note 196 (showing the government’s lack of respect for due process in its suspension of the deal); Lipton, supra note 197 (stressing the weakness of CFIUS’s case against Broadcom, both on the merits and as a matter of jurisdiction).
230 See Lipton, supra note 197 (underscoring the government’s dubious case that Broadcom was either foreign or in control of Qualcomm); O’Keeffe et al., supra note 209 (revealing doubts on the part of CFIUS members about the Committee’s jurisdiction over the deal); FRESHFIELDS BRUCKHAUS DERINGER LLP, supra note 197 (making clear that, for all intents and purposes, Broadcom operated as an American corporation and thus fell outside of CFIUS’s purview).
231 See Lipton, supra note 197 (detailing the requirements for corporate control).
232 Id.
233 O’Keeffe et al., supra note 209.
234 See Kang & Rappeport, supra note 15 (noting the uncommon nature of presidential intervention before the consummation of a transaction); O’Keeffe et al., supra note 209 (highlighting the unprecedented steps taken by the administration to delay a vote on Broadcom’s proposal).
235 See JACKSON, supra note 43, at 11 (describing the operation of the CFIUS review process); Kang & Rappeport, supra note 15 (making clear that the Trump administration did not wait for these reviews to happen).
236 See Li, supra note 11, at 277; Posner, supra note 11, at 957.
237 See FRESHFIELDS BRUCKHAUS DERINGER LLP, supra note 197 (stressing the weakness of the administration’s national security case against Broadcom); Lipton, supra note 197 (emphasizing the many flaws in the government’s arguments against Broadcom).
would take a private equity approach to Qualcomm. If an American private equity firm acquired Qualcomm, the Committee would have no jurisdiction to challenge its decision to reduce R&D spending. In short, the danger had nothing to do with the foreign nature of the acquirer. CFIUS also asserted obliquely that Broadcom had ties to the Chinese telecommunications firm Huawei. Even if one acknowledges that Huawei poses a threat, both Broadcom and Qualcomm already had business with the company. That is to say, blocking the transaction would not alter the status quo. In sum, the Committee’s rationale left much to be desired.

III. “TO DREAM THE IMPOSSIBLE DREAM”: ROLLING BACK RALLS

The previous Section has shown in the years following Ralls Corporation v. Committee on Foreign Investment in the United States, CFIUS has acted free from restraint. With the judiciary unwilling to check the Committee and its
increasingly aggressive use of power, the inter-agency body has stopped giving
investors the certainty they need.246 Even more significant is the fact that the
Committee’s unchecked behavior has caused it to lose legitimacy.247 To remedy
these problems, this Note proposes rolling back Ralls and subjecting
CFIUS’s actions to greater judicial review.248 In particular, Section A argues
that courts should challenge the executive’s national security determina-
tions.249 Section B asserts that Congress should provide explicitly for judicial
review of the Committee’s actions.250

A. “To Right the Unrightable Wrong”: Courts Should Challenge the
Executive’s National Security Determinations

This Section advances three interrelated arguments in the three following
Subsections.251 First, although judges usually defer to the executive’s judgment
in national security matters, deference in the foreign investment space has
gone too far.252 Second, judges should articulate a “law of CFIUS” that pro-


246 See Li, supra note 4, at 18 (noting the change in investors’ litigation calculus in the wake of Ralls); Shields, supra note 17, at 293–94 (making clear how little foreign investors enjoy conducting business within the CFIUS framework); Webster, supra note 1, at 269 (describing the Committee’s review procedures as a “black box”).


248 See Stephen Breyer, Judicial Review of Questions of Law and Policy, 38 ADMIN. L. REV. 363, 363 (1986) (showing that scholars have consistently pushed for judicial review of agency actions); Katyal & Tribe, supra note 18, at 1259 (arguing that without the separation of powers into three dis-
tinct branches, the rule of law will not persist); Cass Sunstein, On the Costs and Benefits of Aggressive Judicial Review of Agency Action, 1989 DUKE L.J. 522, 537 (giving reasons to believe that judicial review of agency action produces benefits for society).

249 See infra notes 251–305 and accompanying text.
250 See infra notes 306–344 and accompanying text.
251 See infra notes 255–305 and accompanying text.
252 See infra notes 255–277 and accompanying text.
vides greater certainty to potential foreign investors. Lastly, judicial review of the Committee’s actions would be both efficient and fair.

