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

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THE RIGHT RIGHTS FOR THE RIGHT PEOPLE? THE NEED FOR JUDICIAL PROTECTION OF FOREIGN INVESTORS

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]

[1] *See* Ralls Corp. v. Comm. on Foreign Inv., 758 F.3d 296, 301 (D.C. Cir. 2014) (noting the government determination that Chinese ownership of these wind farms posed a national security threat); Timothy Webster, *Why Does the United States Oppose Asian Investment?*, 37 NW. J. INT'L L. & BUS. 213, 215 (2017) (questioning the merits of the determination). In 2012, when a Chinese company first sought to acquire the wind farms, foreign ownership of strategically important assets did not even rank highly as a threat. *See Current and Projected National Security Threats to the United States: Hearing Before the S. Select Comm. on Intelligence*, 112th Cong. 13 (2012) (statement of James R. Clapper, Director of National Intelligence) (stressing the national security risks of terrorism and counter-proliferation). When it came to China, intelligence officials expressed concern about the nation carrying out cyber-attacks and economic espionage against the United States. *Id.* at 14. *See generally* OFFICE OF THE NAT'L COUNTERINTELLIGENCE EXEC., FOREIGN SPIES STEALING US ECONOMIC SECRETS IN CYBERSPACE: REPORT TO CONGRESS ON FOREIGN ECONOMIC COLLECTION AND INDUSTRIAL ESPIONAGE, 2009-2011, at iii (2011), https://www.dni.gov/files/NCSC/documents/Regulations/Foreign_Economic_Collection_2011.pdf [https://perma.cc/86TN-73G9] (noting that economic espionage involves stealing critical technology or confidential economic information). The intelligence community does not seem to have placed Chinese acquisitions high on its priority list until 2014. *See Current and Future Worldwide Threats to the National Security of the United States: Hearing Before the S. Comm. on Armed Servs.*, 113th Cong. 10 (2014) (statement of James R. Clapper, Director of National Intelligence) (detailing China's strong desire to gain control of information about the United States' national security).

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]

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[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).

[5] Wang, *supra* note 4, at 194. Ralls' parent corporation is the Sany Group, a massive Chinese conglomerate. Gina Chon, *A Chinese Conglomerate's Bid to Knock Down America's Foreign-Investment Barriers*, QUARTZ (Mar. 4, 2013), https://qz.com/55046/ralls-corp/ [https://perma.cc/33YZ-JQS4]. Ralls' business in the United States consisted of installing and operating wind turbines made by its parent company. Rachelle Younglai, *Obama Blocks Chinese Wind Farms in Oregon Over Security*, REUTERS (Sept. 29, 2012), https://www.reuters.com/article/us-usa-china-turbines/obama-blocks-chinese-wind-farms-in-oregon-over-security-idUSBRE88R19220120929 [https://perma.cc/BTA4-ASN4] (identifying Sany Group as China's largest producer of construction equipment).

[6] Ralls Corp. v. Comm. on Foreign Inv., 926 F. Supp. 2d 71, 99–100 (D.D.C. 2013), *rev'd and remanded*, 758 F.3d 296 (D.C. Cir. 2014).

[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*.[10] Nevertheless, one crucial assumption underlying *Ralls* has gone unexamined: the notion that the executive branch's national security determinations should avoid judicial review.[11] Few question this foundational idea in the foreign investment space.[12] This gap in the literature becomes even more surprising in light of other countries' recent efforts to tighten their foreign investment regimes.[13] 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.[14]

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assets-in-cfius-settlement/ [https://perma.cc/UCN3-HLCE] (explaining that as a result of its settlement with the government, the company had to sell the wind farms it had previously purchased).

[10] *See, e.g.*, Christopher M. Fitzpatrick, Note, *Where* Ralls *Went Wrong: CFIUS, the Courts, and the Balance of Liberty and Security*, 101 CORNELL L. REV. 1087, 1092 (2016) (disagreeing with the reasoning of the D.C. Circuit in *Ralls*); Patrick Griffin, Note, *CFIUS in the Age of Chinese Investment*, 85 FORDHAM L. REV. 1757, 1782 (2017) (asserting that the wind farms had a loose connection to national security).

[11] *Ralls*, 758 F.3d at 311; Xingxing Li, *National Security Review in Foreign Investments: A Comparative and Critical Assessment on China and U.S. Laws and Practices*, 13 BERKELEY BUS. L.J. 255, 276 (2016) (pointing to this assumption underlying the *Ralls* decision). Leading scholars have enthusiastically embraced this idea. *See, e.g.*, Eric A. Posner & Cass R. Sunstein, Chevron*izing Foreign Relations Law*, 116 YALE L.J. 1170, 1227–28 (2007) (arguing that courts should defer to the executive's national security judgments); Richard A. Posner, *Reply: The Institutional Dimension of Statutory and Constitutional Interpretation*, 101 MICH. L. REV. 952, 957 (2003) (contending that judges lack the competency to intervene in national security matters).

[12] *See, e.g.*, Li, *supra* note 11, at 277 (asserting that courts generally should not question the executive branch's national security determinations). Even before the D.C. Circuit issued its decision in *Ralls*, however, some took issue with this presumption. *See, e.g.*, Christina E. Holzer, Note, *Committee on Foreign Investment in the United States and Judicial Review*, 13 J. INT'L BUS. & L. 169, 169 (2014) (maintaining that the presumption against judicial review would not survive because of its legal defects).

[13] *See, e.g.*, Anne Cullen, *UK Gov't Seeking More Power to Block Foreign Takeovers*, LAW360 (Oct. 15, 2019), https://www.law360.com/articles/1209195/uk-gov-t-seeking-more-power-to-block-foreign-takeovers [https://perma.cc/DW2V-N4UJ] (noting that Great Britain is seeking to strengthen its foreign investment regime); Eric Platt et al., *M&A Activity Dives in Fourth Quarter as Corporate Confidence Ebbs*, FIN. TIMES (Dec. 20, 2018), https://www.ft.com/content/06b343fe-0447-11e9-99df-6183d3002ee1 [https://perma.cc/CD5V-H53B] (observing that Australia, Canada, and Germany have heightened their scrutiny of foreign investment).

[14] *See, e.g.*, Li, *supra* note 11, at 276–77 (not questioning the idea that the executive's national security determinations should remain judicially unreviewable); Matthew C. Sullivan, *CFIUS and Congress Reconsidered: Fire Alarms, Police Patrols and a New Oversight Regime*, 17 WILLAMETTE J. INT'L L. & DISP. RESOL. 199, 201 (2009) (exploring the causes of congressional involvement in foreign investment matters); David Zaring, *CFIUS as a Congressional Notification Service*, 83 S. CAL. L. REV. 81, 83 (2009) (claiming that Congress has not deferred to the executive branch with regards to matters of foreign investment); *see also, e.g.*, David Shepardson & Alexandra Alper, *TikTok's Musical.ly Deal Needs U.S. National Security Review: Senator*, REUTERS (Oct. 9. 2019), https://www.reuters.com/article/us-usa-china-tiktok/u-s-senator-rubio-calls-for-review-of-tiktoks-merger-with-musical-ly-idUSKBN1WO28N [https://perma.cc/GNF8-ALHC] (indicating that Congress continues to scrutinize foreign investment).

This Note aims to fill this gap by using *Ralls* as a point of departure in advancing two main arguments.[15] First, *Ralls* has deterred foreign investors from bringing suit against the government because they expect courts to accept the executive's national security determinations.[16] Second, as a result of this ruling, plaintiffs' actions no longer serve as a check on arbitrary determinations by the government.[17] Given this state of affairs, foreign investors should have the right to challenge these judgments in court.[18] To think of rolling back *Ralls* would be, in the words of the Man of La Mancha, "to dream the impossible dream."[19] 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.[20] In addition, judges have plenty of experience handling litigation over large, complex transactions.[21]

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[15] *See, e.g.*, Cecilia Kang & Alan Rappeport, *Trump Blocks Broadcom's Bid for Qualcomm*, N.Y. TIMES (Mar. 12, 2018), https://www.nytimes.com/2018/03/12/technology/trump-broadcom-qualcomm-merger.html [https://perma.cc/NS4V-GARK] (observing that President Trump had taken the unusual step of ending the Broadcom-Qualcomm merger before shareholders had an opportunity to vote on the transaction); Eric Platt & James Fontanella-Khan, *Broadcom Withdraws $142bn Offer for Qualcomm*, FIN. TIMES (Mar. 14, 2018), https://www.ft.com/content/2333db52-2783-11e8-b27e-cc62a39d57a0 [https://perma.cc/FYU7-TBR7] (noting that Broadcom had decided to accept defeat and withdraw its $142 billion offer for Qualcomm after President Trump blocked the tie-up).

[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-m-a-fujian/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).

[18] *See* Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1259 (2002) (maintaining the importance of separation of powers into three distinct branches for upholding the rule of law).

[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.[22] Part I of this Note provides a history of CFIUS and its general freedom from judicial review.[23] Part II presents the reasoning behind *Ralls*, and shows how it has continued to dissuade foreign investors from filing suit against the government.[24] 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.[25]

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.[26] Congress has served as the primary check on its authority.[27] The legislative branch has policed transactions far more aggressively than CFIUS, and pushed the Committee to more protectionist ends.[28]

The Ford administration established CFIUS in 1975 to forestall discriminatory action by Congress.[29] A number of statutes, such as the Defense Produc-

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lic-Law Litigation After Kiobel, 64 DUKE L.J. 1023, 1029 (2015) (emphasizing the role that the Alien Tort Statute has played in allowing victims of human rights abuses around the world to bring their claims in American courts).

[21] *See, e.g.*, Matthew D. Cain et al., *The Shifting Tides of Merger Litigation*, 71 VAND. L. REV. 603, 608 (2018) (showing that litigation over mergers and acquisitions has shifted from Delaware state courts to federal courts); Sean Griffith, *Correcting Corporate Benefit: How to Fix Shareholder Litigation by Shifting the Doctrine on Fees*, 56 B.C. L. REV. 1, 1 (2015) (demonstrating Delaware courts' vast experience with corporate litigation); Donald G. Kempf Jr., *Merger Litigation: From the Birth of* General Dynamics *to the Death of Section 7*, 65 ANTITRUST L.J. 653, 658 (1997) (explaining how federal courts have stopped deferring to the government's judgment in antitrust merger litigation).