1. CFIUS and the Limits of Deference

As a general matter, courts do not involve themselves in questions of national security. To begin with, judges do not have access to the same information as the Commander-in-Chief about the threats facing the nation. In addition, the President makes decisions in this area knowing that voters will exact punishment at the polls for any mistakes made. Furthermore, judges are lawyers, and, as such, have no special understanding of foreign affairs. Thus, in national security matters spanning everything from drone strikes to immigration, courts for the most part do not second-guess the judgment of the President.

The question then becomes why executive determinations about foreign investment should receive different treatment than other areas of foreign policy. The answer is two-fold. First, precedent shows that the judiciary does

253 See infra notes 278–297 and accompanying text.
254 See infra notes 298–305 and accompanying text.
255 See Posner & Sunstein, supra note 11, at 1227–28 (contending that the executive has superior knowledge about the threats facing the nation than judges and is more accountable to voters than judges); Posner, supra note 11, at 957 (maintaining that as lawyers, judges lack the capacity to resolve highly contested issues of national security).
256 Posner & Sunstein, supra note 11, at 1227; cf. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 582 (1994) (noting that judges lack the expertise to pass judgment on whether a parody is good or bad).
257 Posner & Sunstein, supra note 11, at 1227; see also Robert J. McMahon, U.S. Presidential Elections and Foreign Policy: Candidates, Campaigns, and Global Politics from FDR to Bill Clinton, 105 J. AM. HIST. 190, 191 (2018) (concluding that the President shapes foreign policy with an eye towards public opinion).
258 Posner, supra note 11, at 957.
259 See, e.g., bin Ali Jaber v. United States, 861 F.3d 241, 250 (D.C. Cir. 2017) (dismissing claims brought on behalf of victims of a drone strike in Yemen on the grounds that courts do not resolve policy issues entrusted to the other branches of government); Cox, supra note 97, at 1671 (leaving no doubt that judges have been extremely reluctant to question the executive’s judgment with regards to immigration); see also Shririn Sinnar, Procedural Experimentation and National Security in the Courts, 106 CALIF. L. REV. 991, 993 (2018) (making clear that the Supreme Court’s unwillingness to question the rationale behind the travel ban fits with the long-standing tradition of judicial deference to the executive branch’s national security judgments).
260 See Li, supra note 11, at 277 (arguing that judges should defer to the executive’s judgment with respect to foreign investment just as they do with regards to other national security matters).
261 See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 643–44 (1952) (Jackson, J., concurring) (declaring that the President’s Commander-in-Chief power does not turn the executive into the master of the nation’s economic affairs); Katyal & Tribe, supra note 18, at 1259 (asserting that the rule of law requires the separation of powers); Rand Paul, Opinion, Sen. Rand Paul: I Support President Trump, but I Can’t Support This National Emergency Declaration, FOX NEWS (Mar. 4, 2019), https://www.foxnews.com/opinion/sen-rand-paul-i-support-president-trump-but-i-cant-support-this-national-emergency-declaration [https://perma.cc/7GP3-REUK] (suggesting that the abuse of emergency powers will turn the President into a king).
not allow the Commander-in-Chief to wield absolute power in national security matters. Second, limits on executive power help ensure that the Republic remains democratic. Just as the President should not declare a national emergency to advance policy goals, neither should the Commander-in-Chief use vague notions of national security to browbeat foreign investors.

Precedent is in line with this reasoning and it supports subjecting CFIUS to judicial review. To begin with, the Supreme Court has explained that the President’s Commander-in-Chief power does not turn the executive into the master of the nation’s economic affairs. The President does not have the unlimited authority to terminate deals he does not like. In addition, the Court has signaled its disapproval of the executive branch using vague notions of national security and imagined peril to trample on fundamental rights. The President cannot conjure up a threat and expect courts to blindly accept this rationale for blocking a transaction. Furthermore, the nation’s highest court has spelled out that foreign nationals sent to Guantanamo Bay have the right to judicial review of the executive’s actions. It follows that foreigners seeking to

\[\text{\textsuperscript{262}}\text{See, e.g., Boumediene v. Bush, 553 U.S. 723, 771 (2008) (bestowing certain rights to non-citizens held at Guantanamo Bay); N.Y. Times Co. v. United States, 403 U.S. 713, 719 (1971) (Black, J., concurring) (condemning the subjugation of fundamental rights to unclear national security threats); Youngstown, 343 U.S. at 643–44 (Jackson, J., concurring) (limiting presidential authority to intervene in the economy in national security matters).}\]

\[\text{\textsuperscript{263}}\text{See, e.g., Katyal & Tribe, supra note 18, at 1259 (stressing the importance of the separation of powers to the rule of law); Kevin M. Kruse & Julian E. Zelizer, Opinion, Have We Had Enough of the Imperial Presidency Yet?, N.Y. TIMES (Jan. 9, 2019), https://www.nytimes.com/2019/01/09/opinion/president-trump-border-wall-weak.html [https://perma.cc/8VSV-QLM5] (contending that the nation needs to restrain the power of the increasingly imperial presidency).}\]

\[\text{\textsuperscript{264}}\text{Compare 50 U.S.C. § 1622(b) (2012) (providing that Congress shall vote to terminate the President’s declaration of a national emergency), and Jules Lobel, Emergency Power and the Decline of Liberalism, 98 YALE L. J. 1385, 1412 (1989) (indicating that the war in Vietnam and the Watergate scandal motivated Congress to put limits on the executive’s emergency powers), with O’Keeffe, supra note 17 (underscoring the unease among private sector attorneys’ about CFIUS’s aggressive view of its mandate).}\]

\[\text{\textsuperscript{265}}\text{See Boumediene, 553 U.S. at 771 (providing protections to the non-citizens held at Guantanamo Bay); N.Y. Times Co., 403 U.S. at 719 (Black, J., concurring) (stressing the primacy of individual liberties relative to nebulous security concerns); Youngstown, 343 U.S. at 643–44 (Jackson, J., concurring) (underlining the President’s lack of absolute authority).}\]

\[\text{\textsuperscript{266}}\text{Youngstown, 343 U.S. at 643–44 (Jackson, J., concurring).}\]

\[\text{\textsuperscript{267}}\text{See id. (curbing presidential power); Fontanella-Khan et al., supra note 196 (showing that untrammeled presidential power can have disastrous consequences for due process rights); O’Keeffe, supra note 17 (observing that many private sector attorneys believed CFIUS had overstepped its mandate in blocking the Broadcom-Qualcomm transaction).}\]

\[\text{\textsuperscript{268}}\text{See N.Y. Times Co., 403 U.S. at 719 (Black, J., concurring) (noting that individual liberties take precedence over dubious national security threats).}\]

\[\text{\textsuperscript{269}}\text{See id.; Lipton, supra note 197 (pointing to the dubious nature of the national security threat posed by Broadcom’s acquisition of Qualcomm); see also FRESHFIELDS BRUCKHAUS DERINGER LLP, supra note 197 (echoing Lipton in taking issue with CFIUS’s action against Broadcom).}\]

\[\text{\textsuperscript{270}}\text{Boumediene, 553 U.S. at 771.}\]
make substantial investments in the United States should, at the very least, enjoy similar rights.271

Beyond that, as a practical matter, judges should play a role in national security because they can balance the competing interests at stake.272 After all, security is not the nation’s sole concern.273 The separation of powers that safeguards individual liberty must continue, even in times of great danger.274 Moreover, judges’ insulation from voters means they can protect the very rights that the majority may be keen to disregard.275 Experience has shown that these individuals can handle this demanding job, as a state of emergency does not change the fundamental judicial function of weighing competing interests.276 It should come as no surprise that courts handle classified information as well as other branches of government.277

2. The Need for a True “Law of CFIUS”

Although it is easy to call for judicial review on this basis, it is far more difficult to articulate a standard for adjudication of national security determinations.278 As noted earlier, the executive has superior knowledge of the threats facing the nation and periodically faces the voters at the polls.279 If judges do not follow the wishes of the Commander-in-Chief, they could lose their legiti-


273 See id. at 1312 (showing that judges must decide how much weight to give to security concerns relative to protecting individual liberty).