[22] *Ralls*, 758 F.3d at 301.

[23] *See infra* notes 26–102 and accompanying text.

[24] *See infra* notes 103–244 and accompanying text.

[25] *See infra* notes 245–344 and accompanying text.

[26] *See* Li, *supra* note 4, at 9 (noting that *Ralls* represents the first litigation of a CFIUS order); Wang, *supra* note 4, at 194 (highlighting the groundbreaking nature of Ralls' case against the government).

[27] *See* Zaring, *supra* note 14, at 88 (observing that Congress causes more concern for investors than CFIUS); Alan Rappeport, *In New Slap at China, U.S. Expands Power to Block Foreign Investments*, N.Y. TIMES (Oct. 10, 2018), https://www.nytimes.com/2018/10/10/business/us-china-investment-cfius.html [https://perma.cc/Z3RR-4CY3] (explaining the contours of Congress's reform of the CFIUS review process). *But see* Sullivan, *supra* note 14, at 241 (arguing that Congress's fierce reactions to certain foreign acquisitions originated, at least in part, from the difficulties of giving the legislative branch adequate oversight of the CFIUS process).

[28] *See* Sullivan, *supra* note 14, at 241 (illustrating the depth of congressional involvement in foreign investment matters); Zaring, *supra* note 14, at 88 (underscoring that the legislative branch causes more apprehension among foreign investors than the Committee).

[29] *See* Sullivan, *supra* note 14, at 211 (describing CFIUS' roots as a tool to deflect congressional criticism about the lack of screening of foreign investment); Zaring, *supra* note 14, at 92 (stressing

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.[30] Under IEEPA, for instance, the President can in peacetime take remedial measures to respond to national emergencies emanating from outside the United States.[31] None of these statutes, however, explicitly endowed the Commander-in-Chief with the ability to track or halt investment from outside the country.[32]

This gap in the statutory framework greatly concerned Congress, as it considered the prospect of petrodollars flooding America.[33] 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.[34] In the wake of this crisis, Congress wanted to punish the perpetrators.[35]

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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that the Ford administration wanted to prevent Congress from discriminating against members of the Organization of Petroleum Exporting Countries (OPEC)).

[30] 50 U.S.C. §§ 1701–1706 (2018); 50 U.S.C. § 4565; Zaring, *supra* note 14, at 91.

[31] *See* Frederic Block, *Civil Liberties During National Emergencies: The Interactions Between the Three Branches of Government in Coping with Past and Current Threats to the Nation's Security*, 29 N.Y.U. REV. L. & SOC. CHANGE 459, 463–64 (2005) (explaining the motivation behind the passage of the International Emergency Economic Powers Act (IEEPA)).

[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/CBK3-44XM] (supplying this definition).

[34] Wendy Koch, *U.S. Oil Supply Looks Vulnerable 40 Years After Embargo*, USA TODAY (Oct. 19, 2013), https://www.usatoday.com/story/news/nation/2013/10/19/us-oil-imports-opec-embargo/2997499/ [https://perma.cc/C6T2-NFBV] (indicating that the embargo battered the economy in part by quadrupling oil prices); Frank A. Verrastro & Guy Caruso, *The Arab Oil Embargo—40 Years Later*, CTR. FOR STRATEGIC & INT'L STUD. (Oct. 16, 2013), https://www.csis.org/analysis/arab-oil-embargo%E2%80%9440-years-later [https://perma.cc/7WDA-K32V] (noting that the embargo lowered U.S. GDP by roughly 2.5%).

[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 (underscoring 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.[36] 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.[37] This setup guaranteed the representation of both economic and national security concerns.[38] 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.[39]

Nevertheless, Congress still wished for a more fearsome body.[40] In its first five years of existence, CFIUS met ten times.[41] It requested, but did not require, that foreign investors provide preliminary reports about their holdings in the United States.[42] Though the Committee investigated a number of foreign investments, it did not possess the authority to block transactions or force acquirers to divest assets.[43]

The need for this power only became apparent when Fujitsu attempted to purchase eighty percent of Fairchild Semiconductor (Fairchild) in October 1986.[44] 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.*

[38] *See* James Mendenhall et al., *Economic Politics and National Security: A CFIUS Case Study*, 102 AM. SOC'Y INT'L L. PROC. 245, 248 (2008) (providing an insider's account of the CFIUS review process).

[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.[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.[46]

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

Fresh from this victory, Congress sought to protect the nation's strategically important assets.[50] It passed legislation in 1988 that gave the President

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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, 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).

[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).

[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).

[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).

[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.

[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 *Los Angeles Times* analogized the transaction to "selling Mount Vernon to the redcoats." William C. Rempel & Donna K.H. Walters, *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., *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. *Id.* at 1026–27. This invention helped the firm prosper. *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. *Id.* None of the subsequent acquirers of the storied business were able to return the chipmaker to greatness. *Id.*

[50] *See* Zaring, *supra* note 14, at 92–93 (arguing that the proposed Fujitsu-Fairchild transaction prompted CFIUS reform). *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 chang-

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nouncement 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.

[51] Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107, 1425 (1988) (amending the Defense Production Act of 1950 (DPA)); *see* EDWARD M. GRAHAM & DAVID M. MARCHICK, U.S. NATIONAL SECURITY AND FOREIGN DIRECT INVESTMENT 34 (2006) (giving a broad overview of this reform); Sullivan, *supra* note 14, at 214; Zaring, *supra* note 14, at 93. CFIUS practitioners refer to this particular change to Section 721 of the DPA as the Exon-Florio Amendment, as Senator James Exon (D-NE) and Congressman James Florio (D-NJ) drafted the crucial language. Kang, *supra* note 32, at 325–26; Zaring, *supra* note 14, at 92–93.

[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).

[55] *See* George S. Georgiev, Comment, *The Reformed CFIUS Regulatory Framework: Mediating Between Continued Openness to Foreign Investment and National Security*, 25 YALE J. ON REG. 125, 127 (2008) (describing the significance of the 1988 change to the DPA).

[56] Exec. Order No. 12661, 54 Fed. Reg. 779 (Dec. 27, 1988); JACKSON, *supra* note 43, at 10; Kang, *supra* note 32, at 326.

[57] JACKSON, *supra* note 52, at 5.

[58] *Id.*

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.[59]

Despite its new capabilities and protection from the judiciary, the Committee did not really disrupt deal making.[60] In many regards, the Committee's actions under this new regime resembled its actions under the old regime.[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.[62] Rather, the Committee imposed a number of conditions to protect the American semiconductor industry.[63] Although CFIUS had no qualms about using its new strength, it only put its suspension power to use once in the twentieth century.[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.[65]

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[59] 50 U.S.C. § 4565(e)(1) (prohibiting judicial review of the actions and findings of the President). *But see Ralls*, 758 F.3d at 312 (holding that the DPA does allow for some judicial review of the President's actions).

[60] *See* Zaring, *supra* note 14, at 93–94 (noting growing congressional displeasure with the Committee even after the passage of the Exon-Florio Amendment). *But see* Kang, *supra* note 32, at 327–29 (indicating that in the wake of the Exon-Florio Amendment, CFIUS undertook a great deal of unofficial action to modify transactions); Sullivan, *supra* note 14, at 217 (relating how CFIUS forced a Japanese company to abandon its purchase of a nuclear weapons contractor); Clyde H. Farnsworth, *U.S. Stops Acquisition by Japanese*, N.Y. TIMES (Apr. 18, 1989), https://www.nytimes.com/1989/04/18/business/us-stops-acquisition-by-japanese.html [https://perma.cc/E9VC-JECJ] (providing more background on the aborted transaction).

[61] *Compare* JACKSON, *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, *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).

[62] Kang, *supra* note 32, at 328.

[63] *Id.*

[64] *See* JACKSON, *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. *See, e.g.*, Sullivan, *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).

[65] James V. Feinerman, *Enter the Dragon: Chinese Investment in the United States*, 22 LAW & POL'Y INT'L BUS. 547, 556–60 (1991) (providing background on the attempted acquisition); Sullivan, *supra* note 14, at 217; Stuart Auerbach, *President Tells China to Sell Seattle Firm*, WASH. POST (Feb. 3, 1990), https://www.washingtonpost.com/archive/politics/1990/02/03/president-tells-china-to-sell-seattle-firm/4e2521e2-3ba1-4d9b-a864-ec512a607a28/?utm_term=.c8ac25b64331 [https://perma.cc/SE9M-AACH] (giving a contemporary perspective on the aborted transaction). Some commentators have argued that CFIUS's recommendation in this case is a part of a broader pattern of discrimination against Asian investors in the United States. *See, e.g.*, Norman P. Ho, *Asian-American Jurisprudence and Corporate Law: Politicization, Racialization, Foreignness, and the U.S. CFIUS Foreign Direct Investment Review Mechanism*, 4 WIDENER J.L. ECON. & RACE 1, 13 (2012) (contesting the idea that the Chinese corporation posed a threat to national security); Webster, *supra* note 1, at 263 (questioning the rationale behind the denial). *But see* Paul Connell & Tian Huang, Note, *An Empirical Analysis*

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]

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of CFIUS: Examining Foreign Investment Regulation in the United States, 39 YALE J. INT'L L. 131, 135 (2014) (arguing that CFIUS does not discriminate against particular groups of foreign investors).

[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).

[68] National Defense Authorization Act for Fiscal Year 1993, Pub. L. 102-484, § 837, 106 Stat. 2315, 2464 (1992).

[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.[72] In 2005, a Chinese state-owned oil company made an $18.5 billion bid for the American oil giant Unocal.[73] 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.[74] 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.[75] CFIUS's January 2006 approval of this sale emboldened congressional critics of the transaction.[76] Within three weeks, Dubai Ports World had divested its American holdings.[77]

After these whirlwind days of oversight, Congress finally found a way to ensure that the Committee scrutinized investment entering the United States.[78] With the Foreign Investment and National Security Act of 2007 (FINSA), the legislative branch codified CFIUS's powers in a statute.[79] 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).