274 See Chesney, supra note 96, at 1434 (indicating that judges serve as a check on the political branches); Katyal & Tribe, supra note 18, at 1259 (emphasizing the connection between the separation of powers and the rule of law); Reinhardt, supra note 272, at 1313 (underscoring that judges must act free from political pressure and must protect the Constitution as well as the rights it enshrines).

275 See Chesney, supra note 96, at 1434 (highlighting the important role judges play in protecting individual liberty in national security matters); cf. United States v. Carolene Prod. Co., 304 U.S. 144, 153 n.4 (1938) (holding that courts will scrutinize the judgment of Congress when the political process has failed to protect vulnerable groups such as “discrete and insular minorities”).

276 See David Cole, No Reason to Believe: Radical Skepticism, Emergency Power, and Constitutional Constraint, 75 U. CHI. L. REV. 1329, 1357 (2008) (spelling out why judges are qualified to pass judgment on national security matters); Reinhardt, supra note 272, at 1312 (confirming judges’ qualifications in this area, as they spend their time balancing competing interests).

277 See Cole, supra note 276, at 1357 (showing that courts have leaked less classified information than the executive branch in the period after September 11, 2001).

278 See Li, supra note 11, at 277 (underscoring the difficulties judges would have in ruling on national security matters); E. Maddy Berg, Note, A Tale of Two Statutes: Using IEEPA’s Accountability Safeguards to Inspire CFIUS Reform, 118 COLUM. L. REV. 1763, 1798 (2018) (stressing the practical problems with judicial review of CFIUS actions).

279 Posner & Sunstein, supra note 11, at 1227–28; Posner, supra note 11, at 957.
macy and put innocent lives at risk. In addition, if courts dared to intrude into this domain of the executive, they would not have much precedent to guide them. Beyond the canonical cases mentioned above that deal with national security, no court has precisely mapped out the limits of Presidential power in this space.

Outside of foreign investment law, judges could look to analogous statutes for guidance. Courts have often used the interpretation of one statute to aid in their interpretation of another. In this context, the National Emergencies Act (NEA), the statute giving the President the power to declare national emergencies, seems the most comparable. Although the NEA vests the Commander-in-Chief with enormous power, it allows the President to exercise this authority only in certain enumerated instances. In interpreting the statute governing CFIUS, judges could limit the executive’s application of the blocking power to circumstances when the transaction in question rises to the level of a threat under the NEA. Courts would have to tread cautiously, as they do not have the same operational understanding of the threats facing the nation as

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280 See Ashley S. Deeks, The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference, 82 FORDHAM L. REV. 827, 830 (2013) (noting that some scholars approve of judicial unwillingness to second-guess the executive in national security matters); Li, supra note 11, at 277 (pointing to the superior competence of the executive in this area); Berg, supra note 278, at 1798 (underscoring that judicial review of CFIUS matters poses a risk to national security).

281 See, e.g., Ralls Corp. v. Comm. on Foreign Inv., 758 F.3d 296, 311 (D.C. Cir. 2014) (reaffirming the presumption against judicial review and refusing to articulate a standard for scrutinizing the actions of the executive with regards to CFIUS).

282 See supra notes 266–270 and accompanying text (specifying general limits on the President’s power).

283 Cf. Complaint for Declaratory and Injunctive Relief at 10, Ctr. for Biological Diversity v. Trump, No. 1:19-cv-00408-TNM (D.D.C. Feb. 16, 2019) [hereinafter Ctr. for Biological Diversity] (indicating the existence of 123 statutory authorities that allow the President to declare a national emergency); Complaint for Declaratory and Injunctive Relief at 15, Alvarez v. Trump, No. 1:19-cv-00404-TNM (D.D.C. Feb. 15, 2019) (making clear that a statute defines the limits of the President’s emergency powers). Even in the absence of authorities about CFIUS, the mere threat of judicial review would likely cause the executive to behave in a more responsible manner. See Deeks, supra note 280, at 830 (confirming this phenomenon in the state secrets context, among others).


286 See Ctr. for Biological Diversity, supra note 283, at 10 (illustrating that the President can only declare a national emergency for the 123 reasons enumerated in the NEA).

287 See id. (attesting to the fact that under the NEA, national security threats can suffice as a national emergency).
the Commander-in-Chief.288 Under this arrangement, the President would still have great discretion to screen foreign investment, but would not have the ability to concoct fanciful reasons for disfavoring certain transactions.289

Practical considerations also militate in favor of allowing courts to question the executive’s judgment in this area.290 Investors no longer have a good sense of how the Committee will apply the law.291 Judicial review would therefore create more predictability by ensuring CFIUS compliance with the law.292 Moreover, judicial review would give rise to case law in this area that investors and their counselors could rely on to evaluate the regulatory implications of investment opportunities.293 Congress could, in turn, codify this case law in new statutes.294 Allowing litigation and judicial review would speed the development of a true “law of CFIUS.”295 With this new set of rules in place, the

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288 See Sinnar, supra note 259, at 993 (underscoring courts’ unwillingness to question the executive branch on national security matters due to their general lack of expertise).

289 See Li, supra note 11, at 277 (insisting that the President needs discretion in the area of national security); Lipton, supra note 197 (skewering CFIUS’s rationale for blocking the Broadcom-Qualcomm deal).

290 See Nuno Garoupa & Andrew P. Morriss, The Fable of the Codes: The Efficiency of the Common Law, Legal Origins, and Codification Movements, 2012 U. ILL. L. REV. 1443, 1477 (showing that the codification of common law could, among other things, lessen uncertainty); David Sive, The Litigation Process in the Development of Environmental Law, 19 PACE ENVTL. L. REV. 727, 736 (1995) (arguing that litigation has been instrumental in the development of environmental law); Sunstein, supra note 248, at 537 (confirming that judicial review reduces the arbitrariness of agency action). But see Berg, supra note 278, at 1798 (maintaining that judicial review is inappropriate for CFIUS).


292 See Sunstein, supra note 248, at 528–29 (arguing that judicial review of agency action guards against irrational and overzealous regulation as well as unlawful and unreasonable enforcement); COVINGTON & BURLING LLP, supra note 141, at 3–4 (stating that the block of the Fujian-Aixtron transaction represented an unusual and unprecedented extraterritorial application of the Committee’s powers); Kang & Rappeport, supra note 15 (explaining the unusual nature of a presidential intervention before the consummation of the Broadcom–Qualcomm deal).


295 Compare Sive, supra note 290, at 736 (asserting that litigation has been instrumental in the development of environmental law), with Zaring, supra note 14, at 84 (underscoring the difficulty in divining the “law of CFIUS”). The importance of predictability in this area cannot be overstated, as foreign investors’ unwillingness to enter a market can have disastrous consequences. See, e.g., Mark Thatcher, Regulatory Agencies, the State and Markets: A Franco-British Comparison, 14 J. EUR. PUB.
Committee would regain its legitimacy. Committee would no longer be judge, jury, and executioner in the matters before it.297

3. The Efficiency and Fairness of Judicial Review

Judges could handle this increased workload.298 Federal courts have experience handling antitrust cases in which the government challenges a proposed merger or acquisition on competition grounds.299 These judges are also becoming increasingly acquainted with shareholder deal litigation.300 Federal courts would therefore have the capacity to rule on large, complex transactions involving CFIUS.301

In addition, giving foreign investors the right to press their claims in court falls squarely within the proud American tradition of vindicating the rights of non-citizens and corporations alike.302 Among other things, judges have opened the courthouse doors to victims of human rights abuses around the world.303 Courts have likewise not hesitated to extend all sorts of constitutional
protections to corporations. It thus seems appropriate for judges to treat foreign investors in a similar manner.

B. “To Love Pure and Chaste from Afar”: Congress Should Provide for Judicial Review of CFIUS’s Actions

Courts, however, should not act alone in this domain. With FIRRMMA, Congress has moved closer to subjecting CFIUS to judicial review by allowing civil actions to proceed against the Committee. Though this represents progress, civil actions alone will not cure CFIUS’s ills. The Committee has acted without restraint in the wake of Ralls, precisely because the presumption against judicial review remains. Congress should therefore provide explicitly for judicial review.

Beyond just reaffirming the presumption against judicial review, Ralls also gave foreign investors the right to pursue some civil actions. Potential plaintiffs can contest the non-privileged, non-classified evidence leading to the blocking of a transaction. To be clear, investors would not be taking issue with the termination of the deal per se, but rather the evidence behind such an action.