[73] GRAHAM & MARCHICK, *supra* note 51, at 128. In 2005, the Chinese government had a seventy percent stake in CNOOC. Ben White, *Chinese Drop Bid to Buy U.S. Oil Firm*, WASH. POST (Aug. 3, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/08/02/AR2005080200404.html [https://perma.cc/6AUA-XVXQ] (providing contemporary analysis of the demise of the deal).

[74] GRAHAM & MARCHICK, *supra* note 51, at 131. Congress's harsh reaction to the idea of CNOOC purchasing Unocal redounded to the benefit of Chevron, which subsequently bought the oil major for $17.9 billion. David R. Baker, *Chevron Completes Unocal Deal / Purchase Spells End of 115-Year-Old Oil Company*, S.F. CHRON. (Aug. 11, 2005), https://www.sfgate.com/business/article/Chevron-completes-Unocal-deal-Purchase-spells-2648878.php [https://perma.cc/6EGQ-4N4D].

[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).

[79] 50 U.S.C. § 4565; JACKSON, *supra* note 43, at 10.

ened the concept of national security to include economic concerns.[80] This represented a major change, as it shifted the Committee's focus away from more traditional defense concerns.[81] In addition, FINSA provided for fifteen-day presidential determinations to follow the regular thirty-day reviews and forty-five day investigations when necessary.[82] Beyond that, President George W. Bush promulgated an executive order under FINSA expanding committee membership to include five executive office members.[83] Most importantly, Congress increased the number of transactions subject to CFIUS review.[84] In essence, the Committee had to examine the vast majority of foreign transactions.[85]

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[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.

Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, 121 Stat. 246, 253–54 (2007).

[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.

[83] Exec. Order No. 13456, 73 Fed. Reg. 4677 (Jan. 23, 2008); JACKSON, *supra* note 43, at 14.

[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-b0b4-650641f8a0c0/11.19.08.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.[86] Between 1988 and 2005, the Committee conducted twenty-five investigations and saw foreign investors voluntarily shelve their plans thirteen times.[87] In the seven-year period from 2008 to 2015, the Committee carried out 333 investigations.[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.[89] More remarkably, this increased activity coincided with investors voluntarily withdrawing from 103 transactions between 2008 and 2015.[90] Though this number may seem high, CFIUS approved eighty-nine percent of the transactions for which it received notification.[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.[92] *Ralls* represents the only time a court has done anything for a foreign investor faced with one of those denials.[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.[94] Though this reform

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supra note 14, at 96. In particular, Congress required that the Committee immediately investigate transactions involving state-owned enterprises that posed a national security threat. *Id.* Beyond that, Congress gave CFIUS the power to investigate and undo completed transactions, and obligated the body to determine the threat posed by acquisitions to "critical infrastructure." *Id.*

[86] *See* Li, *supra* note 4, at 6 (noting that the Committee review process is now a "legal black hole"); Shields, *supra* note 17, at 293–94 (highlighting foreign investors' distaste for CFIUS's rules). The co-head of JP Morgan's global mergers and acquisitions practice has called CFIUS "the ultimate regulatory bazooka." Kevin Granville, *Cfius, Powerful and Unseen, Is a Gatekeeper on Major Deals*, N.Y. TIMES (Mar. 5, 2018), https://www.nytimes.com/2018/03/05/business/what-is-cfius.html [https://perma.cc/H4CP-HSCY]. Though the CFIUS review process now scares dealmakers, the Committee does seek ways to make transactions work by entering into mitigation agreements with parties wishing to consummate a deal. *See* JACKSON, *supra* note 43, at 20 (describing the mitigation process). Under these commonplace agreements, parties remove the aspects of their transaction that may pose a threat to national security, but have CFIUS approval to continue with the rest of their transaction. *Id.*; *see* COMM. ON FOREIGN INV. IN THE U.S., ANNUAL REPORT TO CONGRESS 21 (2015) (observing that between 2013 and 2015, ten percent of the deals reviewed by the Committee ended in a mitigation agreement).

[87] JACKSON, *supra* note 52, at 21.

[88] JACKSON, *supra* note 43, at 22.

[89] *Id.* at 21–22.

[90] *Id.* at 22.

[91] *Id.* at 21.

[92] *Id.* at 7.

[93] *Id.*; Li, *supra* note 4, at 9.

[94] 50 U.S.C. § 4565(e)(2).

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]

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[95] *Id.* § 4565(e)(1) (forbidding judicial review of the actions and findings of the President); SKADDEN, ARPS, SLATE, MEAGHER & FLOM, US FINALIZES CFIUS REFORM: WHAT IT MEANS FOR DEALMAKERS AND FOREIGN INVESTMENT 1 (2018) (providing an overview of the latest reform to the rules governing CFIUS). The Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) also gives the Committee greater jurisdiction over real estate transactions, and allows CFIUS to collect filing fees. MP McQueen, *Trump to Sign CFIUS Reform Bill: What Dealmakers Need to Know*, NAT'L L.J. (Aug. 10, 2018), https://www.law.com/nationallawjournal/2018/08/10/081018cfius/ [https://perma.cc/G7K3-DLNJ].

[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. Opderbeck, *Drone Courts*, 44 RUTGERS L.J. 413, 448 (2014) (demonstrating that the Supreme Court has delineated the outer limits of military discretion).

[98] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 643–44 (1952) (Jackson, J., concurring).

[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).

[100] Boumediene v. Bush, 553 U.S. 723, 771 (2008) (ruling that non-citizens held at Guantanamo Bay have the right to challenge their detention).

Though this presumption about the lack of judicial review has existed since 1988, *Ralls* left no doubt about courts' acceptance of it.[101] The following Part illustrates the chilling effect *Ralls* has consequently had on the litigation of presidential denials.[102]

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.[103] Between 1990 and 2012, the President prevented the consummation of only two deals.[104] At first glance, the number of denials after *Ralls* may seem small, as CFIUS reviewed 462 transactions between 2014 and 2016 alone.[105] 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.[106] The fact that this dynamic has changed suggests that CFIUS has gone from being the friend of foreign investors to their foe.[107]

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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.*

[105] *See* COMM. ON FOREIGN INV. IN THE U.S., COVERED TRANSACTIONS, WITHDRAWALS, AND PRESIDENTIAL DECISIONS, 2014–2016, at 1 (2017) (providing data on the number of Committee reviews).

[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).

[107] *See* Harry Brumpton et al., *Exclusive: Goldman's China-Backed Fund Bucks Trade Tensions to Buy U.S. Firm*, REUTERS (Mar. 29, 2019), https://www.reuters.com/article/us-goldman-sachs-fund-china-exclusive/exclusive-goldmans-china-backed-fund-bucks-trade-tensions-to-buy-us-firm-idUSKCN1RA0CX [https://perma.cc/8D4Z-DM92] (indicating that Chinese acquisitions of American companies have fallen eighty-eight percent since the passage of FIRRMA); Eric Platt et al., *US Government Is Forcing Chinese Owners to Sell Grindr*, FIN. TIMES (Mar. 27, 2019), https://www.ft.com/content/30408b0e-50e2-11e9-b401-8d9ef1626294?emailId=5c9beef91dc90300049303ec [https://perma.cc/LJ34-V677] (describing how the Committee caused a Chinese technology company to divest itself of the gay dating app Grindr); Theodore Schleifer, *Silicon Valley Is Awash in Chinese and Saudi Cash—And No One Is Paying Attention (Except Trump)*, VOX (May 1, 2019), https://www.vox.

The D.C. Circuit's 2014 decision in *Ralls*, however, has not emboldened investors to take the Committee and the President to court.[108] It has instead made legal challenges a losing proposition.[109] To advance these arguments, Section A of this Part shows how *Ralls* signaled judges' approval of the presumption against judicial review.[110] Section B then demonstrates how *Ralls* seems to have dissuaded foreign investors from pursuing their claims against the government, even in particularly egregious cases.[111]

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.[112] Under this line of reasoning, foreign investors can take their claims to court and win against the government.[113] This optimism unfortunately seems misguided, as *Ralls* reaffirmed the longstanding presumption against judicial review.[114]

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.[115] Like any prosecutor, CFIUS must present the material evidence

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com/recode/2019/5/1/18511540/silicon-valley-foreign-money-china-saudi-arabia-cfius-firrma-geopolitics-venture-capital [https://perma.cc/8RRQ-9X89] (spelling out the chilling effect the newly aggressive CFIUS regime has had on foreign investment in tech firms).

[108] *See* Li, *supra* note 4, at 18 (demonstrating how *Ralls* made litigation an unappealing option for foreign investors).

[109] *See, e.g.*, Liana B. Baker, *Trump Bars Chinese-Backed Firm from Buying U.S. Chipmaker Lattice*, REUTERS (Sept. 13, 2017), https://www.reuters.com/article/us-lattice-m-a-canyonbridge-trump/trump-bars-chinese-backed-hard-from-buying-u-s-chipmaker-lattice-idUSKCN1BO2ME [https://perma.cc/YR2X-P45S] (explaining that a private equity firm had given up its attempt to acquire Lattice Semiconductor Corporation (Lattice), a semiconductor company, after the Trump administration blocked the transaction).

[110] *See infra* notes 112–130 and accompanying text.

[111] *See infra* notes 131–244 and accompanying text.

[112] *See, e.g.*, Judy Wang, Ralls Corp. v. CFIUS: *A New Look at Foreign Direct Investments to the US*, 54 COLUM. J. TRANSNAT'L L. BULL. 30, 55 (2016) (contending that *Ralls* will lead to more CFIUS litigation); Wang, *supra* note 4, at 194 (pointing to Ralls' success before the D.C. Circuit); Webster, *supra* note 1, at 270 (indicating that *Ralls* serves as a procedural safeguard of foreign investors' rights); Griffin, *supra* note 10, at 1782 (arguing that the D.C. Circuit provided a check on the power of CFIUS in *Ralls*); Stanley, *supra* note 3, at 1058 (asserting that *Ralls* represented a "monumental" decision).

[113] Wang, *supra* note 4, at 194; Webster, *supra* note 1, at 270; Griffin, *supra* note 10, at 1782.