This aspect of Ralls has proven of little use to prospective plaintiffs. CFIUS has little desire to share its evidence with investors. If the Committee

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304 WINKLER, supra note 20, at 380.
305 Id.; Young, supra note 20, at 1029.
306 See 50 U.S.C. § 4565(e)(1) (barring judicial review of the actions and findings of the President).
307 See id. § 4565(e)(2) (providing that the United States Court of Appeals for the District of Columbia Circuit will serve as the venue for civil actions against CFIUS).
308 See DORSEY & WHITNEY LLP, supra note 119 (substantiating that in the years since the Ralls decision, investors have not made use of this new power); FRESHFIELDS BRUCKHAUS DERINGER LLP, supra note 197 (underscoring the weakness of the administration’s case against Broadcom); Baker & Heifetz, supra note 114 (showing that Ralls has not made CFIUS any more eager to have investors rebut its evidence).
309 See COVINGTON & BURLING LLP, supra note 141, at 3–4 (leaving no doubt about the fact that CFIUS far exceeded its mandate in ending the Fujian-Aixtron deal); FRESHFIELDS BRUCKHAUS DERINGER LLP, supra note 189 (pointing to the fact that by blocking the Canyon Bridge-Lattice deal, CFIUS was, among other things, erecting an export control regime without oversight and notice); Kang & Rappeport, supra note 15 (indicating that the President did not let CFIUS complete its investigation before blocking the Broadcom-Qualcomm deal).
310 See 50 U.S.C. § 4565(e)(1) (disallowing judicial review of the actions and findings of the President); GARVEY, supra note 193, at 13 (suggesting a strong presumption in favor of judicial review unless the statute explicitly says otherwise or the law commits the action to agency discretion).
311 See DORSEY & WHITNEY LLP, supra note 119; Li, supra note 4, at 18; Li, supra note 11, at 276; Webster, supra note 1, at 269–70; Baker & Heifetz, supra note 114.
312 Li, supra note 4, at 18; Li, supra note 11, at 276; Webster, supra note 1, at 269–70.
313 Li, supra note 4, at 18; Li, supra note 11, at 276; Webster, supra note 1, at 269–70.
314 See DORSEY & WHITNEY LLP, supra note 119 (stressing how little benefit Ralls provides to foreign investors); Baker & Heifetz, supra note 114 (providing empirical evidence that this is the case).
315 DORSEY & WHITNEY LLP, supra note 119; Baker & Heifetz, supra note 114.
wanted to disclose its findings, most of its evidence in all probability remains privileged or classified.\footnote{DORSEY & WHITNEY LLP, supra note 119.} The review of presidential blocks in the wake of \textit{Ralls} underscores this point.\footnote{See Bartz et al., supra note 229 (leaving no doubt that the Committee’s national security determinations about the Broadcom-Qualcomm deal would not undergo judicial scrutiny); Chazan, supra note 139 (explaining that Fujian had given up its pursuit of Aixtron after President Obama blocked the transaction); Pierson, supra note 170 (making clear that Canyon Bridge and Lattice also did not litigate the block of their transaction).} Not one of the injured parties seems to have given much thought to requesting CFIUS’s non-classified, non-confidential information.\footnote{Bartz et al., supra note 229; Chazan, supra note 139; Pierson, supra note 170.}

These unfortunate investors likely chose not to seek civil action because of the continuing presumption against judicial review.\footnote{See 50 U.S.C. § 4565(e)(1) (proscribing judicial review of the actions and findings of the President); \textit{Ralls}, 758 F.3d at 311 (reaffirming this presumption); Bartz et al., supra note 229 (stating that Broadcom could not sue the government in the wake of the block of its transaction).} With a statute exempting the Committee and the President from judicial review and precedent endorsing this carve-out, these plaintiffs did not have strong claims.\footnote{See COVINGTON & BURLING LLP, supra note 141, at 3–4 (demonstrating that the block of the Fujian-Aixtron transaction represented an unusual and unprecedented extraterritorial application of CFIUS’s powers); FRESHFIELDS BRUCKHAUS DERINGER LLP, supra note 189 (making clear that the Committee’s suspension of the Canyon Bridge-Lattice deal represented a unilateral and unauthorized expansion of the export control regime); Kang & Rappeport, supra note 15 (highlighting the fact that the block of the Broadcom-Qualcomm deal came before the conclusion of CFIUS’s investigation).} No court reviewed these investors’ arguments, despite the Committee’s utterly unreasonable missteps in blocking their respective transactions.\footnote{See Dou & O’Keeffe, supra note 176 (attesting to the fact that Lattice had sold its military design unit in 2012); Feng, supra note 158 (testifying to the fact that Chinese investors with the backing of the Chinese government had acquired an American semiconductor company, and had encountered no regulatory difficulties in the United States); Lipton, supra note 197 (showing that the Broadcom-Qualcomm deal hardly qualified as a threat to national security).} Even more gallingly, statute and precedent precluded oversight despite CFIUS’s questionable national security justifications in each instance.\footnote{See GARVEY, supra note 193, at 13 (underscoring the deference courts give to an explicit prohibition of judicial review in a statute).}

Given this state of affairs, Congress should provide explicitly for judicial review.\footnote{See 50 U.S.C. § 4565(e)(1) (precluding judicial review of the actions and findings of the President); GARVEY, supra note 193, at 13 (implying that judicial review cannot occur under a statute that explicitly bars it).} A strong presumption exists in favor of judicial review unless a statute says otherwise or the law commits the action to agency discretion.\footnote{GARVEY, supra note 193, at 13.} Because the DPA specifically frees the President and CFIUS from judicial review, Congress should amend it to provide, in relevant part, “The actions of the Pres-
ident . . . and the findings of the President . . . shall be subject to judicial review.”

Practical and political considerations may make legislators reluctant to amend the statute. Judicial review of Committee investigations and determinations, one might argue, could lead to better policies towards foreign investors. Congress could, in turn, codify whatever understanding emerges. The problem with such a proposal is that, even after Ralls and FIRMMA, foreign investors are not using the courts at all to pursue CFIUS claims. In the absence of a clear signal from Congress and the courts that judges will be open to hearing their arguments, it would be illogical to expect otherwise.

In amending the statute, lawmakers might also worry about alienating their base and attracting the support of unsavory groups. Dealmakers in law, finance, consulting, and accounting would support changing the statute, as it would give their clients a better chance of closing their transactions and en-

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325 See 50 U.S.C. § 4565(e)(1) (blocking judicial review of the actions and findings of the President). In full, the amended statute 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 be subject to judicial review.” See id. (supplying the relevant language).

326 See Tingley et al., supra note 36, at 53 (showing reluctance on the part of American politicians to let Chinese companies consummate M&A deals in distressed industries and sectors involving strategically important assets); Massoudi, supra note 121 (implying that corporations are willing to pay a lot of money to receive advice about how to navigate the CFIUS process).

327 See 50 U.S.C. § 4565(e)(2) (providing that the United States Court of Appeals for the District of Columbia Circuit will serve as the venue for civil actions against CFIUS); Ralls, 758 F.3d at 325 (showing that a court can arrive at a favorable solution for foreign investors).

328 See Aprill, supra note 294, at 33 (contending that the codification of judicial doctrines has worked with regards to tax shelters); Beckett, supra note 294, at 483 (providing further evidence of the benefits of codification).

329 See Bartz et al., supra note 229 (leaving no doubt about the limited recourse Broadcom had against the Committee and the President following the block of its transaction); Chazan, supra note 139 (making clear that Fujian did not litigate the suspension of its deal); Pierson, supra note 170 (demonstrating that Canyon Bridge and Lattice also did not file suit against the government).

330 See 50 U.S.C. § 4565(e)(1) (disallowing judicial review of the actions and findings of the President in this area); Ralls, 758 F.3d at 311 (giving this presumption the court’s blessing); Bartz et al., supra note 229 (indicating Broadcom’s unwillingness to pursue litigation following the block of its transaction).

courage companies to pursue tie-ups in the United States. Corporate lawyers in particular would benefit, because they would be best placed to learn how to structure transactions so as to win the government and the court’s approval. Furthermore, the increase in litigation would create a market for litigation attorneys knowledgeable about the CFIUS process. Shareholders would also favor amending the statute, as foreign firms would help bid up the price of their assets. Beyond that, private equity firms and venture capital funds would support changing the law. These entities would have more leeway to argue that their acceptance of foreign capital does not pose a national security threat. Tech companies would similarly welcome the change, as it could increase their access to foreign funds.