[114] *Ralls*, 758 F.3d at 311; *see* Li, *supra* note 11, at 276 (specifying that the executive's determinations of national security risk remain unreviewable after *Ralls*); Stewart Baker & Stephen Heifetz, Ralls *May Give Foreign Investors More Leverage with CFIUS*, Opinion, LAW360 (Dec. 11, 2014), https://www.law360.com/articles/603312/ralls-may-give-foreign-investors-more-leverage-with-cfius [https://perma.cc/QG58-GSA7] (declaring that *Ralls* will not prove particularly useful to foreign investors).

[115] *See* Li, *supra* note 4, at 18 (highlighting the significance of this part of the *Ralls* opinion); Li, *supra* note 11, at 276 (stressing that *Ralls* ensured procedural, not substantive, protection for foreign

supporting its charge.[116] Investors can then attempt to refute the evidence before them.[117] This represents a major change because before *Ralls*, the law provided no remedy to investors injured by the Committee or the President.[118]

Nevertheless, even this aspect of *Ralls* has proven to be of little use to prospective plaintiffs.[119] To begin with, CFIUS does not wish to share its evidence with investors.[120] As it screens transactions, the Committee works with classified information about national security threats.[121] 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.[122] 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.[123] Thus, even if CFIUS did wish to increase transparency in this regard, it could not do so.[124] 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.[125]

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

[116] Webster, *supra* note 1, at 269–70. Some commentators even take issue with this part of *Ralls*. *See, e.g.*, Fitzpatrick, *supra* note 10, at 1101 (alleging that the D.C. Circuit may have lacked jurisdiction over Ralls' claims against CFIUS); Gent, *supra* note 2, at 481 (criticizing *Ralls* for intruding on presidential prerogatives yet affording foreign investors no meaningful protection).

[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).

[120] DORSEY & WHITNEY LLP, *supra* note 119; Baker & Heifetz, *supra* note 114.

[121] LATHAM & WATKINS LLP, OVERVIEW OF THE CFIUS PROCESS 5 (2017), https://www.lw.com/thoughtLeadership/overview-CFIUS-process [https://perma.cc/FS2J-HV94] (explaining how CFIUS uses classified information not available to the parties); *see also* Arash Massoudi, *Former CFIUS Official Joins Freshfields Law Firm*, FIN. TIMES (Feb. 27, 2019), https://www.ft.com/content/c5949c18-3adf-11e9-b72b-2c7f526ca5d0?desktop=true&segmentId=7c8f09b9-9b61-4fbb-9430-9208a9e233c8#myft:notification:daily-email:content [https://perma.cc/ZZN9-RSKQ] (making clear that the government cannot share most of its evidence with the parties requesting approval).

[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.[126] They will accede to the executive and its judgment in this area.[127] 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.[128] Some scholars suggest that only when confronted with utterly unreasonable behavior should courts raise doubts about the executive's judgment in this area.[129] As the following Section shows, this understanding has had a chilling effect on CFIUS litigation.[130]

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.[131] In these cases, the D.C. Circuit's 2014 decision has not helped investors.[132] By dictating a policy of strict judicial deference,

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> sified or other information subject to privilege or protections under any provision of law, is necessary to resolve the challenge, that information shall be submitted ex parte and in camera to the court and the court shall maintain that information under seal.

50 U.S.C. § 4565(e)(3).

[126] *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).

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

[128] *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).

[129] *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).

[130] *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).

[131] JACKSON, *supra* note 43, at 7.

[132] *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.[133] Circumstantial evidence strongly suggests that *Ralls* has deterred foreign investors from litigating the denials of their transactions.[134] To advance this argument, this Note examines three transactions in chronological order.[135] Subsection 1 focuses on the struggles of a Chinese investment group.[136] Subsection 2 details the difficulties a private equity firm encountered in dealing with the Committee.[137] Subsection 3 concludes with an exploration of how President Trump and CFIUS prevented the consummation of the largest tech deal ever.[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.[139] Fujian Grand Chip Investment Fund (Fujian) had launched a €670 million (approximately $720 million) bid for Aixtron in May 2016.[140]

This relatively small deal caused such great concern, because it involved the strategically important semiconductor industry.[141] Although Aixtron did

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[133] *See id.* (describing the limited options foreign investors have when the U.S. government blocks their deals).

[134] *See* Baker, *supra* note 109 (providing circumstantial evidence about the actions of a private equity firm after the executive branch stopped it from consummating a transaction); Platt & Fontanella-Khan, *supra* note 15 (supplying circumstantial evidence about the actions of Broadcom following the Trump administration's block of its deal); Sheahan, *supra* note 16 (furnishing circumstantial evidence about the activity of a Chinese investment group after the unwinding of its asset purchase).

[135] *See* Baker, *supra* note 109 (describing a private equity firm's interaction with the Committee); Platt & Fontanella-Khan, *supra* note 15 (recounting Broadcom's experience with CFIUS); Sheahan, *supra* note 16 (giving one account of a Chinese investment group's struggle to receive approval from the Committee).

[136] *See infra* notes 139–169 and accompanying text.

[137] *See infra* notes 170–195 and accompanying text.

[138] *See infra* notes 196–244 and accompanying text.

[139] *See* Guy Chazan, *Fujian Drops Aixtron Offer After US Blocks Deal*, FIN. TIMES (Dec. 8, 2016), https://www.ft.com/content/b880ba3a-bd4a-11e6-8b45-b8b81dd5d080 [https://perma.cc/D3YZ-GLU7] (noting that a Chinese investment group had stopped pursuing a German chipmaker); William Wilkes, *Chinese Takeover of Aixtron Collapses After U.S. Ban*, WALL ST. J. (Dec. 8, 2016), https://www.wsj.com/articles/chinese-takeover-of-aixtron-collapses-after-u-s-ban-1481203244 [https://perma.cc/QHW5-X3NH] (noting that the Chinese investment group gave up all hope of completing the transaction following its failure to win regulatory approval from CFIUS and the President); Press Release, U.S. Dep't of the Treasury, Statement on the President's Decision Regarding the U.S. Business of Aixtron SE (Dec. 2, 2016), https://www.treasury.gov/press-center/press-releases/Pages/jl0679.aspx [https://perma.cc/XLJ9-6EL7] (identifying Fujian's ties to the Chinese government).

[140] Sheahan, *supra* note 16; Press Release, Aixtron, GCI to Launch Offer for AIXTRON SE (May 23, 2016), https://www.aixtron.com/en/investors/GCI%20to%20launch%20offer%20for%20AIXTRON%20SE_n929 [https://perma.cc/TZ36-YDRK] (specifying the terms of the deal).

[141] *See* Ben Blanchard & Harro Ten Wolde, *Aixtron Could Revive Takeover Despite U.S. Block: Analysts*, REUTERS (Dec. 5, 2016), https://www.reuters.com/article/us-aixtron-m-a-fujian-china-id USKBN13U0VP [https://perma.cc/9XER-HNNG] (observing that, despite the size of the deal, offi-

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]

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cials worried about the military application of Aixtron's technology); Eyk Henning, *U.S. Regulators Move to Stop Chinese Takeover of German Tech Firm Aixtron*, WALL ST. J. (Nov. 20, 2016), https://www.wsj.com/articles/u-s-regulators-move-to-stop-chinese-takeover-of-german-tech-firm-aixtron-1479549362?mod=article_inline [https://perma.cc/BF8G-LSR2] (confirming the security concerns raised by the transaction). *See generally* COVINGTON & BURLING LLP, PRESIDENT OBAMA BLOCKS CHINESE ACQUISITION OF AIXTRON SE 2–3 (2016), https://www.cov.com/-/media/files/corporate/publications/2016/12/president_obama_blocks_chinese_acquisition_of_aixtron_se.pdf [https://perma.cc/YA29-3DCV] (pointing to the U.S. government's general concerns about any transactions involving the semiconductor industry).

[142] Harro Ten Wolde & Sabine Siebold, *U.S. Fears Over Sensitive Compound Hits Chinese Bid for Aixtron*, REUTERS (Nov. 21, 2016), https://www.reuters.com/article/us-aixtron-m-a-fujian-usa/u-s-fears-over-sensitive-compound-hits-chinese-bid-for-aixtron-idUSKBN13G0OI [https://perma.cc/M7JX-U82X].

[143] *See* Kang, *supra* note 32, at 328 (spelling out how CFIUS protected the semiconductor industry after the passage of the Exon-Florio reform); Sullivan, *supra* note 14, at 213 (describing congressional opposition to the Fujitsu-Fairchild deal). Semiconductors will become only more important in the future, as they play a crucial role in the Internet of Things. *See* Eric Platt et al., *Merck Gatecrashes Versum-Entegris Deal with $5.9bn Offer*, FIN. TIMES (Feb. 27, 2019), https://www.ft.com/content/478d45c6-3a95-11e9-b856-5404d3811663 [https://perma.cc/5CNL-SVWN] (spelling out the link between semiconductors and the Internet of Things). *See generally* Luigi Atzori et al., *The Internet of Things: A Survey*, 54 COMPUTER NETWORKS 2787, 2787 (2010) (defining the Internet of Things as a system by which multiple devices share data with each other so as to achieve common goals).

[144] *See supra* notes 47–49 and accompanying text (describing the saga of the Fujitsu-Fairchild deal).

[145] *See supra* note 62–63 and accompanying text (providing background on this stage of CFIUS's life).

[146] *See* Toby Sterling, *U.S. Blocks Philips' $3.3 Billion Sale of Lumileds to Asian Buyers*, REUTERS (Jan. 22, 2016), https://www.reuters.com/article/us-philips-lumileds-sale-idUSKCN0V02D4 [https://perma.cc/FV79-TTYE] (observing that a Chinese private equity buyer had to terminate its purchase of a Dutch lighting business, because of the Committee's concern over the control of light-emitting diodes).

[147] JACKSON, *supra* note 43, at 63.

Even in light of this long history of protectionism, the Obama administration took extraordinary steps to scuttle the Fujian-Aixtron deal.[148] On September 8, 2016, the German Economics Ministry approved the takeover.[149] On October 24, the ministry withdrew its approval and reopened its investigation into the transaction.[150] 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.[151] After German officials received this information at an intelligence briefing at the U.S. Embassy in Berlin, they reneged their blessing of the deal.[152]

Fujian's troubles continued in America.[153] The German and Chinese firms voluntarily notified CFIUS of their transaction.[154] During its national security review, the Committee informed both parties of its concerns about the transaction.[155] After conducting its national security review, the Committee recommended that the President block the deal.[156] The President followed CFIUS's recommendation and prevented the Chinese investment group from gaining control of a German company.[157]

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.[158] Before diving into the arguments it could have

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[148] *See* COVINGTON & BURLING LLP, *supra* note 141, at 2 (pointing to the unusual way in which the transaction ended); Guy Chazan, *Germany Withdraws Approval for Chinese Takeover of Tech Group*, FIN. TIMES (Oct. 24, 2016), https://www.ft.com/content/f1b3e52e-99b0-11e6-8f9b-70e3cabccfae [https://perma.cc/6YKB-HJXA] (indicating that the German government decided to withdraw its approval of the Fujian-Aixtron deal).

[149] Maria Sheahan & Caroline Copley, *Germany Stalls Chinese Takeover of Aixtron, Citing Security Worries*, REUTERS (Oct. 24, 2016), https://www.reuters.com/article/us-aixtron-m-a-fujian-germany/germany-stalls-chinese-takeover-of-aixtron-citing-security-worries-idUSKCN12O13G [https://perma.cc/8BDJ-S9TM] (providing contemporary analysis of the German government's decision to withdraw its approval of the deal between Fujian Grand Chip Investment Fund (Fujian) and Aixtron).

[150] Chazan, *supra* note 148.

[151] Chazan, *supra* note 139.

[152] *Id.*

[153] *See id.* (describing Fujian's fight to win regulatory approval in the United States); Sheahan, *supra* note 16 (chronicling Fujian's struggle for CFIUS's blessing); Wilkes, *supra* note 139 (confirming that Fujian did not have an easy time convincing the government about the merits of its deal).

[154] COVINGTON & BURLING LLP, *supra* note 141, at 1.

[155] Henning, *supra* note 141.

[156] COVINGTON & BURLING LLP, *supra* note 141, at 1.

[157] Chazan, *supra* note 139; Sheahan, *supra* note 16; Wilkes, *supra* note 139.

[158] *See* COVINGTON & BURLING LLP, *supra* note 141, at 3–4 (indicating that the block of the Fujian-Aixtron transaction represented an unusual and unprecedented extraterritorial application of CFIUS's powers); Chazan, *supra* note 139 (demonstrating that Fujian lost interest in taking over Aixtron after CFIUS and the President had prevented it from doing so); Emily Feng, *How China Acquired Mastery of Vital Microchip Technology*, FIN. TIMES (Jan. 29, 2019), https://www.ft.com/content/7cfb2f82-1ecc-11e9-b126-46fc3ad87c65 [https://perma.cc/4NS2-M2Z2] (demonstrating that Chinese investors with the backing of the Chinese government can acquire an American semiconductor company without encountering regulatory difficulties in the United States).

made, it is important to note that Fujian may not have been entirely without fault.[159] 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.[160]

Regardless of whether those allegations are true, the Committee only has jurisdiction over businesses residing in the United States.[161] The Obama administration appears to have interpreted this requirement quite liberally in asserting jurisdiction over Aixtron.[162] Fujian could have argued that CFIUS and the President exceeded their powers in blocking its takeover of the German firm Aixtron.[163] On these grounds alone, Fujian could have met the stringent utterly unreasonable standard articulated above because Aixtron resided in Germany, not the United States.[164]

Moreover, the Chinese investment group could have contested the idea that it posed a national security threat.[165] In 2015, CFIUS gave its approval to another Chinese investment group with the backing of the Chinese government, a

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[159] *See* Editorial, *China's Global Semiconductor Raid*, WALL ST. J. (Jan. 12, 2017), https://www.wsj.com/articles/chinas-global-semiconductor-raid-1484266212 [https://perma.cc/Y7J9-WVLF] (explaining that the attempted takeover of Aixtron may have involved collusion on the part of two Chinese companies).

[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 FIRRMA 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.[166] In addition, the fact that Aixtron's technology could help China achieve its nuclear ambitions did not mean that it would.[167] The German government did not worry about this dual-use until the Obama administration signaled its fears behind closed doors.[168] Nevertheless, *Ralls* and its strong presumption against judicial review seem to have hindered Fujian from ever raising these arguments in court.[169]

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).[170] Investors had their doubts about the transaction almost immediately.[171] Lattice's shares soon started selling for less than Canyon Bridge's offer price.[172]

The private equity firm faced even greater difficulties on the political and regulatory front.[173] In early December, twenty-two members of the House of

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[166] Feng, *supra* note 158; *see also* Press Release, OmniVision, OmniVision Receives Clearance from the Committee on Foreign Investment in the United States (Oct. 6, 2015), https://www.ovt.com/news-events/corporate-releases/omnivision-receives-clearance-from-the-committee-on-foreign-investment-in-the-united-states [https://perma.cc/LD2A-SH28] (announcing CFIUS's approval of the Chinese buyout of an American semiconductor company).

[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).

[170] *See* Michael Gershberg & Justin Schenck, *President Trump Blocks Chinese Acquisition of Lattice Semiconductor Corporation*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Sept. 24, 2017), https://corpgov.law.harvard.edu/2017/09/24/president-trump-blocks-chinese-acquisition-of-lattice-semiconductor-corporation/ [https://perma.cc/U3YG-ZPU8] (providing a comprehensive history of the transaction and its unwinding); Brendan Pierson, *China-Backed Buyout Fund Founder Guilty of Insider Trading: U.S. Court*, REUTERS (Apr. 24, 2018), https://www.reuters.com/article/us-canyon bridge-chow-insidertrading/china-backed-buyout-fund-founder-guilty-of-insider-trading-u-s-court-idUSKBN1HV2WA [https://perma.cc/TAN4-DYQL] (indicating that a private equity firm with Chinese government backing did not pursue litigation after President Trump blocked its acquisition of an American semiconductor company).

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

[172] *Id.*

[173] *See* William Mauldin, *U.S. Lawmakers Urge Rejection of China-Linked Purchase of Lattice Semiconductor*, WALL ST. J. (Dec. 5, 2016), https://www.wsj.com/articles/u-s-lawmakers-urge-rejection-of-china-linked-purchase-of-lattice-semiconductor-1480988292 [https://perma.cc/A4KF-E7UD] (demonstrating that the acquisition drew the ire of a number of members of Congress); Kate O'Keeffe, *Trump Blocks China-Backed Fund from Buying Lattice Semiconductor*, WALL ST. J. (Sept. 13, 2017), https://www.wsj.com/articles/trump-blocks-china-backed-fund-from-buying-u-s-chip-maker-lattice-1505335670 [https://perma.cc/YV93-4XZR] (attesting to the Obama administration's

Representatives wrote to Treasury Secretary Jack Lew to express their concern about the transaction.[174] The lawmakers worried that the Chinese government was using Canyon Bridge as a front to covertly purchase American semiconductor technology with military applications.[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.[176] Nevertheless, Lattice sold its military design unit in 2012 and thereafter focused on the civilian chip market.[177]

The executive branch did not look any more favorably on the deal than Congress.[178] In late December, the companies notified CFIUS of their transaction.[179] The following month, an Obama administration advisory panel released a report detailing the threat posed by China's aggressive investment in

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strong desire to maintain America's dominance in the semiconductor market in the face of fierce competition from China).

[174] Letter from Members of Congress to Jack Lew, Sec'y of the Treasury (Dec. 6, 2016), http://freebeacon.com/wp-content/uploads/2016/12/Letter-to-CFIUS-re-Lattice-Semiconductor-12.6.16.pdf [https://perma.cc/R5CE-ZPWY] (identifying objections to the proposed acquisition).

[175] *Id.* Lawmakers' concern about transactions like Canyon Bridge-Lattice helped motivate CFIUS reform. *See* Chelsea Naso, *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-ropes-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, *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).

[176] Evan Dou & Kate O'Keeffe, *Buyout Firm Blames China-Bashing for Stalled Semiconductor Deal*, WALL ST. J. (July 28, 2017), https://www.wsj.com/articles/buyout-firm-blames-china-bashing-for-stalled-semiconductor-deal-1501234202 [https://perma.cc/7MKL-NWUV] (presenting Canyon Bridge's contemporary account of the acquisition saga). At this time, Canyon Bridge had only one investor: the Chinese government. Liana B. Baker & Michael Flaherty, *Former Oracle Board Member Dogged by Links to China-Backed Chip Deal*, REUTERS (June 15, 2017), https://www.reuters.com/article/us-lattice-m-a-canyondbridge-bingham/former-oracle-board-member-dogged-by-links-to-china-backed-chip-deal-idUSKBN19703P [https://perma.cc/6P4N-PXL2] (providing a history of Canyon Bridge).

[177] Dou & O'Keeffe, *supra* note 176. Chinese citizens had targeted Lattice before. Teresa Carson, *U.S. Charges Chinese Men in Technology Smuggling Case*, REUTERS (Dec. 18, 2012), https://www.reuters.com/article/us-usa-crime-china/u-s-charges-chinese-men-in-technology-smuggling-case-idUSBRE8BI06B20121219 [https://perma.cc/2SHH-UG6A] (explaining the scheme of one group of Chinese citizens to acquire Lattice's sensitive technology); *see also* Press Release, Fed. Bureau of Investigation, Two Chinese Individuals Charged in Scheme to Obtain Controlled Dual-Use American Technology (Dec. 18, 2012), https://archives.fbi.gov/archives/portland/press-releases/2012/two-chinese-individuals-charged-in-scheme-to-obtain-controlled-dual-use-american-technology [https://perma.cc/S3T3-E9QE] (giving the Federal Bureau of Investigation's view of the matter).

[178] *See* Baker, *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, *supra* note 173 (pointing to the companies' difficulties with CFIUS and the President).