Nonetheless, amending the statute would likely draw the ire of incumbent management, labor, and defense hawks. Mergers and acquisitions can lead to layoffs, restructuring, and general disorder for workers. For this reason,

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332 See Platt & Fontanella-Kahn, Mega-Deal, supra note 331 (confirming that professionals in these fields profit handsomely from M&A activity).

333 See Massoudi, supra note 121 (hinting at the enormous value corporations place on knowledge of CFIUS); Eric Platt & Sami Vukelj, Demand Grows for Lawyers in Secretive World of CFIUS, FIN. TIMES (July 16, 2019), https://www.ft.com/content/19d0e2a-a741-11e9-984c-fac8325aa047?emailId=5d2cebf4fed4e004a4d8d8f [https://perma.cc/56GV-J8WW] (indicating that law firms are competing for individuals who have a deep understanding of the CFIUS process).

334 See Dockery, supra note 9 (showing that at least one law firm has already made money providing advice on how to handle CFIUS litigation).


336 See Naso, supra note 175 (underscoring that the draft FIRRMA legislation made private equity firms fear that they would lose their foreign sources of capital); Sender & Weinland, supra note 175 (demonstrating that venture capital firms had a similar concern about the bill); see also KIRKLAND & ELLIS LLP, KIRKLAND ALERT: CFIUS REFORM AT THE FINISH LINE 1 (2018), https://www.kirkland.com/-/media/publications/alert/2018/07/cfius-reform-at-the-finish-line/cfius_reform_at_the_finish_line.pdf [https://perma.cc/NH73-Y3FM] (showing how the pending legislation would make it more difficult for foreign capital to access American private equity investments).


338 See SHEARMAN & STERLING LLP, supra note 161, at 2 (suggesting that FIRRMA could make it more difficult for tech companies to access foreign capital, as it expands the Committee’s jurisdiction).


340 See Marks et al., supra note 339 (underscoring worker and labor disapproval of mergers and acquisitions); Sumagaysay, supra note 221 (observing that Broadcom terminated 1,100 employees after it acquired Brocade).
labor for the most part opposes making corporate transactions easier.\textsuperscript{341} Incumbent managers would join forces with labor in this fight, if they did not hold much equity and enjoyed their current position.\textsuperscript{342} Lastly, defense hawks would worry about giving foreign investors the unqualified right to sue the government.\textsuperscript{343} The prospect of a foreign investor winning its case would concern them, as the United States would have few remedies to cure the potential damage to national security.\textsuperscript{344}

CONCLUSION

This Note advanced two arguments. First, it demonstrated that \textit{Ralls} has had a chilling effect on the litigation of blocked transactions. Despite having strong arguments against CFIUS and the President, foreign investors have taken neither to court. They rightfully expect that judges will acquiesce to the executive branch in this area. Consequently, plaintiffs’ actions no longer serve as a check on national security determinations by the government. The government in turn carries out arbitrary actions and damages its own legitimacy. Second, it argued that foreign investors should have the right to challenge the executive branch’s decisions in court. Judges should question the executive’s judgments and Congress should provide for judicial review of CFIUS’s actions. Without these reforms, the Committee will continue to be a source of uncertainty for foreigners eager to invest in the United States. Even more importantly, CFIUS will continue to lose legitimacy in the eyes of investors and practitioners alike.

ISAAC LEDERMAN

\textsuperscript{341} See Pagano & Volpin, \textit{supra} note 339, at 842 (suggesting that labor generally opposes corporate takeovers).

\textsuperscript{342} See id. at 864 (providing theoretical support for this hypothesis).

\textsuperscript{343} See Editorial, \textit{supra} note 159 (fretting about the possibility of the United States losing its technological edge to China, in part due to inward M&A deals such as Fujian-Aixtron).

\textsuperscript{344} See id. (implying that if Chinese investors successfully sued the government, the United States might have no means to retrieve its strategically important technology).