[179] Gershberg & Schenck, *supra* note 170.

the semiconductor industry in a sign that the United States would in all likelihood closely scrutinize the deal.[180]

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

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

Like Fujian, the companies had colorable legal arguments.[189] First, the Committee unilaterally stopped the export of this semiconductor technology in

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[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).

[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).

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

[183] Baker, *supra* note 109; Gershberg & Schenck, *supra* note 170; O'Keeffe, *supra* note 173.

[184] Baker, *supra* note 109; Gershberg & Schenck, *supra* note 170; O'Keeffe, *supra* note 173.

[185] Gershberg & Schenck, *supra* note 170.

[186] EXEC. OFFICE OF THE PRESIDENT, *supra* note 180, at 2.

[187] *See* Josh Horwitz, *China Is Stumbling Hard at Acquiring the High-Tech Chip Companies It Wants So Badly*, QUARTZ (Sept. 14, 2017), https://qz.com/1077186/lattice-lscc-china-is-stumbling-hard-at-acquiring-the-high-tech-chip-companies-it-wants-so-badly/ [https://perma.cc/XXU7-S3CD] (indicating that CFIUS and the President had helped terminate seven semiconductor transactions involving Chinese companies between July 2015 and September 2017).

[188] *See* Pierson, *supra* note 170 (showing that Canyon Bridge and Lattice decided against suing the Committee and the President).

[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); FRESHFIELDS 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.[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.[191] Now CFIUS, without oversight and notice, was deciding what technologies could go to what countries.[192] These potential plaintiffs could have questioned this departure from custom.[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.[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.[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.[196] Of all the parties facing denials in

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Global/r/3589/president_trump_prohibits_canyon_bridge_s__1_3bn# [https://perma.cc/93UJ-XFTT] (pointing to the increasingly unpredictable nature of the CFIUS review process).

[190] *See* FRESHFIELDS BRUCKHAUS DERINGER LLP, *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).

[191] *Id.* The Departments of Commerce, Energy, State, and Treasury generally set export control policy. *See* IAN F. FERGUSSON & PAUL K. KERR, CONG. RESEARCH SERV., R41916, THE U.S. EXPORT CONTROL SYSTEM AND THE EXPORT CONTROL REFORM INITIATIVE 10 (2019) (providing background on the lack of a unified export control authority within the executive branch).

[192] *See* FRESHFIELDS BRUCKHAUS DERINGER LLP, *supra* note 189 (making clear that CFIUS had done nothing to notify the public of its action).

[193] *See, e.g.*, *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); *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 generally* TODD GARVEY, CONG. RESEARCH SERV., R41546, A BRIEF OVERVIEW OF RULEMAKING AND JUDICIAL REVIEW 16 (2017) (describing judicial review of APA matters).

[194] *See* Li, *supra* note 11, at 277; Posner, *supra* note 11, at 957.

[195] *See* Dou & O'Keeffe, *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: 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 [https://perma.cc/LZ28-Z7FT] (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).

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

the wake of *Ralls*, the chip company had the strongest arguments against the Committee and the President.[197] Broadcom launched in southern California in 1991.[198] In 2015, Avago Technologies acquired Broadcom, and took its name.[199] Though Avago resided in Singapore, it started as the chip business of the American technology company Hewlett-Packard.[200]

In the years since the tie-up, Broadcom acquired a number of companies.[201] 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.[202] Among others, President Trump

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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).

[197] *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 Lipton, *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'Keeffe, *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).

[198] Tiffany Hsu & Jerry Hirsch, *With Broadcom Exit, Headquarters Flight from Southern California Continues*, L.A. TIMES (May 29, 2015), https://www.latimes.com/business/la-fi-socal-headquarters-20150529-story.html [https://perma.cc/9RZ9-6UZS] (detailing the exodus of companies from southern California).

[199] Jeremy C. Owens & Therese Poletti, *How Broadcom vs. Qualcomm Went from Hostile Takeover Bid to a Trump Blockade*, MARKETWATCH (Mar. 13, 2018), https://www.marketwatch.com/story/how-broadcom-vs-qualcomm-went-from-hostile-takeover-bid-to-a-trump-blockade-2018-03-12 [https://perma.cc/952R-8KCG] (giving a comprehensive account of the unwinding of the Broadcom-Qualcomm deal).

[200] *Id.* Since its inception, Avago underwent a number of corporate transformations. *Id.*; *see* Sujeet 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. II.-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.

[202] Supantha Mukherjee & Sonam Rai, *Broadcom Closes $5.5 Billion Brocade Deal*, REUTERS (Nov. 17, 2017), https://www.reuters.com/article/us-brocade-commns-m-a-broadcom/broadcom-closes-5-5-billion-brocade-deal-idUSKBN1DH1T9 [https://perma.cc/AW9F-KXHZ] (indicating that Broad-

celebrated the idea of Broadcom returning to the United States.[203] The CEO of Broadcom even went to the White House to announce that his company was moving its headquarters back to America.[204]

In November 2017, Broadcom, still basking in the glow of its White House treatment, set its sights on its most ambitious target yet: Qualcomm.[205] The Singapore-based chipmaker offered over $100 billion for its American rival to consummate the largest tech deal in history.[206] After Qualcomm refused this bid, Broadcom pursued hostile means to win over its competitor.[207] In particular, Broadcom sought to nominate directors to its rival's board.[208] Even if the shareholders elected these nominees, Broadcom would not necessarily control Qualcomm.[209] These potential directors had no legal obligation to pass control of Qualcomm stock over to Broadcom.[210]

As Broadcom raised its bid and asked for fewer board seats, the deal came under regulatory scrutiny in late February 2018.[211] Even before members of Congress requested that the administration review the transaction, CFIUS

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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.

[205] *Id.*; O'Keeffe, *supra* note 17; Owens & Poletti, *supra* note 199; Shravanth Vijayakumar et al., *Timeline: Broadcom-Qualcomm Saga Comes to an Abrupt End*, REUTERS (Mar. 14, 2018), https://www.reuters.com/article/us-qualcomm-m-a-broadcom-timeline/timeline-broadcom-qualcomm-saga-comes-to-an-abrupt-end-idUSKCN1GQ22N [https://perma.cc/NP2Z-LSJN] (presenting a timeline of the important events in the Broadcom-Qualcomm saga).

[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-QGJJ] (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'Keeffe 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=5d82c54225b986000414b0b8 [https://perma.cc/9J96-DJQX] ("Patriotic heritage is the first resort of the would-be bid blocker.").

[214] O'Keeffe et al., *supra* note 209.

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

[216] O'Keeffe et al., *supra* note 209.

[217] COMM. ON FOREIGN INV. IN THE U.S., INTERIM ORDER REGARDING THE PROPOSED ACQUISITION OF QUALCOMM, INC. BY BROADCOM LIMITED (2018), https://www.sec.gov/Archives/edgar/data/804328/000110465918014823/a18-7296_4ex99d1.htm [https://perma.cc/76SR-5HJF] (specifying what action Broadcom could take); Owens & Poletti, *supra* note 199; Greg Roumeliotis, *U.S. Has Ordered Broadcom to Give Notice of Steps to Redomicile*, REUTERS (Mar. 9, 2018), https://www.reuters.com/article/us-qualcomm-m-a-broadcom-exclusive/u-s-has-ordered-broadcom-to-give-notice-of-steps-to-redomicile-idUSKCN1GL2X8 [https://perma.cc/LJB5-DP9E] (providing background on the order from CFIUS); Vijayakumar et al., *supra* note 205.

[218] O'Keeffe 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'Keeffe 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.[221] This in turn would endanger the development of 5G in America.[222]

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

In any case, CFIUS began to exert even more pressure on Broadcom.[225] On March 9, 2018, Broadcom released a statement indicating that its shareholders would vote on moving its headquarters on March 23.[226] The Committee reacted quickly; on March 11, it wrote to Broadcom's counsel to warn that,

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firm Freshfields Bruckhaus Deringer. Massoudi, *supra* note 121 (giving more information on Mr. Mir's move from the public to the private sector). The firm hired Mr. Mir in large part due to his ability to help clients navigate the increasingly unpredictable national security review process. *See id.* (making clear that insights into CFIUS are in high demand).

[221] Letter from Aimen N. Mir to Mark Plotkin & Theodore Kassinger, *supra* note 220, at 2–3; *see* Lipton, *supra* note 197. The government's allegations did have some merit. *See* Levi Sumagaysay, *Broadcom Cuts 1,100 Employees After Brocade Purchase, and It May Not Be Done*, MERCURY NEWS (June 15, 2018), https://www.mercurynews.com/2018/06/15/broadcom-cuts-1100-employees-after-brocade-purchase-and-it-may-not-be-done/ [https://perma.cc/5PKE-E9SJ] (noting that Broadcom terminated 1,100 employees after it acquired Brocade). Nevertheless, there is substantial evidence that private equity buyouts have positive consequences. *See* Robert S. Harris et al., *Private Equity Performance: What Do We Know?*, 69 J. FIN. 1851, 1880 (2014) (demonstrating that private equity generates greater returns than publicly traded stocks); Steven N. Kaplan & Per Strömberg, *Leveraged Buyouts and Private Equity*, 23 J. ECON. PERSP. 121, 143 (2009) (finding that, on average, private equity produces economic value); Josh Lerner et al., *Private Equity and Long-Run Investment: The Case of Innovation*, 66 J. FIN. 445, 474 (2011) (showing that firms with private equity backing do not produce any fewer patents than firms without private equity backing); Steven J. Davis et al., *The Economic Effects of Private Equity Buyouts* 36 (indicating that private equity ownership can produce increases in productivity) (Nat'l Bureau of Econ. Research, Working Paper No. 26371, 2019) (indicating that private equity ownership can produce increases in productivity). *But see* Harold Meyerson, *National Security Agencies Have Spoken: Private Equity Ownership Imperils America*, AM. PROSPECT (Mar. 8, 2018), https://prospect.org/article/national-security-agencies-have-spoken-private-equity-ownership-imperils-america [https://perma.cc/9ATC-JTGB] (praising CFIUS for recognizing the danger posed by private equity firms). In any event, it is quite ironic that private equity veterans fill the ranks of the Trump administration. *See* Adam Lewis, *Untangling the Trump Administration's Private Equity Ties*, PITCHBOOK (Mar. 28, 2017), https://pitchbook.com/news/articles/untangling-the-trump-administrations-private-equity-ties [https://perma.cc/QAN5-7X4Y] (indicating that many professionals with private equity experience or ties to the industry work in the Trump administration).

[222] Letter from Aimen N. Mir to Mark Plotkin & Theodore Kassinger, *supra* note 220, at 2–3; *see* Lipton, *supra* note 197.

[223] FRESHFIELDS BRUCKHAUS DERINGER LLP, *supra* note 197; Letter from Aimen N. Mir to Mark Plotkin & Theodore Kassinger, *supra* note 220, at 2.

[224] *See, e.g.*, FRESHFIELDS BRUCKHAUS DERINGER LLP, *supra* note 197 (explaining the reference to Huawei and the companies' pre-existing relationship with this Chinese firm).

[225] *See* Owens & Poletti, *supra* note 199 (detailing the increasing tensions between the Committee and Broadcom); Vijayakumar et al., *supra* note 205 (recounting how relations between the Committee and Broadcom continued to deteriorate).

[226] Owens & Poletti, *supra* note 199.

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

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[227] 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 (Mar. 11, 2018), http://online.wsj.com/public/resources/documents/cfiusletter0311.pdf [https://perma.cc/U9HZ-B38W] (describing CFIUS's concerns with Broadcom's actions).

[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.[238] If an American private equity firm acquired Qualcomm, the Committee would have no jurisdiction to challenge its decision to reduce R&D spending.[239] In short, the danger had nothing to do with the foreign nature of the acquirer.[240] CFIUS also asserted obliquely that Broadcom had ties to the Chinese telecommunications firm Huawei.[241] Even if one acknowledges that Huawei poses a threat, both Broadcom and Qualcomm already had business with the company.[242] That is to say, blocking the transaction would not alter the status quo.[243] In sum, the Committee's rationale left much to be desired.[244]

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.[245] With the judiciary unwilling to check the Committee and its

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[238] FRESHFIELDS BRUCKHAUS DERINGER LLP, *supra* note 197; Lipton, *supra* note 197.

[239] FRESHFIELDS BRUCKHAUS DERINGER LLP, *supra* note 197; Lipton, *supra* note 197. Although one could argue that an American firm would not have any ulterior motives in reducing Qualcomm's investment in 5G wireless technology, it is worth remembering Broadcom operated essentially as an American firm. FRESHFIELDS BRUCKHAUS DERINGER LLP, *supra* note 197.

[240] FRESHFIELDS BRUCKHAUS DERINGER LLP, *supra* note 197. If the federal government wanted to have 5G technology flourish in America, it could produce a coherent industrial policy to boost R&D spending. *See* Tom Wheeler & Robert D. Williams, *Keeping Huawei Hardware Out of the U.S. Is Not Enough to Secure 5G*, LAWFARE (Feb. 20, 2019), https://www.lawfareblog.com/keeping-huawei-hardware-out-us-not-enough-secure-5g [https://perma.cc/G83G-2EAH] (calling for the government to boost investment in 5G R&D).

[241] FRESHFIELDS BRUCKHAUS DERINGER LLP, *supra* note 197.

[242] *Id.* The government does not necessarily have the strongest case that Huawei poses a national security threat. *See* John D. McKinnon & Stu Woo, *Rural U.S. Carriers Resist Proposed Chinese Telecom Ban Aimed at Huawei*, WALL ST. J. (Feb. 11, 2019), https://www.wsj.com/articles/rural-u-s-carriers-resist-proposed-chinese-telecom-ban-11549886402 [https://perma.cc/UA62-G7YR] (indicating that rural carriers in America have no evidence of the Chinese telecommunications company undertaking efforts to undermine national security). *But see* Paul Mozur, *Limiting Your Digital Footprints in a Surveillance State*, N.Y. TIMES (Feb. 27, 2019), https://www.nytimes.com/2019/02/27/technology/personaltech/digital-footprint-surveillance.html [https://perma.cc/VU4P-GZ36] (revealing that it is extremely difficult to escape surveillance in China, as the government controls the telecommunications companies). Huawei's suit against the United States might provide the public a better sense of what is motivating the American intelligence community's concerns. *See* Sijia Jiang & Jan Wolfe, *Huawei Fights Back Against U.S. Blackout with Texas Lawsuit*, REUTERS (Mar. 6, 2019), https://www.reuters.com/article/us-usa-china-huawei-tech-filing/huawei-fights-back-against-u-s-blackout-with-texas-lawsuit-idUSKCN1QO061 [https://perma.cc/U8KU-SBUE] (describing Huawei's lawsuit against the United States government).

[243] FRESHFIELDS BRUCKHAUS DERINGER LLP, *supra* note 197.

[244] *See id.* (exposing the flawed reasoning behind the block of the Broadcom-Qualcomm deal); Lipton, *supra* note 197 (highlighting the weaknesses of the government's case against Broadcom).

[245] *See* FRESHFIELDS BRUCKHAUS DERINGER LLP, *supra* note 197 (contending that many more unprecedented blocks of transactions, like the denial of Broadcom's hostile takeover of Qualcomm, could come in the future); Li, *supra* note 4, at 18 (showing that Ralls has made foreign investors reluctant to take the government to court); O'Keeffe, *supra* note 17 (highlighting the concern on the part

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 determinations.[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-

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of many private sector attorneys that the Broadcom-Qualcomm block constituted an abuse of power). In addition, it is highly unusual for the executive to act in such an aggressive manner in the absence of a crisis. *See* Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 76 U. CHI. L. REV. 1613, 1679 (2009) (pointing to a general trend of executive power waxing in times of crisis).

[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").

[247] *See* Fontanella-Khan et al., *supra* note 196 (underscoring the government's inattention to due process when blocking the Broadcom-Qualcomm transaction); O'Keeffe, *supra* note 17 (highlighting the concern among private sector attorneys that CFIUS had acted far outside the law); Daniel Shane & Sherisse Pham, *Why the US Killed Broadcom's Giant Bid for Qualcomm*, CNN (Mar. 13, 2018), https://money.cnn.com/2018/03/13/investing/broadcom-qualcomm-national-security/index.html [https://perma.cc/4QHP-YLSV] (pointing to a belief that, despite the weak case against Broadcom, politics ultimately swayed the Committee and the President); Jing Zhao, *Chinese Acquisitions Even More Uncertain in New CFIUS Era*, LAW360 (Oct. 10, 2019), https://www.law360.com/technology/articles/1208131/chinese-acquisitions-even-more-uncertain-in-new-cfius-era- [https://perma.cc/9YLK-T7JA] (noting the continuing uncertainty facing foreign investors).

[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 distinct 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.[253] Lastly, judicial review of the Committee's actions would be both efficient and fair.[254]

1. CFIUS and the Limits of Deference

As a general matter, courts do not involve themselves in questions of national security.[255] To begin with, judges do not have access to the same information as the Commander-in-Chief about the threats facing the nation.[256] In addition, the President makes decisions in this area knowing that voters will exact punishment at the polls for any mistakes made.[257] Furthermore, judges are lawyers, and, as such, have no special understanding of foreign affairs.[258] 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.[259]

The question then becomes why executive determinations about foreign investment should receive different treatment than other areas of foreign policy.[260] The answer is two-fold.[261] First, precedent shows that the judiciary does

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[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.[262] Second, limits on executive power help ensure that the Republic remains democratic.[263] 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.[264]

Precedent is in line with this reasoning and it supports subjecting CFIUS to judicial review.[265] 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.[266] The President does not have the unlimited authority to terminate deals he does not like.[267] 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.[268] The President cannot conjure up a threat and expect courts to blindly accept this rationale for blocking a transaction.[269] 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.[270] It follows that foreigners seeking to

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[262] *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).

[263] *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).

[264] *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).

[265] *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) (underscoring the President's lack of absolute authority).

[266] *Youngstown*, 343 U.S. at 643–44 (Jackson, J., concurring).

[267] *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).

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

[269] *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).

[270] *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-

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[271] *See id.*; Barbara Stallings, *The Globalization of Capital Flows: Who Benefits?*, 610 ANNALS AM. ACAD. POL. & SOC. SCI. 202, 204 (2007) (showing that access to foreign capital helps increase economic growth rates).

[272] *See* Stephen Reinhardt, *The Judicial Role in National Security*, 86 B.U. L. REV. 1309, 1311 (2006) (arguing that the role of the judge does not change in times of war, as courts must continue to balance competing interests).

[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.[280] In addition, if courts dared to intrude into this domain of the executive, they would not have much precedent to guide them.[281] 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.[282]

Outside of foreign investment law, judges could look to analogous statutes for guidance.[283] Courts have often used the interpretation of one statute to aid in their interpretation of another.[284] In this context, the National Emergencies Act (NEA), the statute giving the President the power to declare national emergencies, seems the most comparable.[285] Although the NEA vests the Commander-in-Chief with enormous power, it allows the President to exercise this authority only in certain enumerated instances.[286] 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.[287] 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).

[284] *See, e.g.*, Chris-Craft Indus., Inc., v. Piper Aircraft Corp., 480 F.2d 341, 362 (2d Cir. 1973) (looking to SEC Rule 10b-5 for help in understanding Section 14(e) of the Securities Exchange Act of 1934); Robert E. Keeton, *Statutory Analogy, Purpose, and Policy in Legal Reasoning: Live Lobsters and a Tiger Cub in the Park*, 52 MD. L. REV. 1192, 1213 (1993) (pointing to judges' fondness for analogical reasoning).

[285] *Compare* 50 U.S.C. § 1622(b) (2018) (providing that Congress shall vote to terminate the President's declaration of a national emergency), *with* 50 U.S.C. § 4565(e)(1) (Supp. V 2017) (exempting the foreign investment determinations and actions of the President from judicial review).

[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).

[291] *See* FRESHFIELDS BRUCKHAUS DERINGER LLP, *supra* note 189 (expressing concern over the increasingly unpredictable nature of the CFIUS process; Larry G. Franceski et al., *President Trump Blocks Chinese-Backed Firm from Acquiring US Chipmaker*, NORTON ROSE FULBRIGHT (Sept. 18, 2017), http://www.nortonrosefulbright.com/knowledge/publications/156340/president-trump-blocks-chinese-backed-firm-from-acquiring-us-chipmaker [https://perma.cc/YY9M-CD48] (observing that the Committee has become unpredictable).

[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 transaction).

[293] *See* Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1, 9 (2012) (spelling out how following precedent can increase predictability).

[294] *See* Ellen P. Aprill, *Tax Shelters, Tax Law, and Morality: Codifying Judicial Doctrines*, 54 SMU L. REV. 9, 33 (2001) (contending that the codification of judicial doctrines has been effective with regards to tax shelters); William W. Beckett, *Judicial Construction of the Patent Act of 1954—Codification v. Substantive Change*, 37 J. PAT. OFF. SOC'Y 467, 483 (1955) (showing that by codifying the patent case law, Congress simplified patent law).

[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.[296] CFIUS 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

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POL'Y 1028, 1038–39 (2007) (demonstrating that France unwittingly created a duopoly in its 3G market because foreign companies feared that the French government would favor domestic firms over international entrants). Furthermore, if judges decide to assert themselves in the realm of foreign investment, litigants will likely heed their call and contribute to the development of the law of CFIUS. *See* Vanessa Baird & Tonja Jacobi, *Judicial Agenda Setting Through Signaling and Strategic Litigant Responses*, 29 WASH. U. J. L. & POL'Y 215, 217 (2009) (providing evidence that litigants before the Supreme Court respond to signals that the justices send about which cases to bring). Some commentators argue that if both the President and Congress continue to espouse protectionism, it will fall upon the courts to stand up for foreign investors. *See, e.g.*, Robert B. Zoellick, Opinion, *Trump Courts Economic Mayhem*, WALL ST. J. (Jan. 7, 2018), https://www.wsj.com/articles/trump-courts-economic-mayhem-1515360407 [https://perma.cc/US4Q-N3XE] (implying that the judiciary could be the last bastion of free trade).

[296] *See* Katyal & Tribe, *supra* note 18, at 1259 (stressing the importance of the separation of powers to the rule of law).

[297] *See id.* at 1309 (pointing to the dangers posed by the concentration of power in one branch of government).

[298] *See* Cain et al., *supra* note 21, at 608 (tracing the migration of deal litigation from state to federal court); Griffith, *supra* note 21, at 1 (highlighting Delaware courts' well-developed corporate law jurisprudence); Kempf, *supra* note 21, at 658 (making clear that federal courts do not automatically accept the government's arguments in antitrust litigation).

[299] Kempf, *supra* note 21, at 658.

[300] Cain et al., *supra* note 21, at 608.

[301] *Compare* Kadhim Shubber, *US Court Backs AT&T's Acquisition of Time Warner*, FIN. TIMES (Feb. 26, 2019), https://www.ft.com/content/aa902866-39da-11e9-b856-5404d3811663?emailId=5c75c77666f58e000447f503 [https://perma.cc/U3AA-G8F3] (explaining that a federal appeals court approved the $85 billion merger of AT&T and Time Warner), *with* O'Keeffe, *supra* note 17 (discussing President Trump's block of Broadcom's $117 billion acquisition of Qualcomm).

[302] *See* WINKLER, *supra* note 20, at 380 (stressing corporations' success in court at gaining constitutional protection); Young, *supra* note 20, at 1029 (underscoring the importance of the Alien Tort Statute to foreign victims of human rights abuses).

[303] Young, *supra* note 20, at 1029.

protections to corporations.[304] It thus seems appropriate for judges to treat foreign investors in a similar manner.[305]

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.[306] With FIRRMA, Congress has moved closer to subjecting CFIUS to judicial review by allowing civil actions to proceed against the Committee.[307] Though this represents progress, civil actions alone will not cure CFIUS's ills.[308] The Committee has acted without restraint in the wake of *Ralls*, precisely because the presumption against judicial review remains.[309] Congress should therefore provide explicitly for judicial review.[310]

Beyond just reaffirming the presumption against judicial review, *Ralls* also gave foreign investors the right to pursue some civil actions.[311] Potential plaintiffs can contest the non-privileged, non-classified evidence leading to the blocking of a transaction.[312] 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.[313]

This aspect of *Ralls* has proven of little use to prospective plaintiffs.[314] CFIUS has little desire to share its evidence with investors.[315] 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.[316] The review of presidential blocks in the wake of *Ralls* underscores this point.[317] Not one of the injured parties seems to have given much thought to requesting CFIUS's non-classified, non-confidential information.[318]

These unfortunate investors likely chose not to seek civil action because of the continuing presumption against judicial review.[319] 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.[320] No court reviewed these investors' arguments, despite the Committee's utterly unreasonable missteps in blocking their respective transactions.[321] Even more gallingly, statute and precedent precluded oversight despite CFIUS's questionable national security justifications in each instance.[322]

Given this state of affairs, Congress should provide explicitly for judicial review.[323] A strong presumption exists in favor of judicial review unless a statute says otherwise or the law commits the action to agency discretion.[324] 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-

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[316] DORSEY & WHITNEY LLP, *supra* note 119.

[317] *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).

[318] Bartz et al., *supra* note 229; Chazan, *supra* note 139; Pierson, *supra* note 170.

[319] *See* 50 U.S.C. § 4565(e)(1) (proscribing judicial review of the actions and findings of the President); *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).

[320] *See* GARVEY, *supra* note 193, at 13 (underscoring the deference courts give to an explicit prohibition of judicial review in a statute).

[321] *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).

[322] *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).

[323] *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).

[324] GARVEY, *supra* note 193, at 13.

ident . . . and the findings of the President . . . shall be subject to judicial review."[325]

Practical and political considerations may make legislators reluctant to amend the statute.[326] Judicial review of Committee investigations and determinations, one might argue, could lead to better policies towards foreign investors.[327] Congress could, in turn, codify whatever understanding emerges.[328] The problem with such a proposal is that, even after *Ralls* and FIRRMA, foreign investors are not using the courts at all to pursue CFIUS claims.[329] 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.[330]

In amending the statute, lawmakers might also worry about alienating their base and attracting the support of unsavory groups.[331] 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).

[331] *See* Tingley et al., *supra* note 36, at 53 (noting American politicians' eagerness to protect strategically important assets and distressed industries from acquisitive Chinese companies); Eric Platt & James Fontanella-Khan, *GE's Dealmaking and Outlay to M&A Advisers Called into Question*, FIN. TIMES (Oct. 2, 2018), https://www.ft.com/content/8a7c948c-c5c3-11e8-8167-bea19d5dd52e [https://perma.cc/EXY4-SWH2] (indicating that banks have made billions of dollars helping General Electric buy and sell assets since 2000); Eric Platt & James Fontanella-Khan, *Wall St Set for $1bn Fee Bonanza from Pharma Mega-Deal*, FIN. TIMES (Feb. 3, 2019), https://www.ft.com/content/7dc80cda-27d9-11e9-88a4-c32129756dd8 [https://perma.cc/ALG2-BE26] [hereinafter *Mega-Deal*] (pointing to the numerous bankers, lawyers, consultants, and accountants who will benefit from a tie-up between two pharmaceutical companies); Ben White, *Wall Street Freaks Out About 2020*, POLITICO (Jan. 28, 2019), https://www.politico.com/story/2019/01/28/wall-street-2020-economy-taxes-1118065 [https://perma.cc/H2YL-KGND] (making clear that Democratic presidential candidates want to minimize contact with Wall Street).

courage companies to pursue tie-ups in the United States.[332] 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.[333] Furthermore, the increase in litigation would create a market for litigation attorneys knowledgeable about the CFIUS process.[334] Shareholders would also favor amending the statute, as foreign firms would help bid up the price of their assets.[335] Beyond that, private equity firms and venture capital funds would support changing the law.[336] These entities would have more leeway to argue that their acceptance of foreign capital does not pose a national security threat.[337] Tech companies would similarly welcome the change, as it could increase their access to foreign funds.[338]

Nonetheless, amending the statute would likely draw the ire of incumbent management, labor, and defense hawks.[339] Mergers and acquisitions can lead to layoffs, restructuring, and general disorder for workers.[340] 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/1f9d0e2a-a741-11e9-984c-fac8325aaa04?emailId=5d2cfebf4fed4e0004a4ddbf [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).

[335] *See* Michael C. Jensen & Richard S. Ruback, *The Market for Corporate Control: The Scientific Evidence*, 11 J. FIN. ECON. 5, 47 (1983) (demonstrating that target firm shareholders benefit from takeovers); *see also* Gregg A. Jarrell et al., *The Market for Corporate Control: The Empirical Evidence Since 1980*, 2 J. ECON. PERSP. 49, 66 (1988) (same).

[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).

[337] *See* Nevena Simidjiyska, *CFIUS Expanded—How Will the Broadened Scope Affect Private Equity?*, 22 J. PRIV. EQUITY 31, 34 (2018) (noting that FIRRMA will make foreign investors more cautious about entering into private equity deals).

[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).

[339] *See* Marco Pagano & Paolo F. Volpin, *Managers, Workers, and Corporate Control*, 60 J. FIN. 841, 864 (2005) (arguing that management and labor could join together to fight a takeover); Mitchell Lee Marks et al., *Surviving M&A*, HARV. BUS. REV. (Mar.–Apr. 2017), https://hbr.org/2017/03/surviving-ma [https://perma.cc/B3LL-GJUJ] (highlighting the chaos that mergers and acquisitions cause for workers); *see also* Editorial, *supra* note 159 (worrying about the possibility of China taking American semiconductor technology).

[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.[341] Incumbent managers would join forces with labor in this fight, if they did not hold much equity and enjoyed their current position.[342] Lastly, defense hawks would worry about giving foreign investors the unqualified right to sue the government.[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.[344]

CONCLUSION

This Note advanced two arguments. First, it demonstrated that *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.

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[341] *See* Pagano & Volpin, *supra* note 339, at 842 (suggesting that labor generally opposes corporate takeovers).

[342] *See id.* at 864 (providing theoretical support for this hypothesis).

[343] *See* Editorial, *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).

[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).